BOUND: THE IMAGINATIVE SURPLUS OF CONTRACTUAL INTENT

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Contract law is generally understood in terms of enforcement. The legal definition of a contract is a promise that the state will enforce. Individuals are empowered by contract law to create legal arrangements that the state will step in and enforce. And yet most contracts never make it to court.

This Article inverts the conventional focus on enforcement through a study of extralegal contracts. These are formal written agreements that parties call contracts but are not intended for legal enforcement. Examples of these extralegal contracts include no-suicide contracts and contracts for sexual slavery.

Examining extralegal contracts offers multiple insights. First, this analysis sheds new light on Lon Fuller's classic functions of contractual formalities. Second, it reveals five novel functions of these formalities: diagnostic, expressive, constitutive, mapping, and experiential. Third, it shows the relevance of empirical work in behavioral science on the so-called Question Behavior Effect to our understanding of contracting behavior.

These insights from extralegal contracts are theoretically interesting in their own right and practically relevant to our understanding of legal contracts. The Article develops an account of strategic contracting behavior across legal contexts, drawing on the novel functions and Question Behavior Effect mechanisms, specifically dramatizing the impact through contract domains where enforcement is uncertain or unlikely, including preliminary agreements, surrogacy contracts, and demands for assurances.

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Introduction

Contract law is a rather amazing area of law. It is the legal domain where two people, by themselves, without any official status or special institutional authority, can design their own legally enforceable rules. By following just a few simple doctrines, individuals can create structures and expectations—obligations—that the state will then step in and enforce. The parties need not be lawyers; they need not even know the law. Nonetheless, these individual parties can effectively create a form of law.[1]

Despite this power to create law, individuals also choose, at times, to create agreements they call "contracts" that are not intended for legal enforcement. Indeed, parties create some contracts that lie beyond the field of law altogether—what this Article calls "extralegal contracts." Extralegal contracts come in wide-ranging forms: for instance, a no-suicide "contract" that a psychiatric patient is asked by a doctor to sign, promising not to take their own life;[2] or a "contract" for slavery that two individuals in a sadomasochistic sexual relationship sign,

[1] *See, e.g.*, Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 806–07 (1941) [hereinafter Fuller, *Consideration and Form*] ("When a court enforces a promise it is merely arming with legal sanction a rule or *lex* previously established by the party himself. This power of the individual to effect changes in his legal relations with others is comparable to the power of a legislature.").

[2] *See infra* Section II.A.

detailing the form of dominance and submission they desire.[3] Extralegal contracts, in this sense, may be found inside an art gallery, when an artist papers the walls of her installation with copies of a "Contract with the Artist" signed by every viewer who agreed to participate in the work.[4] Individuals may sign "contracts" with themselves and use these formalities to support their commitment to the change they envision making in their lives.[5] These and other extralegal contracts are the focus of this Article.[6]

The parties creating these extralegal contracts are typically not trying to create legally binding contractual arrangements, which raises the question of what purpose these formal agreements serve.[7] What is the function of invoking the formality of contract language without the intention to invoke the force of contract law? This is the first question this Article seeks to answer.

These agreements might seem far afield from the contracts that animate the work of contracts lawyers and the casebooks of contracts professors. And yet most contracts never make it to court.[8] What distinguishes a legal contract from an everyday promise is legal enforceability,[9] but legal enforcement is relatively rare.[10] In a way, then, the extralegal contracts at the heart of this Article have more in common

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3 *See infra* Section II.B.

4 *See infra* Section II.C.

5 *See infra* Section II.D.

6 The extralegal contracts in this Article are distinct from the legalism of the "pseudolaw" movement. *Cf.* Amy J. Cohen & Ilana Gershon, *Prefigurative Neoliberalism: A Provisional Analysis of the Global Sovereign Citizen Movement*, POLAR: POL. & LEGAL ANTHROPOLOGY REV. (forthcoming 2025) (manuscript at 1, 3) (describing "pseudolaw" which entails a "dizzying array of informal groups and loosely affiliated individuals" who use arguments about "freedom of contract, classically defined," in their efforts to free themselves from state authority). The "contracts" discussed in this Article take up contractual formalities for the functions they may serve in the shadow, or perhaps in the wake, of a legal contractual regime. For their various functions, see *infra* Section III.B.

7 The claim here is about the social meaning of these contracts rather than about the individual intentions of each contracting party. In contract-law terminology, this is akin to an objective rather than a subjective account. *Cf.* Lucy v. Zehmer, 84 S.E.2d 516, 520–22 (Va. 1954) (explaining and endorsing the objective account of mutual assent). In rare instances, an individual person signing one of these contracts might think or hope it is legally enforceable, see, for example, *infra* text accompanying note 95, but *reasonable* offerees would not understand these offers to be invitations to enter agreements that the other party would attempt to enforce in a court of law.

8 *See infra* note 25 and accompanying text.

9 *See, e.g.*, RESTATEMENT (SECOND) CONTS. § 1 (AM. L. INST. 1981) ("A contract is 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.").

10 *See infra* note 25 and accompanying text.

with legal contracts than might first appear.[11] In both instances, the parties invoke contractual formalities for purposes other than eventual legal enforcement.[12] What, then, is the function of the contractual formalities in legal contracts, if not to secure legal enforcement on the back end? This is the second question this Article aims to answer.

One way to see the puzzle at the heart of this Article is to consider its inverse: In what ways can formalization of an agreement sometimes kill a potential deal? Keen observers of social and legal behavior recognize that avoiding written documents and technicalities can sometimes be the best way to accomplish a partnership—even a business arrangement—because hammering out the details and insisting on a signed writing can undermine trust and relationship building.[13] In that light, the pursuit of legal formalities in the extralegal contracts at issue in this Article—without any legal purpose—is particularly striking. These intriguing

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[11] *Cf., e.g.*, Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1448 (2004) (arguing that "[c]ontract presents a special case of promise" and "the reasons for making and keeping contracts must be expressed in terms of the reasons for making and keeping the promises that contracts involve"). *But cf., e.g.*, Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 709, 711 (2011) (arguing that "in an important sense, contract and *private* promise are in tension with one another" due to "a natural tendency on the part of contract, when layered on promise, to undermine the value of private promise"). Dori Kimel also importantly distinguishes the "special obligations" created by promise as opposed to "contract," while focusing on the "likelihood" of these relationships—and on whether contract and promise "can be understood as *designed* to fulfil such a function" or thought "intrinsically valuable for their propensity to fulfil it"—rather than on "deny[ing] the possibility" of others. DORI KIMEL, FROM PROMISE TO CONTRACT 72 (2003). In this Article, I am not weighing in on the normative debates over how easy or difficult it should be to make private promises legally enforceable or whether the remedies should be different. This Article is identifying an unusual set of extralegal agreements that parties call "contracts" and using them, in tandem with behavioral science, to make analytic and instrumental arguments, offering a taxonomy and ultimately a set of strategies for rendering the performance of promises (legal or extralegal) more likely.

[12] The threat of legal enforcement may nonetheless encourage performance of legal contracts, particularly since the costs of defending a lawsuit go beyond the prospect of paying damages for breach. *See, e.g.*, Bagchi, *supra* note 11, at 734–35 (discussing material and expressive reasons that the threat of legal enforcement may matter even though "legal enforcement is usually improbable").

[13] *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 146–48 (1991) (describing a fellow Contracts professor's experience of securing a sublet by "hand[ing] over a $900 deposit in cash, with no lease, no exchange of keys, and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation" because "a lease . . . imposed too much formality. The handshake and the good vibes were for him indicators of trust more binding than a form contract" and explaining that "his faith paid off" as his "sublessors showed up at the appointed time, keys in hand, to welcome him in"); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377, 1400 (2010) ("[I]n commercial settings . . . when offered a contract whose performance is based only on trust, a substantial number of individuals will both pay higher prices and extend higher levels of effort than narrow self-interest would dictate.").

moments of legalities beyond law offer a window into the social meaning of contracts and the practical significance of legal formalities.

In this way, the Article also brings new insight to the ongoing study of how parties can make their promises credible. The ability to make promises credible is valuable to the promisor because it allows a party to receive a return performance by a counterparty. Traditionally, this was understood to be the purpose of legal enforcement: to allow the promisor to bind herself and thus to participate in an exchange of promises and performances.[14] More recent work has recognized other mechanisms for making promises credible: namely, withdrawal from this deal and future ones with the counterparty; the prospect of reputational sanctions; and the failure to trigger reciprocity.[15] This Article examines situations in which these mechanisms are less likely to succeed than in everyday commercial transactions and, in so doing, identifies a further set of mechanisms to support promising behavior: the mechanics of form. Distinct functions of form are revealed through this analysis, which can then be used to inform contracting situations both within and beyond the law. The analysis thus reveals a set of strategies for enhancing the likelihood of performance where legal enforcement is unlikely or unwanted.

This Article comes in four parts. Part I sets out key definitions and data, establishing the boundaries of the inquiry. Part II examines four exemplary categories of extralegal contracts. Part III uses these examples to better understand traditional functions of contract formalities, following Lon Fuller, and then to identify five novel functions: diagnostic, expressive, constitutive, mapping, and experiential. It then draws on behavioral science of the so-called Question Behavior Effect to extract a set of mechanisms that support follow-through in the absence of legal enforcement. Part IV applies these insights to legal contracts. Specifically, this Part develops an account of strategic contracting behavior across legal and extralegal contexts, especially where enforcement is uncertain or unlikely, such as preliminary agreements, spousal agreements, surrogacy contracts, and demands for

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[14] *See, e.g.*, Gilson et al., *supra* note 13, at 1379 ("Parties may choose by formal contract to enlist the judicial system to assess the parties' performance of their specified rights and obligations and impose remedies in the event of breach. In turn, the expectation of formal enforcement creates incentives for parties to perform their obligations.").

[15] *See id.* at 1392–94; *see infra* notes 172–77 and accompanying text (discussing mechanisms for making promises credible and ensuring the other side's performance beyond legal sanctions); *see also, e.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1745–49 (2001) (explaining reputation-based sanctions in the cotton industry).

assurances. The Conclusion returns to the power of individuals to make law through contract.

I
Definitions and Boundaries

A typical lay understanding of a contract is a written document signed by the parties setting out an agreement.[16] First-year Contracts students quickly distinguish themselves from their nonlawyer peers by learning that legal contracts do not need to be in writing,[17] and that not every writing that says "Contract" at the top is actually a legal contract.[18]

Legal enforceability is what distinguishes an everyday promise from a contractual promise.[19] And while a writing is not required for most contracts,[20] certain formalities must be observed in order to (1) signal assent and (2) provide a basis for the state to consider the agreement worthy of the state's enforcement.[21] The first element of

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16 *See, e.g.*, Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 Stan. L. Rev. 1269, 1296 (2015) ("The most common understanding of contract formation involves signing a written document."); *see also* Roseanna Sommers, *Contract Schemas*, 17 Ann. Rev. L. Soc. Sci. 293, 293 (2021) (arguing that "contracts are schematically represented as written documents filled with impenetrable text containing hidden strings, which are routinely signed without comprehension"). *But cf.* Monika Leszczyńska, Think Twice Before You Sign!: An Experiment on a Cautionary Function of Contractual Formalities 1 (Jan. 5, 2017) (unpublished manuscript) (on file with author), https://empiricalcontracts.com/wp-content/uploads/2022/09/leszczynska_think-twice-before-you-sign_01052017.pdf [https://perma.cc/J59B-YD59] (finding that, while a handwritten signing induces more caution than clicking "OK" or typing in one's name, signing one's name operates similarly to typing in a four-digit pin).

17 *See, e.g.*, John Edward Murray, Jr., Contracts: Cases and Materials 301 (2006) ("Except for formal contracts, i.e., contracts under seal, the common law does not require contracts to be evidenced by a writing. A promise is legally binding though expressed orally or by conduct if the other essentials for contract formation exist. Any requirement that a contract be evidenced by a writing is a statutory requirement."); Lon L. Fuller, Melvin Aron Eisenberg & Mark P. Gergen, Basic Contract Law 793 (2023) ("The law does not require all contracts to be in writing.").

18 A writing that says "Contract" at the top could easily be lacking in one or more of the elements typically required for contract formation—that is, consideration, as well as sufficient definiteness. *See, e.g.*, Cooper Chiropractic Health Clinic, LLC v. Quezada, 587 S.E.2d 392, 393 (Ga. Ct. App. 2003) (holding a document titled "Contract for Services/Irrevocable Assignment and Limited Power of Attorney" unenforceable because of a lack of consideration); Kalsi Builders, Inc. v. Nat'l City Mortg., No. 2-10-0499, 2011 WL 10453219, at *1, *6 (Ill. App. Ct. June 27, 2011) (holding a document called "Construction Contract" unenforceable because of a lack of sufficient definiteness).

19 *See supra* note 9 and accompanying text.

20 The exceptions to this include, most notably, contracts that fall within a state's statute of frauds. *See, e.g.*, Samra v. Shaheen Bus. & Inv. Grp., 355 F. Supp. 2d 483, 497 (D.D.C. 2005).

21 *See, e.g.*, Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC, 993 F.3d 253, 260 (4th Cir. 2021). The focus here is U.S. contract law, which differs in various respects from the

contract formation consists of a manifestation of mutual assent: typically, offer and acceptance.[22] The second element is a basis of enforcement: typically, consideration.[23] The promises exchanged generally must be made with sufficient definiteness as well.[24]

Although legal enforceability distinguishes contractual promises from ordinary promises, most contracts never make it into court.[25] Legal enforcement is very much in the background of the everyday business of contracting. Indeed, we know that many individuals still feel bound to contracts they've signed, even if they learn that the relevant term is likely not enforceable.[26] So while parties may want the ability to threaten legal enforcement even if they don't intend to pursue it,[27] it also seems that parties are doing something more than

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contract law even of countries with overlapping legal traditions. *See, e.g.*, Andrew Taylor, *A Comparative Analysis of U.S. and English Contract Law*, 9 Int'l In-House Couns. J. 1, 9–11 (2015). For an example of these differences related to formation, see Oman, *infra* note 54, at 4–5. More generally, the extralegal contracts in this Article largely arise in U.S. contexts, although a comparative study of the prevalence and form of extralegal contracts across legal systems and cultures would be most interesting. *See generally* Giuseppe Dari-Mattiacci & Carmine Guerriero, *Law and Culture: A Theory of Comparative Variation in Bona Fide Purchase Rules*, 35 Oxford J. Legal Stud. 543 (2015) (finding that a culture of self-reliance is the most accurate explanatory variable of divergence in extralegal bona fide purchase rules in different legal systems compared to other theories of comparative variation).

22 *See, e.g.*, T.C. May Co. v. Menzies Shoe Co., 113 S.E. 593, 593–94 (N.C. 1922).

23 *See, e.g.*, First Nat'l Bankshares of Beloit, Inc. v. Geisel, 853 F. Supp. 1344, 1351–52 (D. Kan. 1994).

24 *See, e.g.*, Vohs v. Donovan, 777 N.W.2d 915, 917 (Wis. Ct. App. 2009).

25 *See, e.g.*, Tim Cummins, *Are You in an Adversarial Industry? Insights for Contract Negotiators and Managers.*, Commitment Matters (Apr. 23, 2014), https://commitmentmatters.com/2014/04/23/are-you-in-an-adversarial-industry-insights-for-contract-negotiators-and-managers [https://perma.cc/K9N8-T5LV] (reporting that "formal disputes" result from less than 0.1% of contracts); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55, 61–62 (1963) (concluding, based on interviews as well as statistics from the federal courts, that "[l]awsuits for breach of contract appear to be rare").

26 *See* J.J. Prescott & Evan Starr, *Subjective Beliefs About Contract Enforceability*, 53 J. Legal Stud. 435, 471 (2024) ("[E]ven after employees learn that their noncompete is unenforceable, many still indicate . . . that they would weigh their noncompete as a factor in deciding whether to take a better job at a competing employer."); *see also* Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. Econ. & Org. 633, 665–66 (2020) (drawing on "a novel survey effort to gather nationally representative data on noncompete use" to find "that a noncompete is associated with both a longer tenure and a reduced propensity to leave for a competitor even when the noncompete in question is unenforceable under state law" and, more generally, "to empirically substantiate the hypothesis that contracts matter independent of the laws governing their enforceability").

27 *See, e.g.*, G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 Vand. L. Rev. 221, 265 (1991) (explaining that the possibility of "[l]egal recourse for victims of opportunistic conduct is one possible remedy for bolstering the cooperative process").

just seeking legal enforcement by forming contracts.[28] Socially and politically, we also use the word contract for many things that are not legal contracts. The types of extralegal contracts at issue in this Article, such as no-suicide contracts and personal contracts with oneself, involve written instruments explicitly referred to as contracts.[29] These extralegal contracts will be our focus, but first it is helpful to distinguish them from other uses of the term "contract" beyond the legal sphere. This Part therefore maps types of extralegal contractual arrangements, offering a schema that not only helps define the focus of this study, but also sheds light on elusive doctrinal frameworks in contract law. The first Section delineates the types, and the second Section presents a chart that illuminates their relationships.

A. Identifying the Array of Extralegal Uses

References to contract arise across diverse contexts—from the political to the psychological to the spiritual and beyond. We refer to our political arrangements in the United States as stemming from an original "social contract," although (almost) no one really imagines that there was a prepolitical gathering where everyone got together and agreed to form a society.[30] Rather, the social contract is more of a figurative or mythic creation—a story we tell ourselves about a founding moment of collaboration, inclusion, and consent.[31] People also

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[28] Perhaps parties are seeking access to the threat of legal enforcement. Although only a fraction of contracts lead to "formal disputes," *see* Cummins, *supra* note 25, it seems reasonable to surmise that the possibility of making the threat of legal action is some part of the motivation for creating some legally enforceable contracts. For the analysis in this Article to be relevant, however, one need only accept the possibility that the prospect of legal enforcement is not the only motivation for creating legal contracts. *Cf., e.g.*, Fuller, *Consideration and Form*, *supra* note 1, at 800–01 (arguing that contractual formalities serve three functions: evidentiary, cautionary, and channeling).

[29] *See infra* Part II (setting out and discussing these and other examples of what the Article calls extralegal contracts).

[30] *See, e.g.*, Peter T. Leeson, *The Calculus of Piratical Consent: The Myth of the Myth of Social Contract*, 139 PUB. CHOICE 443, 443 (2009) ("Everyone knows that a genuine social contract—a written, unanimous agreement created by individuals in the state of nature with the express purpose of establishing political authority—is myth."). Leeson is the exception that proves the rule, since the purpose of his article is to upset the widespread belief that the social contract is a myth. *See id.* at 445 (arguing that "the myth of social contract is a myth" because "[e]arly 18th-century pirate societies founded government through written, unanimous social contracts").

[31] *See* Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 14 (1999) ("As metaphor, social contract rhetoric is a vehicle for moving language beyond the limitations of literal speech."); Leeson, *supra* note 30, at 443 (quoting Durkheim as saying that "'[t]he conception of a social contract . . . has no relation to the facts . . . . Not only are there no societies which have such an origin, but there is none whose structure presents the least trace of contractual organization'" (citation omitted)).

refer to marriage as a contract, although legal marriage is really more of a license from the state, since the state, rather than the parties, defines the legal rights and obligations entailed by legal marriage.[32]

Contracts arise in psychological discourse. In the words of psychoanalyst and social commentator Adam Phillips, for instance,

> [I]t is not news, from a psychoanalytic or a family-therapy point of view, that people engage in unconscious contracts with each other, though the extent of these contracts—the small print, as it were—should never cease to amaze us (not to mention those even more hidden and binding contracts we enter into with ourselves).[33]

Phillips asserts that we enter relationships with an "unconscious contract" in our head for how the relationship will go, and that we do so in order to manage the "contingency of our lives."[34] Some psychologists and couples counselors speak more generally about the "psychological contracts" people implicitly engage in or refer to couples' "renegotiating" their marriage contract.[35] The latter aren't contemplating any express set of agreed terms, written or otherwise, that the parties are trying to alter; rather, they mean an implicit understanding that the parties went into the marriage with, which now does not suit one or both of them, so they are trying to change it.[36] The term "contract" here seems almost metaphorical, if we understand the formalities of contract to be as important as lay people do.[37]

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[32] *See, e.g.*, Mary Anne Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758, 1765 (2005) ("Marriage has always licensed, but what marriage licenses has changed over time."); Cass R. Sunstein, *The Right to Marry*, 26 Cardozo L. Rev. 2081, 2082 (2005) ("As an official matter, marriage is no more and no less than a government-run licensing system.").

[33] Adam Phillips, On Flirtation 6 (1995).

[34] *Id.* at 6, xii.

[35] *See, e.g.*, Rob Pascale & Lou Primavera, *Marriage as a Social Contract*, Psych. Today (Aug. 15, 2016), https://www.psychologytoday.com/us/blog/so-happy-together/201608/marriage-social-contract [https://perma.cc/G7V6-PYPH] ("In every relationship, including marriage, we have a social contract. By that we mean we have a set of rules, expectations, and boundaries that define that relationship.").

[36] The typical situation discussed here contrasts sharply with the innovative practice Lenore Weitzman describes of married couples writing out explicit "contracts" about their agreements with each other within their marriage. *See* Lenore J. Weitzman, The Marriage Contract: Spouses, Lovers, and the Law, at xxi, 227 (1981).

[37] *Cf., e.g.*, Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 Stan. L. Rev. 503, 508, 542 (2020) (explaining that laypeople believe "they are stuck with what they signed" and "the written terms are what matters" even in the presence of fraud); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 Iowa L. Rev. 1745, 1745 (2014) (reporting that people "see consent to boilerplate as less meaningful than consent to negotiated terms, but they nonetheless would hold consumers strictly liable for both").

