A Negligence Claim for Rape

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Tort law has failed to respond to the intolerably high incidence of rape and sexual assault in the United States. By any measure, there is glaring disparity between the paltry number of tort claims brought by rape victims and the vast number of sexual assaults committed each year. Among the multiple reasons for the underutilization of tort law is the inadequacy of traditional doctrinal frameworks for litigating such cases, particularly the assumption that a rape victim must bring an intentional tort claim to recover against an offender. The labyrinthine doctrine of consent that looms large in intentional tort cases has deterred plaintiffs from suing and has made it difficult for plaintiffs to prevail, even when a defendant's sexual conduct is unwelcome and harmful.

Our solution is to allow tort plaintiffs the option of bringing a negligence claim against the offender, centering the litigation on the unreasonableness of the defendant's conduct rather than the consent of the plaintiff. Allowing a negligence claim for rape responds to the countless date- and acquaintance-rape cases in which the defendant's unreasonable conduct has undermined the plaintiff's ability to consent freely—creating a risk of coercion—and to those cases in which a defendant has placed his interests above the plaintiff's by taking a risk that the plaintiff has not in fact consented. The option of negligence will allow juries to evaluate contested cases in a straightforward fashion and will provide a more secure route to adequate compensation, particularly if courts determine that such negligence claims are not subject to the "intentional acts" exclusion in insurance contracts.

Courts will face a variety of doctrinal questions in litigating such negligence-based rape claims, including the proper categorization of the injury as physical versus emotional harm and the availability of the contributory/comparative negligence defense. Because affording such a negligence option would not preclude plaintiffs from also asserting intentional tort claims, it is important that courts not view such claims as mutually exclusive and that plaintiffs be given the opportunity to argue in the alternative.

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* Professor of Law, Wake Forest University School of Law. The authors would like to thank Nick Christopherson, Megan Murphy, and Océane Tanny for their expert research assistance; the faculties of Wake Forest, Ohio State, and Université de Paris Deux: Panthéon-Assas for their workshops of this Article; and Meghan Boone, Ruth Colker, Ellen Deason, Mike Green, Joshua Dressler, Ken Simons, and Sarah Swan for their very helpful comments on earlier drafts.

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I. Introduction

In May 2021, the American Law Institute approved the Restatement (Third) of Torts: Intentional Torts to Persons, a project on which one of us served as Associate Reporter and the other as Advisor. For the first time, the Restatement addresses liability for sexual torts in a stand-alone section—specifically, a section on the doctrine of sexual consent. In some respects, this Restatement represents significant progress for rape victims: principally, it endorses the concept of "no means no" as a black-letter rule. If more courts follow the Restatement's lead, rape plaintiffs alleging sexual batteries will be entitled to recover if they can prove that they expressed their unwillingness to have sex. In other respects, however, the Restatement reveals just how far tort law has yet to travel before victims of rape have a realistic chance at compensatory justice. This Article highlights these shortfalls and proposes as

a remedy a dramatic yet intuitive shift in tort doctrine: courts should allow plaintiffs the option of bringing rape claims under the rubric of negligence rather than exclusively as intentional torts.

Our proposal is designed to add negligence to the causes of action tort plaintiffs may bring to hold individual perpetrators accountable for rape. Providing this additional theory of liability will not only increase sexual assault victims' prospects for recovery but will accelerate the process of treating rape claims on par with other claims for serious physical injuries in tort law. Although many rape plaintiffs will still choose to pursue only intentional tort claims—for strategic and dignitary reasons—giving plaintiffs the option of negligence responds to many of the difficulties victims of date and acquaintance rape confront when defendants assert that the plaintiff consented to sex. Particularly because most courts have not yet embraced the concept of affirmative consent, plaintiffs should be able to pursue claims that center on reasonableness rather than the concepts of intent and consent.

A. The Systemic Problem of Sexual Assault

The #MeToo movement has brought long-needed attention to the prevalence of sexual harassment and assault—so much so that statistics regarding rape, once known only to those who study or work in the area, are now squarely within our cultural canon. A 2015 Centers for Disease Control and Prevention (CDC) study estimated that 1 in 5 women will be raped during their lifetime and that 1,484,000 rapes occurred against women in 2015.[1] Studies of college campuses have shown similar patterns of rife sexual abuse, with studies reporting that as many as 1 in 5 female college students are subjected to rape or sexual assault, or attempted rape or sexual assault.[2]

1. SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF—UPDATED RELEASE 15 (2018).

2. *See* Aya Gruber, *Anti-Rape Culture*, 64 U. KAN. L. REV. 1027, 1035 (2016) (summarizing various statistical studies of sexual abuse on college campuses); Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 6 & n.29 (2015) (referencing the 1 in 5 figure of campus sexual assaults and briefly explaining the debate behind its accuracy); BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, U.S. DEP'T OF JUST., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10–11 (2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf [https://perma.cc/W6R7-VLVE] (discussing the percentage of completed or attempted rape victimizations among women in higher education institutions); CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST, TARA D. WARNER, BONNIE S. FISHER & SANDRA L. MARTIN, NAT'L INST. OF JUST., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 6-3 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf [https://perma.cc/7KTN-WRNW] ("One out of five undergraduate women experience an attempted or completed sexual assault since entering college."); *see also* Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), https://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/ [https://perma.cc/4U6M-9MCF] (reporting that twenty percent of women who attended college between 2011 and 2015 said they were sexually assaulted).

Moreover, rape and sexual assault are not only crimes against women; men report instances of rape, particularly in the contexts of prison, fraternities, sports teams, gang violence, and military service.[3]

The harm suffered by survivors of rape and sexual assault is dignitary, emotional, psychological, and frequently existential—33% of people who have experienced rape contemplate suicide, and 13% attempt suicide.[4] The harm is also physical. A recent study reported that hospital emergency rooms charged an average of $3,551 for urgent medical care provided to patients reporting sexual violence.[5] In addition to this initial harm, physical harm often manifests over the course of years. For example, survivors of sexual assault often show long-term elevation in rates of hypertension, triglyceride levels, and incidence of clinically poor sleep.[6]

Despite the high incidence and impact of rape and sexual assault, criminal arrests, prosecutions, and convictions are much less common.[7] Survivors are often unwilling to report such incidents—not only due to a variety of social and psychological factors but also because they are all too aware that justice will likely not prevail.[8] Some scholars estimate that the

3. *See* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1273 (2011) (collecting data on the prevalence of male-victim rape in "hypermasculine environments").

4. *Victims of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/victims-sexual-violence [https://perma.cc/MKS9-YNR9].

5. Samuel L. Dickman, Gracie Himmelstein, David U. Himmelstein, Katherine Strandberg, Alecia McGregor, Danny McCormick & Steffie Woolhandler, *Uncovered Medical Bills After Sexual Assault*, 387 NEW ENG. J. MED. 1043, 1043 (2022).

6. News Release, The N. Am. Menopause Soc'y, Sexual Harassment and Assault Take Long-Term Toll on Women's Health (Oct. 3, 2018), https://www.eurekalert.org/news-releases/665048 [https://perma.cc/9QUT-G9TZ].

7. *See* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1211 (1997) (explaining the patterns of "sharp case attrition" for rape across various jurisdictions).

8. According to a Department of Justice report, only 20% of female student survivors and 32% of nonstudent survivors report the incident to law enforcement. SOFI SINOZICH & LYNN LANGTON, U.S. DEP'T OF JUST., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013 1 (2014). Other studies describe even lower report rates; for example, Krebs et al. report that only 2% of incapacitated victims and 13% of forced-rape victims report the incidents to police. KREBS ET AL., *supra* note 2, at xvii. Survivors cite a number of reasons for choosing not to report, including worry that proof would be insufficient, fear of retaliation by the perpetrator, fear of adverse treatment by authorities, fear that authorities would consider the incident insufficiently serious, lack of knowledge about how to report, and fear that family and friends will learn of the incident. Bonnie S. Fisher, Leah E. Daigle, Francis T. Cullen & Michael G. Turner, *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, 30 CRIM. JUST. & BEHAV. 6, 10, 26 (2003); *see also* Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J.L. & FEMINISM 207, 213, 220–21 (2017) (arguing that police unwittingly discourage reports by conveying assumptions that investigations and prosecutions are necessarily "he said, she said" cases involving traumatic cross-examinations); Elizabeth Bernstein, *The Complex Reasons Sexual Assaults Go Unreported*, WALL ST. J. (Sept. 29, 2018, 9:30 AM), https://www.wsj.com/articles/the-complex-reasons-sexual-

likelihood that a reported rape will lead to an indictment and conviction is between 2% and 5%.[9] Disciplinary actions for sexual assault on college campuses are also uncommon; a 2014 Senate subcommittee reported that about 40% of colleges did not investigate even a single sexual assault in the previous five years.[10] The primary reasons for these stark statistics are well known—victims and those in charge of enforcement of the laws/rules are hesitant to seek justice because the contested facts of these cases and difficult procedural burdens make convictions exceedingly unlikely.[11]

This pattern of underenforcement is also evident in the torts realm, although the precise incidence of claims is more difficult to measure. Of the few incidents that come to an attorney's attention, most are settled prior to the filing of a complaint, and most filed suits are settled prior to the issuance of any judicial opinion.[12] Furthermore, although evidence suggests that the incidence of tort claims for rape and sexual assault has increased in recent decades, most of these claims are against third parties charged with enabling

assaults-go-unreported-1538227801 [https://perma.cc/C4ZS-9K5L] (positing that survivors may have limited memories of details of assaults or fear reporting will result in re-traumatization or ostracization within their social circle); MICHAEL PLANTY, LYNN LANGTON, CHRISTOPHER KREBS, MARCUS BERZOFSKY & HOPE SMILEY-MCDONALD, U.S. DEP'T OF JUST., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010 7 (2013) (finding that from 2005–2010, unreported sexual assaults were not reported for fear of reprisal 20% of the time, a belief that police would not help 13% of the time, and a belief it is a personal matter 13% of the time); DONNA COKER, SANDRA S. PARK, JULIE GOLDSCHEID, TARA NEAL & VALERIE HALSTEAD, AM. C.L. UNION, RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING 1, 25, 27 (2015) (concluding from a survey of over 900 advocates, service providers, attorneys, and others that 88% thought police sometimes or often did not believe or blamed survivors for violence, 89% thought reports sometimes or often resulted in child protective services involvement, and 70% thought that reports sometimes or often resulted in loss of housing, employment, or welfare benefits).

9. Joan McGregor, *Introduction*, 11 LAW & PHIL. 1, 2 (1992). In the mid-1990s, a Bureau of Justice Statistics report estimated that 500,000 women are victims of rape or sexual assault each year. U.S. DEP'T OF JUST., VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 6 (1995). Yet in 1994, for example, only 102,096 rapes were reported to authorities, and only an estimated 36,610 of those resulted in arrests. U.S. DEP'T OF JUST., CRIME IN THE UNITED STATES 1994, at 24, 217 (1995).

10. MAJORITY STAFF OF S. SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, 113TH CONG., SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS 8 (Comm. Print 2014), https://www.hsdl.org/?view&did=755709 [https://perma.cc/CVK2-AP8J]. Evidence has shown a modest increase in investigations in recent years, although it remains to be seen what effect the Trump Administration's procedures governing such investigations had. *See* 34 C.F.R. § 106 (2020) (articulating the process for investigating formal Title IX complaints under the Trump Administration).

11. *Cf.* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1946–48 (2016) (discussing procedural hurdles in traditional rape law).

12. *See* Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 59 (2006) (indicating that more than 95% of cases settle before trial).

or failing to prevent the assault.[13] Claims against alleged perpetrators remain rare.[14] A 2008 study reported a meager total of 587 opinions regarding civil claims solely against perpetrators of sexual assault since 1970.[15] If anywhere near 1.48 million rapes occur each year, as the CDC study shows, then between 1970 and 2008, there were tens of millions of rapes—again, resulting in only 587 legal opinions. Although many correlative factors undoubtedly contribute to such an astounding dearth of opinions, it is clear that the gaze of tort law does not often fall upon this realm.

It is not lost on the authors of this Article that heated debate is a constant companion to the topic of rape. Common subjects of debate include the accuracy of incidence statistics, the proper definition of rape and consent, the admissibility of certain types of evidence in rape claims, the danger of false claims, and the proper response from third parties potentially ameliorating the problem.[16] This Article does not engage these particular debates but rests only on the general premises that rape is a pervasive problem in the United States and one that tort law does not adequately remedy. Even if the statistics cited above are off by orders of magnitude, these premises seem

13. *See* Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1570 (2008) (explaining that since the 1970s, a "far greater" number of published opinions addressed civil claims against third parties than solely against alleged perpetrators).

14. *See* Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. 957, 960 (2020) (noting that "most" survivors do not sue their perpetrators); Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39, 45 (2018) ("There are considerably more cases of sexual assault brought against third-party defendants . . . ."); Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 32 (2011) (finding a lack of "robust data on the percentage of rape and sexual assault victims who pursue civil litigation" but citing suggestive data for the proposition "that this figure is no larger than one percent"); Bublick, *supra* note 12, at 63 (finding "relatively few" tort suits "filed by sexual assault victims against alleged rapists" during the years 2000 to 2004); Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2205 n.39 (2000) ("Suits are rarely pursued against the rapist alone . . . .").

15. Lininger, *supra* note 13, at 1570.

16. *See, e.g.*, Ramona C. Albin, *Appropriating Women's Thoughts: The Admissibility of Sexual Fantasies and Dreams Under the Consent Exception to Rape Shield Laws*, 68 U. KAN. L. REV. 617, 618–21 (2020) (examining the admissibility of evidence in sexual assault claims under the "consent exception"); Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH L. REV. 1, 5–9 (2016) (discussing the debate around and definitions of "affirmative consent"); Charlene L. Muehlenhard, Zoë D. Peterson, Terry P. Humphreys & Kristen N. Jozkowski, *Evaluating the One-in-Five Statistic: Women's Risk of Sexual Assault While in College*, 54 J. SEX RSCH. 549, 550 (2017) (noting that commentators have criticized the accuracy of statistics demonstrating one in five women are sexually assaulted in college); Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 338–42 (2017) (discussing various definitions of force and consent); Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 1010–11 (2015) (concluding that bystanders are less likely to intervene due to ambiguities in the law on sexual assault and rape); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 16–20 (2017) (explaining that pervasive skepticism toward women alleging sexual assault leads to "credibility discounts").

unobjectionable. Many, many survivors of rape suffer harm without compensation from the perpetrator.

B. Causes of Systemic Failure of Tort Law

Tort law, at its core, is a means of providing compensation to an injured plaintiff from a wrongdoer.[17] It might also have some effect at deterring wrongdoing *ex ante*.[18] Considering the extraordinarily low incidence of successful tort suits against perpetrators of rape, it is evident that tort law poorly serves these ends. Particularly at a time when the overutilization of criminal law has come under attack for producing mass incarceration, one would expect tort law to emerge as an attractive alternative to criminal law in at least some sexual abuse cases. Yet the dramatic underutilization of tort law has persisted for a host of reasons: survivors of rape may decide not to sue for a variety of personal and structural reasons;[19] perpetrators are frequently judgment proof;[20] and plaintiffs' lawyers share a common belief that the low chance of winning such suits is outweighed by the expense of bringing them.[21]

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17. *See, e.g.*, Stephen R. Perry, *Tort Law*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 57, 71–72 (Dennis Patterson ed., 1996) ("[T]he assumption of tort law is that the defendant alone has a reason to compensate the plaintiff."); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 697–98 (2003) (explaining that tort law centers on the ideas of "rights, wrongs, and recourse").

18. *See* W. Jonathan Cardi, Randall D. Penfield & Albert H. Yoon, *Does Tort Law Deter Individuals? A Behavioral Science Study*, 9 J. EMPIRICAL LEGAL STUD. 567, 571–76 (2012) (reviewing literature on the subject and ultimately questioning the efficacy of tort law as a deterrent of tortious behavior by individuals).

19. *See supra* note 8 and accompanying text. *See also* Lininger, *supra* note 13, at 1578–79, 1583 (citing privacy concerns, lengthy civil proceedings, the threat of comparative fault, and the possible impact on a criminal prosecution); Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. CMTY. PSYCH. 191, 192 (2010) (citing studies identifying shame, fear the victim would not be believed, potential for revenge, and fear of poor treatment by the police); Bryden & Lengnick, *supra* note 7, at 1378 (identifying "embarrassment," "self-blaming," "fear of the investigatory and adversarial processes," the "desire to resume a normal life," friends' and family members' attitudes, and a "desire to preserve her relationship with the rapist").