Bridging the psychological and the spiritual, the psychotherapist Susan Stiffelman proffers the idea of a "sacred contract" between people who struggle with one another, formed before either was born, where they agreed to play a certain role in each other's growth.[38] "This is just an idea," she hastens to add; "you don't need to believe in reincarnation to benefit from it. Just play along with me for a moment, and see if the image is useful."[39] She then goes on to imagine a conversation between these two "disembodied beings," which ends with the words, "'It's a deal!'"[40] My purpose here is not to embrace (or mock) the idea of a sacred contract between unborn people, but to illuminate the vast array of social uses of the term and concept of contract.

Finally, at times, parties will explicitly invoke the formalities of contract formation without any intention of creating a legally enforceable contract. They do this in varied contexts, including in the commercial sphere,[41] as well as in the noncommercial examples that form the primary focus here.[42] The Article will ultimately draw lessons for both legal and extralegal contracts, after setting out a frame for examining extralegal contracts and analyzing the four main types of extralegal contracts at issue here.

B. Defining the Boundaries of Extralegal Contracts

These wide-ranging forms of extralegal contracts can be sorted along several dimensions that parallel types of legal contracts, depicted in Table 1. The mapping in this Section allows us to define more precisely the focus of study in this Article: explicit extralegal contracts. Moreover, the analogies drawn in this Section can help shed light on two doctrinal categories that sometimes elude first-year Contracts students—contracts implied-in-law and contracts implied-in-fact—and how they differ from express legal contracts, which are the heart of contract law.

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38 *See* Susan Stiffelman, Parenting with Presence 12 (2015).

39 *Id.*

40 *Id.*

41 *See, e.g.*, Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 Colum. L. Rev. 1641, 1644–45 (2003) (describing "comfort agreements" as "deliberately incomplete contracts" that commercial parties use to "screen[] potential trading partners" and "gain valuable information about each other's preferences for reciprocity"); Cathy Hwang, *Faux Contracts*, 105 Va. L. Rev. 1025, 1033, 1050–51 (2019) (examining the prevalence and aims of "the formal-looking but non-binding and unenforced 'faux contract,'" based on her interviews with M&A lawyers, and describing varying degrees of formality among them).

42 *See infra* Part II (setting out the four core examples of the Article).

Table 1: Types of Legal and Extralegal "Contracts"

	Ascriptive/Mythic	Descriptive/Contextual	Formalist/Explicit
Legal	Contracts implied-in-law	Contracts implied-in-fact	Express legal contracts
Extralegal	"Social contract"; "sacred contract"	"Unconscious contracts"; "psychological contracts"	Express extralegal contracts (the focus of this Article)

The social contract and sacred contract described in the previous Section are only contracts in the sense that an external authority or observer has ascribed to the parties an imagined deal that should be treated as having been formed. In this way, these examples are akin to *contracts implied-in-law* (or "quasi contracts"), which have been called a "mythical creation of the law."[43] A contract implied-in-law arises when a court decides to treat parties as having assumed some obligation to one another because justice requires it, even though the parties never actually reached any deal, explicitly or implicitly; indeed, the parties might not even have interacted with one another prior to the "performance."[44] For instance, where a doctor provides assistance to an unconscious accident victim and then seeks compensation after the fact, a court might assign liability under a theory of a contract implied-in-law.[45] Similarly, the social contract and sacred contract are mythic inventions of a belated observer or authority, who imagines an originary moment when the parties came to some agreement that that external authority finds it useful to ascribe to them.[46] This is the first column of Table 1.

By contrast, in the second column, the unconscious contracts and psychological contracts are understood to involve an actual agreement between the parties, just not an explicit one, making them more like a *contract implied-in-fact*.[47] A contract implied-in-fact meets the elements of an express legal contract, except that the parties never made their agreement explicit.[48] So, for instance, the parties might have engaged in conduct that signaled their understanding that they formed or are

[43] Cotnam v. Wisdom, 104 S.W. 164, 165 (Ark. 1907).

[44] *See, e.g.*, Bailey v. West, 249 A.2d 414, 417 (R.I. 1969); Callano v. Oakwood Park Homes Corp., 219 A.2d 332, 334 (N.J. Super. Ct. App. Div. 1966).

[45] *See, e.g.*, *Cotnam*, 104 S.W. at 165–66 (affirming jury instructions that awarded recovery under the "legal fiction" of a contract implied-in-law for doctors who provided emergency assistance to an unconscious patient who ultimately did not survive).

[46] On the social contract, see *supra* notes 30–31 and accompanying text; on so-called sacred contracts, see *supra* note 38 and accompanying text.

[47] For discussion of unconscious contracts and psychological contracts as implicit agreements, see *supra* notes 33–37 and accompanying text.

[48] *See, e.g.*, *Bailey*, 249 A.2d at 416.

forming a contract, but without ever uttering a word or signing any document.[49] The parties might have had a contract in the past that expired, and they continued to behave as if they are under contract; or the parties might be operating silently in a context in which certain behavior is assumed to form a contract—like a person who goes into a store and picks up a bottle of soda with the intent to buy it. If the bottle explodes in their hand, the default warranties apply and protect that person under contract law.[50] Likewise, in unconscious contracts, the parties behave according to an understanding between them, even though they have not spoken that agreement aloud.[51]

Finally, the third column of the Table represents express contracts, in which the parties verbally make explicit the formation of their agreement, invoking oral or written formalities. Under U.S. contract law, the elements of an express legal contract consist of manifestation of mutual assent (typically offer and acceptance), a basis of enforcement (typically consideration), and sufficient definiteness.[52] The extralegal contracts at the heart of this Article often have these elements, but as above, the relation is one of analogy. These extralegal contracts, which are the subject of Part II, satisfy the key indicia of the lay understanding of a contract: a writing that the parties sign.[53] But the difference is that the context of the parties' agreement suggests no intention to enter the legal domain. Note that the point is not that these contracts could never be enforceable—in some cases they likely could, recognizing that enforcement typically means damages rather than specific performance;[54]

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[49] *Cf., e.g.*, RESTATEMENT (SECOND) OF CONTS. § 4 (AM. L. INST. 1981) ("A promise may be stated in words . . . or may be inferred wholly or partly from conduct.").

[50] *See, e.g.*, Barker v. Allied Supermarket, 596 P.2d 870, 871 (Okla. 1979) (finding that the act of taking possession of goods from a self-service display in a grocery store with the intent to pay for them is sufficient to create a "contract for their sale"); *see also* U.C.C. § 2-314 (AM. L. INST. & UNIF. L. COMM'N. 2011) (providing an implied warranty of merchantability).

[51] This example is analogous rather than precisely the same, particularly because an unconscious contract likely exists without any (conscious) intent to promise.

[52] *See supra* notes 21–24 and accompanying text.

[53] *See supra* note 16 and accompanying text (citing sources on the role of the written document in lay understandings of contract).

[54] *See infra* notes 66–67 (citing sources on contract remedies). It is interesting to observe that the default rule for whether something is an extralegal or a legal contract can vary by context. So, for instance, in the intimate domain, parties are more often assumed to be making extralegal agreements unless they invoke formalities or expressly say otherwise; whereas in the commercial sphere, parties may need to go to greater lengths to indicate that they do not intend to form a legally enforceable agreement. For discussion of TINALEA (This Is Not a Legally Enforceable Agreement) clauses, see Klass, *infra* note 283, at 1751, 1762. Moreover, the default rule can vary by jurisdiction. So, for example, in the context of contracts governed by U.K. law, formation requires, as an additional element, the intent to form legal relations. *See, e.g.*, Nathan B. Oman, *Intent to Create Legal Relations and the Nature of Contractual Consent*, *in* RESEARCH HANDBOOK OF THE PHILOSOPHY OF CONTRACT LAW (Mindy Chen &

the point is rather that legal enforcement is not what the parties are doing in creating these extralegal contracts.[55]

The focus here is on those agreements that the parties call "contracts"—and that meet key elements of the lay understanding of contract, like a writing and often a signature[56]—but that do not aim at legal enforceability.[57] These extralegal contracts, which are elaborated through a series of examples in our next Part, instead seem geared toward some other end—other than the law—while nonetheless invoking the legal language of "contract" and the formality of a written document they call "the contract."[58]

II
Extralegal Contracts

This Part considers four central examples of extralegal contracts: no-suicide contracts; contracts for sexual slavery; contracts within art; and self-contracts. The aim in studying these so-called contracts is first to examine and analyze them in their own right, as rich social artifacts, and second to use them to build a deeper understanding of legal contracts. This Part takes up the first aim, and the second aim is the focus of the next two Parts.

Prince Saprai eds.) (forthcoming) (manuscript at 4) (on file with the William & Mary Law School) ("Under English law, the intent to create legal relations is formally an element of contract formation. It is not enough that there is an offer and acceptance supported by consideration.").

55 For a discussion of this aspect of the definition of extralegal contracts as analogous to an objective account of contract formation, see *supra* note 7.

56 *Cf., e.g.*, Sommers, *supra* note 16, at 293.

57 Because the focus in this Article is on the surplus purpose of binding oneself through contract—beyond the possibility of legal enforcement—agreements that are formally extralegal but enforceable through some other mechanism are not part of this study. For example, technology or homework contracts for children, on the one hand, or roommate contracts for college students, on the other, may well be created with no intention of enforcing them in the courts, but these agreements often have an external source of authority contemplated as an enforcing mechanism: the parents or the school. *See, e.g.*, Erika Sauder, *Technology Acceptable Use Agreement 2023–2024*, Geyserville Elementary Sch., https://www.gusd.com/uploads/1/0/7/8/107860989/2023-24_elem_aup_english.pdf [https://perma.cc/6HWX-BFUM]. Indeed, they often set out consequences of violating the terms of the agreement, making explicit the mechanism and process for enforcement.

58 Though the Article discusses extralegal and legal contracts as binary categories, it would be interesting to think of them on a spectrum. I thank Bob Scott for this point. One very intriguing work-in-progress appears to pursue an idea along these lines. *See* D Dangaran & Andy Izenson, *Autonomous Contracts and Transformative Justice: Practicing Family Law Without Court Intervention* (Feb. 7, 2025) (unpublished manuscript) (abstract on file with author) ("This paper posits that 'autonomous contracts' that do not rely on court intervention may be the ultimate family-law abolitionist's goal. It categorizes other types of interventions into carceral, non-carceral, anti-carceral, and abolitionist in parallel to analogous interventions in the criminal sphere.").

A. No-Suicide Contracts

"The 'no-suicide' contract, where patients are asked to sign an agreement not to commit suicide, or in common parlance, 'to contract,' has become disconcertingly commonplace."

—Marcia Goin, 2003[59]

Over approximately the last half century, a practice called no-suicide contracting has developed among psychotherapists and others concerned with suicide prevention.[60] A no-suicide contract is typically an agreement a psychiatric patient signs stating their intention not to harm themselves and outlining the steps they will take in the event of suicidal thoughts.[61] The broader category of "no-suicide contracting" (NSC) comprises an array of practices: some more in the nature of oral assurances, some oral agreements, and some written contracts signed or cosigned.[62] In its varied forms, NSC is "widespread,"[63] and most common are the more informal varieties,[64] though the focus here is on the versions that invoke contractual formalities.

These are explicitly not legal contracts,[65] and obviously they cannot directly stop people from killing themselves. The idea of a lawsuit for breach of a no-suicide contract may seem the stuff of dark comedy, though the apparent absurdity of such a claim sets into relief the pervasiveness of the commonsense view of contracts as remedied by specific performance.[66] In reality, damages are the standard remedy

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59 Marcia Goin, *The "Suicide-Prevention Contract": A Dangerous Myth*, Psychiatric News (July 18, 2003), https://psychnews.psychiatryonline.org/doi/full/10.1176/pn.38.14.0003 [https://perma.cc/787Z-35X5].

60 *See, e.g.*, *id.* (explaining the origins and evolution of no-suicide contracts).

61 These are typically agreements made with a treating clinician, but sometimes they involve family or other parties. *See, e.g.*, Jacoves v. United Merch. Corp., 11 Cal. Rptr. 2d 468, 474–75 (1992) ("On April 9, 1985, in a family meeting, Dr. Bloom proposed that Jonathan sign a contract with his family in which he would promise, among other things, not to commit suicide.").

62 *See* Stephen J. Edwards & Mark D. Sachmann, *No-Suicide Contracts, No-Suicide Agreements, and No-Suicide Assurances: A Study of Their Nature, Utilization, Perceived Effectiveness, and Potential to Cause Harm*, 31 Crisis 290, 291 (2010).

63 *Id.* at 290.

64 *Id.* at 293.

65 *See, e.g.*, Kevin Caruso, *No-Suicide Contracts—What They are and How You Should Use Them*, Suicide.org, http://www.suicide.org/no-suicide-contracts.html [https://perma.cc/4AG4-7QEX] ("Please note that no-suicide contracts are not legal documents; they are agreements that outline what a person needs to do if he or she becomes suicidal."); *see also* Goin, *supra* note 59 (referring to them as "pseudo-legal agreement[s]").

66 *See* Tess Wilkinson-Ryan, David Hoffman & Emily Campbell, *Expecting Specific Performance*, 98 N.Y.U. L. Rev. 1633, 1665 (2023) (concluding, inter alia, that "most people do not naturally think of money damages in breach of contract cases; instead their automatic reaction is to think of specific performance").

for breach of contract,[67] and contract damages are typically available after death.[68] But clearly these no-suicide contracts are not intended as legal contracts for which enforcement would be sought in the event of breach.[69] There is reason to think that some clinicians use these contracts as a way to practice defensive medicine—to try to preempt a lawsuit if something goes wrong[70]—though the literature on them emphasizes that they do not help in the event of a lawsuit and that this approach to their use can damage relationships with patients.[71] One study finds that patients often think that these contracts are being used for self-serving "medico-legal" purposes, even though clinicians may aim to use them for diagnostic or therapeutically supportive purposes.[72]

Though their use is widespread,[73] no-suicide contracts are often not viewed as best practices, and indeed they are recommended against

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67 *See, e.g.*, Javierre v. Central Altagracia, Inc., 217 U.S. 502, 508 (1910) ("[A] suit for damages would have given adequate relief, and therefore the appellee should have been confined to its remedy at law."); Anthony T. Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 354 (1978).

68 *See, e.g.*, Burch v. J. D. Bush & Co., 106 S.E. 489, 490 (N.C. 1921) ("The general rule is that contracts bind the executor or administrator, though not named therein, and that death does not absolve a man from his engagements."); 14 Timothy Murray, Corbin on Contracts § 75.1 (2024).

69 Of course it's possible an individual would believe such a contract enforceable, but recall that the claim here is about the social meaning akin to an objective account. *See supra* note 7.

70 *See* Edwards & Sachmann, *supra* note 62, at 295–96 (finding, inter alia, that 48% of practitioners in the study used NSCs "often to always" for "medico-legal" protection; 72.9% "often to always" for the "therapeutic" purpose of "suggesting alternatives to suicidal behavior"; and 43.1% "often to always" for the "diagnostic" purpose of "assessing precipitating risk factors").

71 *Id.* at 291 (warning that "service users perceive [NSC and similar practices] as practitioner self-protection"); Caruso, *supra* note 65 ("Clinicians who use no-suicide contracts should be aware that they are not afforded inpunity [sic] from civil action by the mere usage of the contracts. Thus the use of no-suicide contracts as an attempt to thwart liability by clinicians is not only patently unethical but also completely ineffectual."); Rebecca Hyldahl & Brent Richardson, *Key Considerations for Using No-Harm Contracts with Clients Who Self-Injure*, 89 J. Counseling & Dev. 121, 125 (2011).

72 *See, e.g.*, Joshua J. Descant & Lilian M. Range, *No-Suicide Agreements: College Students' Perceptions*, 31 Coll. Student J. 238, 240 (1997) (finding, in a survey of 145 college students on NSCs, "[s]tudents who had been in therapy responded similarly to those who had not on all items except one: students who had been in therapy thought that no-suicide agreements would reduce the therapist's legal liability"); Edwards & Sachmann, *supra* note 62, at 299 (reporting that "a substantial majority of practitioners positively regarded . . . NSC to enhance a therapeutic relationship" whereas "few considered the reverse, where, for example, patients may perceive [NSC and related practices] as self-serving"); *see also id.* at 298 (observing "the apparent use of NSC as 'a stop-gap measure' when practitioners lack the resources to adequately respond to suicide risk").

73 *See* Edwards & Sachmann, *supra* note 62, at 290, 297 (observing that these practices are in "widespread use" and finding in their study that a "majority of those surveyed had used [no-suicide agreements of some kind] and most had used them in the past year," though also finding that "participants generally preferred verbal over written" versions of these procedures); *see also* Hyldahl & Richardson, *supra* note 71, at 121 (reporting that

by some leading scholarly accounts.[74] The aim here is not to endorse them, but to try to understand their use of contractual formalities.

The formalities vary, but they generally involve the date and at least one signature—the patient's—and sometimes two.[75] Where the provider signs, this may signify formalities for their own sake, since the providers are often not promising anything in the written agreement itself.[76]

What purposes do these formal extralegal no-suicide contracts seem designed to serve? Five main purposes emerge from these contracts and the commentary on them. Most obviously, this tool seems to have been created mainly for diagnostic purposes: to assess a patient's risk level and determine the safety of allowing more leeway and less supervision.[77] If a patient readily agrees with a statement like "I will not kill myself"—or refuses to make such a statement—then a clinician may consider that information relevant to determining the patient's state of mind and threat to themselves.[78]

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two prominent methods of addressing self-injury—that is, dialectical behavior therapy (DBT) and the S.A.F.E. (Self Abuse Finally Ends) program—typically require "formal commitment or contract from clients prior to beginning treatment" though the contract used by the founder of DBT focuses on "commit[ment] to the therapeutic process and does not necessarily include a statement about ceasing" self-harming behaviors).

74 *See, e.g.*, Edwards & Sachmann, *supra* note 62, at 300 ("While these studies are somewhat speculative because of the largely qualitative nature of the evidence, it is arguable that a first order question: 'Do the potential inherent risks of [NSC and related practices] outweigh the perceived benefits?' has been answered in the affirmative."); *see also* Hyldahl & Richardson, *supra* note 71, at 123, 125 (warning that NSC can "inadvertently" lead patients to deceive clinicians and otherwise fail to disclose key "thoughts[] or urges" in order to avoid revealing a breach, and noting that "[s]everal researchers and clinicians suggest avoiding the term *contract* altogether because of its perceived implications, preferring terms such as *agreement*, *promise*, and *commitment*").

75 *See, e.g.*, Dr. Roberta Marowitz, *Suicide Safety Plan*, Squarespace, https://static1.squarespace.com/static/5b12308155b02c548793fedd/t/5b249870562fa7107c7dd481/1529124976406/no-suicide-contract.pdf [https://perma.cc/7HD5-X8CT] (including lines for patient's signature and date and therapist's signature and date); *see also* Caruso, *supra* note 65 (stating that "[a]fter the agreement has been completed, both parties sign and date the contract"); Kevin Caruso, *No-Suicide Contract*, Suicide.org, http://www.suicide.org/no-suicide-contract-form.html [https://perma.cc/T8EK-DSAA] (providing lines only for the patient and a witness to sign and date).

76 *See, e.g.*, Caruso, *supra* note 65. When only the patient signs, those no-suicide contracts might seem like a form of self-contracts, *see infra* Section II.D, though they typically appear to be formed with a mental health professional of some kind, and the relational benefits of signing (like greater freedom or more trust) may be implied rather than stated. In some contracts, however, the provider is assuming "specific responsibilities." Hyldahl & Richardson, *supra* note 71, at 121.

77 *See, e.g.*, Robert C. Drye, Robert L. Goulding & Mary E. Goulding, *No Suicide Decisions: Patient Monitoring of Suicidal Risk*, 130 Am. J. Psychiatry 172 (Feb. 1973).

78 *See id.*

Second, no-suicide contracting developed as a way to help patients lay out plans for how to handle threatening future moments, by specifying the steps they will take if suicidal thoughts take hold at a future moment.[79] Thinking through the precise steps when in a relatively "cool" state, the argument goes, may help with rational decision-making when in a "hot" (emotional) state.[80]

Third, some believe no-suicide contracting makes the promise not to engage in self-harm weightier, more significant, to the person undertaking it. Some practitioners assume that a potentially suicidal party will feel more obligated not to take certain steps if they have promised not to, in this formal way.[81]

Fourth, the formalities may form or shape a relationship. For instance, some writing suggests that these contracts can increase trust—that is, they can in some way strengthen the relationship between practitioner and patient (or client)—while others suggest these contracts may diminish trust.[82]

Finally, the formation of these contracts may change the individual experience at the moment of contracting. For instance, according to one professional in the field, a patient may find relief in saying that they don't have suicidal intentions, since the suicidal thoughts may be

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[79] *See, e.g.*, Witsell v. Sch. Bd., No. 8:11-cv-781-T-23AEP, 2012 U.S. Dist. LEXIS 28603, at *3 (M.D. Fla. Mar. 5, 2012) ("Furthermore, I agree that I will take the following steps following actions [sic] if I am ever suicidal . . . ."); *see also* Hyldahl & Richardson, *supra* note 71 at 122 ("Behaviorally, contracts can be helpful to a client by including specific steps the client promises to undertake before resorting to self-injurious or self-harming behaviors . . . ." (internal citation omitted)).

[80] *See* George Loewenstein, *Emotions in Economic Theory and Economic Behavior*, 90 Am. Econ. Rev. 426, 430 (2000) (discussing the significance of "hot" states on decision making); *cf.* George Loewenstein, *Hot-Cold Empathy Gap and Medical Decision Making*, 24 Health Psych. S49, S49 (2005) ("[P]eople who are in 'cold' states tend to underestimate the motivational force of their own future hot states," which can result in a "fail[ure] to take measures to avoid situations that will induce such states, or to prepare to deal with those that are inevitable.").

[81] *See, e.g.*, Tony L. Farrow, *'No Suicide Contracts' in Community Crisis Situations: A Conceptual Analysis*, 10 J. Psychiatric & Mental Health Nursing 199, 201 (2003) (discussing, in an article criticizing NSC, earlier research finding that crisis nurses view the practice as a tool "to empower the suicidal person by involving them in both reducing their own suicidality and being a partner in formulating future planning" (internal citation omitted)); Janet L. Assey, *The Suicide Prevention Contract*, 23 Persps. Psychiatric Care 99, 102 (1985) ("Our culture has instilled in most of us a code of honor focused on the importance of the act of giving someone your word. Consequently, when a client agrees to something, most often he/she will honor that contract.").

[82] *Compare, e.g.*, Hyldahl & Richardson, *supra* note 71, at 125 (discussing ways that the process of negotiating a no-harm contract can "help build and strengthen the therapeutic alliance"), *with* notes 72 and 74 and accompanying text (discussing the potential for misunderstanding and communication failures between patients and clinicians who use no-suicide contracts).

frightening.[83] Although this clinician was not discussing written contracts in particular, the comment points to a broader way in which engaging in the formal exercise of no-suicide contracting might alter an individual's self-understanding or relationship to the idea of self-harm.

B. S/M Contracts for Slavery

> *"Stay healthy, wealthy, and wise. Grow. Evolve. Play. Fuck. Communicate. Let whatever turns us on lead the way."*
>
> *—Mrs. Darling*[84]

An explicitly extralegal contract for sexual slavery appears in the pages of the 1870 novel *Venus in Furs* by Leopold von Sacher-Masoch—after whom the term *masochism* was named.[85] The characters Wanda and Severin create what they call a "contract" inscribing them as mistress and slave. In essence, Severin promises to become Wanda's total slave, and in exchange, Wanda promises to wear furs as often as possible, and particularly when in a cruel mood.[86]

The two discuss the matter of enforceability:

> "Should I sign the contract[?]" [Severin] ask[s].
>
> "Not yet," said Wanda, "I want to add your conditions. Besides, you're going to sign it in the right place."
>
> "Constantinople?"
>
> "No. I've thought it over. What good is having a slave where everyone has slaves? I want to be *alone in having a slave* in our educated, sober, Philistine world—a slave with no will of his own, a slave who is put into my hands not by the law, not by my privilege or brutal violence, but solely by the power of my beauty and my being."[87]

Wanda and Severin thus pointedly exemplify what this Article calls an extralegal contract. That is, they create something they call a contract

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[83] *See, e.g.*, Drye et al., *supra* note 77, at 172 (observing that, after making a formal commitment not to kill himself, "the patient will often express considerable relief, since suicidal fantasies can be quite frightening"). This point was not repeated in other sources I read, so it is offered as the view of one professional in the field, not as a general claim.

[84] Mrs. Darling, *Sample Master/Slave Contract—Basic*, SUBMISSIVE GUIDE, https://submissiveguide.com/articles/relationships/sample-master-slave-contract-basic [https://perma.cc/4A4U-RPWQ] [hereinafter Mrs. Darling, *Sample Basic*].

[85] LEOPOLD VON SACHER-MASOCH, VENUS IN FURS 73 (Joachim Neugroschel trans., Penguin Classics 2000) (1870).

[86] *Id.*

[87] *Id.* at 52. She then adds, "I find that piquant." *Id.*

with no purpose of legal enforceability—a legalistic document *beyond* rather than *before* the law.[88]

Wanda and Severin's bond is fictional and historic, but current individuals form real "contracts" for sexual slavery.[89] These contracts are real in the sense that the people making them are real people, rather than characters in literature, but they are plainly not legal documents.[90] Articles and websites that provide advice and templates for creating these sexual contracts repeatedly emphasize that these are not legally enforceable agreements.[91] Their formation is often highly legalistic, however, and the drafters of template agreements sometimes announce their relevant legal training or knowledge. For instance, a site that sells these contracts—many are free, but this one charges—advertises its wares by noting: "Written by an attorney, this contract is ideal for giving morally binding authority to your arrangement."[92] An article explaining the value of these contracts states, "[f]or a contract to be complete, there are four key elements: [m]utual assent (offer, acceptance, and obligation), adequate consideration, capacity, and legality."[93] The author then goes on to clarify that the last element is not met because "you

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[88] The phrase "before the law" here refers to being subject to the law's enforcement mechanism. It also alludes to the famous parable included in Kafka's *The Trial*, which begins "Before the law stands a doorkeeper." Franz Kafka, *Before the Law*, *in* Selected Stories 186 (Mark Harman trans., 2024).

[89] *See, e.g.*, Petra Zebroff, *How A '50 Shades'-Style Sexual Contract Can Lead To Better Sex*, HuffPost (Sept. 17, 2012), https://www.huffpost.com/entry/50-shades_b_1878051 [https://perma.cc/QQF4-WY98]; lunaKM, *What You Need To Know About Using Contracts to Negotiate a Relationship*, Submissive Guide, https://submissiveguide.com/articles/communication/what-you-need-to-know-about-using-contracts-to-negotiate-a-relationship [https://perma.cc/X42K-62EV]; Baadmaster, *Slave Contracts: Part One*, Kink Weekly, https://www.kinkweekly.com/article-baadmaster/slave-contracts-part-one [https://perma.cc/R3MB-TZPW].

[90] In the United States, most of these would not be enforceable if they are contracts for slavery, because slavery (whether voluntary or involuntary) is not legal. Moreover, the focus here is on contracts for sexual slavery, and sexual contracts of any kind face a tough battle for enforcement. *See infra* note 116 (citing sources); *see also* Andrew Gilden, *Note*, *Sexual (Re) consideration: Adult Entertainment Contracts and the Problem of Enforceability*, 95 Geo. L.J. 541, 548 (2007) (observing that "[f]or contracts in the adult film industry to be enforceable, they must overcome the substantial obstacles posed by the contractual doctrines of illegality and public policy").

[91] *See, e.g.*, *Are BDSM Contracts Legally Binding?*, BDSM Conts., https://bdsmcontracts.org/are-bdsm-contracts-legally-binding [https://perma.cc/Z4A8-P7TU] ("You will not be able to enforce a BDSM Contract in Court. . . . The intention behind negotiating and signing a power exchange/kinky Contract is to define your relationship with one another, your goals, desires, boundaries and limits and to give moral binding authority to your arrangement."); Ms. Rika, *The Pros And Cons Of Contracts*, Kink Weekly, https://www.kinkweekly.com/article-guest-author/the-pros-and-cons-of-contracts [https://perma.cc/NA9G-YU5T] ("There are no LEGAL slavery contracts in most countries around the world today.").

[92] *Master/Male Slave Contract Download*, BDSM Contracts, https://bdsmcontracts.org/product/master-male-slave-contract-download [https://perma.cc/8NRC-54H4].

[93] Ms. Rika, *supra* note 91.

can't sign yourself, legally, into being someone else's property," since "[s]lavery is illegal," and so that limit exists "[n]o matter how much you want to."[94] And some folks do express such a desire to bind themselves fully, as evidenced by the comments section of another article, where someone writes in, "I want my master slave contract to be legal."[95]

The parties regularly embrace the legal formalities that we know to be most salient in lay understandings of what makes a contract binding: a written document with formal signatures.[96] Again and again, these contracts include the signature page and the date of signing.[97]

Why do parties who know these are not legally enforceable agreements nonetheless call them contracts and engage in these formalities? In the fictional context of *Venus in Furs*, Wanda and Severin create this written so-called contract after Severin has already pledged to be Wanda's slave.[98] In contemporary sexual contracts, the drafters and commentators emphasize the formalization right alongside their disclaimers about the lack of any legal obligations created by these agreements.[99]

Five purposes seem to emerge from the writing about these contracts for sexual slavery. First, the process of creating them is cast as an erotic and "fun" experience.[100] One writer specifically states that

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94 *Id.*

95 fifi michelle, Comment to *Slave Contracts: Part One*, KINK WEEKLY, https://www.kinkweekly.com/article-baadmaster/slave-contracts-part-one [https://perma.cc/R3MB-TZPW].

96 *See* Wilkinson-Ryan & Hoffman, *supra* note 16, at 1296.

97 *See, e.g.*, Mrs. Darling, *Sample Master/Slave Contract with Ethical Non-Monogamy Section*, SUBMISSIVE GUIDE: HELPING YOU FIND YOURSELF (2019), https://submissiveguide.com/articles/relationships/sample-master-slave-contract-with-ethical-non-monogamy-section [https://perma.cc/J65G-7GL7] [hereinafter Mrs. Darling, *Sample with Ethical Non-Monogamy*]; *BDSM Master/Slave Contract*, BDSM CONTS., https://bdsmcontracts.org/master-slave-contract/#iLightbox[image_carousel_1]/1 [https://perma.cc/RR47-D9FC]; winged, *A Real-Life Slave Contract*, EVERYTHING2 (May 22, 2001, 9:16 PM), https://everything2.com/title/a+real-life+slave+contract [https://perma.cc/XC7M-D844]; *BDSM Beginners Kit*, BDSM LEARNING CTR., https://www.geocities.ws/bdsmlearningcenter/basics/sample_slave_contract.html [https://perma.cc/4Q7N-DH66].

98 *See* SACHER-MASOCH, *supra* note 85, at 50–51 (pledging orally with the words, "'I swear to you here, by God and my honor, that I am your slave wherever and whenever you like, as soon as you order me,' I cried, barely in control of myself . . . ."); *id.* at 73–74 (signing the written contract quoted earlier, *supra* text accompanying note 87).

99 *See, e.g.*, *BDSM Contracts and the Law*, BDSM CONTS., https://bdsmcontracts.org/the-law [https://perma.cc/73MA-2WMY] ("In all jurisdictions, the terms of [BDSM] contracts will be unenforceable . . . . So where does this leave you? If you are entering into a BDSM relationship, you should still have some kind of agreement. A formal contract, although not binding, can best identify the parties [sic] expectations.").

100 *See, e.g.*, Baadmaster, *supra* note 89 ("First, they are sexy. One cannot get hotter than a paragraph that says, 'I will devote myself completely and totally to the pleasure and desires of my Master . . . .'"); Ms. Rika, *supra* note 91 ("Another positive aspect of writing a contract, is that they're really fun to sign. There's something exciting about drafting the terms of a power dynamic, and putting one's name on the line. . . . The notion of formalizing the commitment,

the "process" itself, not the product, is the goal,[101] while other writers emphasize both.[102] Second, another process goal repeatedly emphasized is communication.[103] This is valued for what the parties learn about each other as they create the contract and for what skills they build in communicating, which they can use when facing later difficulties.[104] Some writings also explicitly emphasize sexual contract formation as a way to translate inchoate thoughts and desires into words the other person can understand—which sounds very much like Lon Fuller's channeling function (discussed further below).[105] Third, for some partners, the writing helps them realize their own desires and limits; self-knowledge is therefore another process goal of the contract formation.[106] Fourth, the formation of the contract can provide the parties something to look back to, in order to remind themselves of their aims and commitment to one another (akin to Fuller's evidentiary function[107]), and some

even if it's meaningless, is titillating."). Superfluous phrases also support this experiential element—for instance, stating in the contract exactly what a slave may or may not wear right after stating that is always up to the master. *See, e.g.*, Baadmaster, *supra* note 89 ("The slave may dress herself, but must seek approval of any clothing she wishes to wear in public. Unless specifically stated otherwise, the slave may not wear panties.").

101 Ms. Rika, *supra* note 91 ("The process of making the contract is more important than the contract itself. Consider creating it together, even if you don't sign it, and then throw it away.").

102 *See, e.g.*, lunaKM, *supra* note 89 (describing the contract as "a declaration of the commitment you both wish to have and basic means for expressing certain term changes, violations of the contract and means for dismissal," as well as "about the spiritual connection, the emotional and physical commitment established by the people signing it").

103 *See, e.g.*, *Master/Male Slave Contract Download*, *supra* note 92 ("When entering into a D/s or M/s relationships [sic], it's important to discuss your goals, needs, desires and boundaries. The negotiation process is a great way to open up communication. This document is designed to help you talk about all the important aspects of your relationship.").

104 *See, e.g.*, Zebroff, *supra* note 89 (noting that such a contract "establishes ways to deal with awkward sexual situations" and that "[a]s a couple becomes familiar with the sexual negotiation process, it becomes increasingly easier to discuss all sexual topics, including those sexually awkward moments").

105 Ms. Rika, *supra* note 91 ("When we write, we force our brains to organize our thoughts and to clarify concepts. Using a contract to clarify terms, in detail, will help communications."). *Cf.* Fuller, *Consideration and Form*, *supra* note 1, at 802 ("One planning to enter a legal transaction" must "force the raw material of meaning into defined and recognizable channels" by finding the "legal transaction . . . which will most nearly accomplish the [economic or sentimental] goals"); *infra* Section III.A.3 (discussing Fuller's cautionary function of contractual formalities).

106 Zebroff, *supra* note 89 ("1. It can make us aware and titillated . . . .We discover new areas that turn us on and can make us aware of our 'sexual triggers.' . . . 3. It makes us aware of our limits—what we won't do. . . . 4. It makes us curious to explore what we might do" by "introduc[ing] a safe way to engage in activities that we wouldn't have normally thought of doing.").

107 *See infra* Section III.A.1 (discussing Fuller's evidentiary function of contractual formalities); *see, e.g.*, Baadmaster, *supra* note 89 ("Second, they remind the Dom/me and the sub of their duties during the term of the contract.").

explicitly agree to review the contract at certain intervals.[108] Finally, the parties seem to feel that the contract can increase their intimacy and transform their relationship into something deeper that makes them feel more bound together.[109]

Some writers mention that these "contracts" might afford some legal protection if there is a subsequent accusation of nonconsent. But most writers emphasize the opposite: The rules and law surrounding sexual violence cannot be contracted around, and rape is always rape, and this contract won't help you. With this in mind, one commentator specifically proposed revisions in 2017 to respond to the #MeToo movement.[110]

As some commentators note, these contracts for sexual slavery may be seen as misogynistic, particularly if they involve a male master and female slave.[111] Other writers note that any gender combination can be involved,[112] and sites offer multiple gendered and nongendered options for contract templates.[113] Interestingly, some contracts explicitly state that superiority is not the reason for the master's dominance; rather, control lies with the consent of the slave.[114] How one reads these claims will, of course, vary by reader, and my aim here, as in the previous Section, is not to endorse or critique their use.

Some of these S/M contracts for sexual slavery include domestic obligations within a marriage with a level of specificity reminiscent of the proposals by Lenore Weitzman (among others) for spouses

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108 Mrs. Darling, *Sample Basic*, *supra* note 84.

109 *See, e.g.*, Zebroff, *supra* note 89 ("It creates greater intimacy with our partner. If we know what our partner is excited about or hesitant about doing sexually, we can help them to realize their desires.").

110 *See* Baadmaster, *Slave Contracts v. 2017*, Kink Weekly, https://www.kinkweekly.com/article-baadmaster/slave-contracts-v-2017 [https://perma.cc/G7GS-84MN].

111 *See, e.g.*, Zebroff, *supra* note 89 ("Some might think this contract is about sex, to others it is about power, to still others it is about free clothes, and for a few folks it smacks of misogyny.").

112 *See, e.g.*, Chief, Comment to *BDSM Contracts: A Beginner's Guide*, Kinky Events (Mar. 4, 2020), https://kinkyevents.co.uk/bdsm-contracts-a-beginners-guide [https://perma.cc/V8YV-X9WA] ("'[A]re women always the submissive in a D/s dynamic?' . . . [T]he answer is absolutely not. Gender is irrelevant.").

113 *See, e.g.*, *BDSM Contract Forms, Clauses & Resources*, BDSM Contracts, https://bdsmcontracts.org [https://perma.cc/R3C8-A4K2].

114 *See, e.g.*, Mrs. Darling, *Sample with Ethical Non-Monogamy*, *supra* note 97 (including in the portion of the contract titled "Master's Creed" statements like "I am a dominant man. I am just that. I am not dominant because of any superiority on my part. Not because I feel more intelligent or wiser. I am not dominant because of the strength or the mass of my body." And "I am not, nor would I want to be dominant with all women. Yet to you, I am Master. I am your Master only after earning your trust").

in egalitarian partnerships to write explicit "marriage contracts."[115] Weitzman's "contracts" were distinct from legal marriage—and indeed would likely not be enforceable under U.S. family law—and thus represent another example of the extralegal contracts under discussion here, at least for those aware of their legal irrelevance.[116] Similarly, when those in polyamorous relationships write out detailed agreements they know are not enforceable and call them "contracts," these also exemplify the practice at issue in this Article.[117]

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115 WEITZMAN, *supra* note 36, at xxi (proposing a "contract model" to "facilitate the freedom of married and unmarried couples to order their personal relationships as they wish and to devise a structure appropriate for their individual needs and values" and, where appropriate, to "establish[] egalitarian relationships"); *cf., e.g.*, Martha Ertman, *Commercializing Marriage*, 77 TEX. L. REV. 17, 55 (1998) (proposing "premarital security agreements" in the form of "written agreements" between spouses, "[t]o serve the dual goals of valuing women's work and protecting the financial interests of displaced homemakers"). *But see* ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 103–06 (2008) (discussing the uses of a written agreement between householders in "selected contexts," such as proving what was agreed in the event of dispute, but concluding that more informal processes of iterative "gift-exchange" generally have "advantages over the various forms of express contracting" between "trusting intimates").

116 *See* WEITZMAN, *supra* note 36, at xix–xx (describing the legal "marriage contract" as a distinct background set of rules that are not subject to individual variation); *cf. supra* note 32 (citing sources for the observation that state marriage is a license rather than a contract). On the enforceability of Weitzman-style individually composed "marriage contracts," she acknowledges the lack of enforcement as a historical matter, while expressing some optimism that courts are becoming more amenable to enforcement. WEITZMAN, *supra* note 36, at 335–52. For more recent work less sanguine about the prospects of enforcing contracts between spouses related to what is traditionally considered the substantive details of what is exchanged within a marriage, see, for example, Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 92 NW. U. L. REV. 65, 66–67 (1998) (noting that "marriage might look like a contract to exchange services and goods: love, money, the ability to have and raise children, housework, sex, emotional support, physical care in times of sickness, entertainment and so forth" but observing that, "when the parties to a marriage put these terms in writing, courts only enforce the provisions governing money"); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 499–501 (2005) ("The law loudly denies enforcement to a variety of economic exchanges between husbands and wives . . . . For example, interspousal contracts for domestic services . . . [and] sex are . . . unenforceable."); *see also* ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 112, 117 (2008) (explaining how terms that are personal rather than financial may render a spousal contract invalid).

117 *See, e.g.*, "Relationship Contract/Consent," https://docpro.com/doc2835/relationship-contract-consent-polyamorous-open [https://perma.cc/P8J4-7NLS]; *see also* Libby Sinback, *Agreements Are Great*, MAKING POLYAMORY WORK (Oct. 4, 2022), https://www.makingpolyamorywork.com/episodes/agreements-are-great [https://perma.cc/36UV-W24S] (discussing situations where people in poly relationships make "full-on contracts with each other" and reasons why "it's good to write down an agreement sometimes"). Because the focus here is on agreements that the parties actually call a "contract," arrangements under another name—such as "poly agreement"—are outside the scope. *Cf., e.g.*, *Sample Poly Agreement*, https://www.bravenmanor.com/Resources/Sample%20Poly%20Agreement.pdf [https://perma.cc/CC2Y-WH9R] (setting out many detailed provisions, and also mentioning "our slave contract" as a separate document, within the terms of a much broader "Sample

C. Contracts with the Artist

"I will always do what I say I am going to do."
—Adrian Piper, 2013[118]

Extralegal contracts arise in the context of visual and installation art, and each installation is unique. Legal language and tropes appear in a wide variety of artworks,[119] and performance art has been compared to the performance of a contract.[120] The uses of contractual terminology and imagery in art is often strictly metaphorical, however—more akin to the implied-in-law contracts discussed earlier than to the express contracts that are the focus of this Article[121]—or representational rather than interactive.[122] By contrast, this Section zeroes in on two examples of express extralegal contracts in art in order to draw out features rooted in their use of contractual language and formalities: Marina Abramović's *Dream Bed* and Adrian Piper's *Probable Trust Registry*.[123]

Poly Agreement"); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. Rev. L. & Soc. Change 277, 324 (2004) (discussing the practice of "'Negotiating and making agreements' as one of the key relationship challenges for polyamorous relationships" (quoting Dr. Joy Davidson)).

118 *"I will always mean what I say."* (photograph), *in The Probable Trust Registry: The Rules of the Game #1–3*, APRA Found. Berlin, http://www.adrianpiper.com/berlin/art/biennale/TPTR_RG2.shtml [https://perma.cc/748D-EM6E].

119 *See generally* Joan Kee, Models of Integrity: Art and Law in Post-Sixties America (2019).

120 *Id.* at 141 (quoting the performance artist Vito Acconci's view "creating a performance work was like 'performing a contract'").

121 *See supra* Section I.B (setting out, in Table 1, the types of extralegal configurations of contract forms and defining the focus in this Article as extralegal versions of express contracts).

122 For a fascinating discussion of different kinds of contracting practices in and around artistic production, see Lauren van Haaften-Schick, *Contractual Practices*, Grey Room, Winter 2024, at 67, 67–72. Van Haaften-Schick reflects on, inter alia, the artist Cameron Rowland's practice of leasing rather than selling some of his works and requiring "lessees also [to] complete a background check using a form sourced from Rent-A-Center, a chain that rents furniture and appliances by targeting regions of concentrated poverty in the United States." *Id.* at 70. As van Haaften-Schick explains, "[w]ith this confrontational gesture, Rowland subjects art buyers to the invasive procedures that poor people in the United States—who are disproportionately Black—are subjected to by private companies and the state." *Id.* at 70. By renting some works and selling others, Rowland "effect[s] a further hierarchy between lessees and property owners" and "perform[s] some of the historic inequalities endemic to contracting." *Id*. Those who lease can "renew their lease and retain the physical agreement after it terminates." *Id.* at 69. In other words, the lease agreement with the artist becomes, in effect, the only work of art that lessees can own: with the lease agreement as the artwork now representing the actual lease agreement between the artist and the (renting) consumer of the art. *Id.* (citing Eric Golo Stone, *Legal Implications: Cameron Rowland's Rental Contract*, 164 October 89, 89–112 (2018)).