20. Shen, *supra* note 14, at 32.

21. Christine Rua, *Lawyers for #UsToo: An Analysis of the Challenges Posed by the Contingent Fee System in Tort Cases for Sexual Assault*, 51 COLUM. HUM. RTS. L. REV. 723, 733–37 (2020) (describing the reasons attorneys typically decline to represent victims in sexual assault suits); Krista M. Anderson, *Twelve Years Post* Morrison*: State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims by Rape Survivors*, 36 HARV. J.L. & GENDER 223, 245 (2013) ("Civil lawsuits are frequently cost prohibitive where the victim has to bear the full cost of litigation, and because lawyers are unlikely to represent victims on a contingency fee basis unless there is a significant likelihood of recovery, rape victims have a particularly difficult time securing contingency fee representation." (footnotes omitted)); Lois H. Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 281 (2005) ("The reluctance of civil legal services attorneys to take on sexual assault cases may . . . be a function of their inexperience in dealing with criminal issues.").

This Article focuses, however, on tort law itself. Plaintiffs' attorneys are rightfully hesitant to take on sexual assault claims due to two prominent features of tort law as it is applied to such claims: First, rape claims against the primary offender are litigated exclusively as intentional torts. Because liability insurance does not typically cover intentional torts,[22] recovery of any judgment is unlikely unless the perpetrator has significant personal financial resources. Second, such sexual assault claims often turn on whether the plaintiff consented to the sexual contact, or whether the defendant reasonably believed that the plaintiff consented (a doctrine referred to as apparent consent); the outcomes of such fact-intensive disputes are notoriously difficult to predict and disproportionately favor defendants.[23] This, combined with defendants' particular reluctance to settle sexual battery claims due to the resulting perception that they committed the crime of rape, creates a risky proposition for plaintiffs' attorneys.[24] Juries might also be reluctant to label a defendant a rapist when there is uncertainty as to whether the defendant subjectively believed that the plaintiff consented.

C. Our Proposal: Allow Plaintiffs the Option of Suing in Negligence

This Article's focus is on cases in which the plaintiff claims to have been sexually assaulted by the defendant in the absence of extrinsic physical force—that is, force beyond what is intrinsic to sexual penetration itself.[25] Such focal cases include, for example, those in which the plaintiff was drunk or asleep when the assault occurred. They include scenarios in which the plaintiff felt compelled to have sex due to the defendant's actions, demeanor, or position of authority. Perhaps the defendant held the plaintiff's car keys or otherwise isolated the plaintiff. Or perhaps the plaintiff felt intimidated or afraid because of what the defendant did or said, or because of other factors—for instance, if the plaintiff had been subject to sexual assault in the past. Indeed, our focal cases include those in which the plaintiff simply did not

22. Weiner, *supra* note 14, at 967–69.

23. *See* Bublick, *supra* note 12, at 77–79 (discussing difficulties posed by consent doctrine).

24. *See* Lininger, *supra* note 13, at 1612 (discussing the effects of an inference of rape from a civil settlement).

25. Although our proposal, in theory, covers cases of sexual physical contact that do not involve penetration, our primary emphasis is on cases of sexual penetration because tort law is most remiss in not providing adequate remedies for this class of particularly harmful assaults. For a discussion of additional difficulties posed by cases of sexual assault not involving penetration, see *infra* Part IV.

In addition, cases of sexual penetration might involve other physical force, so long as the defendant has a viable argument that he believed the plaintiff consented. For example, suppose the plaintiff and defendant met on a BDSM website, and the defendant believed that the plaintiff desired "rough sex." Such a case might involve negligent conduct on the part of the defendant as well as physical force extrinsic to penetration.

desire or agree to have sex for whatever reason, and the defendant nevertheless persisted.

In some of these cases, the plaintiff might be convinced that the defendant intentionally ignored her wishes—but also that it will be hard to convince a jury on the matters of intent and non-consent. In others, the defendant might have been ignorant of the plaintiff's desires or acting under a sincere, if misguided, belief that the plaintiff wanted to have sex.[26] Consider the following scenario,[27] first as described by the defendant, then by the plaintiff:

Defendant's Testimony: Defendant goes to a bar to have a drink with friends. He meets a woman. They have a couple of drinks, but they aren't drunk. He suggests they go to his place. She agrees. They walk together into his second-floor apartment, and once inside, out of habit, he presses the lock on the entrance door. He invites her into his bedroom where they make their way to the bed and begin to kiss. Neither of them says anything. She removes her clothing, and they have sex. He wakes the next morning, disappointed to find her gone.

Plaintiff's Testimony: Plaintiff is a college student and goes to a bar with some friends. She meets a guy and later agrees to go to his apartment. When they walk in, he locks the door by pressing a button. She texts her friends that she intends to have sex with him. They walk to his bedroom where he sits on the bed and says, "Let's have sex." He asks her to come over to the bed, but she remains standing, not wanting to have sex. He gets up, walks over to her, and starts to kiss her. She does not look at him or respond to his advances. She says that she needs to leave, but he doesn't respond to that, so in her words, she "kind of just let him do it." Afterward, she tries to leave but can't figure out how to unlock the door. She calls friends for a ride

26. *See* JENNIFER S. HIRSCH & SHAMUS KHAN, SEXUAL CITIZENS: A LANDMARK STUDY OF SEX, POWER, AND ASSAULT ON CAMPUS 19 (2020). In a description of such cases among college students, Hirsch and Khan observe:

> Sometimes assaulters ignore a clearly articulated "no." Sometimes it is the body language, telling them to stop, that they disregard. And sometimes they turn a persistent "no" into an unwanted "yes." A lot of times . . . [it is the failure to understand] that one's social power, or the group's, might render another unable to say no, failure to think about how the desire to avoid an awkward moment could literally overpower the desire not to have sex—or failure to consider that, given how much the other person has had to drink, it's absurd to imagine that they can consent.

Id.

27. This scenario is loosely drawn from the facts of *Rondini v. Bunn*, 434 F. Supp. 3d 1266 (N.D. Ala. 2020). *See infra* text accompanying notes 67–82. In the actual case, the defendant first denied to the police that the plaintiff came to his apartment, and then claimed that he was too intoxicated to remember what happened before finally claiming that the sex was consensual. *Rondini*, 434 F. Supp. 3d at 1270 & n.5.

and escapes by dropping from the bedroom's second-story window. Her friends take her to a hospital, where she reports that she has been raped.

Suppose the jury believes that both plaintiff and defendant are telling the truth, each from his/her perspective. If so, the jury is faced with a conundrum—the plaintiff has suffered rape, and yet the defendant did not intend to rape her. Or suppose instead that the defendant is lying—that he did know or at least suspect that the plaintiff did not want to have sex—but suppose the jury isn't sure whom to believe. In either case, the jury is left with a stark choice under current law: deny the plaintiff recovery or hold the defendant liable for the intentional tort of battery and perhaps also false imprisonment. The present reality is that juries overwhelmingly choose the former—so much so that such cases are rarely even filed. Our proposal is that the law ought to give plaintiffs and juries another option: to impose negligence liability.

Under the facts described above, the plaintiff might decide the crux of her claim is that the defendant's purpose was to engage in sex without her consent or that he acted knowing that she did not consent. The plaintiff might also (or in the alternative) want to argue that the defendant acted wrongfully by (1) unreasonably creating circumstances that undermined her ability to consent freely and/or (2) unreasonably believing that she had in fact consented. In our view, the latter are allegations of negligence, not intentional torts. In contrast to intentional tort claims, consent will at most play only a subsidiary or supporting role in such claims, helping to frame the main question of whether the defendant acted unreasonably. Courts ought to allow plaintiffs the option to try such claims accordingly.

We see three main benefits of applying negligence doctrine in such cases. First, rather than couching the liability issue in the often confusing and highly contested doctrine of consent, courts would instruct juries to consider simply whether the defendant acted unreasonably under the circumstances. Not only is this a more straightforward and common-sense approach from the jury's perspective, but it more faithfully tracks the existing system of culpability in tort law.

Second, existing liability insurance policies might cover negligence claims, making tort compensation a realistic possibility for many survivors of sexual assault.

Third, juries would no longer be faced with the difficult choice of finding a defendant, who plausibly claims to have believed the plaintiff consented to the sexual act, either not liable or liable for an intentional tort, the latter in essence labeling the defendant an intentional "rapist." In cases in which the defendant's conduct was unreasonable, even if not intentional, the jury would have the option to impose a verdict that reflects a commensurate level of disapprobation. And in cases in which the jury feels unsure about the defendant's state of mind or is otherwise uneasy about imposing intentional

tort liability, the jury might nevertheless be persuaded of the unreasonableness of the defendant's conduct.

A court willing to adopt this approach would face several specific doctrinal questions and obstacles, which we discuss later in the Article. As a preliminary matter, suffice it to say that courts are bound to ask whether such an approach would represent too great a departure from existing precedent. It is true that very few opinions exist in this area—indeed we have located only two courts, in unpublished opinions, that have applied the doctrine of negligence to a sexual assault claim against an offender.[28] Despite the lack of cases, we suggest that our proposal is primarily a change in form rather than substance, and one that would bring greater coherence with existing tort law.

A Note on Terminology: Finding an appropriate term for the type of cases with which this Article is concerned is difficult. In focusing on cases involving sexual penetration in which the survivor does not suffer additional, extrinsic physical injuries, we mean to signal not only that such cases are commonplace but also that the injuries experienced by the plaintiffs constitute serious violations despite their ubiquity. Many refer to such cases as "non-forcible, non-consensual rapes." However, we reject use of the term "non-forcible" because it is dismissive of the harm suffered by the survivors of such encounters and begs the question of whether non-consensual penetration should itself be regarded as force. The colloquial terms "date rape" or "acquaintance rape" are closer to capturing our focal cases but pose their own difficulties—the date/acquaintance rape description is both under- and over-inclusive because some victims of date and acquaintance rapes suffer physical injuries in addition to penetration, and in some of the penetration-only cases which with we are concerned, the parties are not on a "date" nor does their relationship fit within the "acquaintance" category. For want of a better term, we will simply use "focal cases" or "target cases" as a shorthand reference throughout the remainder of this Article. As we use the term, "focal or target cases" is a broad category encompassing all cases of sexual assault effected without use of physical force beyond the act of sexual penetration.

In addition, we recognize that such focal cases occur between people of any combination of sex and gender. For simplicity's sake, reflecting the majority of cases coming before courts, we will refer to defendants using the pronouns "he/him/his" and to plaintiffs using "she/her/hers."

This Article consists of six parts. Part II sets the stage by providing the necessary background on intentional tort claims relating to sexual assault. We describe the requisites for proving a prima facie case of sexual battery

28. *See* MacKenzie v. Fischer, No. 52908–1–I, 2004 WL 2378418, at *3 (Wash. Ct. App. Oct. 25, 2004) (applying a negligence theory); Florek v. Vannet, No. 31-CV-15-2675, 2019 WL 1320619, at *1 (Minn. Ct. App. Mar. 25, 2019) (relying on a negligence per se theory).

and discuss the complicated definitions of actual and apparent consent (complete with many ancillary doctrines relating to capacity, duress, and mistake), which serve to cut off liability. Interestingly, the description reveals that the concept of reasonableness pervades the construction of the various intentional tort doctrines, demonstrating a structural similarity to the tort of negligence in this context and suggesting that our proposal to allow plaintiffs the option of suing in negligence is not a radical departure from existing law. Part II concludes by analyzing the Restatement (Third)'s adoption of a bright-line principle for sexual torts ("no means no"), which protects those victims of sexual assaults who clearly state their unwillingness to engage in sex.

Part III articulates the affirmative case for allowing a negligence claim for rape. It sets out our basic argument that victims of sexual assault ought to have the option of suing in negligence. We marshal both doctrinal coherence and pragmatic considerations in support of this proposal. It explains why negligence captures the nature of the defendant's wrong in many cases, specifically focusing on the defendant's unreasonable creation of circumstances that run the risk of undermining the plaintiff's ability to freely consent or on the defendant's action in proceeding with sex despite the existence of an unreasonable risk that the plaintiff had not in fact consented. We also detail the benefits to plaintiffs and defendants of allowing negligence claims, touching on the availability of insurance, vicarious liability, and statutes of limitations.

Part IV details implications of and possible objections to our proposal. It discusses four important doctrinal questions that would be faced by a court interested in adopting our proposal. We first address whether the harm in our focal cases ought to qualify as physical harm rather than purely emotional harm. We make the argument that such assaults constitute physical harm based on scientific studies documenting the physical pain that victims experience and on survivors' accounts of trauma and injury. Arguing in the alternative, we analyze our focal cases as also falling within an exception to existing "no-duty" rules, entitling plaintiffs to recover for negligent infliction of emotional distress. The second question we take up in Part IV is whether the defense of comparative negligence ought to be available in claims against the offender. We explain why the defense ought not to be permitted in this class of cases, adopting the view that there is no duty for victims to prevent their own assaults. The third question we explore is the important procedural question of whether courts should allow plaintiffs to bring claims for both intentional sexual battery and negligence. We argue that the claims are not mutually exclusive and that plaintiffs should be allowed to argue in the alternative. Finally, the fourth question we address involves the availability of insurance and the effect of "intentional acts" exclusions in insurance policies. Although we sever the question of insurance from the doctrinal issue of whether plaintiffs should be able to sue in negligence, we predict that once

negligence claims are authorized, courts will be more likely to interpret insurance policies to find coverage for plaintiffs.

Part V places our proposal that courts allow negligence claims in our target cases within its larger cultural context. We explain how our proposal is compatible with both the movement toward affirmative consent and the #MeToo movement, viewing it as one of a constellation of legal reforms designed to close the gap between the intolerably high level of sexual assaults and the availability of legal remedies.

II. Existing Law

A. Intentional Torts

1. Prima Facie Requirements.—Four intentional torts are potentially relevant in the context of rape. Rape might be accomplished by means of (or concurrent with) a threat of harm, which would constitute the tort of assault.[29] Rape is also often coincident with a restriction on the victim's movement—conduct that would constitute the tort of false imprisonment.[30] If the court and the jury regard the context as sufficiently outrageous, non-consensual sex would qualify as intentional infliction of emotional distress.[31] Regardless of the surrounding circumstances, however, rape constitutes the tort of battery, which the Restatement (Third) of Torts: Intentional Torts to Persons § 1 defines as having occurred if:

> (a) the actor intends to cause a contact with the person of the other . . . ;
>
> (b) the actor's affirmative conduct causes such a contact; and

29. The Restatement (Third) of Torts: Intentional Torts to Persons § 105 defines assault as having occurred if: (a) "the actor intends to cause the other to anticipate an imminent, and harmful or offensive, contact with his or her person, or . . . (b) the actor's affirmative conduct causes the other to anticipate an imminent, and harmful or offensive, contact with his or her person." RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 105 (AM. L. INST., Tentative Draft No. 1, 2015).

30. *See, e.g.*, Priest v. Rotary, 634 F. Supp. 571, 583 (N.D. Cal. 1986) (applying California law) (holding that plaintiff proved false imprisonment in a case in which defendant trapped plaintiff between himself and another employee while touching her body in a sexual manner). The Restatement (Third) of Torts: Intentional Torts § 7 defines false imprisonment as having occurred if: "(a) the actor intend[ed] to confine the other within a limited area, . . . (b) the actor's affirmative conduct causes a confinement of the other . . . and (c) the other is aware that he or she is confined or the other suffers bodily harm as a result of the confinement." RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 7 (AM. L. INST., Tentative Draft No. 4, 2019).

31. *See, e.g.*, *Rondini*, 434 F. Supp. 3d at 1277 (sending to the jury the plaintiff's intentional infliction of emotional distress claim in the date-rape context).