123 The focus here is on extralegal contracts *within* art, but another contract-related variation that would be interesting to examine is the "certificates" issued to owners of work by Felix Gonzalez-Torres. For discussion, see, for example, Kee, *supra* note 119, at 207–19.

In a well-known work entitled *House with the Ocean View* in 2002, the "grandmother of performance art" Marina Abramović lived naked, without eating, for twelve days in the Sean Kelly Gallery in New York's Soho, where visitors could come see her.[124] This installation entered the popular imagination more than most contemporary art—notably through an episode of the Emmy-award winning HBO series *Sex and the City*.[125] But more interesting for purposes of this Article was the installation next door to Abramović's temporary residence in the gallery: a smaller work titled *Dream Bed*. There, a large, coffin-shaped box stood in the middle of the room, and visitors could sign up to spend one hour lying in it, wearing an astronaut-style costume that Abramović called a "dream suit."[126] To participate, a visitor had to sign a "Contract Between _____ and Artist Marina Abramović," promising to stay in the box and not come out for the full hour.[127] At the bottom, there was a blank for the visitor's signature and the date.[128]

Though brief, this "contract" with Marina Abramović would arguably be enforceable, in that there is consideration (the opportunity to participate in exchange for the promise to stay for an hour), manifestation of mutual assent (a written document proffered by the artist and signed by the visitor), and sufficient definiteness (with an implied payment/fee of zero and a specific length of time).[129] But, as noted earlier, the question here is not whether an extralegal contract is enforceable, but whether in context it seems intended for legal enforceability.[130] That these "contracts" had extralegal purposes is suggested not only by the context, but by the role the documents played

124 *See, e.g.*, Naomi Martin, *Iconic Artworks: The Marina Abramović Performance 'The House With The Ocean View*,' ARTLAND MAG., https://magazine.artland.com/iconic-artworks-the-marina-abramovic-performance-the-house-with-the-ocean-view [https://perma.cc/4HKH-EMED]. On the epithet, see *Marina Abramović*, TATE, https://www.tate.org.uk/art/artists/marina-abramovic-11790 [https://perma.cc/5MP7-Q9CD].

125 *Sex and the City: The One* (HBO television broadcast Sept. 14, 2003).

126 Marina Abramović, Contract with Marina Abramović, *Dream Bed* (on file with author) [hereinafter Contract with Abramović]; *see also* Charlie Finch, *Sean on Marina*, ARTNET (2002), https://www.artnet.com/magazine/features/finch/finch11-20-02.asp [https://perma.cc/64WZ-QWCW]; *Marina Abramović*, UNDO.NET (Nov. 11, 2002), https://1995-2015.undo.net/it/mostra/11765 [https://perma.cc/8SAN-Y2TY].

127 *See* Contract with Abramović, *supra* note 126. ("I agree to commit myself to take an active part in using the transitory object *Dream Bed*. I promise that I will stay for the entire duration of the work—1 hour—and that I will not interrupt the process by my early departure.").

128 *Id.*

129 *Cf. supra* notes 21–24 and accompanying text (discussing elements of formation).

130 *See supra* text accompanying notes 53–55.

in the exhibition: The walls of the antechamber were papered with the "contracts" of the participants in *Dream Bed*.[131]

In Adrian Piper's award-winning 2015 installation at the Venice Biennale, *The Probable Trust Registry: The Rules of the Game #1–3*,[132] visitors were invited to choose among three statements—"rules"—to which they would agree.[133] Each statement appeared in gold print on the wall behind one of three sleek gold receptionist's desks, and visitors could choose their preferred statement, then sign a formal document binding themselves to that statement.[134] Museum and gallery descriptions of the work call these documents "contracts."[135] After the exhibit ended, participants received an email reminding them of their chosen statement and providing them a list of all the signatories to that particular statement.[136]

The three statements were "I will always do what I say I am going to do," "I will always be too expensive to buy," and "I will always mean what I say."[137] Descriptions of the work highlight the ethical and communitarian dimensions of this process:

> In the contracts, each individual voluntarily commits to align his or her future deeds with ethical principles such as honesty and reliability. The entries will then be collected in a registry which all participants will receive at the end of the exhibition. They form a community of people who are likely to be trustworthy in the future.[138]

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131 *See, e.g.*, Finch, *supra* note 126 ("After an hour, we toddled past the *Dream Bed* where Marina wannabes sign up for an hour to channel her thoughts. *Art Newspaper* gonniff Adrian Dannatt was among the early signees whose contracts adorned the walls.").

132 *Adrian Piper. The Probable Trust Registry: The Rules of the Game #1–3*, Staatliche Museen zu Berlin [hereinafter *Adrian Piper*], https://www.smb.museum/en/exhibitions/detail/adrian-piper-the-probable-trust-registry-the-rules-of-the-game-1-3 [https://perma.cc/RJK6-ATSK].

133 *Adrian Piper*, *supra* note 132; *56th Venice Biennale*, APRA Found. Berlin, http://www.adrianpiper.com/berlin/art/biennale [https://perma.cc/748D-EM6E]; Lucy Ives, *Trust Survey 2018*, Art in Am. (Dec. 1, 2018, 10:25 AM), https://www.artnews.com/art-in-america/features/trust-survey-2018-63582 [https://perma.cc/M3CR-V5X6] (describing the work when installed at the MoMA in 2018 as giving visitors access to "an apparently more livable bureaucratically managed community, under the auspices of which, at a series of three reception desks staffed by attentive young people, they may pledge always to 'be too expensive to buy,' 'say what I mean' [sic], and 'do what I say I am going to do'").

134 *56th Venice Biennale*, *supra* note 133 (showing visitors signing the documents); *Adrian Piper*, *supra* note 132.

135 *See, e.g.*, *Adrian Piper*, *supra* note 132.

136 *See id.*; E-mail from the Museum of Modern Art to Lauren van Haaften-Schick (July 22, 2019) (on file with author). In the Venice version, parties also had an additional interaction, via an email asking for their permission to be included in the list, apparently in deference to European privacy laws. E-mail from Fondazione La Biennale di Venezia to Anthony Graves (Oct. 22, 2018) (on file with author).

137 *56th Venice Biennale*, *supra* note 133 (showing photos of the statements).

138 *Adrian Piper*, *supra* note 132.

In the words of Piper,

> In order to build trust among ourselves, we must begin right now to train ourselves to become trustworthy. This requires that each of us can rely on ourselves to fulfill our own expectations of ourselves; and this, in turn, that we can bring our actions into accord with our assertions, our assertions into accord with our beliefs, and our beliefs into accord with our values. The Probable Trust Registry offers the public the opportunity to work together, individually and collectively, on strengthening these character traits.[139]

Trust has many dimensions, and this installation arguably aims to build both affective (emotional) and cognitive (rational) trust by demonstrating to the visitors that others are signing these statements and reminding them at a later date.[140] The contracts not only attempt to make the individuals feel bound, but also to help them feel connected through their shared acts of commitment.[141]

Both the Abramović and the Piper works seem to be using extralegal contracts to invent relational connections. Their signed legalistic documents create ties between the artist and the individual visitors to the gallery, most obviously, by committing the visitors to a formal statement and a written document provided by the artist's agent.[142] Moreover, both use these formalities to link visitors with each other in some way: Abramović by displaying the signed "contracts" on the walls of the gallery, inviting each new visitor into the participant-visitors' experience, and Piper by sending the participant-visitors a later email reminder and list of everyone who collectively signed.[143] Both artists seem concerned to make participants feel more bound and to institute a relationality with and among participants and all visitors.[144]

The works diverge in the kind of relationships they create. In the language of social movements, Abramović seems more interested in building relationships of "power over," whereas Piper appears

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139 *Id.*

140 *Cf.* Elizabeth F. Emens, *On Trust, Law, and Expecting the Worst*, 133 Harv. L. Rev. 1963, 1965 (2020) (reviewing Jill Elaine Hasday, Intimate Lies and the Law (2019)) (distinguishing *affective trust* and *cognitive distrust*—later reframed as *epistemic curiosity*—and arguing for a combination of them).

141 *Adrian Piper*, *supra* note 132 ("It does not only call on the visitors to make a personal declaration, but also urges us to think about our actions and the consequences they entail on [a] political, economic, and social level.").

142 This could be understood as a version of "contractual depth," which Cathy Hwang and Matthew Jennejohn understand to be parties writing contracts with multiple audiences in mind. *See* Cathy Hwang & Matthew Jennejohn, *Contractual Depth*, 106 Minn. L. Rev. 1267, 1270 (2022).

143 *See supra* text accompanying notes 131 and 136.

144 *See* Finch, *supra* note 126 (discussing the connection of the "wannabes").

to aspire toward relationships more in the nature of "power with." "Power over" dynamics involve "a relationship in which individuals or groups in positions of dominance use coercive or manipulative tactics to impose their will on others,"[145] whereas "power with" relationships ask, "What do we, individually and together, have to contribute to this process, as we move toward shared goals?"[146] This is not to say that either work fully represents "power over" or "power with," but the contrast in their directional pull may be understood through these divergent concepts.[147]

In "House with an Ocean View," Abramović appeared vulnerable—she was naked and bound to remain there, while visitors came and went—and yet she exerted power over the viewers in striking ways: For instance, she created a rule of silence in the gallery, enforced by the staff, and she stared at the visitors until they broke eye contact.[148] In light of her penetrating gaze in the main gallery, the opportunity to participate in *Dream Bed* looks like an extension to the audience member of Abramović's confinement in the gallery—even more explicitly, in this side gallery, on Abramović's terms. And the "contracts" papering the walls invited all the visitors who didn't want to participate—or who didn't make the cut (as the sign-up filled quickly)—also to experience imaginatively the intersubjective connection with the artist. Signing that contract (or even reading it) led the visitor through the feeling of lying in the box after having committed not to get out.[149] In this way, *Dream Bed* bears some resemblance to the extralegal contracts for slavery discussed earlier, in which the written agreement aims to take relative equals and

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[145] Susan P. Sturm, What Might Be: Confronting Racism to Transform Our Institutions 151 (2025) ("Using force, threats, promises, or manipulation, those with 'power over' get others to follow their rules and do what they want. 'Power over' typically operates within a hierarchical power structure . . . and [] is built on the belief that power is a finite resource . . . ." (first citing Mary P. Follett, Dynamic Administration: The Collected Papers of Mary Parker Follett (Elliot M. Fox & L. Urwick eds., 2d ed. 1973); and then citing Steven Lukes, Power: A Radical View (1974))).

[146] *Id.* at 198 ("Moving from 'power over' to 'power with'—by deciding whose knowledge counts and how people make decisions—enables those involved in change work to figure out how best to use the power they each have.").

[147] Most notably, Piper is still establishing all the literal and metaphorical terms of engagement—the "rules of the game," in her title's words—which runs counter to the aim of "power with" to engage all participants in determining the terms of their collaboration. *See, e.g.*, Sturm, *supra* note 145, at 158 (explaining that moving from "power over" to "power with" requires "ensuring that everyone involved is held accountable for sustaining and supporting changes based on shared decisions").

[148] *See* James Westcott, *Marina Abramović's* The House with the Ocean View*: The View of the House from Some Drops in the Ocean*, 47 Drama Rev. 129, 129, 131 (2003).

[149] Perhaps relatedly, the person with whom I went to the exhibit took one look at the person lying in the coffin-shaped box and was so disturbed she ran out of the room.

transform their relationship into an embodied fantasy of role-based domination.

The extralegal contracts created by these two artists shape both a present moment and an extended time period: that is, the moment of commitment and the moment when parties are reminded of this agreement. In both installations, a moment of signing is a present-moment experiential component of the installation. Then, for the time-lapsed aspect, for Abramović, the "contracts" papering the walls of the gallery remind each visitor of the commitments of past participants, the moment of signing invites the intending participant to picture themselves lying in the box, and later the written documents remind the committed participant of what they promised at the appointed hour.[150] By contrast, for Piper, the time-lapsed component is the email sent by the installation reminding people of their commitment—a full year later—and telling them who else joined the agreement with them.[151] Both works take participants and observers into an intersubjective intimacy that transcends conventional boundaries of time.

D. Self-Contracts

"The contract changed everything for me."
—Mindy Halleck, 2018[152]

Various books, coaches, and other entities urge individuals to make a contract with oneself. The idea behind these *self-contracts* is to bolster self-change or self-improvement efforts by committing with the formality of a signed writing. These arise in multifarious contexts, including creativity, habit-change, and general self-improvement.

For instance, the bestselling guide to overcoming writer's block, *The Artists' Way*, includes a self-contract at the end of the Introduction:

> I, _____, understand that I am undertaking an intensive, guided encounter with my own creativity. I commit myself to the twelve-week duration of the course. I, _____, commit to weekly reading, daily Morning Pages, a weekly Artist Date, and the fulfillment of each week's tasks.
>
> I, _____, further understand that this course will raise issues and emotions for me to deal with. I, _____, commit

150 *See, e.g.*, Finch, *supra* note 126.

151 *See* sources cited *supra* note 136.

152 Mindy Halleck, *Personal Creative Contracts—*The Artist's Way, Mindy Halleck (Apr. 16, 2018), https://mindyhalleck.com/2018/04/16/personal-creative-contracts-the-artists-way [https://perma.cc/8AAW-SLP9].

> myself to excellent self-care—adequate sleep, diet, and exercise, and pampering—for the duration of the course.
>
> [Signature and date].[153]

The book has sold over five million copies,[154] and, while the "contract" is not central to the book or the (seemingly endless) paeans to the book,[155] the contract with oneself fits with the book's approach of committing to structures and boundaries to listen to one's own voice and block out interfering demands.[156] Moreover, some fans do celebrate the contract as vital: For instance, in writing about the impact of the book on her creative life, writer and teacher Mindy Halleck observes, "The contract changed everything for me."[157] Another artist, Francesca Sciandra, describes the contract as part of beginning to keep promises with herself: "Signing the contract was an act of putting myself on the line a bit. As I grow and dive deeper into committing to myself and my creativity, I am learning that it's important to not break promises to myself."[158]

Initiating steps toward healthier living is sometimes supported with self-contracts. For example, Oprah Winfrey offers a "Contract with Myself" for those who want to quit smoking. It includes the following terms:

> I, _____, hereby commit to 12 weeks of becoming a nonsmoker. I recognize that this may be the greatest challenge I have ever faced, but I also acknowledge that quitting smoking is the single most effective thing I can do for my health. Upon signing this contract, I make a commitment to myself to live a healthier life, free from cigarettes and free from the limitations placed on me by my addiction. When I succeed, I will assure myself a healthier present and future, and I will protect the health of my family, friends, and colleagues,

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153 Julia Cameron, The Artist's Way: A Spiritual Path to Higher Creativity 23 (1992); Mel Lee-Smith, *Why the Creativity Contract Is Vital for Writers*, Mel Lee-Smith (Apr. 7, 2019), https://www.melleesmith.com/why-the-creativity-contract-is-vital-for-writers [https://perma.cc/FS7T-HUWF].

154 Hurley Winkler, *The Artist's Way for Writers*, Substack (Sept. 22, 2023), https://lonelyvictories.substack.com/p/the-artists-way-for-writers [https://perma.cc/TG2E-TGWY].

155 *See, e.g.*, Jillian Steinhauer, *I Used to Cringe at Self-Help Books. Until This One Changed My Life*, N.Y. Times (Mar. 12, 2024), https://www.nytimes.com/2024/03/12/magazine/artists-way-morning-pages-julia-cameron.html [https://perma.cc/KQU9-NPFN] (emphasizing the "morning pages" and "artist's date" as changing her life).

156 Cameron, *supra* note 153, at 24 ("When I am teaching the Artist's Way, I require students to make a contract with themselves, committing to the work of the course. Can you give yourself that gift?").

157 Halleck, *supra* note 152.

158 Francesca Sciandra, *Four Habits I Learned from* The Artist's Way, Francesca Sciandra, https://francescasciandra.art/blog/four-habits-i-learned-from-the-artists-way [https://perma.cc/YUA5-WAPE].

> who will no longer be exposed to the dangers of secondhand smoke. Today there are more former smokers than current smokers. I know that I am strong enough to become a nonsmoker. I deserve to give myself the healthiest life possible. I realize that this contract is solely with myself and that it carries no rewards, penalties, or punishments other than those associated with improved health and the reflection of my strength and self-worth.[159]

The "contract" concludes with a line for signature and date, after an optional dedication.[160]

More generally, many teachers, coaches, and entrepreneurs offer forms of self-contracts that individuals can use to change their habits or themselves in the particular way they choose. For instance, various online articles recommend this approach to self-improvement and provide templates.[161] Some lay out specific instructions for how to create one's own self-contract.[162] Ian Ayres has also developed the idea of what he calls "commitment contracts"[163] wherein people commit to habit change typically with a contingent punishment or reward attached to their success or failure.[164] Although the stickK website built by Ayres

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159 *O's Quit Smoking Challenge: Contract with Myself* (2005), https://static.oprah.com/download/pdfs/omag/omag_200511_contract.pdf [https://perma.cc/Q7MP-DGVC].

160 *Id.* ("[OPTIONAL] I am quitting in honor of (celebrity, friend, or other) (signature) (date).").

161 *See, e.g.*, Michelle Lu, *Why I Write Contracts to Myself*, Medium (Oct. 30, 2019), https://medium.com/swlh/why-i-write-contracts-to-myself-4005a67ba465 [https://perma.cc/ATB4-FXF7]; Kate Arends, *How Writing a Personal Contract Improved My Life (and Tips for Creating Your Own)*, Wit & Delight (Dec. 27, 2023), https://witanddelight.com/2023/12/writing-a-personal-contract [https://perma.cc/3V3R-WN9C].

162 *See, e.g.*, Arends, *supra* note 161 (listing suggestions for writing a personal contract).

163 Ian Ayres, *Using Commitment Contracts to Further* Ex Ante *Freedoms: The Twin Problems of Substitution and Ego Depletion*, 62 Ala. L. Rev. 811, 811 (2011); Ian Ayres, Carrots and Sticks: Unlock the Power of Incentives to Get Things Done, at xiv (2010) [hereinafter Ayres, Carrots and Sticks]; *cf.* Samuli Reijula & Ralph Hertwig, *Self-Nudging and the Citizen Choice Architect*, 6 Behav. Pub. Pol'y 119, 132 (2020) (citing Owain Service & Rory Gallagher, Think Small: The Surprisingly Simple Ways to Reach Big Goals (2017)) (discussing "self-nudging" and offering, as an example of the particular strategy of "self-deployed social comparison and social pressure," that "someone who wants to start exercising regularly could make a public commitment to their colleagues . . . [and] could even appoint a 'commitment referee'—someone who tracks transgressions and enforces a specified penalty in cases of failure (for example, having to wear the shirt of a rival football team for a day)").

164 Ayres, Carrots and Sticks, *supra* note 163, at xiv (explaining commitment contracts as "promises backed by contingent rewards or punishments. With a commitment contract, if you promise to exercise three times a week, you had better do it or you'll be hit by some kind of penalty (or lose out on some kind of reward)"). For a literary analogue, one might think of Stephen King's story "Quitters Inc.," where an individual can hire an agency to help him quit smoking by, for instance, betting the life of his relatives on his success. *See* Stephen King, *Quitters, Inc.*, *in* Night Shift 213, 214–15 (1978) (introducing elements of the deal gradually, for instance, through this dialogue as one character gives another character the business card

and his cofounders does not require an explicit reward or punishment, the site strongly recommends involving these consequences, charges for participation for those who do, and does not use formalities like a written agreement or a signature.[165] Thus, the idea there seems more about actually creating an enforceable contract—the ones with third-party consequences are termed "commitment bonds"[166]—than about invoking the formalities of contracts for extralegal purposes.[167]

The extralegal self-contracts at issue in this Article seem to have several purposes. First, they involve making a deal with one's future self and demonstrating one's present seriousness and commitment by formalizing that promise.[168] Second, the written articulation of these goals can allow the promisor to look back and remember the commitment—akin to the evidentiary function of contracts.[169] Moreover, in some instances, the self-contracts set out plans in detail, helping the doer imagine themselves doing the things intended, especially when difficulties arise.[170] Lastly, the experience of writing these contracts

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of the agency: "'Keep it, if you want,' McCann said. 'They'll cure you. Guaranteed.' 'How?' 'I can't tell you,' McCann said. 'Huh? Why not?' 'It's part of the contract they make you sign. Anyway, they tell you how it works when they interview you.'").

165 *See FAQ – About stickK*, stickK, https://www.stickk.com/faq [https://perma.cc/4NGT-LJMX].

166 *See* Michael Abramowicz & Ian Ayres, *Commitment Bonds*, 100 Geo. L.J. 605, 607 (2012) ("A principal strategy [of constraining mechanisms] is to enter into an arrangement in which one will suffer costs if one yields to temptation . . . . In contrast, a compensating commitment bond provides the party entering into the commitment some benefit . . . .").

167 This discussion of self-contracts calls to mind other innovative mechanisms for using the language of "contract" and associated formalities to shape one's future behavior. For example, individuals sometimes create "Ulysses contracts" to set out intentions for their care at a future time of mental impairment. *See, e.g.*, Rebecca Dresser, *Bound to Treatment: The Ulysses Contract*, 14 Hastings Ctr. Rep. 13, 13 (1984) (describing, and ultimately critiquing, the idea of Ulysses contracts that "furnish[] a means of consenting in advance to treatment for a mental disorder and of waiving the right to refuse that treatment when it is administered"); *see also* Alexander Boni-Saenz, *Sexual Advance Directives*, 68 Ala. L. Rev. 1, 19–21 (2016) (explaining that "[t]he most famous example of self-binding comes from Homer's *The Odyssey*, in which Ulysses told the crew of his ship to stuff their ears with beeswax and to tie him to a mast so that he might hear the song of the Sirens"). These Ulysses contracts "often require[] third parties to enforce or implement" them, Boni-Saenz, *supra*, at 19, which would put them outside the scope of this Article, but one could imagine versions that might aim merely to be self-informing or suggestive.

168 *See, e.g.*, Arends, *supra* note 161 ("It provides clarity. . . . [It] is a reflection of all the things I want in life. It's distilled down to clear priorities that remind me to build the habits that will lead me where I want to go. . . . [It] helps me make intentional choices throughout my day . . . .").

169 *Cf.* Fuller, *Consideration and Form*, *supra* note 1, at 800 (discussing the evidentiary function of contracts).

170 *See, e.g.*, *O's Quit Smoking Challenge: Contract with Myself*, *supra* note 159; Arends, *supra* note 161 ("Then it goes into *how* I will make things happen in different areas of my life. In each section, I include the intentions I'm setting for myself as well as some examples of how those intentions should play out in my everyday life.").

seems geared to initiating a more fundamental change in the person crafting them. In a sense, these self-contracts aim to use the imagination to transform the present self into a desired future self.[171] This brings us to Part III.

III
Functions and Mechanisms

Extralegal contracts serve a variety of functions. They not only inform our understanding of familiar functions of contractual formalities; they spotlight an array of previously unexamined functions and point us toward new insights into the value of form itself.

One persistent puzzle in the field of contracts concerns the mechanisms for making promises credible and ensuring a counterparty's performance where legal sanctions are inadequate, unavailable, or counterproductive.[172] One potential means for a party to become bound, regardless of the availability of legal sanctions, is the threat of nonlegal sanctions by the other party: X will be angry or disappointed,[173] or X will withdraw return performance or decline future dealings.[174] Secondarily, a party might fear extralegal sanctions from third parties.[175]

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171 *See, e.g.*, Arends, *supra* note 161 ("The contract is about creating an external version of me to reference whenever I'm feeling small or scared."); *cf.* Kasia Urbaniak, Unbound: A Woman's Guide to Power 67–68 (2020) (proposing a program for change based on "imagination" (rather than "effort") with the "goal" of "that vital feeling of being fully awake"). *But cf.* L.A. Paul, Transformative Experience 47 (2014) (arguing that certain life events—"transformative experiences"—change one's current self so much that "you have no idea what you are getting into").

172 *See, e.g.*, Gilson et al., *supra* note 13, at 1392–93 (observing that "informal enforcement depends entirely on private behavior—each party's ability to observe directly the other's actions and willingness to sanction misbehavior directly when it is observed" and discussing several types of "private sanctions that make informal enforcement effective").

173 *See, e.g.*, Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 Wake Forest L. Rev. 843, 869 (2012) ("[A] service provider dealing with a homeowner may decide not to breach, even if breach would be efficient and the homeowner could be fully compensated, because the service provider believes that the homeowner would be angry in the event of breach."); Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Efficient Breach? A Psychological Experiment*, 108 Mich. L. Rev. 633, 633 (2010) ("Subjects were more willing to breach a contract—an action normally dictated against by social and moral norms—when damages were stipulated.").

174 *See, e.g.*, Gilson et al., *supra* note 13, at 1392 ("One type of informal enforcement is the threat that one party to an informal contract will respond to its counterparty's breach by reducing or terminating future dealings. This tit-for-tat strategy imposes losses on the defector, which, in prospect, create disincentives to breach in the first place.").

175 *Cf., e.g.*, Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724, 1749 (2001); Gilson et al., *supra* note 13, at 1393–94; Judith van Erp, *Reputational Sanctions in Private and Public Regulation*, 1 Erasmus L. Rev. 145, 150 (2008); *see also* Claire A. Hill, *A Comment on Language and Norms in Complex Business Contracting*, 77 Chi.-Kent L. Rev. 29, 36 (2001)

These seem most powerful for those who are embedded in networks of people who will know and care.[176] A third mechanism identified in the literature is a more complex version of the first: A party's taste for reciprocity may lead to a normative rejection of a counterparty who doesn't prove reliable or trustworthy.[177]

The analysis of extralegal contracts in this Article points toward a further mechanism for eliciting credible promises: the mechanics of form. This Part begins by revisiting Lon Fuller's classic article *Consideration and Form*, showing how extralegal contracts exemplify the functions he identifies and shed new light on his inscrutable channeling function. The analysis then proceeds to identify the novel functions that extralegal contracts point us toward. Section III.B offers a typology of those functions. Section III.C then introduces an empirical literature on contexts in which individuals follow through on their intentions even in the absence of any enforcement mechanism. This Section spotlights a phenomenon called the Question Behavior Effect and the mechanisms researchers have identified to explain why individuals are more likely to engage in actions they have predicted they will take. The functions and mechanisms identified in this Part lay the groundwork for applying these insights to the world of legal contracts in Part IV.

A. Exemplifying Fuller's Functions

In his 1941 article *Consideration and Form*, Lon Fuller articulates three functions of contractual formalities: evidentiary, cautionary, and channeling. One can see all of these operating in extralegal contracts.

("Most appreciable contract breaches . . . carry reputational [and] legal costs: [Violations of] contracted-for dut[ies] will likely be . . . undesirable in a contracting partner, whether or not legal recourse is sought or obtained. Thus, parties who do not fear legal sanctions may nevertheless refrain from breaching a contract to avoid reputational costs.").

176 Extralegal sanctions may, conversely, be better supported if the outside parties do not care *too much*: Ayres reports that stickK users are more successful when they name multiple people to monitor their progress on their self-contracts. AYRES, CARROTS AND STICKS, *supra* note 163, at 94–95 (observing that, "as with . . . other commitment issues, the choice of referee can be fraught with complications. . . . [Y]ou need to trust that the referee will be willing to follow through and forfeit your money if you do fail. . . . [Y]ou shouldn't designate either an enemy or a softhearted friend to be your referee" and proposing the idea as "an army of stickK referees").

177 Gilson et al., *supra* note 13, at 1393 (identifying another "type of informal enforcement" that is "supported either by the morality or tastes of the contracting parties rather than their calculations of individual gain" and observing that "experimental evidence also indicates a widespread, but not universal, taste for reciprocity—an inclination to reward cooperators and punish opportunists even when the subjects derive no direct and particular benefits from doing so." (citations omitted)); Scott, *supra* note 41, at 1662–72 (reviewing literature on reciprocity and concluding that an extralegal contract based on opportunities to reciprocate can sometimes "produce a better result for both parties" than a legally enforceable contract).

Before proceeding with a typology of the novel functions illuminated by this study of extralegal contracts, this Section explains Fuller's classic functions and what can be learned by applying them to the extralegal contracts in this Article.

1. Evidentiary.—To Fuller, "[t]he most obvious function" of legal formalities is to supply "evidence of the existence and purport of the contract, in case of controversy."[178] Fuller does not here specify to whom this evidence is important, but his later discussion indicates an awareness that such "evidence" is important not only for courts, should they become involved, but for the parties themselves.[179] Indeed, he criticizes another scholar for placing "undue emphasis" on the value for courts rather than for parties "transacting business out of court."[180]

The evidentiary function is highly relevant to some of the extralegal contracts at issue here. For instance, the no-suicide contracts allow an individual to set out in writing a plan and relevant information (such as whom to contact and what numbers to call) while in a "cold" reflective state, which can then be accessed and used at a future moment while in a less deliberative "hot" state (when feeling inclined toward self-harm).[181] Whether these contracts work as intended is a different question,[182] but one can see this evidentiary function at work in their creation. The sexual contracts discussed earlier can serve as reminders to the parties of their prior agreements about how to handle certain situations, such as interest from a third party, when it may be more convenient to forget those agreements.[183] The contract with oneself can set out intentions and reasons for the commitment that can be reviewed later at more challenging moments.[184]

2. Cautionary.—Fuller observes that legal formalities, like a writing or a seal, serve "a cautionary or deterrent function by acting as a check against inconsiderate action."[185] Historically, "affixing and impressing of a wax wafer" was a "symbol in the popular mind of legalism and weightiness," and therefore the seal, Fuller tells us, "was

178 Fuller, *Consideration and Form*, *supra* note 1, at 800 (quoting 2 JOHN AUSTIN, *Fragments—on Contracts*, *in* LECTURES ON JURISPRUDENCE 940 (4th ed. London, John Murray 1879)).

179 *Id.* at 801 ("In this passage it is apparent that Ihering has placed an undue emphasis on the utility of form for the judge, to the neglect of its significance for those transacting business out of court.").

180 *Id.*

181 *See supra* Section II.A. On hot and cold states, see *supra* note 80 and accompanying text.

182 For discussion of doubts and concerns about NSCs, see *supra* note 74 and accompanying text.

183 *See supra* Section II.B (discussing, for example, an extralegal contract created by a couple open to nonmonogamy under certain conditions).

184 *See supra* Section II.D.

185 Fuller, *Consideration and Form*, *supra* note 1, at 800.

an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future."[186] *Look before you leap*, such formalities say.

In the context of extralegal contracts, the cautionary function is apparent. For example, the written "contracts" with the artist offered by Marina Abramović and Adrian Piper press those who participate in their installations to take the commitment seriously—and the formalities thereby nudge those who will not follow through to opt out.[187] No-suicide contracts may help clinicians to slow down their process of releasing an individual and to examine the rightness of their decision.[188] Interestingly, the contracts in the S/M context may encourage parties to exercise caution at multiple time points: to pause during the writing and signing to notice hesitation or contrary desires at the moment of formation, and, later, to stop and consider exiting the dynamic through "safe words"—akin to termination clauses.[189]

3. Channeling. —According to Fuller, "one of the most important functions of form" is typically overlooked: what he terms the *channeling* function.[190] Fuller initially frames channeling as "a simple and external test of enforceability,"[191] but his discussion quickly turns to more nuanced, internal aspects of this function. He tells us:

> Form is for a legal transaction what the stamp is for a coin. Just as the stamp of the coin relieves us from the necessity of testing the metallic content and weight—in short, the value of the coin (a test which we could not avoid if uncoined metal were offered to us in payment), in the same way legal formalities relieve the judge of an inquiry *whether* a legal transaction was intended, and—in case different forms are fixed for different legal transactions—*which* was intended![192]

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186 *Id*.

187 *See supra* Section II.C. This also creates an opportunity for forms of reflection and participatory experience that will be discussed in the next Section. *See infra* Section III.B. Reading these "contracts" as less ingenuous is also possible, of course, but the presentation itself is quite serious.

188 *See supra* Section II.A.

189 *See* Baadmaster, *supra* note 110 (proposing that these agreements include a term such as, "[t]he slave, at any time, can use the following words to stop all play at any time for any reason: 'No' (preferred), 'Stop,' or 'Red.' (A safe signal should also be agreed to and enumerated.)").

190 Fuller, *Consideration and Form*, *supra* note 1, at 801.

191 *Id.* ("That a legal formality may perform a function not yet described can be shown by the seal. The seal not only . . . satisfactor[il]y memorial[izes] the promise and induces deliberation in [its] making . . . . It serves also to mark or signalize the enforceable promise; it furnishes a simple[,] . . . external test of enforceability.").

192 *Id.* (quoting Rudolf von Jhering, Geist des Romischen Rechts 494 (8th ed. 1923)).

Fuller then includes his mention of the importance of this information for "those transacting business out of court" as well as for the judge.[193]

The channeling function is the least accessible of Fuller's functions. Focusing on extralegal contracts helps us to identify why the channeling function is so puzzling. The vantage point of extralegal contracts sets into relief the slippage in Fuller's account of channeling between a specifically external purpose (that is, the purpose of legal enforceability) and a more complex internal account (that is, the substantive purpose of the deal the parties are creating). The block quote above includes the (external) point about channeling's role in determining legal enforceability, and these lines also include the (internal) idea that channeling helps with discerning *which* part of the material is the contract.

What Fuller says next focuses more squarely on the latter: the substance of the parties' deal. He says the most useful analogy for the channeling function is language itself:

> One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels; he must reduce the fleeting entities of wordless thought to the patterns of conventional speech. One planning to enter a legal transaction faces a similar problem. His mind first conceives an economic or sentimental objective, or, more usually, a set of overlapping objectives. He must then, with or without the aid of a lawyer, cast about for the legal transaction (written memorandum, sealed contract, lease, conveyance of the fee, etc.) which will most nearly accomplish these objectives.[194]

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193 *Id.*

194 *Id.* at 802. This account of channeling and the analogy to language echo Fuller's broader project of "eunomics"—that is, his unfinished "life-long project dedicated to the study of institutional design"—and his "effort to develop an account of freedom that would make sense of the manner in which the forms of ordering—and indeed, forms more generally—condition human behavior." Shyamkrishna Balganesh, *Interactional Ordering: Reconstructing Lon Fuller's Theory of Private Law*, 69 Am. J. Juris. 217, 220, 223 (2025) ("Real, meaningful freedom therefore necessitated constraint. Language, to Fuller, was paradigmatic of such freedom-enabling constraints in so far as it was essential to communication."); *see also* Lon L. Fuller, *Freedom as a Problem of Allocating Choice*, 112 Procs. Am. Phil. Soc'y 101, 102 (1968) (observing that the "often inconvenient restraints" of language "are the price we pay for communication" and concluding that, "[t]o carry my thought into the mind of another, I must direct it along channels of speech familiar to both of us. If we shared no common linguistic map, charting and restricting the flow of thought between us, we would simply be unable to communicate"); Lon L. Fuller, *Eunomics: The Theory of Good Order and Workable Social Arrangements*, *in* The Principles of Social Order: Selected Essays of Lon L. Fuller 59, 71 (2001) ("Any social goal, to be meaningful, must be conceived in structural terms, not simply as something that happens to people when their social ordering is rightly directed.").

Here, channeling is a way of turning what is inside of us into a form recognizable to others. This function need not involve distinguishing legal from nonlegal, and thus can apply to extralegal contracts as well. Another analogy could be the publication of a book: An author might produce many versions of a manuscript, each with handwritten notes and marginalia varying the content and word choice. The book's publication signals to others not only *that* the author intended to communicate with an audience but *which words* they wanted to include in the communication.

These extralegal contracts involve formalities that help make sure the parties are communicating their intentions to each other clearly, much like publication helps the reader know that a communication was intended and which words were meant to be a part of it. For instance, an erotic encounter, particularly one contemplating a future relationship, may involve many words of fantasy and desire; the S/M contract crystallizes *that* they decided to form an agreement and *which* elements the parties both decided they want to include. Self-contracts lift out of our many thoughts and aspirations a particular commitment we decide to elevate to a written form and a ritual execution.

The upshot for reading Fuller's classic text is the recognition that his channeling function of formalities has two dimensions: the external dimension of helping convert deals into legal language to facilitate enforcement and legal cognizablity; and the internal dimension of translating ideas into communication and thus into deals between parties. Only the latter dimension can apply to extralegal contracts and, since it applies so readily, an internal dimension of the channeling function is illuminated. In this way, examining extralegal contracts contributes to unraveling the puzzle of the meaning and significance of the cautionary function for legal, as well as extralegal, contracts.

B. A Typology of Novel Functions

Extralegal contracts illuminate functions that go beyond Fuller's classic trio of evidentiary, cautionary, and channeling. Building on the analysis in Part II, we can identify five novel functions of extralegal contracts: diagnostic, expressive, constitutive, mapping, and experiential. As with the functions that Fuller discusses, these functions are often intertwined, although they are each notable in their own right.[195] This

[195] *Cf.* Fuller, *Consideration and Form*, *supra* note 1, at 803 ("Just as channeling may result unintentionally from formalities directed toward other ends, so these other ends tend to be satisfied by any device which accomplishes a channeling of expression. There is an evidentiary value in the clarity and definiteness of contour which such a device accomplishes.").

Section discusses each function in turn, drawing on the particulars of the types of extralegal contracts discussed earlier.[196]

1. Diagnostic.—The formation of an extralegal contract can serve a diagnostic function in the sense of eliciting critical information. No-suicide contracts (NSCs) most obviously display this function, as they aim to assist a clinician in determining a patient's likelihood of engaging in self-harm.[197] The willingness of a patient to commit not to engage in self-harm is considered revealing, by those who recommend these NSCs, of a lesser level of threat to the patient who so commits. The diagnostic function can also be seen in other types of extralegal contracts. For instance, a party to an S/M contract for sexual slavery can learn about the other party's willingness to respect boundaries and safe words through the process of formation, situating them as suitable or unsuitable partners.[198]

The diagnostic function comprises not only learning about the other party, but also, potentially, drawing out important knowledge about oneself. The patient signing an NSC may learn something from their own willingness—or unwillingness—to sign.[199] The individual crafting a sexual-slavery contract may realize what excites them or puts them off.[200] A person creating a self-contract may also learn what timetable feels realistic for the intended change, as they formalize the promise in a signed document they call a contract.[201]

2. Expressive.—An extralegal contract can express a message to the other party or to third parties not directly involved in the agreement. In the *Dream Bed* exhibition, Marina Abramović's display of the many participants' contracts on the walls of the exhibition space communicate the seriousness of the participants' commitment. The written documents demonstrate to the visitors, to the witnesses of this installation, the bond formed by the artist and her subjects.[202] In the S/M context, creating the written agreement can be a process of communicating one's desires and limits, to build the kind of relationship sought.[203] In self-contracts, taking the formal step to sign the document can be a way of demonstrating

196 *See supra* Part II.

197 *See supra* Section II.A. This is sometimes referred to as a form of "screening" in medical terminology. *See, e.g.*, Carolyn V. Billings, *Psychiatric Inpatient Suicide: Assessment Strategies*, 9 J. Am. Psychiatric Nurses Ass'n 176, 177 (2003) (discussing, and noting concerns about, "no-self-harm contracts" in the context of "screening tools" that nurses and other members of treatment teams use in practice).

198 *See supra* Section II.B.

199 *See supra* Section II.A.

200 *See supra* note 106.

201 *See supra* Section II.D.

202 *See supra* Section II.C.

203 *See supra* Section II.B.

to oneself—and sometimes to third parties—a commitment to one's goals.[204] The extralegal contracts that the parties draft themselves may express something more particular, to each other or to third parties,[205] but any extralegal contract can serve an expressive function.

3. Constitutive.—Formalizing extralegal contracts can also constitute relationships or aspects of identity.[206] Similar to the way a written constitution founds a national community, a written "contract" can constitute a community among those who are party to it.[207] In the art world, Adrian Piper's *The Probable Trust Registry* explicitly aims to use the signing of "contracts" to craft individual identity rooted in values and create community around those shared values.[208] Signing a contract saying "I will do what I say I am going to do," for instance, leads eventually to an email informing you of the other hundreds of people who made the same formal commitment to that value.[209] Participants in Marina Abramović's *Dream Bed* constituted a relationship with the artist—even without any prior connection—for those who signed a contract promising to stay in the coffin-shaped box under her specific conditions. Through these formalities, participants were brought into contact with her, in ways that were then announced to all passersby throughout the rest of the exhibition, not just for the hour when participants each lay in the box.[210]

For NSCs, at their best, signing such an agreement may help form a relationship between provider and patient—and may even help shape

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204 *See supra* Section II.D.

205 *Cf.* Anna Gelpern & Mitu Gulati, *Feel-Good Formalism*, 35 Queen's L.J. 97, 100, 111 (2009) (using the term "feel-good formalism" to describe terms, such as the "promise never to seek restructuring of a debt instrument," that serve only an "expressive motive"); Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 Geo. L.J. 5, 31, 49 (2011) (concluding that "[f]orces such as moral obligations, motivated reasoning, and social norms affect people's perception of their contractual obligations and the way in which they are expected to behave").

206 The claim here is that these extralegal contracts offer examples of written agreements serving this constitutive function, rather than that every promise or contract does or should create a form of community. *Cf.* Markovits, *supra* note 11, at 1420 ("I claim that promises generally, and contracts in particular, establish a relation of recognition and respect—and indeed a kind of community—among those who participate in them . . . . I present a detailed account of the characteristic relations that this form of community, which I call *collaboration*, involves.").

207 *Cf.* Geoffrey L. Cohen, Belonging: The Science of Creating Connection and Bridging Divides, at x (2022) (observing that "even fleeting experiences of belonging . . . [can] raise our sense of well-being and self-worth, improve our performance, lessen our defensiveness and hostility, increase our tolerance of outsiders, and make us more compassionate").

208 Piper, *supra* note 132; *see also* Ives, *supra* note 133; *see supra* Section II.C.

209 *See supra* note 136 and accompanying text.

210 *See, e.g.*, Contract with Abramović, *supra* note 126; *see also* Finch, *supra* note 126.

the patient's identity as someone committed to avoiding self-harm.[211] Alternatively, as some critics suggest, NSCs can break down trust by prompting the patient to feel coerced or to lie about contrary intentions or behavior.[212] In either version, the form of relationship is being shaped by this contracting moment in powerful ways. Self-contracts aim to harness the force of contractual formalities to support constituting a commitment to one's future self and an identity transformation.[213]

4. Mapping. — Signing an extralegal contract of the kinds discussed here can serve the function of imagining and mapping a future course of action. Explicit versions of this can be seen vividly in NSCs, which often involve a person's planning the precise steps they will take if they feel inclined to harm themselves.[214] Contracts for sexual slavery comprise a purpose of planning what will happen under particular circumstances, to create a roadmap and prepare for various eventualities.[215] For instance, one such contract sets out the precise steps a party should take in the event of feeling desire for a third party.[216] Self-contracts involve mapping a desired future, typically painting a picture of the desired outcome and sometimes addressing pitfalls that may arise.[217]

5. Experiential. — Finally, these extralegal contracts often serve an experiential function — in other words, the experience of creating and formalizing them is itself important. Creating contracts for sexual slavery is described as fun, and as an erotic encounter, by participants

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211 *See supra* notes 81–82 and accompanying text.