(c) the contact (i) causes bodily harm to the other or (ii) is offensive.[32]

As § 1 reflects, most jurisdictions treat battery as a "single-intent" tort, holding that the actor need only intend the contact, not any injury or offense.[33] This is significant in the rape or sexual assault context; in jurisdictions in which battery is a "dual-intent" tort—that is, requiring an intent not only to cause contact but also to cause harm—a defendant who honestly but unreasonably believes that his sexual advances are welcome would generally not have the requisite intent and thus would not be liable for battery.[34] Under the majority/Restatement approach, however, any incident of rape will have satisfied the intent requirement because the defendant intended to cause physical contact with the plaintiff.

In addition to the elements of intent and contact, § 1(c) of the Restatement also requires that the contact cause "bodily harm" or "is offensive." Courts typically presume that this requirement is satisfied in sexual battery cases without explaining whether rape constitutes bodily harm, offensive contact, or both.[35] In the absence of case law on this issue, the Restatement (Third) does not take a position on whether sexual penetration—without other physical injury—constitutes bodily harm. It does, however, recognize that "[i]f an actor causes a nonconsensual sexual contact with a person, the contact satisfies the definition of offensive contact for purposes of battery liability."[36]

In light of these requirements, a rape entailing external physical force plainly satisfies the prima facie elements of a battery claim—it is an intentional physical contact that results in either bodily harm or offense. In addition, sexual penetration of the sort with which this Article is concerned—i.e., cases in which no additional coercive force was used and the defendant argues that the plaintiff consented—would also, under Restatement § 1, constitute battery. However, courts impose an additional requirement on liability that complicates such cases: the absence of consent.

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32. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 1 (AM. L. INST., Tentative Draft No. 4, 2019).

33. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 102 (AM. L. INST., Tentative Draft No. 1, 2015) ("The intent required for battery is the intent to cause a contact with the person of another. The actor need not intend to cause harm or offense to the other.").

34. *See id.* § 102 cmt. b & illus. 10–11 (explaining single versus dual intent and contrasting, in illustrations 10 and 11, liability for "[o]blivious and indifferent actors" in the sexual context under those rules).

35. *See, e.g.*, Ademiluyi v. Phillips, No. 14-cv-00507, 2015 WL 5146898 at *2 (D. Nev. Sept. 2, 2015) (applying Florida law) ("Unwelcome sexual contact is 'harmful or offensive.'").

36. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 (AM. L. INST., Tentative Draft No. 6, 2021). Section 3 of the Restatement (Third) defines "offensive" as follows: "the contact is offensive to a reasonable sense of personal dignity." RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 3(a) (AM. L. INST., Tentative Draft No. 4, 2019).

2. Consent.—Most courts list the absence of consent as a prima facie element of battery. However, neither the Second nor Third Restatement of Torts follows suit. Instead, the Restatements describe consent not as a defense or privilege but merely as a "requirement," locating consent within its own separate chapter.[37] The reason for this unique treatment is that the most important aspect of consent's doctrinal classification is whether the plaintiff or defendant carries the burden of proof, a matter on which the Restatement (Third) expressly takes no position, citing a "dearth and mix of authority."[38] Although proper placement of the burden of proof is an underdeveloped area of tort defenses generally,[39] the issue plays a particularly important role in the types of cases with which this Article is concerned. In deciding whether to believe a plaintiff's or defendant's account of a sexual encounter, many juries might find themselves at equipoise. The facts of sexual interaction are such that—more often than in other categories of intentional tort cases—juries will be unsure whom to believe or even what their intuitive notions of justice demand. In such cases, if the defendant bears the burden of proof, the plaintiff wins; if the plaintiff bears the burden, the defendant wins. Thus, the allocation of the burden of proof is often outcome determinative.

Regardless of its precise doctrinal role, consent is at the center of nearly every rape case not involving extrinsic force or injuries. In such cases, the prima facie elements of battery listed in Restatement § 1 are rarely at issue. Rather, the typical case turns entirely on whether the plaintiff consented to the defendant's conduct. The consent concept—or more accurately, bundle of concepts—thus bears more careful explanation.

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37. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. e (AM. L. INST., Tentative Draft No. 4, 2019) (declining to take a position on the question of burden of proof for consent).

38. *Id.* The Restatement (Third) explains:

> Our review of the case law and jury instructions suggests that most jurisdictions have not clearly resolved which party bears the burden of production and persuasion on the question whether plaintiff has satisfied any of the categories of consent . . . that preclude liability for one of the intentional torts to persons. Among those jurisdictions that *have* addressed the issue, the predominant but not universal view is that plaintiff has the burden of proving the absence of actual consent, but there is very little authority concerning burden of proof as to other categories of consent. See § 1, Comment *f* (battery); § 4, Comment *e* (purposeful infliction of bodily harm); § 5, Comment *j* (assault); § 7, Comment *k* (false imprisonment); and the associated Reporters' Notes. Because of this dearth and mix of authority, and because there are competing considerations with respect to which party shoulders the burden of proof, this Restatement takes no position on the issue.

Id.

39. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 17 cmt. i (AM. L. INST., Tentative Draft No. 6, 2021) (describing the lack of case law on whether the plaintiff or defendant bears the burden of proof for consent in the context of the emergency doctrine).

The case law on consent is famously muddled, with terms like "implied consent," "constructive consent," and "apparent consent" taking on a variety of meanings depending on the context and jurisdiction. The Restatement (Third) clarifies the law in this regard, dividing consent into three forms: actual consent, apparent consent, and presumed consent[40] (the last of which is not relevant to cases involving sexual battery). A defendant is not liable if the requirements of any of these three consent doctrines are met.

a. Actual Consent.—"Actual consent" is thought of as an inquiry into the subjective state of mind of the plaintiff.[41] Actual consent exists if the plaintiff is proven (1) to have had the capacity to consent, (2) to have been free of duress or substantial material mistake, and (3) to have been subjectively willing for the defendant's conduct to occur.[42] Significantly, the Restatement takes the position that willingness is not synonymous with desire—a grudging willingness, so long as it is free of duress or mistake, is sufficient. The Restatement offers the following illustration:

> C and D have had a romantic and sexual relationship for several months, but they have not had sexual intercourse. In an unthreatening manner, D tells C that D is frustrated by their lack of greater sexual intimacy and that D will end the relationship unless they sleep together soon. C prefers not to have intercourse with D until they have decided to marry, and neither C nor D is ready to make that commitment. Nevertheless, C reluctantly agrees to intercourse with D. Because C is willing to engage in this conduct, C actually consents . . . .[43]

Although the core concept of "willingness" ostensibly focuses on the plaintiff's subjective state of mind, a number of aspects of actual-consent doctrine require consideration of what a reasonable person would have believed to be the plaintiff's state of mind—an inquiry that sounds rather like negligence.

First, a plaintiff's willingness may be express or inferred from the circumstances.[44] Inferred willingness allows the jury to consider the

40. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS §§ 12, 16 (AM. L. INST., Tentative Draft No. 4, 2019).

41. *See id.* § 13 cmt. c ("One might conceptualize . . . actual consent . . . by imagining that, after the otherwise tortious conduct has occurred, the plaintiff is given a reliable truth serum and asked whether, at the time of the actor's conduct, he was willing to permit it.").

42. *Id.* § 13.

43. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 cmt. d, illus. 2 (AM. L. INST., Tentative Draft No. 6, 2021). Although the law is fairly clear on this question, philosophers are not. *See, e.g.*, ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 148–52 (2003) (sharing differing views on whether consent "under pressure" invalidates consent).

44. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 13 cmt. c (AM. L. INST., Tentative Draft No. 4, 2019).

circumstances of a plaintiff's conduct and conclude that the plaintiff likely consented, no matter the plaintiff's contrary assertions at trial. Traditionally, courts have allowed a wide variety of evidence in this regard: for example, courts have allowed juries to infer willingness from the plaintiff's dress, the fact that the plaintiff agreed to visit the defendant's residence, the plaintiff's failure to report the violation, the plaintiff's sexual history with the defendant or with others, the lack of physical resistance or the plaintiff's failure to otherwise communicate unwillingness, or the plaintiff's prior communications of willingness to the defendant or to friends.[45] Although each of these forms of evidence might arguably be probative of a plaintiff's subjective state of mind,[46] such evidence invites the jury to collapse that inquiry into a judgment about whether the defendant reasonably believed that the plaintiff was consenting—the core determination of what is described below as apparent consent. Although modern courts are beginning (properly) to subject the types of evidence listed above to increased scrutiny,[47] the doctrine of inferred consent remains the law.

A similar issue arises in the context of capacity to consent. In some circumstances—for example, a plaintiff's youth—courts have adopted a bright-line rule for judging incapacity.[48] In other instances—particularly those most relevant to the topic of this Article—the test for incapacity is whether "an actor [in the defendant's position] should realize that a person lacks capacity to consent."[49] Thus, in cases involving drugs or alcohol, the central question is not whether the plaintiff's actual capacity to consent was below some minimum scientific threshold but whether a reasonable person

45. *See, e.g.*, Kravitz v. Beech Hill Hosp., L.L.C., 808 A.2d 34, 40 (N.H. 2002) (holding that trial court did not err when it admitted evidence of the victim's prior consensual sexual activity). For cases involving text messages as evidence of consent, see *Rondini v. Bunn*, 434 F. Supp. 3d 1266, 1269–70, 1274 (N.D. Ala. 2020); *Doe v. Rose*, No. CV–15–07503, 2016 WL 9108915, at *2–3 (C.D. Cal. July 27, 2016); and *Lawson v. Rubin*, No. 17-cv-6404, 2018 WL 2012869, at *19 n.20 (E.D.N.Y. Apr. 29, 2018).

46. The serious problems with the types of evidence described in this paragraph are well-documented. *See, e.g.*, Bublick, *supra* note 12, at 76–77 (documenting barriers to bringing civil rape cases and identifying evidence of victims' prior sexual conduct as deterring victims from filing rape suits in civil courts); Cynthia Ann Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 410 (1988) (criticizing implied consent evidence and proposing redefinition of rape laws).

47. *See* Patrick J. Hines, Note, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 880 (2011) (discussing varying coverage of rape shield protections to tort victims).

48. *See, e.g.*, Lindeman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints, 43 F. Supp. 3d 1197, 1207 (D. Colo. 2014) (holding that as a matter of law, the fifteen-year-old plaintiff lacked legal capacity to consent to sexual conduct with defendant Sunday school teacher).

49. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 cmt. g (AM. L. INST., Tentative Draft No. 6, 2021).

in the defendant's position would have understood that the plaintiff lacked the capacity to consent.[50]

Both duress and substantial mistake also turn, in part, on reasonableness determinations. As the Restatement (Third) explains, whether a defendant's coercive actions vitiate consent depends on "the interests protected by the particular tort action; the type of conduct at issue; the age, mental capacity, and relationship of the parties; and the surrounding circumstances," as well as whether the defendant's coercive conduct is "of a type to which a person of ordinary firmness or a reasonable person might yield."[51] Similarly, mistakes are less likely to vitiate consent if they involve "matters that a reasonable person in plaintiff's position would not consider material."[52] Although the Restatement (Third) frames these considerations in terms of the plaintiff's reasonableness rather than the defendant's, the underlying issue is whether the defendant's misrepresentation or pressure should nullify the plaintiff's consent. The defendant's conduct does not nullify consent if a reasonable person would consider it to be immaterial or not sufficiently coercive—determinations that, again, are in danger of collapsing into an evaluation of the reasonableness of the defendant's conduct.

One final actual-consent rule depends, at least in part, on a reasonableness determination. If a person consents to a sexual act, the scope of that consent does not extend to other, substantially different sexual acts.[53] The "substantially different" standard is not susceptible to a clear threshold. Without further guidance, it seems likely that juries will simply ask whether the defendant was reasonable to interpret plaintiff's consent to one activity as evidencing consent to another. Suppose, for example, that during a sexual encounter a defendant touches the plaintiff's breast—an action to which she clearly consents. Defendant then puts his hand between the plaintiff's legs, an action that plaintiff asserts at trial to have been non-consensual. In determining whether the second action is substantially similar to the first, it

50. *See, e.g.*, Doe v. Rose, No. CV–15–07503, 2016 WL 9108915, at *3 (stating that "the very fact that Plaintiff could lucidly communicate with Defendant . . . through text messaging an hour before the incident could indicate that Plaintiff was not . . . so intoxicated that she could not consent to intercourse," but nevertheless holding that this communication did not establish as a matter of law the plaintiff's capacity to consent).

51. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 15 cmt. d (AM. L. INST., Tentative Draft No. 4, 2019).

52. *Id.* § 15 cmt. e.

53. *Id.* § 14; RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 cmt. j (AM. L. INST., Tentative Draft No. 6, 2021) ("Actual consent to a modest degree of sexual intimacy, such as a kiss, does not entail either actual or apparent consent to a much greater degree of intimacy, such as sexual intercourse or penetration."); *see also* Lawson v. Rubin, No. 17-cv-6404, 2018 WL 2012869, at *19 (E.D.N.Y. Apr. 29, 2018) (applying New York law) (denying defendant's motion to dismiss battery claims, despite plaintiffs having signed agreements consenting to engage in "sadomasochistic activity" without further specifics, in light of plaintiffs' assertions that they did not agree to especially violent sexual acts, including being shocked with a cattle prod).

seems likely that a jury will simply ask whether the defendant's subsequent conduct was reasonable in light of plaintiff's consent to the former conduct. Indeed, such reasoning might even underlie the concept of substantial similarity. As the Restatement (Third) explains:

> The scope of actual consent must be defined realistically, in light of the practicalities of social interactions, inevitable uncertainties about a person's desires and intentions, and the inability of an actor to calibrate his or her conduct precisely to the other person's desires. Moreover, *it is justifiable for the factfinder to consider reasonable appearances and prevailing customs* when assessing the scope of the conduct that the consenting person is willing to permit.[54]

In summary, the doctrine of actual consent is not merely an inquiry into the plaintiff's actual, subjective state of mind at the time of the defendant's conduct. Rather, in many if not most cases, the doctrine of actual consent involves considerations of reasonableness and suggests that there is not a hard border between intentional tort claims and claims based on negligence. Moreover, there is considerable overlap between the doctrine of actual consent and the doctrine of apparent consent, in which considerations of negligence are front and center.[55]

b. Apparent Consent.—Like actual consent, the existence of apparent consent precludes a defendant's intentional tort liability. The Restatement (Third) describes the doctrine of apparent consent as follows: "Apparent consent exists if the actor reasonably believes that the other person actually consents to the conduct, without regard to whether the person does actually consent."[56]

Thus, apparent consent does not really concern the plaintiff's consent—rather, it is about whether a defendant's mistaken belief about the plaintiff's consent was reasonable.[57] Put simply, it is an inquiry into whether the defendant acted reasonably under the circumstances, the core test of negligence.

Apparent consent addresses a recurrent issue in intentional torts—what justice demands of an innocent defendant who harms an innocent plaintiff.

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54. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 14 cmt. b (AM. L. INST., Tentative Draft No. 4, 2019) (emphasis added).

55. *See id.* § 16 cmt. b ("In many cases, strong evidence that a reasonable person in the actor's position would believe that the plaintiff actually consented will also[, in addition to satisfying apparent consent,] be convincing evidence that the plaintiff did actually consent."). It is worth noting, however, that courts might one day choose a different approach. A court might decide that actual consent turns solely on whether the jury believes the plaintiff's testimony regarding whether she consented. But this is not the current state of the law.

56. *Id.* § 16(a).

57. *Id.* § 16 cmt. b ("[T]his category of consent could be called 'reasonable mistake about consent' or 'reasonable belief about consent.'").

In such cases, the non-consenting plaintiff's rights have been violated in the very way the tort conceives—in the sexual context, the plaintiff has been intentionally and non-consensually touched, confined, or both. Yet, the defendant has engaged in this otherwise tortious conduct in the reasonable belief that the plaintiff was a willing participant. Although courts have taken disparate approaches to cases involving two "innocent" parties in other contexts,[58] in sexual battery cases, the Restatement privileges the defendant's interests and perspectives over those of the plaintiff.[59]

Not only does the doctrine of apparent consent apply to sexual torts, it applies in a fairly strong form. The rule privileges a defendant against liability even if the plaintiff lacked the capacity to consent or gave consent under duress. So long as the defendant reasonably believed that plaintiff had the capacity to consent and was not under duress, the defendant will not be held liable.[60] Suppose, for example, that a plaintiff is so drunk that she lacks the capacity to make decisions—indeed, so drunk that she lacks any memory of the encounter—but suppose also that she does not act in a way that would cause a reasonable person to believe that she is incapacitated. In such a case, although the plaintiff could not have consented, the doctrine of apparent consent will shield the defendant from liability.