212 The latter is why some commentators recommend that clinicians introduce no-suicide contracting only after a relationship with a patient is formed, and even more commonly advise against them, though clearly NSCs are used widely. *See, e.g.*, Hyldahl & Richardson, *supra* note 71, at 122–23; *supra* note 74 and accompanying text.

213 *See supra* Section II.D.

214 *See, e.g.*, *supra* notes 79–80 and accompanying text.

215 *See supra* note 103.

216 *See* Mrs. Darling, *Sample with Ethical Non-Monogamy*, *supra* note 97. The contract includes the following language, for instance: "3. If either feels a 'spark', [sic] interest, or any attraction of more than friends, it needs to be shared with spouse prior to sharing with anyone else, including that person. A simple text or phone call with confirmation received will suffice unless #4." *Id.* The terms continue: "4. If spouse requests further discussion before moving forward, that request will be honored. 5. If contact is instigated by 'other,' spouse is to be notified immediately and prior to any response being sent. Again text or phone call with confirmation received will suffice unless #4." *Id.* The terms also anticipate possible decision moments and next steps: "6. Flirty (see A) in person conversation is acceptable without prior consent from spouse, however spouse should be notified right away if this has lead [sic] to #3. If this conversation turns sexual (see B) then conversation needs to be put on hold until above can happen." *Id.*

217 *See, e.g.*, *O's Quit Smoking Challenge: Contract with Myself*, *supra* note 159 (imagining a future smoke free life and its benefits); Cameron, *supra* note 153, at 23 ("I . . . further understand that this course will raise issues and emotions for me to deal with. I . . . commit myself to excellent self-care — adequate sleep, diet, exercise, and pampering — for the duration of the course.").

who have written about it.[218] Though some readers must be thinking that this kind of contracting is not *everyone's* idea of fun, and they are surely right, it is also true that such a contract featured prominently in the erotic novel *Fifty Shades of Grey*[219] that sold over 100 million copies.[220] This suggests that, at the very least, reading such contracts is thrilling to many. The contracts created by Abramović and Piper offer visitors an experiential relationship to the artist and work of art; lying in the *Dream Bed* box is reserved for those who secure a coveted hour-long slot on the schedule, but visitors can imaginatively enter the experience through the contracts they read on the walls.[221] Moreover, the act of creating a self-contract may feel meaningful to an individual who has trouble (in general or in the current period) valuing her own goals and intentions, or prioritizing her own internal goals over external demands, as some writers have suggested was important to them about *The Artist's Way* contract.[222] The experiential function is the most surprising of the functions identified by this focus on extralegal contracts. Part IV examines this function in more depth and considers its implications for legal contracting.

C. Mechanisms that Support Performance

Extant research on contracts finds that legal formalities make parties feel more obligated to follow through on their promises,[223] but this research leaves open intriguing questions as to the mechanism by which parties feel more bound.[224] Focusing on extralegal contracts offers a unique vantage point from which to view that question of mechanism. The formalities employed in extralegal contracts serve multiple functions, as discussed above,[225] several of which relate to future behavior, without threat of legal sanctions and, in many cases, without the available mechanisms of informal policing.[226]

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218 *See supra* note 100.

219 E. L. James, Fifty Shades of Grey 499–500 (2011).

220 Andy Lewis, *'Fifty Shades of Grey' Sales Hit 100 Million*, Hollywood Rep. (Feb. 26, 2014), https://www.hollywoodreporter.com/news/general-news/fifty-shades-grey-sales-hit-683852 [https://perma.cc/6Z8X-EP5R].

221 *See supra* Section II.C.

222 *See supra* Section II.D.

223 *See infra* note 290 (discussing the impact of contractual formalities).

224 *See, e.g.*, Scott, *supra* note 41, at 1675 (asserting that the source of reciprocal behavior is "irrelevant for the purposes of understanding self-enforcing agreements . . . [w]hatever the source of that behavior (whether learned, normative, or intrinsic)").

225 *See supra* Section III.B (identifying five novel functions of extralegal contracts: diagnostic, expressive, constitutive, mapping, and experiential).

226 *See supra* notes 172–77 and accompanying text.

As the threat of sanctions cannot fully explain the appeal of forming extralegal contracts, these agreements are an interesting site for considering how formalities make parties feel more bound. This Section therefore brings these extralegal contracts into dialogue with the empirical research on the ways that predictions or intentions can influence behavior, even in the absence of sanctions for not following through. Specifically, research on the Question Behavior Effect offers a number of insights into how merely laying out one's promises and plans can influence performance.

In areas ranging from voting to recycling to flossing,[227] "[a] growing body of literature in consumer psychology demonstrates that merely asking people a question about their future behavior influences the subsequent performance of that behavior."[228] Typically called the Question Behavior Effect (QBE) now, this finding was first termed the "self-erasing error of prediction" because attempts to measure a subject's behavior led to mispredictions (relative to controls), but those errors were corrected, to some extent, because the subjects who (mis)predicted their future behavior tended to comply with their own predictions.[229] In other words, "asking people what they would do in a particular situation assures that they will act that way, even if they would have acted differently without the asking."[230] Early findings led to two strands of research: "self-prophesy" and "mere-measurement."[231] The term mere-measurement effect[232] further spotlights the way that

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227 *See, e.g.*, David W. Nickerson & Todd Rogers, *Do You Have a Voting Plan? Implementation Intentions, Voter Turnout, and Organic Plan Making*, 21 Psych. Sci. 194 (2010) (examining voting); Andrew Perkins, Ronn J. Smith, David E. Sprott, Eric R. Spangenberg & David C. Knuff, *Understanding the Self-Prophecy Phenomenon*, 8 Eur. Advances Consumer Rsch. 462 (2007) (examining recycling); Jonathan Levav & Gavan J. Fitzsimons, *When Questions Change Behavior: The Role of Ease of Representation*, 17 Psych. Sci. 207 (2006) (examining flossing).

228 Eric R. Spangenberg, Anthony G. Greenwald & David E. Sprott, *Will You Read This Article's Abstract? Theories of the Question–Behavior Effect*, 18 J. Consumer Psych. 102, 102 (2008) [hereinafter Spangenberg et al., *Will You Read?*].

229 Steven J. Sherman, *On the Self-Erasing Nature of Errors of Prediction*, 39 J. Personality & Soc. Psych. 211, 217 (1980).

230 *Id.* at 215.

231 *See, e.g.*, Eric R. Spangenberg, David E. Sprott, David C. Knuff, Ronn J. Smith, Carl Obermiller & Anthony G. Greenwald, *Process Evidence for the Question–Behavior Effect: Influencing Socially Normative Behaviors*, 7 Soc. Influence 211, 212 (2012) [hereinafter Spangenberg et al., *Process Evidence*] ("While mere-measurement researchers have typically demonstrated the effect for various consumer behaviors (e.g., durable and non-durable goods purchases, brand . . . loyalty[,] . . . drug and alcohol consumption), self-prophecy demonstrations have most often been associated with socially normative actions (e.g., donating to a charity, recycling, attending a health club, cheating on an exam, voting, gender stereotyping).").

232 *See* Vicki G. Morwitz, Eric Johnson & David Schmittlein, *Does Measuring Intent Change Behavior?*, 20 J. Consumer Rsch. 46 (1993); *see also* Levav & Fitzsimons, *supra* note

attempts to measure intentions and predictions can actually change the underlying behavior because people are shaped by their "prebehavioral cognitive work."[233] For instance, studies have found that people who are asked if they will floss are more likely to floss.[234] This seems salutary for flossing, but less so for engaging in risky or harmful behaviors like cheating or unprotected sex; the concern that asking about risky behaviors may increase them is therefore one focus of this research.[235]

Subsequent studies have tried to understand the features and the underlying mechanisms of the QBE.[236] Other work finds that the QBE is automatic rather than reasoned, and that it persists over time.[237] The research indicates that the mechanisms are multiple—including accounts based on consistency, fluency, and motivation—and no single mechanism explains the entire QBE impact.[238]

227, at 207 ("Morwitz et al. labeled this phenomenon the *mere-measurement effect*, as merely measuring intentions changed respondents' behavior.").

233 Sherman, *supra* note 229, at 219.

234 Levav & Fitzsimons, *supra* note 227.

235 *See*, *e.g.*, Gavin J. Fitzsimons & Sarah G. Moore, *Should We Ask Our Children About Sex, Drugs and Rock & Roll? Potentially Harmful Effects of Asking Questions About Risky Behaviors*, 18 J. Consumer Psych. 82, 84, 93 (2008) (concluding from the QBE literature that the worst option for parents is to ask about risky behavior and say nothing else—and that not asking at all would be better than that—and the best option is to ask in a way that helps to discourage the behavior, for instance by asking "how likely are you to avoid" the target behavior, rather than asking if you will (or even if you won't) engage in it); Spangenberg et al., *Will You Read?*, *supra* note 228, at 105 (suggesting parents ask "Are you planning to drink soft drinks tonight at the party?" rather than asking about intentions toward alcohol).

236 *See generally, e.g.*, Eric R. Spangenberg, Ioannis Kareklas, Berna Devezer & Dave E. Sprott, *A Meta-Analytic Synthesis of the Question–Behavior Effect*, 26 J. Consumer Psych. 441 (2016) [hereinafter Spangenberg et al., *Meta-Analytic Synthesis*].

237 *See, e.g.*, Gavan J. Fitzsimons & Patti Williams, *Asking Questions Can Change Choice Behavior: Does It Do So Automatically or Effortfully?*, 6 J. Experimental Psych.: Applied 195, 195 (2000) (finding the effect of QBE on subsequent behavior to be primarily automatic). One interesting wrinkle in the QBE literature concerns whether merely *asking* the question is enough, or whether answering is also important. As the descriptions quoted in this Article reflect, researchers in the field often speak as if asking alone will suffice to trigger the effect, and some studies do report effects to stand-alone questions. *See, e.g.*, Fitzsimons & Moore, *supra* note 235, at 85 (discussing work that merely asks the question, for instance, through a billboard that says, "Ask Yourself…Will you recycle?"). Despite this tendency, the mechanics of the studies often involve responses to the question posed and findings that the manner of response can matter to the effect. *See, e.g.*, Spangenberg et al., *Meta-Analytic Synthesis*, *supra* note 236, at 451–53 (discussing how "response scales"—i.e., when a study offers respondents a dichotomous "yes/no" response versus a continous, multinominal response to a QBE question—significantly impact a test subject's likelihood of engaging in behaviors posed in the QBE question); *see also infra* note 265 and accompanying text (discussing a particular study in which plan making seems to have mattered more than mere questions). Though interesting, this slippage in the literature should carry little significance for the contexts at issue in this Article, where the parties are articulating intentions through written "contracts."

238 *See, e.g.*, Spangenberg et al., *Meta-Analytic Synthesis*, *supra* note 236, at 453 ("The nature and weight of our findings strongly suggest multiple theoretical mechanisms at

This Section will discuss four explanations of how merely *asking a question* about future behavior could actually *change* future behavior. The first is the leading approach to a mechanism centered on consistency: cognitive dissonance. The second is a vivid version of the fluency-based mechanism: the ideomotor account. The third and fourth are two different versions of motivation-based mechanisms: social identities and implementation intentions.

1. Cognitive Dissonance. — The consistency account of the QBE posits that it is caused by "some form of consistency between the question and behavior."[239] The leading approach is "cognitive dissonance," which turns on the discomfort people feel when their attitudes and their behavior are not aligned.[240] The specific sequence of events posited in the consistency account of QBE seems complex, but when laid out step-by-step, the logic becomes clearer:

> Making a self-prediction is proposed to cause psychological discomfort by making people aware of a discrepancy between held values (e.g., normative beliefs about performing the target behavior) and past behavior regarding the target action. Thus, by making a self-prediction, people simultaneously become aware of what they *should* do, in addition to what they have (or have not) previously done regarding the behavior. If these cognitions are discrepant (e.g., "I should recycle, but I throw away many recyclable materials in the trash, even though recycling services are available to me"), cognitive dissonance results. People making a self-prediction thus alleviate associated cognitive dissonance by performing the socially desirable action they would have been less likely to perform.[241]

In other words, a person is asked about their intentions to recycle in the future, which reminds them that they value recycling and also that they don't do it as much as they feel they should; then, when an opportunity arises to recycle, the person is more likely to do it than if they hadn't been asked the question. Research indicates that the question about intentions has more of an impact than merely being asked about their attitudes toward the target activity.[242] Indeed, the

play . . . ."); *id.* at 445 ("Researchers generally share the view that none of the theoretical explanations seem to completely account for all demonstrations . . . .").

[239] *Id.* at 443.

[240] *See generally* Leon Festinger, A Theory of Cognitive Dissonance (1957).

[241] Spangenberg et al., *Process Evidence*, *supra* note 231, at 213–14.

[242] *Cf. id.* at 223 (finding, through several experiments "directly testing both attitude accessibility and cognitive dissonance as process explanations for the QBE," that "the three experiments compellingly support dissonance as the theoretical mechanism for the QBE").

consistency account of the QBE seems to have the most empirical support to date.[243]

2. Ideomotor. — The fluency account of the QBE suggests that the process of being asked the question about future behavior makes doing the behavior easier (more *fluent*) due to the earlier exposure — in the researchers' terms, due to the "redundancy" between the mental activity at time 1 (the questioning) and time 2 (the behavioral opportunity).[244] A particularly vivid version of fluency is the "ideomotor" account, which suggests that a "question activates a perceptual image or idea of an action being asked about, with the activated image guiding future performance of the behavior."[245] In other words, a question about your future behavior prompts you to picture yourself doing the thing, which then makes it easier to do the thing when the time comes.

The term *ideomotor* was coined in the mid-nineteenth century and picked up by William James in his *Principles of Psychology* in 1890.[246] Though characterized as a theory in the leading review article in the QBE literature,[247] the ideomotor account makes sense of recent QBE empirical data. For instance, people are more likely to increase their flossing in response to a question about their flossing behavior if the question is posed in a way that makes flossing easy to picture.[248] Researchers asked subjects about their intent to floss in the coming week, either with a regular frequency (that is, seven times per week) or with a frequency that was disconnected from weekly rhythms (that is, two or eight times per week).[249] The subjects who were given the version of the question that made it easier to picture themselves fitting flossing into their daily routine (seven days a week) were more likely to engage in the behavior.[250] In the authors' account, "We conjecture that intention questions trigger the use of a simulation heuristic, such that

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243 *See* Spangenberg et al., *Meta-Analytic Synthesis*, *supra* note 236, at 444.

244 *Id.*

245 Spangenberg et al., *Will You Read?*, *supra* note 228, at 104; *see also* Spangenberg et al., *Meta-Analytic Synthesis*, *supra* note 236, at 444 (discussing this account as a version of fluency).

246 William James, 2 The Principles of Psychology 522 (Dover 1950) (1890) (describing "*ideo-motor action*" as "the sequence of movement upon the mere thought of it, as the type of the process of volition" and explaining that "[w]herever movement follows *unhesitatingly and immediately* the notion of it in the mind, we have ideo-motor action"); *see also* Spangenberg et al., *Will You Read?*, *supra* note 228, at 104 (recognizing James's contribution). James credits William Carpenter with the first use of the term. *See* James, *supra*, at 522.

247 *See* Spangenberg et al., *Will You Read?*, *supra* note 228, at 104.

248 *See* Levav & Fitzsimmons, *supra* note 227, at 208; *see also* Spangenberg et al., *Will You Read?*, *supra* note 228, at 104 (discussing this research in relation to ideomotor theory).

249 *See* Levav & Fitzsimmons, *supra* note 227, at 211.

250 *Id.*

respondents mentally represent the target behavior and the instances in which they might engage in that behavior."[251]

Under this account, "question-behavior effects are more likely to emerge when a clear image of performing the behavior is available to the person responding to the question; missing class, consuming alcohol, using drugs, watching television . . . ."[252] The ideomotor account could therefore explain the finding that drug users were more likely to use drugs after being asked about their intentions to do so, compared to controls.[253] This account also comports with findings that QBEs are "more likely to occur without conscious cognitive mediation."[254]

3. Social Identities.—Motivational accounts of the QBE are based on the idea that "questioning activates an intention that uniquely guides future behavioral performance by . . . enhanc[ing] commitment to perform a certain action."[255] There are two branches of motivational theory: "social identities" and "implementation intentions" accounts.[256] This Section focuses on the first of these.

Motivation to engage in the behavior may turn on a sense of social identity.[257] The idea here is that the questioning involved in the QBE "may activate social identities (i.e., self-definitions of group identification) that motivate behavior consistent with [those] activated identities."[258] In other words, being asked a question about your intention to recycle can trigger a positive sense that "I am a recycler," which then motivates future recycling behavior.[259]

4. Implementation Intentions.—Lastly, with implementation intentions, the "questioning" central to the QBE "facilitates an if-then plan in one's mind, guiding future behavioral performance."[260] Rather than being asked one question about their intentions, individuals are effectively helped "in plan making" because the questions posed inspire them to "[a]rticulat[e] the when, where, and how of following through on an intention," which "creates cognitive links between an

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251 *Id.* at 208.

252 Spangenberg et al., *Will You Read?*, *supra* note 228, at 104.

253 *See id.* (citing Patti Williams, Lauren G. Block & Gavan J. Fitzsimons, *Simply Asking Questions About Health Behaviors Increases Both Healthy and Unhealthy Behaviors*, 1 Soc. Influence 117 (2006)).

254 *Id.*

255 Spangenberg et al., *Meta-Analytic Synthesis*, *supra* note 236, at 445.

256 *Id.*

257 Perkins et al., *supra* note 227, at 464; *see also* Spangenberg et al., *Meta-Analytic Synthesis*, *supra* note 236, at 445 (discussing social identities as a motivation-based account of QBE).

258 Spangenberg et al., *Meta-Analytic Synthesis*, *supra* note 236, at 445.

259 Perkins et al., *supra* note 227, at 464 ("Specific to these results, when a particular self-identity is activated (in this case, the recycling self-identity), the positivity associated with that normative self-identity is reflected in the increase of that individual's self-esteem.").

260 Spangenberg et al., *Meta-Analytic Synthesis*, *supra* note 236, at 445.

anticipated future situation and the intended behavior."[261] In the words of one study focused on encouraging people to make a voting plan, an implementation intentions approach "can be thought of as 'if situation *Y*, then behavior *X*.'"[262]

Researchers studying implementation intentions have found that context matters. Strikingly, for instance, assistance making a concrete voting plan—in terms of the how and when—significantly increases voting behavior for people who don't live with any other eligible voters but *not* for those who do live with other eligible voters.[263] This seems puzzling until one considers that voting takes effort and people who live alone haven't had the chance to be reminded or to collaborate on that effort, the way that people who live with other voters may have.[264] Moreover, the planmaking involved in implementation intentions may be more impactful than merely being asked the question about future behavior.[265] And researchers have also found that implementation intentions work particularly well in combination with mental contrasting—"[a] self-regulation strategy of mentally contrasting an envisioned positive future with obstacles of present reality."[266] Further work finds that mental contrasting is most useful after goals are formed, to help in the creation of effective implementation intentions.[267] In other words, the "metacognitive strategy" supported by the research involves three steps: Define an intention, identify obstacles, and then create if/

261 Nickerson & Rogers, *supra* note 227, at 195.

262 *Id.* (citation omitted).

263 *Id.* at 198 ("[W]e found that among single-eligible-voter households, targets were 9.1 percentage points more likely to vote when they received a script guiding them to make a plan, whereas targets in multiple-eligible-voter households were unaffected by the same script.").

264 *Id.* ("[T]argets living with others who might share an interest in the focal behavior are more likely to engage in plan making on their own, which might explain the impotence of the plan-making intervention when directed at them."). *Cf.* Elizabeth F. Emens, *Admin*, 103 Geo. L.J. 1409, 1446–50 (2015) (discussing the ways that hassle costs associated with life admin—that is, the office work of life—can affect behavior).

265 Nickerson and Rogers were attempting to replicate an earlier study finding a significant effect on voting behavior after calls merely asking voters if they will vote, but their work found only a "marginally significant turnout increase" from "vote-intention self-prediction," whereas the "script that incorporated both self-prediction and implementation intentions resulted in a 4.1-percentage-point increase in turnout among those in the experimental conditions." Nickerson & Rogers, *supra* note 227, at 198. The implementation intentions script followed up the basic question about whether the person "intended to vote" with "three follow-up questions designed to facilitate voting plan making: what time they would vote, where they would be coming from, and what they would be doing beforehand." *Id.* at 195.

266 Peter M. Gollwitzer & Gabriele Oettingen, *The Question-Behavior Effect from an Action Control Perspective*, 18 J. of Consumer Psych. 107, 109 (2008).

267 *Id.* at 109.

then plans for fulfilling the intention.[268] Drafting a contract involves setting intentions and creating plans for follow-through, and Part IV will discuss ways this research could inform that process.[269]

IV
Implications for Legal Contracts and Beyond

The analysis thus far offers four main insights. The first is that these extralegal contracts highlight the primary dimension of our understanding of contracts: limits and constraints.[270] They exemplify the way that contracts—those things we call "contracts"—are invoked when we want ourselves or another party (or both) to *feel more bound*. Contracts add weight, heft, and a quantitative difference in the degree of commitment. Contractual formalities shape the extent to which we feel we are seriously limiting our future behavior by our current words.