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58. For example, the privilege to use force to regain possession of personal property exists only if the other "has wrongfully removed the property from the actor's possession"; it does not protect one who reasonably but mistakenly believes that the other has done so. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 32 & cmt. g (AM. L. INST., Tentative Draft No. 6, 2021). Similarly, the privilege to use force to defend one's land from intrusion exists only if the intruder is not privileged to be on the land; it does not exist if the landowner reasonably but mistakenly believes that the intruder is unprivileged. *Id.* § 30 & cmt. f.

59. One can imagine a legal regime in which such defendants must nonetheless compensate plaintiffs. Police departments would be required to pay innocent detainees regardless of the reasonableness of the officers' actions in arresting them. A person who uses force against another in self-defense due to a reasonable but incorrect belief that the other poses a danger would nonetheless have to pay for resulting harm. And a person who initiates sex under a reasonable but incorrect belief that the other is willing would have to redress the violation. Indeed, some tort defenses require exactly that. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 26 cmt. c & reporters' note to cmt. c (AM. L. INST., Tentative Draft No. 6, 2021) (discussing the duty to compensate for an "incomplete" necessity privilege). Although courts do not explain the reasoning underlying disparate approaches to this issue, the Restatement (Third) cites the relative interests at stake—a defendant's interest in protecting against physical harm and society's interest in police discretion are more significant interests than the protection of land or personal property. *Id.* § 26 reporters' note to cmt. c. Extending this reasoning to sexual consent, one might expect the law to reject the reasonable belief standard. After all, one's interest against non-consensual sexual penetration is at least as significant as one's interest in avoiding other forms of physical harm or society's interest in police discretion. Thus, the very existence of the doctrine of apparent consent seems dubious in the context of penetrative sexual battery. Nevertheless, no court has considered this argument, and apparent consent remains good law.

60. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16 cmt. b (AM. L. INST., Tentative Draft No. 4, 2019) ("Insofar as actual consent includes scope conditions and requirements of capacity, absence of duress, and absence of mistake, apparent consent exists if the actor holds reasonable beliefs with respect to those conditions and requirements.").

Finally, apparent consent—and for that matter, actual consent—need not be traced to the words or affirmative conduct of the plaintiff.[61] If the plaintiff's words or conduct expressed neither willingness nor unwillingness, a jury may nevertheless find that the defendant reasonably believed that the plaintiff consented. Put differently, tort law has not embraced the principle of "affirmative consent" (or "only yes means yes"), a concept we discuss later in this Article.

In one key respect, however, the Restatement advances the law from its traditional stance. Section 18(b) of the Restatement provides:

> If a person, by words or conduct, communicates to an actor the person's unwillingness to engage in any sexual act or in a particular sexual act, yet the actor causes the person to submit to or perform the act, the person has not consented to the act, and the actor is subject to liability for the applicable intentional tort (battery, assault, false imprisonment, or intentional infliction of emotional distress).[62]

Section 18(b) expresses the principle known as "no means no." Although most courts recognize the basic proposition that neither verbal nor physical resistance is required to demonstrate the absence of actual or apparent consent,[63] no means no creates a default rule that communication of unwillingness establishes non-consent as a matter of law. The rule demonstrates both that the plaintiff did not actually consent and that the defendant may not rely on apparent consent because no reasonable person would believe that a plaintiff has consented in the face of a plaintiff's communication to the contrary.

It remains to be seen how many jurisdictions will adopt the no means no standard in sexual tort cases. Equally important, it is hard to predict just how strong of a default the rule will become. A strong version would mean that, in the face of a communication of unwillingness, no prior or contemporaneous evidence of willingness would be admissible at trial.[64]

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61. *Id.* § 16 cmt. c.

62. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18(b) (AM. L. INST., Tentative Draft No. 6, 2021).

63. *Id.* § 18 cmt. j; *see also, e.g.*, Back v. Virginia, No. 17-cv-00477, 2019 WL 6352657, at *8 n.9 (W.D. Va. Nov. 27, 2019) (holding that despite the fact that the plaintiff never protested or expressed her discomfort with the defendant's advances, "a reasonable jury may find that [the defendant] could not reasonably understand [the plaintiff's] conduct to constitute consent").

64. However, if the plaintiff's communication of unwillingness is vague or contradicted by a contemporaneous expression of willingness, the issue of willingness would be for the fact finder to determine. Suppose, for example, that the plaintiff said "no" while smiling, undressing, and handing the defendant a condom. In such a case, even under the strong version of no means no, the court might properly send the matter to the jury for a determination of willingness. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 cmt. k (AM. L. INST., Tentative Draft No. 6, 2021) (noting that in situations in which it is unclear whether the person is communicating unwillingness, the relevant inquiry is whether a reasonable person in the actor's factual circumstances would recognize that the person has expressed unwillingness).

(Subsequent communications of willingness would still be admissible in light of accepted doctrine that consent or non-consent may later be revoked—in other words, people can change their mind.[65]) The black letter of Restatement (Third) § 18(b) appears to adopt such a bright-line default.

A weaker version of no means no would, despite a communication of unwillingness by the plaintiff, nonetheless (1) allow a defendant to offer other evidence of willingness and (2) not serve as grounds for summary judgment for the plaintiff on the issue of consent. The effect of this weak version of the rule is thus merely to satisfy the plaintiff's prima facie burden, allowing a case to reach a jury rather than establishing non-consent as a matter of law.

Most of the case law cited by the Restatement (Third) supports the weak, or prima facie, version of the no means no rule.[66] Consider the tragic case of *Rondini v. Bunn*,[67] alluded to earlier, in which parents brought a sexual battery claim against the man whom they claimed raped their college-aged daughter.[68] Although we presented the defendant's and plaintiff's versions of the facts of this case in Part I, the full facts require clarification here. After meeting the defendant at a bar, the young woman went to his house and accepted his invitation to enter his bedroom.[69] She then texted some friends that she was going to have sex with him.[70] According to the plaintiff, the defendant "sat on his bed and he, like, wanted me to sit with him and . . . made comments like he wanted to have sex and I really didn't want to and he walked over to me and, like, started trying to kiss me and I didn't really want to."[71] The plaintiff stated that throughout, she "wasn't really looking at him, I kind of—I had already said, like, I needed to leave and he wasn't really responding to that, so I kind of just let him do it."[72] Afterward, she tried to leave but found that the door was locked in a way that she could not manage to bypass.[73] She called friends for a ride and escaped by dropping from the bedroom's second-story window.[74] Her friends took her to a

65. *Id.* § 18 cmt. f.

66. *Id.* § 18 reporters' note to cmt. j.

67. 434 F. Supp. 3d 1266 (N.D. Ala. 2020).

68. *Id.* at 1269.

69. *Id.*

70. *Id.*

71. *Id.* at 1269–70.

72. *Id.* at 1270.

73. *Id.* As the court explained: "Affixed to Defendant's door was a privacy lock. Defendant argues that there is a specific way to lock and unlock the door: 'It's a very simple push lock that you operate with two fingers. You push it in to lock the door and you just take and pull it out to unlock it.'" *Id.* at 1273 (citation omitted).

74. *Id.* at 1270.

hospital, where she reported that she was raped.[75] She later committed suicide due to the PTSD associated with the experience.[76]

During his initial interview by police, the defendant first claimed that the plaintiff had never been in his apartment.[77] He then claimed to have no memory of the entire night due to his excessive alcohol consumption.[78] At trial, he offered a third explanation, specifically disputing the plaintiff's account of the events. There, the defendant claimed that throughout the encounter, the two did not speak, the plaintiff walked over to the bed and removed her clothing, and they had consensual sex.[79]

In denying the defendant's motion for summary judgment, the court held that "[t]he . . . evidence indicates that [the d]efendant continued to make advances towards [the woman] after she told him she needed to leave. This is undoubtedly unwanted sexual contact."[80] Yet, the court did not grant summary judgment to the plaintiff but rather sent the case to the jury.[81] Under a weak version of the no means no rule, the court reached the proper result.[82]

Although the defendant's actions in *Rondini* were coercive and dismissive of the plaintiff's desires, proof of lack of consent posed a formidable obstacle. The facts of *Rondini* serve as a useful foil in discussing the core of this Article's assertion that plaintiffs in such cases ought to have the option of suing in negligence. It is to this argument we now turn.

III. The Option of Negligence

As described in Part I, this Article's focus is on cases in which the plaintiff claims to have been sexually penetrated by the defendant in the absence of other physical force—cases we refer to as our focal or target cases. Conceivably, courts might make a number of doctrinal changes to reach just results in these cases. For example, courts might adopt a completely different definition of intent that takes into account the special challenges plaintiffs face in sexual assault cases. Courts might also adopt a strong affirmative consent requirement or even prohibit altogether the defense of apparent consent in such cases. We agree that courts ought to consider such possibilities; we particularly support the adoption of affirmative consent. Our

75. *Id.*

76. *Id.* at 1271.

77. *See supra* note 27.

78. *See supra* note 27.

79. *Id.* at 1270 n.5.

80. *Id.* at 1276.

81. *Id.* at 1275.

82. Had the court applied the black letter of § 18(b), the court might have held for the plaintiff as a matter of law—or at most, sent a narrower set of questions to the jury: (1) whether the defendant's explanation of plaintiff's conduct was credible, and (2) if so, whether it served as a revocation of the plaintiff's earlier communication of non-consent.

experience with the American Law Institute's (ALI) debates regarding the Model Penal Code and the Intentional Torts Restatement, however, as well as our reading of current judicial and public sentiment suggest that such proposals face an uphill (but not hopeless) battle. In this Article, we make a more modest suggestion, but one that would have significant justice benefits for plaintiffs—and even for some defendants—in our target cases. Our argument is that plaintiffs in such cases ought to have the option to sue in negligence as an alternative to, or in addition to, an intentional tort. Our argument stems from two types of considerations: those of internal doctrinal coherence and those of pragmatic justice.

A. Considerations of Doctrinal Coherence

1. The Nature of Defendants' Wrong Is Risk-Creation.—A cause of action is designed to capture the concepts that trigger a defendant's duty to remedy a plaintiff's harm. Formalizing these concepts helps to ensure that like cases will be decided alike and facilitate decision makers' ordered, clear-sighted analysis of the facts of the case.[83] Unlike the ancient writs, modern causes of action are framed in general terms so that they might encompass many different factual scenarios, the resolution of which ought to stem from the same conceptual analysis. Thus, a case involving a car accident and a claim alleging medical malpractice are both analyzed pursuant to a negligence cause of action. On the other hand, claims based on distinct justice-related concepts or that reflect qualitatively different policy trade-offs are decided pursuant to different causes of action.[84]

The wrong underlying an intentional tort is antisocial behavior that, as a default, is harmful in itself.[85] The wrong in battery, for example, consists of three parts: it is (1) intentional, (2) physical contact, (3) that is harmful or offensive.[86] The concept of "fault," as it is defined in negligence law, plays

83. W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 934–35 (2005).

84. The evolution of strict products liability serves as a useful case study in this regard. After determining that the goals of compensation and industry internalization of the costs of injuries caused by defective products justified the imposition of strict liability, Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring), over time courts have found that fault-based concepts remain important to the just resolution of such cases. Thus, courts have gradually reinserted fault concepts, melding them with strict liability to create a curiously hybrid doctrine. *See generally* Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183 (1992) (concluding that strict products liability no longer exists in its original form).

85. *See* Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 225 (1985) (distinguishing negligence claims from the "antisocial [behavior] usually associated with intentional torts such as battery").

86. *See supra* note 29 and accompanying text. One might contend that such a contact is not wrongful unless non-consensual. On the other hand, one might conceive of the wrong as stated and

no conceptual role in this wrong.[87] For example, an arresting officer has wronged a suspect as contemplated by the prima facie elements of battery (as well as false imprisonment) when the officer grabs the suspect and places him in handcuffs. Of course, assuming the arrest is valid, the officer will not be held liable—but not because the prima facie elements of battery are not satisfied. Rather, the officer will escape liability due to a defense known as the law enforcement privilege, which turns on the reasonableness of the officer's actions.[88] Thus, the concept of fault does indeed play a role in intentional tort doctrine—but principally only in its defenses, not its core elements. A battery, assault, or false imprisonment is *inherently* wrong, and an offending defendant will escape liability only by offering some special justification. Such special excuses often turn on the concept of fault.[89]

Negligence, by contrast, is grounded in the idea that a defendant should be held liable for harm that the defendant unintentionally, but nevertheless unreasonably, caused.[90] A negligent defendant intends conduct just as an intentional defendant does—but rather than intending conduct substantially certain to cause harm, the negligent defendant intends conduct that merely

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contend that consent ought merely to serve as a defense. This philosophical dispute is not central to our argument.

87. *See, e.g.*, Lynn v. Burnette, 531 S.E.2d 275, 279 (N.C. Ct. App. 2000) ("[N]egligence 'cease[s] to play a part' in the analysis where the injury is intentional . . . ." (quoting Pleasant v. Johnson, 325 S.E.2d 244, 248 (N.C. 1985))).

88. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 39 reporters' note to cmt. b (AM. L. INST., Tentative Draft No. 6, 2021) ("The kernel of the law enforcement privilege is a consideration of whether the law enforcement officer reasonably believed his or her actions to be reasonable in light of the facts and circumstances at the time of the alleged tort.").

89. For example, the defenses of self-defense, defense of property, and citizen's arrest depend, in part, on the reasonableness of the defendant's conduct. *Id.* §§ 21, 30(c), 42(c)–(d).

90. *See* Brown v. Kendall, 60 Mass. (6 Cush.) 292, 296 (1850) (explaining that a defendant can be held liable for failing to exercise ordinary care). It is worth noting that in still other cases, a defendant's conduct might not have been intentional but was qualitatively riskier than negligence. Courts have created a third standard for such cases: recklessness. The wrong in recklessness is defined by some courts as "to know of and disregard a substantial risk of harm," *e.g.*, Grange Ins. Ass'n v. Roberts, 320 P.3d 77, 88 (Wash. Ct. App. 2013), or, consistent with the Restatement (Third):

> (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and
>
> (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 2 (AM. L. INST. 2010). The essential distinctions between recklessness and negligence are that with reckless conduct, (1) not only should the defendant have known of the risk, the defendant did know, and (2) the risk of harm to the plaintiff was so great that the defendant's conduct was not merely unreasonable but demonstrated indifference. One might argue that recklessness ought also to be available to plaintiffs in our focal cases, and we would agree. For simplicity's sake, our argument here focuses on negligence.

creates a *risk* of harm.[91] For example, suppose that a defendant fires a gun into the opposing stands at a crowded football game—either with the purpose of hitting someone or with substantial certainty that someone will be hit. Such a case would properly be analyzed as a battery claim. Now suppose instead that a defendant fires a gun into the opposing stands of an apparently empty football stadium, not realizing that someone is sitting in the opposing stands. The intended physical actions of the two defendants are the same. The difference is the defendants' state of mind. The first defendant intentionally caused non-consensual harmful contact; the latter only took an unreasonable risk of causing harmful contact.

In a negligence claim, risk-creating behavior is not necessarily wrongful—such behavior merely triggers a defendant's duty to act with care.[92] The core concept mediating wrongfulness is whether the risk taken was "unreasonable."[93] Although juries are typically given wide latitude in supplying the conceptual content of reasonableness, when judges decide the element as a matter of law, reasonableness often turns on a balancing of three factors: (1) the degree of foreseeable likelihood that the defendant's actions would result in injury;[94] (2) the range in severity of foreseeable injuries; and (3) the benefits and burdens of available precautions or alternative manners of conduct.[95] The higher the risk, the more careful the defendant is required to be.[96]

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91. *See, e.g.*, Guzman v. Pring–Wilson, 963 N.E.2d 1196, 1200 (Mass. App. Ct. 2012) (contrasting negligence with intent).

92. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (AM. L. INST. 2010).

93. *Id.* § 3.

94. *E.g.*, OLIVER WENDELL HOLMES, THE COMMON LAW 76–77 (Mark DeWolfe Howe ed., 1963).