The second point pushes in a different direction. These extralegal contracts also show that—contrary to our typical understanding of contracts as constraining us—contracts also offer imaginative possibilities. Calling something a contract and invoking associated formalities may be part of imagining a different future for ourselves (as with a smoker who wants to become a nonsmoker[271]) or even, at a bleak moment, imagining a future at all (as with someone who signs a no-suicide contract[272]). Crafting a written agreement and formalizing it with another person may allow us to constitute a relationship or invite us into new forms of intimacy now or in the future. Examining extralegal contracts not only sheds new light on traditional contract functions, as we saw in relation to Fuller's channeling function,[273] but illuminates functions previously overlooked.[274] This is a qualitative difference made by contractual formalities: Rather than just making people feel more bound, the contractual form can make people feel differently bound.

Third, these extralegal contracts lead to a surprising new perspective on contracts: The process of formation is not always a means to something else. Rather, the moment of formation is sometimes an end in itself. This runs contrary to the way we think about contracts, which,

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268 *Id.*

269 *See infra* Part IV.

270 *Cf.* Fuller, *Consideration and Form*, *supra* note 1, at 802 ("The Statute of Frauds, for example, has only a kind of negative canalizing effect in the sense that it indicates a way by which one may be sure of *not* being bound.").

271 *See supra* Section II.D.

272 *See supra* Section II.A.

273 *See supra* Section III.A.

274 *See supra* Section III.B.

even if understood relationally or complexly, are viewed in terms of the future.[275] Yet these extralegal contracts show that formation itself may serve experiential purposes.[276]

Finally, this study has cast a spotlight on key mechanisms by which parties feel impelled to follow through on their intentions. Examining the use of formalities outside of any enforcement framework has led us to excavate behavioral research on the ways that merely indicating intentions about the future can make people more likely to fulfill those intentions. The empirical work in this area offers several key mechanisms and findings that can inform the best ways to negotiate and write contracts, as this Part will discuss.

The analysis here has implications for legal contracts. Namely, the mechanisms that support people's follow-through on their intentions, from the QBE literature discussed in Section III.C, can inform strategic contracting decisions.[277] The most obvious applications of these insights involve doctrinal areas where enforcement is uncertain or precluded, which form the focus of this Part; however, because legal enforcement is relatively rare even for enforceable contracts,[278] these strategies are also relevant to the formation of conventional legal contracts. Moreover, the novel functions of legal formalities identified in the analysis in Section III.B can be used to better shape parties' aims in forming legal and extralegal contracts.[279] Lastly, the experiential dimension in particular can change the way contracting parties and their lawyers work.[280] This Part will take each of these points in turn.

A. Strategic Contracting: Applying Behavioral Mechanisms

This Section draws on the mechanisms for following through on intentions discussed at the end of the previous Part in order to identify strategies to increase the likelihood of performance through the contracting process.[281] Securing performance is often, though not always, the aim of contracting. The next two Sections will build on the analysis of extralegal contracts to discuss the payoffs of identifying other

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275 *See, e.g.*, P.S. Atiyah, Book Note, 1983 Duke L.J. 669, 678 (reviewing The Principles of Social Order: Selected Essays of Lon L. Fuller (1981)) ("Contract differs from mere exchange because it contains an element of futurity . . . . Contracts *bind* people to future performances.").

276 *See supra* Section III.B.

277 *See infra* Section IV.A.

278 *See supra* note 25 and accompanying text (discussing the infrequency of legal enforcement of contracts).

279 *See infra* Section IV.B.

280 *See infra* Section IV.C.

281 *See supra* Section III.C.

functions.[282] This Section first zeroes in on the more common aspiration of legal contracts: to spur the other party to perform without the need for litigation.

Picture two parties negotiating and drafting an agreement in a realm where enforcement is uncertain or even unlikely. The parties may be affirmatively trying to remove themselves from the realm of legal enforcement altogether, for instance, by inserting a This-Is-Not-a-Legally-Enforceable-Agreement (TINALEA) clause.[283] Parties may seek to shield their agreements from legal enforcement for various reasons, including avoiding the cost of litigation or fearing the courts will interpret or apply their agreement contrary to their wishes.[284] Alternatively, the uncertainty of enforcement may not be a choice or preference, but a political reality. This is the situation, for instance, with surrogacy contracts in some states,[285] as well as agreements about allocation of responsibilities inside a marriage or among multiple partners.[286]

In these situations, for parties seeking to encourage performance by the other party, the mechanisms of the QBE can help with strategically designing the agreement and the contracting process to maximize the likelihood of performance. This Section walks through several specific

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[282] *See infra* Sections IV.B and IV.C.

[283] *See, e.g.*, Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. Rev. 1726, 1751, 1762 (2008) (describing TINALEA clauses and courts' willingness to allow parties to opt out of enforcement).

[284] *See, e.g.*, Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 Wis. L. Rev. 507, 525–26 (noting that "[t]here are any number of reasons why a promisor might want to avoid potential liability for breach of contract besides the fact that she wants to have the right not to perform" and TINALEA clauses allow parties to "order their actions without fear of suits in contract"); David R. Lowry, Anthony F. Bartlett & Timothy J. Heinsz, *Legal Intervention in Industrial Relations in the United States and Britain—A Comparative Analysis*, 63 Marq. L. Rev. 1, 19 n.102 (1979) (recounting the use of these clauses to counter a change of British law making collective bargaining agreements legally enforceable).

[285] *See, e.g.*, Melissa Ruth, *Enforcing Surrogacy Agreements in the Courts: Pushing for an Intent-Based Standard*, 63 Vill. L. Rev.: Tolle Lege 1, 2 (2019); Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 Willamette L. Rev. 459, 503 (2015); *see also* Rachel Rebouché, *Contracting Pregnancy*, 105 Iowa L. Rev. 1591, 1630 (2020) (observing that "lawyers draft contractual provisions governing prenatal decisions with practical and strategic objectives in mind, even when they know that those terms are difficult if not impossible to enforce").

[286] *See, e.g.*, Silbaugh, *supra* note 116, at 66–67; Kaiponanea T. Matsumura, *Beyond Polygamy*, 107 Iowa L. Rev. 1903, 1944 (2022) ("Many people in plural relationships attempt to set parameters regarding how to negotiate multiple sexual partners and what types of communication they require. These amatory terms are currently unenforceable, and the inclusion of these terms risks infecting an otherwise valid agreement." (citing sources)); *cf. generally* Alexander Chen & Christina Mulligan, *Parafamily*, 105 B.U. L. Rev. 101, 103–04 (forthcoming 2025) (discussing the obstacles presented by the legal system for people who "center[] their lives around members of their parafamily"—i.e., their "close and committed connections" beyond the nuclear familiar—"as well as their nuclear family").

insights from the behavioral research and applies them to particular legal examples.

The utility of these strategies is most obvious in the situations where enforcement is uncertain or impossible. But the strategies are relevant for most contracting situations—not just these special cases—because most contracts never make it into court and the parties would generally prefer to avoid legal enforcement altogether.[287]

1. Cognitive Dissonance: State clearly who intends to do what.— Cognitive dissonance supports a clear statement of intentions that will prepare a party to feel the uncomfortable dissonance of any behavior contrary to that statement.[288] This mechanism may operate widely and generally to support follow-through on promised behavior. Putting a promise in writing thereby serves an evidentiary function to oneself,[289] as well as to others and to the court, consistent with the empirical work finding that the formality of a writing leads people to feel more bound.[290] Framing the promisors in contracts as institutional actors may diminish the effect, however, so where it doesn't change the meaning or obligations in the contract, naming the individuals responsible for performing promises may trigger this mechanism more effectively. For instance, in a preliminary agreement, after laying out the names of the individuals and their respective entities, the written instrument could assert the promises in terms of the named individuals.[291] Namely, "Frank Bruno of Bruno Instruments will consult these vendors." Or "I, Frank Bruno, will consult these vendors."

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[287] *See supra* note 25 and accompanying text. Note also that the strategies outlined in this Article could be used for oppressive purposes, which is of course not the aim here; by pointing out these techniques, however, the hope is that they might also help with identifying nefarious uses. *Cf.* Starr, Prescott & Bishara, *supra* note 26, at 665 (observing, in a study finding that unenforceable noncompetes nonetheless affect behavior, that "contracts on article and in hand may produce *in terrorem* behavioral effects without regard to 'law,' and legal scholars have speculated for years that unenforceable, invalid, and even unlawful contracts may dramatically alter party behavior, particularly when the party is unaware of the law"); *see also supra* note 26 (discussing relevant findings from this study by Starr, Prescott & Bishara, *supra*, inter alia).

[288] *See supra* Section III.C.1.

[289] *Cf.* Section III.A.1 (discussing Fuller's evidentiary function of contractual formalities).

[290] *See supra* note 16 and accompanying text (citing sources on the role of the written document in lay understandings of contract); *see also* Wilkinson-Ryan & Hoffman, *supra* note 16, at 1281–83 (conducting a series of empirical investigations finding, inter alia, that parties are more likely to feel bound after signing even if they know they are not yet legally bound).

[291] *Cf., e.g.*, Tchrs. Ins. & Annuity Ass'n of Am. v. Trib. Co., 670 F. Supp. 491, 499 (S.D.N.Y. 1987) (finding in this case "a binding preliminary commitment [that] obligated both sides to seek to conclude a final loan agreement upon the agreed terms by negotiating in good faith").

2. Ideomotor: State promises in a manner that makes their performance easy to picture.—Under the ideomotor account of the QBE, parties should ensure that contract negotiations and terms are formulated in a way that facilitates a mental image of performing what is being promised.[292] This paves the way for more fluent follow-through when the time comes.[293] Continuing the example of the preliminary agreement, for example, we can see the importance of concrete language about how and where the various steps of performance will be undertaken. Akin to asking people if they will floss seven rather than eight times in the coming week, the promises in an agreement should track geographical and calendar realities.[294]

Moreover, intentions should, as much as possible, be stated affirmatively rather than negatively.[295] The affirmative intention to *do* something is concrete in a way that better facilitates forming the mental picture crucial to the ideomotor account.[296] With that in mind, for instance, in a relationship agreement, the partners would want to lay out who will do what in a manner that tracks the structure of the weeks

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[292] *See supra* Section III.C.2 (describing the ideomotor account as one species of fluency accounts of the QBE).

[293] *Id.* Since parties are more likely to visualize contract terms they helped to negotiate, the ideomotor effect could dovetail with a strategy, drawn from other research, of engaging both parties in negotiating the terms, where feasible, rather than either side's delivering the terms wholesale or the parties' adopting boilerplate terms. *See* Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. Legal Stud. 67, 67 (2012) (finding that "individuals are more likely to comply with contracts they participated in negotiating (even marginally) than with ones they did not").

[294] *See* Levav & Fitzsimons, *supra* note 227, at 211; *see also supra* Section III.C.2 (discussing the ideomotor account of QBE, which posits that the effect is driven by the ease of picturing oneself doing the thing that is asked about in the question).

[295] *Cf.* Spangenberg et al., *Will You Read?*, *supra* note 228, at 104 (explaining that the ideomotor theory best explains QBE when the question elicits a clear image by the participant).

[296] Moreover, negative instructions may slow processing by increasing cognitive load, relative to affirmative instructions. *See, e.g.*, Robert Wirth, Wilfried Kunde & Roland Pfister, *Following Affirmative and Negated Rules*, 47 Cognitive Sci. 1, 10–11 (2023) (finding that rules framed negatively are "difficult to enact" relative to those framed positively and concluding that, due to the "costs of negation processing . . . . [i]f rules can equally be formulated affirmatively and in a negated manner, affirmative formulations are clearly preferable"). This strategy, like the others set out in Section III.C, can also be applied to the specific types of extralegal contracts discussed in Part II. *Cf., e.g.*, Ann Kirkwood & Lynda Bennett, *The Shift from "No Harm Contracts" to "Safety Plans" for Suicide Prevention and Treatment: A Literature Review* (2011), http://www.tahoelifeline.org/uploads/5/3/6/4/53641359/safety_plans_for_suicide_prevention_final_pdf.pdf [https://perma.cc/ZM9E-H7F9] (recommending the "safety plan" approach to preventing suicide and explaining that a "safety plan is different from a no-harm contract in that, rather that [sic] committing to what a person will *not* do, it is a specific commitment for what a person *will* do").

and the year.[297] To the extent feasible, the agreement should say where things will occur and how, so that the party assuming that responsibility can readily picture themselves doing the thing.

Parties seeking assurances of the other side's performance would do well to utilize this strategy as well. Under UCC § 2-609 and the Restatement,[298] a party may "demand adequate assurance" that performance will be forthcoming whenever "reasonable grounds for insecurity arise with respect to the performance of either party."[299] Generally, a demand for assurances needs to be in writing and "clear and unequivocal" in its demands so that the parties understand "that the demanding party will withhold performance unless assurances are tendered."[300] Though a letter demanding assurances should include the reasons for insecurity, it should also foreground the affirmative steps being sought.[301] These steps can be stated as positive measures that the insecure party hopes and expects to see in performance—rather than emphasizing the demand *not* to breach. So, for instance, a letter demanding assurances might say, "Please indicate the steps that you will take to complete the promised delivery of X by the delivery date of Y," rather than, "Please confirm that you will not breach the contract."[302]

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297 Such agreements are unlikely to be enforced. *See supra* note 116 and accompanying text.

298 Though minor technical differences distinguish the right to assurances across the UCC and the Restatement, the versions are similar enough that courts and commentators tend to treat them as synonymous. *See, e.g.*, James J. White, *Eight Cases and Section 251*, 67 CORNELL L. REV. 841, 842–43 (1982) ("Because the sections [of the UCC and the Restatement (Second)] are nearly identical, there is no reason to believe that the outcome of those cases would have been different had they been governed by section 251 rather than by the UCC."); Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71, 99–107, 99 n.151 (1998) (summarizing the modern law of adequate assurance by "commingl[ing] the U.C.C. and Restatement versions of adequate assurance . . . unless the context requires otherwise").

299 U.C.C. § 2-609(1) (AM. L. INST. & NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2023); *see also* RESTATEMENT (SECOND) OF CONTS. § 251(1) (AM. L. INST. 1981).

300 *See, e.g.*, Alaska Pac. Trad. Co. v. Eagon Forest Prods., Inc., 933 P.2d 417, 422 (Wash. Ct. App. 1997); *see also* MG Refin. & Mktg. v. Knight Enters., No. 94 Civ. 2512 (SS), 1996 U.S. Dist. LEXIS 22941, at *7–8 (S.D.N.Y. Feb. 13, 1996) (refusing to apply New York's Section 2-609 where a party did not explicitly demand assurances of performance).

301 *See, e.g.*, JOEL D. APPLEBAUM, SHELDON STONE & LINDA M. WATSON, CLARK HILL, THE TRUMP CARD: EFFECTIVELY USING DEMANDS FOR ADEQUATE ASSURANCE OF PERFORMANCE 20 (2017), https://media.clarkhill.com/wp-content/uploads/2021/03/10101322/In-House_Webinar_3.28.17.pdf [https://perma.cc/EZF7-M2BD]; *see also* Carren B. Shulman, Joel Cazares & Randal B. Short, *Dry Times: How to Deal with California's Drought*, LAW360 (May 5, 2014, 1:04 PM), https://www.sheppardmullin.com/media/article/1311_Dry%20Times%20How%20To%20Deal%20With%20California_s%20Drought.pdf [https://perma.cc/94LN-W9BD] ("The key for those seeking assurances of performance is to describe with as much specificity as possible the reasonable grounds for 'insecurity.'" (quoting U.C.C. § 2-609 (AM. L. INST. & NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2023))).

302 The next best option, after an affirmative demand like the one in the text, would be a request that the party explain "the steps you will take to avoid breach," rather than asking

Relatedly, the behavioral research indicates that contracting parties would be wise not to set out promises that are too ambitious, lest they undermine the prospects of follow-through. If the intended task is too difficult, the QBE effect may backfire; that is, asking about the intention may make the intended behavior less likely.[303] So, for example, a party seeking assurances would not want to ask for the form of proof sought to be too onerous or the timeline too demanding, if possible. Where the request must be very demanding, research finds that positive affirmations may help neutralize the demandingness effect.[304] This overlaps with the next strategy.

3. Social Identity: Ascribe to the other party the traits you want them to display.—Under the social identity account, individuals find motivation to follow through on their intentions in part through their self-understanding.[305] Seeing oneself as the kind of person who does X can help motivate a person to do X when the opportunity arises.[306] Continuing with UCC § 2-609, we can readily see how this insight could apply to a letter seeking assurances.[307] For instance, the party seeking assurances could explain that the counterparty's reputation for consistent and reliable performance led to the formation of this contract. If the parties have an ongoing relationship, the letter could remind the counterparty that their past performance was excellent or good (or whatever positive description is true). The idea of ascribing positive qualities to the other party may run counter to an individual party's (or lawyer's) instinct, particularly at a moment of frustration and insecurity. This seems an additional reason to pay attention to the possible benefits of this approach.

Moreover, this strategy could also be useful at or just after the initial formation stage, even before any difficulty arises. For parties seeking

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the party "not to breach." *See supra* note 235 (describing research concluding that people are better at picturing *avoiding* a task than *not* doing a task). *Cf., e.g.*, Michael J. Leonard, *California Business Contracts: The Right to Adequate Assurance of Performance*, San Diego Corp. L. (Feb. 27, 2019), https://sdcorporatelaw.com/business-newsletter/california-business-contracts-the-right-to-adequate-assurance-of-performance [https://perma.cc/D5RK-PJYZ] (recommending that letters demanding assurances "state the facts," presenting any cause for concern in a "straight-forward, non-argumentative or accusatory" tone with "some time-table" for resolution).

303 *See* Tommy van Steen & Adam Nicholas Joinson, *Self-Affirmation and Goal Difficulty as Moderators of the Question-Behavior Effect*, 2 J. Theoretical Soc. Psych. 76, 82–83 (2018) (offering evidence that parties who are asked to commit to "a difficult goal" show relatively less follow-through compared to those asked to commit to an "easy-goal").

304 *See id.* at 83.

305 *See supra* Section III.C.3.

306 *See* Perkins et al., *supra* note 227, at 464 (discussing this phenomenon in the context of recycling behavior).

307 *Cf. supra* notes 298–302 and accompanying text.

follow-through on deliberately indefinite agreements in the commerical sphere—such as Robert Scott's "comfort agreements" in commerical contracting or Cathy Hwang's "faux contracts" in the M&A context—statements about the other party's strong track record for performance and reliability could be included informally (in negotiations or performance-related exchanges) or formally (in contract recitals).[308] Parties may well not want the state involved in these arrangements,[309] but they may nonetheless prefer that the other party performs.[310] These strategies can help to thread that needle.

4. Implementation intentions: Anticipate obstacles and make if/then plans for overcoming them.—As described above, one well-supported version of the QBE involves helping with plan-making. When parties are assisted in setting out concretely the steps they will take—including the how, when, and where—they are more likely to follow through; moreover, the process is strengthened if parties engage in "mental contrasting," after goal setting, by identifying obstacles or challenges to reaching the goal, and then devising if/then plans for navigating those difficulties.[311] One could imagine applying this strategy to most any contracting context that involves express terms. Surrogacy contracts offer a vivid example.

As noted earlier, surrogacy contracts are legal in some states and not others, with a constantly evolving legal context in light of political interest in them.[312] In addition, they involve parties who are likely dealing with intense and changing emotions.[313] With this in mind, if/then plan-making may be particularly helpful to support follow-through on both sides. For example, anticipating the challenge of an unexpected delay in achieving a pregnancy or even in qualifying for necessary pretransfer medical testing, and setting out clearly what steps will be

308 *See, e.g.*, Scott, *supra* note 41, at 1658 n.78; Hwang, *supra* note 41, at 1033.

309 *See* Scott, *supra* note 41, at 1686–88 ("[A]n attempt to enforce deliberately incomplete contracts . . . is socially inefficient.").

310 Scott argues that the parties draw on reciprocity norms, and through these comfort agreements, the parties sort for their preferred partners. More on this below. *See infra* note 318 and accompanying text.

311 *See supra* Section III.C.4.

312 *See supra* note 285 and accompanying text; *see also* Courtney G. Joslin, *Surrogacy and the Politics of Pregnancy*, 14 Harv. L. & Pol'y Rev. 365, 366–87 (2020) (describing changing attitudes to surrogacy over time); Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perceptive*, 20 Wm. & Mary J. Women & L. 423, 437–40 (2014) (same).

313 *See, e.g.*, Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 L. & Soc'y Rev. 143, 143, 159 (2015) (quoting one lawyer's description of surrogacy as an "emotional roller coaster" in an article setting out the complex emotional dimensions of surrogacy and the efforts to manage it by lawyers and other intermediaries).

taken, can avoid conflict and tension and increase the chances that the parties reach their ultimate goals together.[314]

B. Broadening the Aims: Utilizing the Varied Functions of Contract Formation

The focus of the previous Section was on strategies to increase the likelihood of performance of contractual promises. As the analysis in this Article has shown, securing the promised performance is not the only aim of contractual formalities. Rather, the examination of extralegal contracts has yielded a set of novel functions, which, this Section will show, can be used to inform decisions related to legal contracts. The overarching argument is that contracting parties can and should use the typology set out in Part III to identify primary and tertiary functions of their contracts. That knowledge can support more tailored decisions about negotiation, drafting, and performance. This Section discusses these decisions with regard to the first four novel functions: diagnostic, expressive, constitutive, and mapping. The next Section turns to the experiential function.

1. Diagnostic: Gaining information.—One function of invoking contractual formalities is to elicit critical information.[315] An aim of a preliminary agreement, for instance, may be to assess the other party—in terms of their resources, connections, and character—and the ease of collaborating.[316] Knowing that this is a primary purpose of formalizing the relationship should shape the extent of the commitment as well as the terms. For instance, in a surrogacy situation, if parties know they are still trying to get to know each other through the contracting process, then they may want a more protracted payment schedule (from the intending parents' perspective) or a termination clause that makes ending the arrangement easy prior to initiation of a pregnancy (from the surrogate's or the intending parents' perspective).[317] In a sense, this

314 *Cf., e.g.*, Kristie Thielka, *Top Reasons You Might Experience Delays in Your Surrogacy Journey*, Fam. Choice Surrogacy (Sept. 12, 2022), https://familychoicesurrogacy.com/top-reasons-for-surrogacy-delays [https://perma.cc/QGB8-RER5] (discussing potential delays that might arise in a surrogacy process).

315 *See supra* Section III.B.1.

316 *See, e.g.*, Cathy Hwang, *Deal Momentum*, 65 UCLA L. Rev. 376, 406–08 (2018).

317 *Cf., e.g.*, *Intended Parents Understanding Surrogacy Contracts*, Surrogate, https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/understanding-surrogacy-contracts [https://perma.cc/EMH9-D963] ("There are many variables and 'what if' scenarios in surrogacy, which need to be addressed in the contract."); *Essential Components of Surrogacy Agreements*, Burnett Att'ys & Notaries (Mar. 5, 2024), https://www.burnett-law.co.za/essential-components-of-surrogacy-agreements [https://perma.cc/2YRG-VX47] ("Embarking on the journey of surrogacy involves myriad legal complexities, underscoring the importance of a well-crafted surrogate motherhood agreement.").

diagnostic function describes the purpose of intentionally indefinite agreements, wherein the parties are trying to sort counterparties for whether they are inclined to reciprocity or strict self-interest.[318]

As noted earlier, the diagnostic function could also involve drawing out important information about oneself.[319] For instance, one could start into a contracting process to see whether it feels right, akin to flipping a coin about a difficult decision and then seeing if the result sparks happiness or regret. Learning about oneself may be most obvious with a deeply personal decision, like whether to enter a surrogacy or polyamorous relationship contract; some may see the formal process of a marital engagement to serve a similar purpose.[320]

A party should determine whether the diagnostic function is significant at the current stage of a particular contracting situation—whether to learn about oneself, the other party, or the deal. Recognizing that diagnostic aims are paramount can help determine what to ask, how much effort to exert, how and when to make financial investments, and how to write terms about timelines and other matters.

2. Expressive: Communicating to a counterparty or third parties.—Alternatively, the aim of contractual formalities could be to express something.[321] A preliminary agreement might function as a communication to third parties, for example, to show prospective tenants in a shopping development that the process of securing anchor tenants is underway.[322] The willingness to create an intentionally incomplete contract might signal an orientation toward trust and reciprocity norms.[323]

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318 *Cf.* Scott, *supra* note 41, at 1683–85 (positing that "[comfort] agreements . . . are designed to allow parties to learn about each other's taste for reciprocal fairness").

319 *See supra* text accompanying notes 199–201.

320 *Cf., e.g.*, Berk, *supra* note 313, at 172–73 (describing the "web of rules [that] 'legalizes' and infuses emotion management into the exchange relationship" of surrogacy); Jesse Dagger, *Jesse's Poly Contract*, Polyamory for Us, https://www.polyfor.us/articles/poly-contract [https://perma.cc/4XGE-WJYP] (describing a "poly contract" she wrote mainly for her own purposes, to make sure she was entering her polyamorous relationships in a manner true to herself and her own "healthy practices," and sharing it with the readers "because it might help others figure out where they want to start, even if it is to do the complete opposite of what I want and need").

321 *See supra* Section III.B.2.

322 *See, e.g.*, Albert H. Choi & George Triantis, *Designing and Enforcing Preliminary Agreements*, 98 Tex. L. Rev. 439, 460 (2020); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 Colum. L. Rev. 217, 257–58 (1987).

323 Scott, *supra* note 41, at 1658; *see also* Hwang, *supra* note 41, at 1063 (reporting that "adhering to non-binding term sheets shows the other side that one is such an integrity player that one will even adhere to non-binding terms—thereby building trust that one will be a good business partner for future activities, binding or not").

In a more personal contract, like a prenuptial agreement, certain terms may be important in order to demonstrate care and concern for the other party: for instance, a term indicating that a spouse could keep a residence.[324] As another example, in a relationship agreement among polyamorous partners, setting out plans for communication and schedules for time with each partner, or in particular subgroupings, could communicate an intention to sustain intimacy within and across each dyad.[325]

These diagnostic and expressive functions can also operate in relation to each other. If one party is trying to learn from the process of negotiation and drafting whether the other party is an appealing partner (in business or life), then the other party will need to take care with what they are expressing.[326]

3. Constitutive: Creating a relationship or an identity.—The intended function of some contractual formalities is to call something into being that wasn't there before.[327] So parties may craft an agreement together in order to link their fates, not only for the particular performances promised, but for the relationship they initiate in this way. This is most obvious, perhaps, with preliminary agreements and other forms of relational contracting.[328]

Preliminary agreements are increasingly governed by a doctrine that enables the legal recognition of what would have been called, historically, "agreements to agree" because they do not spell out the

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324 *Cf., e.g.*, Brittany Wong, *How to Bring Up a Prenup Without Sounding Like a Jerk*, HuffPost (Jan. 19, 2018, 12:07 PM), https://www.huffpost.com/entry/how-to-bring-up-prenup_n_5a60e0efe4b05085db606d29 [https://perma.cc/SL38-YAGT] (recommending that partners discuss how they would "each want to be treated at the end of [their] marriage").

325 *Cf., e.g.*, Kassia Wosick-Correa, *Agreements, Rules and Agentic Fidelity in Polyamorous Relationships*, 1 Psych. & Sexuality 44, 54 (2010) (finding, in a study involving a survey that included 343 self-identified polyamorists and interviews that included twelve self-identified polyamorists, that "agreements and rules reflect a responsibility to both communication and disclosure. Poly rules seem less regulatory and more participatory, encouraging an overall commitment to oneself, current partners and potential partners rather than restricting certain sexual and/or nonsexual interactions").

326 This point could apply to the parties or to the lawyers representing them, who may be repeat-players even if the parties are not. *See* Hwang, *supra* note 41, at 1057 ("In particular, deal lawyers reported caring about their own reputations, even if their clients were non-repeat players. The fact that deal lawyers cared about their own reputations caused them to advise clients to approach term sheet deviations carefully.").

327 *See supra* Section III.B.3.

328 *See, e.g.*, Gilson et al., *supra* note 13, at 1425–30 ("The question is important because the parties meet as strangers with no necessary prospect of an ongoing relationship, and as yet there is no mechanism to stimulate the development of trust. . . . The contemporary doctrine enforces preliminary agreements to invest in the search for a mutually profitable partnership.").

intended performance with sufficient definiteness.[329] But courts have more recently been willing to recognize that parties may want to form an agreement for the purposes, essentially, of forming that agreement. In other words, parties start a relationship, even when they do not yet know where it can take them, and so they are not yet in a position to make specific promises about the ultimate performances exchanged.[330] Knowing this may lead parties to contract into lesser remedies than full expectation damages, for instance.[331]

In the family law context, one lawyer has coined the term "aftermarriage" for the kind of relationship divorcing spouses with children should understand themselves to be creating.[332] They enter the divorce process thinking they are splitting up, but she urges them to conceive of the divorce as a transition to a different kind of relationship because, with kids in the picture, they will likely never really end their connection.[333]

4. Mapping: Designing future steps. — The function of contractual formalities may, instead or in addition, be to map out specific future steps.[334] This can readily be imagined with surrogacy contracts, where the parties hope to maintain good relations by anticipating difficulties and agreeing in advance how they will handle those situations, as discussed earlier.[335] Custody agreements, for similar reasons, may include painstaking detail about how every holiday will be allocated, down to the minute.[336] In the future, the parties may never need or follow such

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329 *See, e.g.*, *id.* at 1425–26, 1425 n.162 ("Historically, preliminary agreements . . . would be unenforceable . . . . Recently, however, in a major shift in doctrine, courts have relaxed the common law rule under which parties are either fully bound or not bound at all. Instead, a new enforcement rule is emerging to govern cases where the parties contemplate further negotiations." (internal citation omitted)).

330 *See, e.g.*, Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 702 (2007) ("Parties often make relation-specific investments on the basis of preliminary understandings with the intention of formalizing their relationship later."); Gilson et al., *supra* note 13, at 1383 ("Because parties cannot specify ex ante the nature of the product to be produced or its performance characteristics, an informal contract will cover the terms of substantive performance; however, those performance terms will be developed through the very governance process that the formal elements of the contract create.").

331 *See, e.g.*, Gilson et al., *supra* note 13, at 1385 (reporting "that courts are beginning to impose what we call 'low-powered' legal enforcement of the formal elements of braided contracts").

332 *See generally* ANITA WYZANSKI ROBBOY, AFTERMARRIAGE: THE MYTH OF DIVORCE (2002).

333 *See generally id.*

334 *See supra* Section III.B.4.

335 *See supra* notes 312–14 and accompanying text.

336 *See, e.g.*, Christy Bieber, *How to Reach a Child Custody Agreement Without Court*, FORBES (May 30, 2023, 4:01 AM), https://www.forbes.com/advisor/legal/child-custody/custody-agreement-without-court [https://perma.cc/V542-3H5X] (suggesting that parents

exacting terms, but divorce lawyers may recommend starting with such precise rules in order to avoid conflicts later on.[337]

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These functions, like traditional evidentiary and cautionary functions, all treat the process of formalizing an agreement as a means to some other end. Most obviously, contractual formalities aim to secure performance of promises. The functions just discussed also treat the drafting process as a means to something else—whether it's information or a map or a communication or the creation of a relationship that will last into the future. The final function identified here is different. The experiential function centers on the process of negotiating and drafting a contract as the end in itself. For that reason, the next Section is dedicated to elaborating the implications of this surprising idea for legal contracting.

C. Experiencing Formation: Crafting Process as Outcome

The analysis of extralegal contracts in this Article points us toward an idea previously overlooked by contracts scholarship[338]: Contract formation may be an end in its own right, something that the parties value beyond the question of any future performance or even any present derivative benefit.

This is far from intuitive. The orientation of contracts is toward some future something. This is the idea of a promise.[339] If the parties merely trade one thing for another in the present, then no contract has been formed. And as we discuss in Contracts class, even a spot transaction in today's world is typically a contract—in the sense of involving promises about the future—because the exchange of money for goods, for

"create a child custody agreement . . . comprehensive enough to address the key issues that arise" such as schedules for "holidays and . . . special occasions").

337 *See, e.g.*, *id.*

338 The closest work I've seen to this is scholarship arguing for an expressive speech dimension to contracts. *See, e.g.*, Steven C. Begakis, *Rediscovering Liberty of Contract: The Unnoticed Economic Right Contained in the Freedom of Speech*, 50 Loy. L.A. L. Rev. 57, 64–66 (2016) (arguing that "[c]ontract formation is, from top to bottom, speech" and that therefore contracts deserve First Amendment protection). Other work makes observations that might be read to support my argument here, but the context suggests their focus is still on the future obligations, not the present moment experience. *See, e.g.*, Wilkinson-Ryan & Hoffman, *supra* note 16, at 1271 ("From a policy perspective, the subjective experience of formation is often significant because contracts act as reference points. Parties treat each other, and their obligations, differently pre- and postcontract." (footnote omitted)).

339 *See supra* notes 50 and 275 and accompanying text (discussing this future element to contracts).

instance, generally involves implied if not express warranties.[340] Those warranties are guarantees toward future events, with the potential for enforcement and remedies if the warranties are breached at some future moment.

By contrast, these extralegal contracts focus our attention on an overlooked possibility: an inherent value in the formation process. Most obviously, in the S/M context, participants talk about the process of forming the contracts for sexual slavery as "fun."[341] It is not hard to imagine that, for some participants in those contracts, if they wrote their sexual contract together and then never saw each other again, that could still have been a pleasurable encounter.[342] Some of the aims in creating the contract would have been fulfilled, even if to a different degree for different parties. This is perhaps especially striking in the sexual domain where spelling out consent in exacting language is often deemed the opposite of erotic. In the 1990s, Antioch College was mocked for its sexual consent policy—culminating in a Saturday Night Live sketch called "Is It Date Rape?"—because the policy required an affirmative "yes" for each new level of sexual contact between students.[343] In stark contrast to the mocking portrayal of Antioch-style policies as sex negative, in the S/M contracts for sexual slavery, writing out a detailed plan for the metes and bounds of sexual domination and consent is framed as an erotic experience.[344]

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340 *See, e.g.*, U.C.C. § 2-314 (Am. L. Inst. & Nat'l Conf. of Comm'rs on Unif. State L. 2023) ("(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind."); *supra* note 50 and accompanying text.

341 *See supra* note 100 and accompanying text.

342 *Cf. supra* note 101 (quoting a source recommending creating the contract and then "throw[ing] it away").

343 *See, e.g.*, Katherine Rosman, *The Reinvention of Consent*, N.Y. Times (Feb. 24, 2018), https://www.nytimes.com/2018/02/24/style/antioch-college-sexual-offense-prevention-policy.html [https://perma.cc/MJS4-BSBY]; Bethany Saltman, *We Started the Crusade for Affirmative Consent Way Back in the '90s*, Cut (Oct. 22, 2014), https://www.thecut.com/2014/10/we-fought-for-affirmative-consent-in-the-90s.html [https://perma.cc/VYN8-6BEQ]; *cf.* Dahlia Lithwick & Brandt Goldstein, Me v. Everybody: Absurd Contracts for an Absurd World (2003) (offering a humorous account of contractual language in the context of intimate relationships).

344 *See supra* Section II.B. There are voices who urge a similar perspective on consent regimes for more typical sexual encounters, including at Antioch itself. *See, e.g.*, Rosman, *supra* note 343 (quoting Jeanne Kay, a former Antioch student who now "work[s] for the school's fund-raising division" as saying, "You can learn to ask in ways that are sexy and romantic and say, 'Is this O.K.? You want to continue to do this? Can I touch you there?' These are all thing[s] that can enhance the experience instead of killing the buzz."). And yet, even in that context, the contractual is still portrayed as the enemy of the sexual. *See id.* (quoting Jeannie Kay as saying "[t]here's an idea that it has to be very unromantic and very *contractual* and that's not true at all . . . ." (emphasis added)).

Other extralegal contracts also exemplify the contracting process as a valuable end. Visitors to Marina Abramović's *House with Ocean View* and *Dream Bed* make themselves participants in her work and bring themselves into a relationship with the artist with the experience of signing the *Dream Bed* contract.[345] Whether or not the person ever comes back to follow through on the terms and lie in the coffin-shaped bed for an hour, the visitor who signs the contract has created a different imaginative and relational experience for herself.[346] The person who signs a self-contract has asserted something (potentially important) about himself—about his commitment to himself and his goals—regardless of what he does next.[347] Likewise, the person signing a No-Suicide Contract is asserting a value of not harming himself, and that statement may be significant, regardless of next steps or any information derived from it.[348]

Recognizing an experiential dimension to contract formation has significant implications for legal contracts. These implications can be seen by considering the role of lawyers in contract formation. Lawyers are commonly seen as the transaction costs of contract formation, as Contracts professors like to remind their students.[349] When contracts are incomplete, a major reason is that getting a contract right is costly.[350] Negotiating and drafting each additional term takes time and, given the

345 *See supra* Sections II.C, III.B.5.

346 *See supra* Section III.B.5.

347 *See supra* Sections II.D, III.B.5.

348 *See supra* notes 82–83 and accompanying text. Note that the fact that the person is asserting an intention to non-harming may or may not be helpful, as discussed in the literature; if the person cannot follow through, then having made this commitment may have negative consequences. That is a future-based point, primarily, but it may also have consequences for the individual and for the relationship with the provider in the present moment, if the person knows he is lying about his intentions. *See* Hyldahl & Richardson, *supra* note 71, at 122–23 (arguing that "requiring clients to contract for safety can promote dishonesty" and may ultimately backfire).

349 *See, e.g.*, David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 Ariz. L. Rev. 61, 62 (2005) ("[L]awyers are transaction costs, at least to the people who pay their fees. When two people making a contract, for example, pay lawyers to draft documents and anticipate potential enforcement problems, the lawyers' fees constitute transaction costs." (footnote omitted)); *see also* Pierre Schlag, *The Problem of Transaction Costs*, 62 S. Calif. L. Rev. 1661, 1685 (1989) (characterizing attorneys as "nothing but a transaction cost" from the perspective of particular clients) (emphasis omitted).

350 *See, e.g.*, Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 Yale L.J. 814, 817 (2006) (finding that vague contract terms "are commonplace in commercial contracting because they reduce front-end transaction costs"); Cathy Hwang, *Collaborative Intent*, 108 Va. L. Rev. 657, 668–70 (2022) (discussing the reasons parties may leave contracts incomplete, including the expense of specifying terms).

cost of lawyers, money.[351] For the parties, trying to reach their ultimate goal, any time or money spent on the formation process is a means to an end—and one the parties might prefer to rid themselves of, if they could.[352]

Focusing on the experiential dimension to contract formation, however, could radically transform this vision of the process and the lawyers who facilitate it. To an extent, there are contracting contexts where an experiential dimension is recognized and explored already. For instance, in the consumer context, customer service surveys sometimes ask about the ease of using a site or working with a particular representative; those are usually referring to one's experience of the performance of the contract, but sometimes those surveys ask about the formation experience.[353] As another example, some divorce lawyers focus on the process of forming a settlement agreement in terms of the experience of the parties—indeed, some advertise themselves in this way—and a branch of divorce lawyering is committed to trying to make negotiating a divorce settlement as positive (or not negative) an experience as it can be: collaborative divorce.[354] Whether or not these lawyers succeed is a different question.[355] But this is one domain where the experience is a key focus. At one level, this is something lawyers across fields surely do: think about the kind of service they provide and how that can improve the experience for the client. But it is another level altogether to think of the formation process itself as a focal point of contracting.

Conclusion

When I teach Contracts, I begin the class with the idea that began this Article. Contracts is a remarkable area of law because individual

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351 *See, e.g.*, Hwang, *supra* note 350, at 661 (describing vagueness resulting from efforts to avoid "provisions that are rarely litigated but expensive to negotiate").

352 *Cf., e.g.*, Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 Yale L.J. 239, 241 (1984) ("Clients have their own, often quite uncharitable, view of what business lawyers do. In an extreme version, business lawyers are perceived as evil sorcerers who use their special skills and professional magic to relieve clients of their possessions."). For a more complex view of the value that business lawyers can actually add to the bottom line, see, for example, *id.* at 301 (describing business lawyers' role as "transaction cost engineers").

353 *See, e.g.*, Message from American Express to author (July 28, 2024) (on file with author) ("American Express would greatly appreciate your feedback. Our records indicate that you recently applied for an American Express card."); E-mail from REI Research to author (Jan. 8, 2024) (on file with author) ("Thanks for your recent REI.com purchase! We'd love to hear how your experience went so we can celebrate what went well and fix what didn't.").

354 *See, e.g.*, Mark Baer, *What Is "Collaborative Divorce" Without Collaboration?*, HuffPost: Contributor, https://www.huffpost.com/entry/what-is-collaborative-div_b_5015551 [https://perma.cc/SD98-FZVE] (May 22, 2014).

355 *See, e.g.*, *id.*

parties can effectively make law. They can devise rules based on their own aspirations, and they can transform those rules of their choosing into an agreement that the state will step in and legally enforce. One might say the process is akin to magic: creating something out of nothing.

For years I have thought of the magic of contract law as the transformation of not-law into law. This Article points to a different kind of magic, however. Looking to areas where the contractual magic isn't keyed to the prospect of legal intervention—but nonetheless a legal formality is used—presents an opportunity to learn what imaginative possibilities contractual formalities can create, within and beyond the law.

We think of legal contracts in terms of their enforceability—promises the state will enforce. But since most contracts never make it to court, when parties create legal contracts, those parties are not so much more likely to end up in court than are parties to extralegal contracts. In other words, what governs extralegal contracts overlaps substantially with what governs legal contracts. When the parties' aim is securing performance, then the formal articulation of intentions helps set the parties on a path toward fulfilling these intentions. And beyond securing the promised performance, the formalization of their intentions may serve a range of functions. This Article has excavated the functions of extralegal contracts and the mechanisms of encouraging performance through particular ways of expressing intentions. The result is a set of tools for strategic contracting based in form.

After reading this Article, a party or their lawyer designing a contract would consider a range of strategies to help secure performance, rooted in behavioral science. The contract would, for example, set out the imagined steps in a clear, concrete, and affirmative way that would be easy to visualize. Rather than emphasizing breach, the contract or any demand for assurances would frame the steps positively. Promises would be feasible, imaginable, and not so aspirational as to make them difficult to represent mentally. The contract would anticipate any obstacles and set out if/then plans for performing in spite of them. The contract would put the intentions in writing, to make the dissonance with non-performance palpable, and the recitals would emphasize the identity aspects that resonate with performance rather than breach.

Moreover, a contracting party would know to step back and consider the range of functions that contractual formalities might have and allow that insight to shape the approach to drafting and negotiations before or after formation. The purpose might be diagnostic—to gain information about the deal, the counterparty, or even her own inclinations. In that

case, she would approach the negotiation and drafting differently than if her purpose were mapping—trying to set out the if/then steps ahead and the approach to any obstacles. A constitutive aim would lead to a different, more collaborative frame than a mapping aim. The implications of an expressive aim would depend on what she wanted to express and to whom.

Most distinctly, a focus on an experiential purpose for this contractual endeavor would zero in on how the process feels. Whether the individual invests more or less time, she would be attentive to this contractual step, in terms of the process, independent of the desired outcome. The imaginative possibilities would encompass the present as well as the future. For individual contracting parties—and especially for their lawyers—this reorientation may well be the true magic of contracts.