95. *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (enshrining these factors in the mathematical formula in which liability lies if B (burden of precautions) < P (probability of loss) × L (magnitude of loss)); Markowitz v. Ariz. Parks Bd., 706 P.2d 364, 369 (Ariz. 1985) (recognizing that foreseeability of risk and the burden of precautions are "factors which determine the reasonableness of the defendant's conduct"); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 453–54 (W. Page Keeton ed., 5th ed. 1984) ("The unreasonableness of the risks which [a reasonable person of ordinary prudence] incurs is judged by the . . . process of weighing the importance of the interest he is seeking to advance, and the burden of taking precautions, against the probability and probable gravity of the anticipated harm . . . ." (footnote omitted)); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS, §§ 143–146, at 450–59 (2d ed. 2011) (explaining in detail the interplay of foreseeability and reasonableness).

96. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 reporters' note to cmt. d (AM. L. INST. 2010). The Reporters' Note cites a long list of cases for the proposition that the amount of care required is proportionate to the extent of danger involved. *See, e.g.*, Lollar v. Poe, 622 So.2d 902, 905 (Ala. 1993) ("The degree of care required of an animal owner should be commensurate with the propensities of the particular animal and with the place where the animals are kept, including its proximity to high-speed highways."); Indus. Chem. & Fiber-Glass

Understanding the differing wrongs at the core of these torts is central to our argument that negligence is a good conceptual fit in many of our focal cases, equally as acceptable as the framework of battery. The wrong in a battery claim is the intentional contact that was itself harmful—for example, punching someone in the jaw. In many of our focal cases, by way of contrast, the defendant will argue that he intended no such harmful contact or that he believed that the plaintiff was consenting. Even if one takes such defendants' claims at face value, their conduct might nonetheless have been wrongful. However, the wrong in our focal cases is not intentional contact, but rather (1) the defendant's *unreasonable* creation of circumstances that ran the *risk* of undermining the plaintiff's ability to consent freely or (2) the defendant's sexual penetration of the plaintiff despite the existence of an *unreasonable risk* that the plaintiff had not in fact consented. In both instances, the creation of the risk is central and constitutes the gravamen of the negligence claim.

Consider this distinction in the factual context of *Rondini v. Bunn*, described above, in which the college-aged plaintiff alleged that she did not want to have sex and told the defendant that she wanted to leave his apartment.[97] Suppose that the plaintiff's account of events was accurate and also that the defendant honestly believed that the sex was consensual. In such case, it might technically be true that the defendant intended the contact, which was in fact non-consensual and harmful, and thus that the defendant committed a battery. But is that account the only way to capture the defendant's wrong? Would a jury in such a case be willing to label the defendant an intentional tortfeasor, a sexual batterer, a rapist? Our contention is that an equally accurate description of the defendant's wrong is that he took an unreasonable risk. By locking the door, remaining silent in response to the plaintiff's comment that she should leave, and approaching the plaintiff to initiate physical intimacy, the defendant's wrong was unreasonably—even if unintentionally—creating a risk of coercion. And by initiating sex in the face of the plaintiff's communications, her ensuing silence, and her avoidance of eye contact, the defendant's wrong was to unreasonably ignore a risk that she was not, in fact, consenting. In this account, the core of the defendant's putative wrongdoing in *Rondini* was not intentional antisocial behavior; it was negligence.

Corp. v. Chandler, 547 So.2d 812, 831 (Ala. 1988) ("[T]hose who deal with dangerous instrumentalities, such as explosives or chemicals, must exercise a great amount of care because the risk is great."); Blanchard v. City of Bridgeport, 463 A.2d 553, 555 (Conn. 1983) ("The degree of care to be exercised by keepers of wild animals to protect visitors from harm must, at the very least, be equal to the coiled spring danger that lurks within the cage."); *see also* KEETON ET AL., *supra* note 95, § 31, at 170–71 (explaining that although "[n]early all human acts, or course, carry some recognizable but remote possibility of harm to another," precaution is required "if the risk is an appreciable one, and the possible consequences are serious").

97. *See supra* notes 67–81 and accompanying text.

As a final illustration of this point, consider which of the following (simplified) jury instructions would more cogently guide a jury in evaluating the defendant's wrong in *Rondini*:

Alternative 1: In determining whether the defendant committed sexual battery against the plaintiff, you must decide first whether the defendant intended physical intercourse with the plaintiff. If so, you must decide whether that contact resulted in physical harm or offense to a reasonable person's dignity. Next, you must decide whether the plaintiff actually consented to the contact. [Here is where the instructions could get quite a bit more complicated, perhaps incorporating detailed guidelines regarding duress and mistake.] If so, you must find for the defendant. Even if the plaintiff did not consent, you must decide whether a reasonable person in the defendant's position would have believed that the plaintiff consented. If so, you must find for the defendant.

Alternative 2: The defendant owed the plaintiff a duty to use reasonable care in initiating intercourse. In determining whether the defendant breached that duty, you must decide whether the defendant acted unreasonably under the circumstances.

We contend that the latter instruction fairly captures the defendant's putative wrong in *Rondini* and in many of our focal cases.

2. Reasonableness as a Prima Facie Wrong Versus an Aspect of Consent.—As noted above, it is true that the jury in a battery case will often consider the reasonableness of the defendant's action under the auspices of actual or apparent consent. If so, then why does it matter whether the case is treated as negligence or an intentional tort?

As a matter of internal coherence,[98] the answer is partially addressed by the previous section: a cause of action should represent the concepts underlying the defendant's wrong. Negligence fairly captures a defendant's wrong in many of our focal cases more closely than does battery. Even if such cases check the doctrinal boxes of battery, it feels artificial and convoluted to evaluate the defendant's wrongdoing under that rubric.

The above jury instructions hint at additional reasons, however. The law of intentional torts is delineated by more particularized rules than is the doctrine of negligence. Thus, the set of instructions for battery (Alternative 1) are considerably more detailed than those for breach of a negligence duty (Alternative 2). The battery instructions above would be even more detailed were they to cover the issues of duress and mistake—both of which are relevant to a great many scenarios. Courts have imposed extraordinarily tight boundaries around a plaintiff's ability to prove that their consent was vitiated by duress or mistake. For example, as the Restatement

98. For a discussion of consequentialist answers to this question, see *infra* subpart III(B).

(Second) explains: "The cases to date in which duress has been found to render the consent ineffective have involved those forms of duress that are quite drastic in their nature and that clearly and immediately amount to an overpowering of the will."[99] The Restatement (Third) confirms the continued accuracy of this statement,[100] noting that arguments of duress and mistake fail in cases involving "subtle emotional pressure," "reluctant consent" given pursuant to a defendant's threats short of physical violence, or a defendant's fraudulent statements regarding marital status or feelings of love or commitment toward the plaintiff.[101]

Such narrowly defined rules pose two problems when applied to our focal cases. First, the rules of consent were established largely by cases in the realm of contract and medical malpractice—contexts qualitatively different from claims of sexual battery.[102] In light of evidence that the factual context of a body of law plays a significant role in shaping its content over time,[103] it seems likely that consent rules do not adequately reflect the considerations prominent in sexual cases. Second, like any rule, consent rules (1) preclude just outcomes in the context of certain sets of facts[104] and (2) fix standards of behavior in time, limiting the law's ability to adapt to changing societal norms.[105] Such inherent limitations pose a particular danger for our

99. RESTATEMENT (SECOND) OF TORTS § 892B cmt. j (AM. L. INST. 1979).

100. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 15 reporters' note to cmt. d (AM. L. INST., Tentative Draft No. 4, 2019).

101. *Id.* § 15 cmts. d & f.

102. *See* Martin R. Studer, *The Doctrine of Informed Consent: Protecting the Patient's Right to Make Informed Health Care Decisions*, 48 MONT. L. REV. 85, 86–88 (1987) (discussing the medical-context development of the doctrine of informed consent).

103. *See, e.g.*, Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 667 (2010) (offering evidence that the wealth of the parties affects litigation outcomes, which impacts the eventual content of the law); Carole D. Hafner & Donald H. Berman, *The Role of Context in Case-Based Legal Reasoning: Teleological, Temporal, and Procedural*, 10 A.I. & L. 19, 20 (2002) (arguing the doctrine of stare decisis is "subject to contextual restraints and influences").

104. *See generally* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (suggesting that in adhering to the rule of law, courts ignore entirely the reality of human affairs); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) (setting forth the classic basis for "rule-skepticism"); *see also* Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1022–23 (1928) (stating that the "passing of judgment in bulk . . . is a dangerous thing" due to the limited prescience of human thought).

105. *See* W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 800–01 (2005). Contrasting the fixed standards of conduct with the changing norms of society, Professor Cardi states:

> Particularized duty standards, consisting of individual judges' divination of the customs of the age, are frozen as precedent—immune to the natural evolution of the community. Jury decisions, by contrast, are not thus limiting. Indeed, the generality of the reasonable person standard and of the various standards for proximate cause exists precisely to allow tort liability to evolve with changing cultural mores.

Id.

focal cases. Questions of whether a defendant's pressure to have sex was too coercive, or whether a defendant's fraudulent misstatement created a substantial enough mistake, for example, turn on extraordinarily subtle facts that are not susceptible to clear rules. Moreover, community standards regarding sexual behavior are subject to rapid change. It was not so long ago that consent was presumed between married parties,[106] and courts have only recently begun to curb the use of evidence such as a plaintiff's manner of dress to infer actual consent.[107]

For these reasons, the law of actual and apparent consent improperly restricts a jury's evaluation of a defendant's wrongful conduct in date and acquaintance rapes and other focal cases. In our view, these dangers are relieved in many cases by opening up the inquiry and focusing the jury's attention more generally on the reasonableness of the defendant's conduct. Consider again the facts of *Rondini*. Forced to pursue a battery claim, the plaintiff would certainly fail to establish that her consent was undermined by duress—the defendant did not threaten her with violence or otherwise "overpower her will."[108] Were the jury instructed in negligence, however, the result is less certain. A jury might well decide that in locking the bedroom door, effectively isolating the plaintiff, and ignoring her statements that she should leave, the defendant unreasonably created a risk that the plaintiff was not freely consenting. Such a determination—however it came out—would more closely reflect both the nuanced facts of the case and current societal patterns of ethical and moral conduct.[109]

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106. Linda Jackson, Note, *Marital Rape: A Higher Standard Is in Order*, 1 WM. & MARY J. WOMEN & L. 183, 183–84 (1994) (explaining the then-existing "marital rape exemption").

107. *See supra* note 47 and accompanying text.

108. *See supra* note 100 and accompanying text.

109. One might counter that our argument proves too much—if negligence may be pursued in sexual assault cases, why not other factual contexts in which consent is possibly relevant? We offer three possible answers to this challenge: First, the sheer number of uncompensated rapes of the type described in this Article is reason enough to create a *sui generis* category. Second, the nuanced issues of consent and duress presented in the sexual context lend themselves more readily to a negligence analysis than to the rigid rules of consent and duress crafted over time in battery cases involving other factual contexts. Third, the very nature of sex is reason to treat cases of unwilling sex differently than other forms of contact. Consensual sexual intercourse is a sought-after aspect in the lives of many adults. It is generally considered harmful *only* if wrongfully procured. By contrast, a physical confinement or a punch in the nose are not generally accepted human interactions; rather, they are violations of one's person *unless* consensual (or unless some other special excuse is present).

We want to be careful to cabin our arguments here. We are not suggesting that sex is or should be deemed desirable by any person, or in any scenario, as a default. Nor are we suggesting that undesired (or reluctant) sex, even if consensual and not the result of defendant's negligence, is harmless—to the contrary, it can be harmful and experienced by the plaintiff as an invasion (although it is not an invasion that triggers a duty to compensate under our current legal system). We are merely pointing to the qualitative difference between sex and a punch in the nose as further justification for allowing our focal cases, but not other batteries, to be pled as negligence. Finally,

Yet another matter in considering whether negligence or consent is the better home for reasonableness determinations is where to place the burden of proof. In a negligence case, the plaintiff carries the burden to prove that the defendant acted unreasonably.[110] The law is considerably less clear regarding which party carries the burden with respect to consent. Although the Restatement (Second) of Torts states that the plaintiff must prove the absence of consent,[111] as noted above, the Restatement (Third) cites a "dearth and mix of authority" and thus takes no position on the matter.[112]

B. Pragmatic Justice Considerations

In addition to benefits internal to tort law, our proposal would result in pragmatic benefits for both the plaintiffs and defendants in our focal cases.

1. Plaintiff Benefits.—Allowing plaintiffs to bring negligence cases would open the door to justice, which is foreclosed by our current system, for large numbers of potential plaintiffs. Several aspects of the change would lead to this expanded access.

As noted above, access to negligence analysis might free juries to impose liability for acts that would not trigger liability under intentional tort doctrine—for example, cases in which the defendant initiated intercourse in the face of a plaintiff's expression of ambivalence or vacillation; cases in which a defendant created unreasonable pressure (but pressure short of duress) on a plaintiff to have intercourse; cases in which the plaintiff was inebriated but not wholly incapacitated, or cases in which both parties were inebriated; or cases in which the plaintiff was silent or passive. Plaintiffs in each of these scenarios would be unlikely to succeed under courts' narrow consent rules but might succeed if the question posed to a jury were whether the defendant acted unreasonably under the circumstances.

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our argument here should not be read as a suggestion that negligence ought to be the *only* theory available to plaintiffs. Although the nature of sex suggests a reason to treat it differently from other batteries, subpart IV(C) explains why plaintiffs ought to be allowed to plead negligence and intentional torts in the alternative.

110. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS, § 9.5, at 197 (2d ed. 2016); KEETON ET AL., *supra* note 95, § 38, at 239.

111. RESTATEMENT (SECOND) OF TORTS § 10 cmt. c (AM. L. INST. 1979).

112. *See supra* note 38 and accompanying text. The Restatement (Third) specifically states that with regard to the burden of persuasion in sexual battery cases, "we have found no case law directly on point." RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 reporters' note to cmt. e (AM. L. INST., Tentative Draft No. 4, 2019). The Restatement (Third) does posit that with regard to affirmative consent specifically, there are reasons for a court to place at least the burden of production on the defendant, who normally has "greater access to the relevant evidence than will the plaintiff." *Id.* § 12 cmt. e. Should jurisdictions begin to take up the view that consent is best viewed as a defense, therefore shifting the burden to the defendant, that would introduce another wrinkle to the questions addressed in this section.

In addition, because the prima facie wrongs defined by negligence more accurately match the defendant's conduct in many of our focal cases, a jury verdict for the plaintiff would carry a more commensurate level of disapprobation. Rather than labeling defendants who subjectively believed the plaintiff to be consenting as "rapists" or even "intentional tortfeasors," a negligence verdict would simply reveal that the defendant had acted unreasonably and should compensate for the plaintiff's harm. Correspondingly, in negligence cases, punitive damages would also be unavailable except in cases in which the defendant's conduct was so egregious that it meets the relevant culpability threshold in that jurisdiction. Because such consequences arguably would be more commensurate with the defendant's conduct and objectively less severe, we believe juries would be more likely to hold defendants liable under a given set of facts.[113] Juries might also be more willing to resolve difficult factual disputes in favor of plaintiffs. Although the standard of proof is the same in negligence and intentional tort claims (a preponderance of the evidence), when the jury is weighing "he-said/she-said" testimony, the relative consequences of a plaintiff verdict might well nudge the jury's factual findings in a corresponding direction.

A third and potentially major benefit to plaintiffs relates to the availability of liability insurance. Whereas most homeowners' or renters' insurance policies cover an insured's liability for negligence, they typically exclude intentional torts.[114] Under the current system, most rape plaintiffs are thus realistically precluded from suit unless the defendant has considerable personal financial assets—plaintiffs' attorneys, who work on a contingency fee basis, will not take suits without a realistic chance of a collectible judgment.[115] Were negligence—and thus, insurance coverage—available, a much broader swath of sexual tortfeasors would be held liable for the harm they have caused.

Of course, on seeing such a change in the law, insurance companies might well amend their policies, excluding negligent sexual assault from coverage much as they have done with liability coverage for sexually

113. *Cf.* Jack Glaser, Karin D. Martin & Kimberly B. Kahn, *Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants*, 39 LAW & HUM. BEHAV. 539, 543 (2015) (explaining that jurors' decision making is influenced by sentence severity—jurors are less likely to convict if the possible punishment is very severe—and finding that other factors, such as defendants' race, also influence jurors' decision making).

114. Weiner, *supra* note 14, at 967–69.

115. *Id.* at 966. In fact, as Professor Weiner explains, even verdicts against wealthy defendants often present considerable hurdles in collection—hurdles which would be avoided were the verdict covered by insurance. *Id.* at 971.

transmitted infections.[116] On the other hand, negligent behavior in sexual interactions is—for purposes of liability insurance—no different than any other form of negligence. (In fact, unlike many other negligent acts covered by homeowners' insurance, sexual negligence often occurs within the home, thus creating an actual nexus to the policies' origins.) Finally, even if insurance carriers are not persuaded by reason or required by regulation to cover sexual negligence under existing liability policies, Professor Merle Weiner mounts a compelling argument that insurance companies might profitably offer what she dubs "civil recourse insurance," a new product in the form of a prepaid legal plan that would cover a plaintiff's litigation costs and attorney's fees in such claims.[117]

A fourth benefit to allowing plaintiffs to conceptualize claims as negligence is that doing so would pave the way for more claims against third-party defendants by enlarging the scope of vicarious liability through the doctrine of *respondeat superior*. Many employers currently escape liability for rapes committed by employees by successfully arguing that the scope of vicarious liability is narrower for intentional torts than it is for negligently committed acts.[118] Were such claims reframed as negligence, courts would be obliged to treat sexual negligence claims similarly to other torts committed by employees that cause physical harm to clients and others with connections to the business.

A final benefit of our proposal is that at least some plaintiffs asserting claims for sexual negligence will benefit from the longer statute of limitations period afforded negligence claims (typically between three and six years) compared to claims asserting intentional torts (typically one or two years).[119] This benefit is significant because many victims of sexual torts understandably take years to process their experience and reach a decision to seek justice.[120]

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116. *See* Daniel C. Eidsmoe & Pamela K. Edwards, *Sex, Lies, and Insurance Coverage? Insurance Carrier Coverage Defenses for Sexually Transmitted Disease Claims*, 34 TORT & INS. L.J. 921, 923–24, 923 n.14 (1999) (explaining the various forms such exclusions take).

117. Weiner, *supra* note 14, at 962.

118. Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 143–44 (2013) (exemplifying how courts frequently refuse to impose liability in the context of intentional torts involving sexual abuse).

119. *See* 1A STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, THE AMERICAN LAW OF TORTS § 5:40, at 543 (Monique C.M. Leahy ed., 2021) ("The statute of limitations governing battery, assault, or assault and battery is usually quite short—frequently the period is fixed at one year."); CHRISTINE M.G. DAVIS, JOHN A. GEBAUER, SARAH HERKAMP, TAMMY E. HINSHAW, GARY HUGHES, LAURA HUNTER DIETZ, JULIANNA KITTELSON, CARALYN M. ROSS, CHRISTINA WALDMAN, EILEEN WIERZBICKI, LISA A. ZAKOLSKI, JUDY E. ZELIN & STEPHANIE ZELLER, 2A CARMODY-WAIT CYCLOPEDIA OF NEW YORK PRACTICE WITH FORMS § 13:60 (2d ed. 2021) (stating that a three-year statute of limitations applies "where the nature and origin of the liability asserted are, regardless of form, a liability for damages caused by negligence").

120. *See supra* note 8.

It is worth repeating that we are not proposing that plaintiffs be limited solely to negligence claims in our focal cases; we believe plaintiffs should have the option to plead negligence rather than, or in the alternative to, intentional torts. A plaintiff might decide for a variety of reasons that the benefits of pleading the case as an intentional tort outweigh the benefits of negligence. For example, the threat of an intentional tort verdict might serve as a stronger lever in settlement negotiations.[121] A plaintiff might want punitive damages—indeed, particularly in a jurisdiction with statutory caps on noneconomic damages, the plaintiff might not otherwise find an attorney to take the case.[122] Most significantly, many victims of sexual assault understandably seek the societal condemnation that accompanies an intentional tort judgment.[123] For such plaintiffs, being limited to a negligence claim would be insufficient and perhaps even demeaning. Nevertheless, for the many plaintiffs who want and need compensatory damages,[124] our proposal would help to address their needs.

2. Defendant Benefits.—Although our proposal largely benefits plaintiffs who have suffered sexual torts, reconceptualizing claims as negligence would also benefit defendants in certain respects. For those defendants who would run the risk of paying damages even under an intentional tort regime, the availability of insurance could have the effect of protecting them from potentially crushing liability. This is doubly true in cases in which plaintiffs see a benefit to foregoing the possibility of punitive damages. Furthermore, as discussed above, a negligence verdict does not engender the same level of condemnation as that of an intentional tort. Thus, defendants held liable for negligence might not be stigmatized in the same way as those held liable—or even those who settle—claims alleging battery, false imprisonment, or intentional infliction of emotional distress. Defendants might therefore be more willing to settle negligence claims and perhaps even to admit to their error in judgment. And apologies often benefit both victim and perpetrator.[125]

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121. By contrast, in a negligence claim, the defendant's insurance carrier might cover the plaintiff's litigation expenses with a reservation of rights. In such case, the plaintiff is out-of-pocket only upon settlement or an adverse verdict; thus, the plaintiff might have even less incentive to settle, as the $P \times L$ of a potential jury verdict might be still smaller than the plaintiff's settlement demands.

122. Weiner, *supra* note 14, at 973, 982.

123. *Id.* at 985, 988–91 (citing a variety of studies showing that victims of sexual violence primarily seek accountability, revenge, empowerment, and deterrence rather than money).

124. *See id.* at 991 ("[S]urvivors of gender-based violence deserve and frequently need compensation, even if that is not their primary motivation for suing their perpetrators.").

125. *See* Murat C. Mungan, *Don't Say You're Sorry Unless You Mean It: Pricing Apologies to Achieve Credibility*, 32 INT'L REV. L. & ECON. 178, 181 & n.25 (2012) (citing studies detailing the value of apologies by offenders).

IV. Doctrinal Obstacles

Plaintiffs will undoubtedly encounter several doctrinal obstacles to pursuing rape and sexual assault cases as negligence claims. Because of the habit of conceptualizing such cases solely as intentional torts, courts must freshly consider not only whether established law permits negligence claims, but also which of the available negligence-proof frameworks should be used to try such cases, including whether traditional negligence defenses ought to apply without alteration. Additionally, looming over these questions is the important procedural issue of how intentional tort liability should be handled once plaintiffs are permitted to bring sexual assault cases under a negligence rubric. It will make an enormous practical difference whether plaintiffs have the freedom to bring both intentional tort and negligence claims in one lawsuit (most often arguing for liability in the alternative) or will be forced to elect only one framework to pursue, cutting off potential liability for the other type of claim.

Assuming that at least some courts will permit plaintiffs to pursue negligence claims, they will likely need to address three broad questions. First, courts must decide whether sexual assault cases should be categorized as physical harm cases or rather should be treated as claims for pure emotional distress. Such initial categorization is consequential, particularly in the class of cases we focus on in this Article, in which plaintiffs have not sustained physical injuries beyond the injury of penetration. Second, courts will be called upon to decide whether the defense of comparative negligence may be used to diminish or even cut off liability in sexual assault cases brought under negligence, even though plaintiff negligence is not typically permitted as a defense in intentional tort assault cases brought against aggressors. Finally, courts will have to determine whether claims for intentional tort liability and negligence claims in the sexual assault context should be treated as mutually exclusive or simply as distinct claims brought under two different theories.

A. Pure Emotional Distress or Physical Harm?

If negligence claims for sexual assault against individual aggressors are cognizable, there are two routes courts might take in approaching such claims: (1) categorize the claim as one for physical harm by recognizing that sexual penetration is itself physical injury or (2) categorize the claim as a pure emotional harm claim, allowing recovery only if it fits within an exception to the "no duty not to cause pure emotional harm" default rule.[126] Because prevailing tort doctrine makes it more difficult to recover for pure

126. When the sexual contact constituting an assault or battery does not involve penetration, the doctrinal questions posed are similar, but plaintiffs may have additional difficulty convincing courts that their harm qualifies as physical injury.

emotional distress compared to physical injury, plaintiffs will try to convince courts that their injuries should count as physical. Only if that route is unsuccessful will plaintiffs likely argue in the alternative that their injury, although categorized as pure emotional loss, nevertheless warrants recovery.

1. Penetration as Physical Harm.—There are compelling reasons why sexual penetration—even if unaccompanied by other physical injuries inflicted by extrinsic force—should qualify as physical harm. Sexual penetration is quite literally a physical invasion of the body. It entails a touching of the skin of another person and the introduction of a bodily part (or other object) into that person. The physicality of the act of sexual penetration is so intrinsic to its nature that is it difficult to conceive of sexual intercourse in the absence of the physical presence of the individuals involved. Although sexual acts may occur in cyberspace and produce sexual responses,[127] a sexualized injury that takes place online is qualitatively different from the harm caused by sexual penetration. In this sense, sexual penetration is the classic or prototypical physical harm, every much as physical as a punch in the nose.

Sometimes, of course, when the penetration is desired, the parties experience pleasure and the touching, although still physical, is not commonly regarded as an injury. This shift in the meaning of the contact is not unique to sexual intercourse or penetration. For example, when individuals actively engage in contact sports and agree to the rules beforehand, we commonly do not regard the minor contacts intrinsic to the sport as an injury, although few would argue that the contact is not physical. The same is true of pregnancy, a condition not seen as inherently harmful when desired but often treated as such when negligently or non-consensually caused. Indeed, courts commonly allow negligence recovery by pregnant women against those who unreasonably failed to effectuate the woman's efforts at birth control.[128]

What makes sexual penetration distinctive derives from the reality of victims' experiences. When sexual penetration is not desired, penetration is frequently painful and experienced as an injury. One study, for example, found that 87% of rape victims suffered microtearing in the skin and

127. *See* Asaf Harduf, *Rape Goes Cyber: Online Violations of Sexual Autonomy*, 50 U. BALT. L. REV. 357, 371 (2021) (describing how the internet opened new possibilities for virtual sexual acts).

128. Miceli v. Ansell, Inc., 23 F. Supp. 2d 929, 933 (N.D. Ind. 1998) ("By recognizing the claim of wrongful pregnancy, Indiana state courts have decided that in certain cases, pregnancy may be considered a harm or damage done to a plaintiff."); Alice D. v. William M., 450 N.Y.S.2d 350, 356 (N.Y. Civ. Ct. 1982) ("The fact that her choice of an abortion is purely a personal one does not alter the fact that she has suffered harm resulting from the conception, pregnancy, and subsequent abortion." (citations omitted)).

sometimes in the muscles.[129] Even without microtearing, however, unwanted sexual penetration can cause intense pain that is best recognized as physical pain. It is now clear that victims who experience sexual assault, even in the absence of other physical injuries, often suffer severe pain that lasts for a considerable time after the assault. Thus, in a first-of-its-kind study of sexual assault victims by the National Institutes of Health (NIH) published in 2012, researchers found that even in sexual assault cases in which physical trauma was limited, victims frequently experienced acute pain.[130] Pain was often reported in multiple body areas, including extra-genital pain symptoms among women who did not experience trauma outside the genital area during the attack.[131] The NIH researchers theorized that "pain in the aftermath of sexual assault may not simply be an ancillary experience resulting from co-occurring physical trauma or struggle, but (like psychological symptoms) may also be a neurobiological sequela of the stress experience itself."[132] This finding is congruent with the contention of rape survivors and feminist scholars who have long argued that non-consensual intercourse is a serious physical harm, often described as "excruciatingly painful."[133] The scientific evidence now provides proof for that assertion.

Unfortunately, the Restatement of Torts has not yet declared that non-consensual sexual penetration amounts to physical or bodily harm. The Restatement (Third) of Torts: Physical and Emotional Harm defines bodily harm to include "physical injury, illness, disease, impairment of bodily function, and death."[134] Citing primarily cases involving exposure to toxic substances and fear of future disease, the comments to the Restatement note that to qualify as physical harm, there must be a physical impairment (no matter how slight) that amounts to a "detrimental change in the physical condition of a person's body."[135] There is no discussion of whether the

129. *See* Marilyn Sawyer Sommers, *Defining Patterns of Genital Injury from Sexual Assault: A Review*, 8 TRAUMA, VIOLENCE, & ABUSE 270, 272 (2007) (citing a study finding "a genital injury prevalence of 87% in 131 sexual assault survivors").

130. Samuel A. McLean, April C. Soward, Lauren E. Ballina, Catherine Rossi, Suzanne Rotolo, Rebecca Wheeler, Kelly A. Foley, Jayne Batts, Terry Casto, Renee Collette, Debra Holbrook, Elizabeth Goodman, Sheila A.M. Rauch & Israel Liberzon, *Acute Severe Pain Is a Common Consequence of Sexual Assault*, 13 J. PAIN 736, 738 (2012).

131. *Id.* at 739.

132. *Id.* at 740.

133. Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 58, 65 (1993); *see also* Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442, 1448 (1993) (indicating that unwanted sexual penetration is physically painful); Complaint & Jury Demand at 120, Doe 1 v. U.S. Olympic Comm., No. 19-cv-00737 (D. Colo. Mar. 12, 2019) (alleging Larry Nasser's actions caused the plaintiffs "discomfort, bleeding, urinary tract infections, [and] bacterial infections" and that plaintiffs "continue to suffer pain of mind and body").

134. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 4 (AM. L. INST. 2010).

135. *Id.* § 4 cmt. c & reporters' note to cmt. c.

infliction of intense physical pain is enough to classify a bodily intrusion as bodily harm, suggesting that all pain and suffering should be regarded as emotional harm. The Restatement does recognize, however, that if physical or bodily harm is caused or mediated by emotional distress, the injury is nevertheless properly classified as bodily harm.[136]

Under the Restatement's definition of physical harm, it is not clear that the bodily intrusion of sexual penetration alone is enough to qualify as bodily harm. Without proof of microtearing (presumably a physical impairment) or the ability to rely on the mediation theory that would allow a victim to claim physical harm (i.e., pain in extra-genital areas of the body) resulting from emotional trauma of the rape, the Restatement may be interpreted as relegating the harm of rape in our focal cases to the category of emotional harm.

The Restatement's reluctance to analyze the physical versus emotional harm classification of sexual penetration likely stems from courts' habit of treating rape solely as an intentional tort, coupled with holdings that rape clearly constitutes offensive battery.[137] What is missing from the courts' analysis, however, is appreciation of the physicality of the act of penetration and the physical nature of pain as experienced by rape victims. It is akin to telling a torture victim who suffers no visible external injuries that their injury amounted only to emotional harm, somehow erasing the physical nature of their suffering. The hesitation to regard sexual penetration as physical harm is not limited to tort law but likely also stems from the long-standing, misogynist cultural assumption that there is no physical harm from (mere) non-consensual intercourse unless the aggressor also inflicts extrinsic physical injuries, such as bruises or broken bones, in addition to the physical invasion of penetration itself. This reluctance to equate non-consensual intercourse with physical force and physical harm can be seen most prominently in the criminal law, which traditionally required a showing of extrinsic physical force (in addition to non-consent) before imposing liability for rape.[138] The physical-force requirement (and its corollary, the physical-resistance requirement) was a principal target of the feminist rape-reform movement of the 1970s.[139] As a result, many states eliminated the separate

136. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 45 cmt. b (AM. L. INST. 2012).

137. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 reporters' note to cmt. b (AM. L. INST., Tentative Draft No. 6, 2021).

138. Martha Chamallas, *The Elephant in the Room: Sidestepping the Affirmative Consent Debate in the Restatement (Third) of Intentional Torts to Persons*, 10 J. TORT L., no. 2, 2017, at 1, 9–10 (discussing the physical-force requirement in criminal law).

139. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 230–31 (2d ed. 2003) (describing reconsideration of the physical-force requirement as "a feminist interpretation of rape law"); Katharine K. Baker & Michelle Oberman, *Consent, Rape, and the Criminal Law*, *in*

physical-force requirement, and some courts held that the intrinsic force required to accomplish penetration constituted sufficient force to satisfy the physical force requirement.[140] However, the criminal law is still resistant to imposing liability for purportedly non-violent forms of sexual assault.[141]

The unwillingness to grasp the seriousness of the injury of "mere" sexual penetration also reflects a male (and heteronormative) perspective that finds it difficult to comprehend a harm that historically has been gendered female and has no precise analogue in the lives of most men. While there is growing appreciation that men (both cisgender and transmen) can be and have been victimized by sexual penetration,[142] most victims are women and most perpetrators of sexual assaults are men.[143] Thus, sexual penetration is still commonly regarded as an act done by men to women. Moreover, the popular discourse surrounding rape often remains stuck in a zero-sum narrative in which criminal punishment or civil penalties for rape are thought to benefit women but to harm men. Despite mainstream denunciations of sexual assault, resistance to more thoroughgoing reforms continues to take the form of minimizing certain types of rape or denying that male aggression or assertive behavior amounts to rape, regardless of protestations by victims.[144] It also perpetuates the myth that men are immune to rape by other men, erasing the harm done to men who experience unwanted sexual penetration.

That there could still be debate as to whether sexual penetration amounts to physical harm may seem astonishing, but sadly, it reflects a tort system that has had trouble dealing with gendered injuries, particularly sexualized injuries.[145] For example, a similar lack of comprehension and denial can be

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THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah L. Brake, Martha Chamallas & Verna L. Williams eds., forthcoming 2023) (discussing the rape reform movement of the 1970s); Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 628 (2005) (explaining the physical-resistance requirement).

140. The leading case is *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992).

141. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.1 (AM. L. INST., Tentative Draft No. 6, 2022) (requiring an actor to use aggravated physical force or restraint to be guilty of sexual assault by aggravated physical force or restraint).

142. *See generally* Capers, *supra* note 3 (discussing rape of men).

143. One study indicated that approximately 98% of female and 93% of male rape survivors reported that their assailants were male. MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 24 (2011).

144. *See* Shen, *supra* note 14, at 14–27 (discussing rape myths).

145. *See generally* Martha Chamallas, *Feminist Legal Theory and Tort Law*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 386 (Robin West & Cynthia Grant Bowman eds., 2019) (cataloguing "tort law's many failures in responding to gender-related harms and in valuing injuries suffered by women"); *see also* Jamie R. Abrams, *Distorted and Diminished Tort Claims for Women*, 34 CARDOZO L. REV. 1955, 1995 (2013) (examining the legal focus on fetal harms over maternal harms).

seen in tort cases involving women's reproductive injuries, in which some courts have had extraordinary difficulty classifying harms—such as negligently caused miscarriages, stillbirths, and *in utero* injuries to fetuses—as physical harms to the pregnant woman as well as injuries to the fetus.[146] Cases alleging sexual or reproductive injury often demonstrate a kind of sexual exceptionalism, whereby courts treat such claims differently (and less favorably) than other claims litigated under the same tort theory.[147] The upshot is to make recovery for reproductive and sexualized injuries more difficult without closing the door completely to such claims. The refusal to treat our focal cases as physical harm claims is another example of such exceptional and disfavored treatment.

Particularly in tort law, there is no good reason for failing to classify sexual penetration as physical harm. Unlike the criminal law, there has never been a physical-force (or physical-resistance) requirement in tort law. In litigating sexual assault claims under an intentional tort framework, it generally does not matter whether the claim is labeled a harmful or offensive battery: both give rise to liability, and notably, sexual intercourse and other sexual contacts are considered per se harms without proof beyond the fact of contact. Further, the Restatement (Third) of Torts: Intentional Torts to Persons now makes it clear that verbal resistance (no means no) is sufficient to establish non-consent; there is no need to establish that the victim offered physical resistance or was faced with a threat of physical force.[148] The same protective approach should be used in negligence cases alleging sexual assault.

In other contexts, at least some courts have classified rape as a physical injury, equal in seriousness to other forms of physical injuries. For example, one court held that a male inmate who experienced permanent PTSD (without residual physical injury) stemming from a rape in prison qualified as having suffered "permanent loss of a bodily function" under the New Jersey Tort

146. *See, e.g.*, Sheppard–Mobley *ex rel.* Mobley v. King, 830 N.E.2d 301, 304–05 (N.Y. 2005) (distinguishing between injuries suffered by a mother and by an *in utero* fetus after a negligently performed, ineffective abortion injured the fetus).

147. *See* Martha Chamallas & Lucinda M. Finley, *Introduction* to FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS 3, 19 (Martha Chamallas & Lucinda M. Finley eds., 2020) (discussing sexual exceptionalism in tort cases); Chamallas, *supra* note 14, at 62–63 (discussing how sexual exceptionalism in tort claims allows courts to "deny redress and compensation to victims of sexualized injuries"). The exceptional treatment extends to the taxation of damage awards. The tax code excludes only "personal physical injuries or physical sickness" from taxation, leaving awards for emotional harm taxable. The provision has been interpreted in biased ways to effectively reduce awards for sexual abuse victims. Simon de Carvalho, Comment, *Does the Tax Code Believe Women? Reexamining 26 USC § 104(a)(2) in the #MeToo Era*, 87 U. CHI. L. REV. 1345, 1348–50 (2020).

148. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 (AM. L. INST., Tentative Draft No. 4, 2019).

Claims Act,[149] while another court held that the rape of a female inmate inflicted trauma sufficient to constitute "pain" under the Eighth Amendment.[150] Although these courts were not adjudicating tort claims, conceptually the courts were faced with the same problem of categorizing pain, trauma, and injury stemming from sexual assault.

Tellingly, in the medical context, some courts have been able to conceptualize rape or other sexual misconduct as malpractice or professional negligence when patients are molested during the course of an examination.[151] Reframing a sexual assault as malpractice has the effect of downplaying the sexual aspects of the misconduct and assimilating the injury to other physical harms caused by professional negligence. In these cases, courts are less inclined to question the legitimacy of the harm or relegate it to the lower status of pure emotional injury.

Moreover, unauthorized physical intrusions into a patient's body—such as unintentionally leaving a catheter tip in a patient's body during delivery of a baby[152] or a botched lip tattoo procedure[153]—are actionable in tort even if otherwise non-injurious. Such medical negligence cases demonstrate the exceptional (and disfavored) treatment of sexual cases, despite the reality that the severity of the injury is far likely to be greater and longer lasting in the sexual context.

In sum, the case for categorizing rapes as physical harms is compelling, intuitive, and straightforward despite the historical legal ambivalence toward treating such claims as physical injuries. In these cases, the defendant's act is unquestionably physical, constituting an intrusion of the plaintiff's body, and there should be little doubt that it is harmful and injurious because it causes pain that is often severe and long-lasting. The fact that desired consensual sex bears a superficial resemblance to rape does not change the nature of the injury—it only means that we must take care to determine whether the defendant's act was wrongful, not whether it was physical or harmful.[154]

149. Collins v. Union Cnty. Jail, 696 A.2d 625, 633 (N.J. 1997).

150. Crocker v. City of Fairhope, No. Civ.A. 04-0184, 2005 WL 1027248, at *3 (S.D. Ala. Mar. 30, 2005).

151. *E.g.*, Martinmaas v. Engelmann, 612 N.W.2d 600, 603 (S.D. 2000) ("[S]exual misconduct falls within the definition of malpractice."); *see also* Corgan v. Muehling, 574 N.E.2d 602, 607 (Ill. 1991) ("A patient may recover damages from a psychotherapist who is found liable for sexual exploitation.").

152. Sostre v. Swift, 603 A.2d 809, 810 (Del. 1992).

153. Kesses v. Panache V. Inc., No. CV 950373558, 1997 WL 356137, at *3 (Conn. Super. Ct. June 18, 1997).

154. The case for classifying sexual contacts not involving penetration as physical harm is somewhat more complicated for the simple reason that such cases inevitably require line drawing and assessments about the seriousness of the injury inflicted. For example, we would argue that

2. Rape Cases as Emotional Harm.—If plaintiffs are unsuccessful in convincing courts to treat our focal cases as involving physical harm, the fallback position is for plaintiffs to argue that their claim comes within a recognized exception to the no-duty rule for pure emotional harm cases. The initial problem litigants encounter pursuing emotional harm claims is the wide variety of standards used in the various states, making recovery unpredictable and somewhat arbitrary. Courts often take a skeptical stance toward recovery for negligent infliction of emotional distress (NIED), looking for markers that plaintiffs' claims are genuine, serious, and unusual.

Thus, a small minority of states still cling to a requirement that plaintiffs prove their emotional distress resulted in physical manifestations or physical consequences, refusing to grant recovery in NIED cases absent some tangible evidence of injury or a medical diagnosis of psychiatric harm that courts regard as equivalent to more conventional physical injuries.[155]

Other states are willing to dispense with the physical manifestation requirement but still insist on a special connection or relationship (often a contractual relationship) between the parties, treating the NIED claim as a kind of appendage to contract law that should be reserved for only a subset of contracts in which emotional distress is highly foreseeable given the delicate nature of the undertaking.[156] All jurisdictions limit recovery to cases of serious emotional distress to rule out claims for trivial or moderate injuries.[157] Finally, the Restatement (Third) of Torts has adopted a "liberal" provision allowing recovery for "serious emotional harm" that "occurs in the course of specified categories of activities, undertakings, or relationships in

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cases involving oral sex should be treated the same as sexual intercourse cases, given that each involve close physical contact with the genital area and often affect victims in comparable ways. However, we can expect courts to resist the physical harm label in cases of groping, kissing, squeezing, and other sexual contacts, even though there is an obvious physical dimension to these touchings. Unlike evidence in penetration cases, the evidence that such contacts cause plaintiffs physical pain is likely to be less persuasive, and it will often be more difficult to assimilate these cases to instances of physical invasions in the medical context. For many of these cases, plaintiffs will find themselves arguing that these intrusions are harmful because they are offensive, humiliating, and cause them distress, inevitably sliding into the emotional realm and leading plaintiffs to press the alternative claim that their injury should be compensable as negligent infliction of emotional distress.

155. *See, e.g.*, O'Donnell v. HCA Health Servs. of N.H., Inc., 883 A.2d 319, 324 (N.H. 2005) ("To recover for emotional distress under a traditional negligence theory, we have consistently required plaintiffs to demonstrate physical symptoms of their distress regardless of physical impact."); Reynolds v. Highland Manor, Inc., 954 P.2d 11, 13 (Kan. Ct. App. 1998) (stating that the plaintiff must establish that the defendant's conduct was accompanied by immediate physical injury); Reilly v. United States, 547 A.2d 894, 896 (R.I. 1988) (indicating that a plaintiff must suffer physical injuries to recover damages for NIED).

156. *See, e.g.*, Larsen v. Banner Health Sys., 81 P.3d 196, 206–07 (Wyo. 2003) (finding that in limited circumstances where a contractual relationship exists, a negligence action can be maintained when the only alleged damages are great emotional pain).

157. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. l (AM. L. INST. 2012).

which negligent conduct is especially likely to cause serious emotional harm."[158] The Restatement commentary acknowledges, however, that "[c]ourts have not [yet] provided clear guidelines to identify precisely which activities, undertakings, or relationships will support liability."[159]

To make sense of the legal landscape, one of us (Jonathan Cardi) has constructed a framework for understanding the common law of NIED.[160] Cardi's starting point for predicting outcomes in NIED cases is to identify the recurring concerns that courts cite when limiting liability, namely "the verifiability of plaintiffs' claims, the potential flood of litigation and crushing liability, and in . . . relevant case[s], freedom of speech."[161] He then observes that even in light of these policy reasons for denying liability, courts often allow recovery in cases in which the defendant's culpability is high and there is a strong foreseeability of harm. Finally, Cardi detects an unarticulated consideration that operates in favor of imposing liability in NIED cases, namely when the facts of the case are "horrible," a consideration akin to the "outrageousness" test used in cases of intentional infliction of emotional distress (IIED).[162]

Although the issue is not free of doubt, plaintiffs can make a strong case for recovery for NIED in our target cases. For those states that typically insist on proof of physical manifestations or physical consequences, plaintiffs can testify to the physical pain they experienced as a result of the sexual encounter and can point to the fact of the defendant's sexual penetration as physical verification that a harm-causing incident actually occurred. In this respect, sexual penetration functions much like the old "physical impact" rule that long restricted NIED recovery to cases in which the defendant's conduct caused a physical impact or contact with the plaintiff, even if the major source of the plaintiff's suffering was categorized as emotional.[163]

In jurisdictions that generally require a contractual relationship between the parties, victims of consent-based rape will face the more difficult burden of convincing the court to stretch its qualifying relationship requirement to encompass intimate sexual relationships in addition to commercial/contractual relationships. The argument here is that the factors of trust and the expectations of the parties point in favor of liability in both

158. *Id.* § 47(b) & cmt. h.

159. *Id.* § 47 cmt. f.

160. W. Jonathan Cardi, *Net Negligence: Framework for Understanding Claims of Negligent Infliction of Emotional Distress in the Modern Era*, *in* THE RIGHT TO PRIVACY IN THE LIGHT OF MEDIA CONVERGENCE 298 (Dieter Dörr & Russell L. Weaver eds., 2012).

161. *Id.* at 299.

162. *Id.* at 302.

163. *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 819–21 (1990) (discussing the physical impact rule). Likewise, in cases not involving penetration, plaintiffs can point to the physical touching to provide the nexus to physicality that such courts seem to require.

contexts. In the contractual situation, it seems fair to impose a duty of reasonable care on a person who has voluntarily agreed to provide a service or benefit to the other. In the sexual setting, the source of the obligation arises not from contract but from normative standards of ethical behavior and decent treatment. At least some courts should be willing to rely on the increasingly strong norm against sexual exploitation to justify imposing a duty of reasonable care in cases of sexual abuse as well. Such an argument, however, is likely to be most persuasive in cases of sexual intercourse or penetration because many courts may balk at imposing a duty in "minor" cases of sexual touchings, such as kissing or groping where there is even less consensus about sexual ethics and expectations.

For states inclined to follow Restatement (Third) § 47(b), the provision is tailor-made for our focal cases and clearly fits the requirements of the section. It is quite easy to argue that a sexual encounter is the kind of "activity" that is "especially likely to cause emotional harm" if conducted negligently. Indeed, one of the examples given in the Restatement commentary under § 47 involves a spouse mentally abusing another spouse,[164] another instance of intimate partner abuse that is often placed on a continuum with rape by feminist scholars who have studied the dynamics of sexual and relationship abuse.[165]

Perhaps most importantly, the general policy concerns underlying courts' reluctance to impose NIED liability do not loom large in our focal cases. As mentioned above, concerns about the verifiability of injury are generally satisfied by proof that sexual penetration occurred. Although many defendants will deny that penetration occurred or, more frequently, that no wrong occurred because the encounter was consensual and reasonable, those denials involve the credibility of the parties and are relevant to the issue of breach of a duty, not to the antecedent question of whether a duty of reasonable care is owed in the first instance. Moreover, although allowing negligence claims in our focal cases will hopefully increase the paltry number of claims, this reform will hardly open the floodgates of litigation. Lawsuits against individual sexual offenders will rarely if ever involve huge numbers of victims, and even suits brought by a single plaintiff will likely still be relatively rare given the formidable cultural obstacles that depress claims by sexual assault victims who merely wish to get on with their lives. Our proposal is designed to open the door to negligence tort claims, not to displace the criminal law as the primary legal avenue for addressing claims of sexual abuse. Nor will permitting NIED claims against individual

164. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. f (AM. L. INST. 2012).

165. *See, e.g.*, Günnur Karakurt & Kristin E. Silver, *Emotional Abuse in Intimate Relationships: The Role of Gender and Age*, 28 VIOLENCE & VICTIMS 804, 804 (2013) (noting that emotional abuse is often a precursor to physical abuse).

offenders affect the free speech rights of defendants or result in crushing liability. Even in the cases in which multiple victims sue a single sexual predator, a ceiling on recovery is often set by caps on non-economic damages in many states. Finally, the facts of many rapes may strike the trier as horrible, particularly in instances in which the plaintiff is vulnerable and the defendant has acted cruelly or callously.

In short, the concerns that have fueled opposition to NIED liability as a general matter have little purchase in the context of NIED claims in our focal cases. Even for courts that are wary of classifying a plaintiff's injury as a physical harm, the undeniable physical aspects of the defendant's conduct should serve to distinguish this class of cases and assuage fears of triggering a slippery slope of NIED liability. Imposing a duty of reasonable care to protect against serious emotional harm is highly appropriate in this setting where the suffering of victims is predictable and curbing abusive behavior remains an elusive yet urgent goal.[166]

B. Comparative Fault

Perhaps the biggest issue facing courts that permit negligence claims in our focal cases is how to handle the defense of contributory/comparative negligence. This is one key respect in which pursuing a negligence claim potentially carries greater risks for plaintiffs than bringing an intentional tort claim. The discrepancy flows from the established doctrine that contributory negligence is no defense to an intentional tort claim but is generally available in cases tried under a negligence theory.[167] Thus, if a plaintiff sues the offender for battery, the plaintiff's recovery cannot be diminished or cut off because the jury believes the victim is also at fault. As mentioned earlier, defendant-oriented interpretations of the doctrines of actual and apparent consent are the site in which gender-based stereotypes and victim-blaming narratives are most easily incorporated into intentional tort litigation. The concern raised by feminists and other scholars is that the comparative negligence defense will simply reproduce the gender-related hurdles posed

166. The success of cases involving sexual touchings other than penetration will very much depend on the facts of the individual cases. For example, although groping in some cases can be expected to result in serious emotional harm and may be thought of as horrible, in other cases the groping may seem less noxious, leading courts to worry about the slippery slope problems that are not present in cases of sexual penetration.

167. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 50 (AM. L. INST., Tentative Draft No. 6, 2021).

by the consent doctrines,[168] making the availability of a negligence claim yet another weak remedy with little practical effect.[169]

It is unclear, however, whether the comparative negligence defense will be permitted in negligence cases for sexual assault.[170] Because courts have not yet dealt with negligence claims brought directly against a sexual offender, there is virtually no precedent precisely on point. In one unpublished rape case in which an offender was held liable for negligence, the court did allow the defense, and the jury assigned 40% of the fault to the plaintiff.[171] However, courts have not yet been faced with a "classic" date-rape case in which the plaintiff argues that the defendant acted aggressively to pressure her into having unwanted sex, while the defendant denies culpability and argues that he merely misread signals the plaintiff was sending. Will courts allow the comparative negligence doctrine to be used in such cases to assign a share of the responsibility to a plaintiff for being weak or unassertive, appearing sexually available (in the defendant's eyes), or for not doing more to resist the defendant's actions?[172]

A clue as to how courts might rule on this question can be found in the treatment of the comparative negligence defense in third-party rape cases in which a rape victim sues a third party, most often an institutional defendant (such as an employer, landlord, school, municipality, etc.), for failure to prevent the violation from taking place.[173] In such cases, courts have

168. *See, e.g.*, Ellen M. Bublick, *Citizen No-Duty Rules*: *Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1434 (1999) (describing the way in which the concept of reasonableness can lead to gender-biased comparative fault rulings).

169. It is clear, however, that defendants shoulder the burden of proof with respect to comparative negligence, though courts are divided as to whether the burden to prove consent in intentional tort cases rests with the plaintiff or defendant.

170. *See* Aaron D. Twerski & Nina Farber, *Extending Comparative Fault to Apparent and Implied Consent Cases*, 82 BROOK. L. REV. 217, 221 (2016) (advocating for the application of comparative fault in apparent or implied consent situations except in cases of sexual assault).

171. MacKenzie v. Fischer, No. 52908–1–I, 2004 WL 2378418, at *2 (Wash. Ct. App. Oct. 25, 2004). The facts of the case are not made altogether clear in the opinion, but it appears that the plaintiff's fault was in unreasonably believing that the man climbing into her bed and initiating sex was her boyfriend, rather than the defendant. The defendant's negligence was in unreasonably failing to verify that the plaintiff knew that it was him. *Id.*

172. *Cf.* Deborah L. Brake, *Back to Basics: Excavating the Sex Discrimination Roots of Campus Sexual Assault*, 6 TENN. J. RACE, GENDER, & SOC. JUST. 7, 32 (2017) (discussing the persistence of rape myths justifying sexual assault).

173. *See* Sarah Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403, 447 (2013) (explaining that, unlike defendants in two-party rape cases, third-party defendants may invoke the comparative fault defense); Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1380–86 (2010) (discussing third-party criminal attack cases); Bublick, *supra* note 12, at 61 (noting that the majority of sexual assault cases from 2000 to 2004 focused on the liability of third-party actors); Jessica Hynes, *Commentary on* Sharon P. v. Arman, Ltd., *in* FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS, *supra* note 147, at 217, 217–24 (describing the unsettled legal landscape of third-party criminal attack cases).

generally allowed defendants to assert a comparative negligence defense, often reflexively following the basic rule that comparative negligence is a defense in negligence litigation. In modified comparative fault jurisdictions, this means that the plaintiff's claim can even be barred if the percentage of fault assigned to the plaintiff is 50% or greater.[174]

Application of the comparative fault defense in third-party rape cases has been criticized by scholars who argue that the defense gives new life to the persistent cultural tendency to assign women the responsibility for protecting themselves by scrupulously monitoring their daily behavior. In a path-breaking article on the subject, Professor Ellen Bublick described the tenor of the civil third-party rape cases raising the victim-fault defense:

> The answer, from a broad swath of case law, seems to be that almost any conduct by a woman (and the case law makes clear that it's a woman) may subject her to an unreasonable risk of rape. According to the cases, a reasonable woman does not go outside alone at night to hail a cab or walk to her car in a hotel parking lot, especially if a man is outside. She does not take four or five steps inside the door before closing it. She double checks her door locks and is certain that every window is closed. She does not open the door when someone knocks or invite a salesman into her home or a man into her hotel room. She never drinks alcohol with a man, particularly if he is older or streetwise or someone she has recently met.
>
> . . . She is always on guard, and her fear of rape shapes every aspect of her life . . . .[175]

Bublick's solution for the excessive victim blaming found in third-party rape cases is for courts to adopt a specific no-duty rule with respect to victim fault, essentially abolishing the comparative negligence defense in this class of cases.[176] The no-duty rule declares, in effect, that it is unjust to make women (or other victims of sexual assault) shoulder the burden of preventing their own rapes and that every citizen, regardless of gender, "should be entitled to shape her life around the assumption that others will not

174. Chamallas, *supra* note 173, at 1381.

175. Bublick, *supra* note 168, at 1432–33 (footnotes omitted). A chilling example of Bublick's warning may be found in *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So.2d 70 (La. Ct. App. 1989), in which the court reduced the thirteen-year-old plaintiff's recovery against a group of older boys who raped her on the reasoning that she negligently accompanied them on a walk in the woods at their summer camp. *Id.* at 78. The Restatement (Third) of Intentional Torts expressly disclaims the *Morris* court's holding. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 50 cmt. d, illus. 5 & reporters' note to cmt. d (AM. L. INST., Tentative Draft No. 6, 2021).

176. Bublick, *supra* note 168, at 1416; *see also* Hannah Brenner Johnson, McCarty v. Pheasant Run, Inc*., 826 F.2d 1554 (7th Cir. 1987)*, *in* FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS, *supra* note 147, at 322, 332 (advocating the no-duty rule).

intentionally rape her."[177] Framed in gender-neutral terms, the main function of the no-duty rule is to protect the interest in sexual autonomy of both men and women.

To date, the no-duty approach has received a favorable mention in the Restatement (Third)[178] but has been applied only in cases involving the sexual molestation of minors,[179] a type of case in which there is far less inclination to blame the plaintiff and more cultural pressure to find an avenue for redress. Thus, it is still the case, for example, that an adult plaintiff's negligence recovery against a fast-food restaurant for failing to provide adequate safety precautions to secure its parking lot may be reduced for a commonplace action—such as walking back to her vehicle after using the restroom where there were men standing beside a parked car, an action that would not bar her from recovering against the rapist for intentional tort of battery.[180]

Whatever the merits of applying the comparative negligence defense in third-party rape cases, a qualitatively different issue is posed, we believe, when the defense is raised in negligence cases brought directly against the offender. As Bublick's examples suggest, many third-party rape cases involve stranger rapes in which an intruder gains access to a space that has not been made secure by the owner or other entity responsible for security. Although occasionally a plaintiff will sue a third party for facilitating or failing to prevent a date or acquaintance rape on the premises,[181] the kind of negligence that courts and juries are typically called upon to evaluate in third-party cases involves more familiar cost/benefit assessments about investments in safety or the screening and selection procedures for employees. In contrast, in non-stranger rape cases against the offender, the courts must grapple with a very different calculus involving norms against exploitative or oppressive behavior in the sexual realm, where negligence

177. Bublick, *supra* note 168, at 1416.

178. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. h (AM. L. INST. 2010).

179. *See, e.g.*, Christensen v. Royal Sch. Dist. No. 160, 124 P.3d 283, 287 (Wash. 2005) (holding that no contributory negligence defense applied where minor was abused by teacher); Gillespie v. Calcasieu Parish Sch. Bd., 179 So.3d 966, 972 (La. Ct. App. 2015) (same); Ammons v. Wash. Dep't of Soc. & Health Servs., No. C08–5548, 2013 WL 139541, at *5 (W.D. Wash. Jan. 10, 2013) (holding that no defense is available in the case of sexual abuse of a child by her counselor). *But see* Doe v. Bd. of Educ., 982 F. Supp. 2d 641, 663 (D. Md. 2013) (upholding a finding that a nine-year-old was contributorily negligent for failing to report abuse). Some courts have also disallowed a defense based on the plaintiff's fault in cases of assault of inmates by prison guards. *See, e.g.*, Spurlock v. Townes, 368 P.3d 1213, 1219 (N.M. 2016) (denying consideration of any theories of comparative fault).

180. *See* Storts v. Hardee's Food Sys. Inc., No. 98-3285, 2000 WL 358381, at *2 (10th Cir. Apr. 6, 2000) (reducing the plaintiff's damages by 30%).

181. *See* Malone v. Courtyard by Marriott L.P., 659 N.E.2d 1242, 1245 (Ohio 1996) (alleging that a hotel failed to respond to reports by hotel guests of an "abusive situation").

consists not in the failure to invest in material safety precautions before the fact but in a failure to take care to treat one's sexual partner reasonably and with respect during the sexual encounter.

Further, in many third-party rape cases, the nature of both the plaintiff's and the defendant's conduct may be roughly similar—for example, when the plaintiff alleges that a motel owner should have double-checked the locks and the plaintiff is faulted for not doing the same. Although a good argument can be made that the landowner is in a far better position to take precautionary measures than an individual guest,[182] it is not surprising that courts (and juries) are inclined to compare the two negligent acts, especially in a torts system staunchly committed to comparative fault. Most importantly, in third-party rape cases, there is a cultural tendency to view the institutional defendant as a "victim," in addition to the plaintiff, in the sense that the institutional defendant is also hurt by the culpable, often criminal, behavior of the individual offender.[183] In such situations, some may regard it as fair to reduce the plaintiff's recovery.

The calculus is fundamentally different in tort cases brought against the offender. In such cases, the defendant's fault centers on his creating an unreasonable risk of undermining a plaintiff's ability to consent or unreasonably believing the plaintiff has consented—an assessment by the fact finder that almost invariably takes into account the words and actions of the plaintiff. Thus, to determine whether the defendant acted unreasonably, the fact finder must determine how the defendant acted in relation to the specific plaintiff during the sexual encounter. In a negligence action, this initial inquiry as to the reasonableness of the defendant's conduct precedes and often obviates the need to determine separately the plaintiff's comparative negligence.

In our focal cases, we believe that this pivotal negligence determination should most often be the key to establishing liability, with a focus on the reasonableness of the defendant's actions under the circumstances. Unlike cases involving three actors, in which both the plaintiff and the third-party defendant could be seen as having an equal opportunity to prevent the offender from inflicting harm, lawsuits brought directly against the offender are more asymmetric, requiring the fact finder to decide whether one party abused the other. In these cases, it is contradictory to conclude that the defendant acted unreasonably under the circumstances for failing to secure the consent of the plaintiff, yet at the same time to fault the plaintiff for somehow not preventing or mitigating the defendant's negligent "mistake." Unless tort law is to embrace a radically relativistic view that each party's

182. *E.g.*, Johnson, *supra* note 176, at 329–30.

183. *See* Chamallas, *supra* note 118, at 171 (highlighting how an institutional defendant is seen as victimized and duped by the offender).

subjective perception of their actions is equally valid, there is no escaping the sometimes-difficult assessment of whether the defendant's behavior violated evolving societal norms of reasonableness, taking into account the perspective of *both* parties. In debatable cases, of course, the question of a defendant's negligence should be left to the jury.

To avoid the victim-blaming effects associated with application of the comparative negligence doctrine, we recommend that courts adopt Bublick's no-duty proposal for sexual assault cases brought directly against the offender.[184] The case for eliminating (or sharply curtailing) the comparative negligence defense—and reinforcing the value of a plaintiff's sexual autonomy—is even more compelling in this class of cases than in third-party rape cases. Keeping the focus of the litigation squarely on the reasonableness of the defendant's actions not only simplifies the tort action but also has the virtue of encouraging juries to look closely at the quality and the specifics of the defendant's behavior before deflecting attention away to other legal issues.

We recognize that there might be some cases in which a plaintiff's behavior seems clearly to be highly risky, in the sense of recklessly inviting the defendant to misperceive her desire to engage in sexual intercourse, even though it is also clear that the defendant's conduct was negligent. In such rare instances, courts might wish to use their authority to withdraw the no-duty rule to allow a comparative negligence defense. Indeed, although citing a dearth of case law comparing reckless plaintiffs and negligent or reckless defendants, the Restatement (Third) of Torts: Intentional Torts to Persons allows comparative fault in some situations.[185]

C. The Mutually Exclusive Problem

If negligence claims are permitted in rape cases, an important preliminary question is whether both an intentional tort claim and a negligence claim may be brought in one lawsuit or whether the claims should be treated as mutually exclusive, requiring the plaintiff to elect only one claim.[186] As a strategic matter, if a plaintiff is required to elect which theory to pursue, she runs the risk of misjudging the fact finder's evaluation of the

184. Bublick, *supra* note 168, at 1416.

185. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 50(c) (AM. L. INST., Tentative Draft No. 6, 2021).

186. A separate question is whether a jury will be permitted to find a defendant liable for both an intentional tort and for negligence even though double recovery is not permitted. It is possible that a court will permit both claims to be brought but will regard the claims as inconsistent. In such jurisdictions, although a plaintiff will not be required to elect which claim to bring in advance, the jury will be instructed that they must choose which (if any) claim has been proven. If juries are not permitted to find liability on both claims, plaintiffs may be inclined to forego one claim based on strategic calculations involving the availability of insurance, punitive damages, or other differences between the two theories of liability.

evidence and may miss her chance to bring a winning claim. If both claims are allowed, plaintiffs will typically argue them in the alternative. This opportunity allows plaintiffs to hedge their bets and not be penalized for failing to predict whether a jury will view the defendant's conduct as intentional or negligent.

Roughly speaking, the argument that intentional tort and negligence claims are mutually exclusive is based on the notion that if the alleged invasion of the plaintiff's body qualifies as an intentional tort (and sometimes a crime as well), plaintiffs should not be able to circumvent the requirements of proving an intentional tort simply by framing their case as a negligence claim, the culpability elements of which are less exacting. The counterargument is that the (physical and emotional) harm arising in such cases should be actionable in negligence because the gravamen of the harm is caused by the defendant's lack of reasonable care. It is irrelevant that the defendant can escape criminal liability or is not liable in tort for battery and assault because the defendant lacks the requisite intent or apparent consent can be invoked to relieve the defendant of liability.[187] The mutually exclusive issue is particularly important in our focal cases, in which there is often disagreement and differing perspectives about the facts, including the mindset of the defendant. In many date- and acquaintance-based rapes, for example, not only do parties often have a radically different account of what happened (e.g., the words said prior to penetration, the exact conduct that occurred, the events leading up to the encounter, etc.), but there are also often basic disagreements about the intentions and knowledge of the other party. To be sure, in some of these cases, the defendant will sincerely believe that the plaintiff consented, although a jury might ultimately be presented with enough evidence to conclude that the defendant acted unreasonably in doing so. However, in other cases—perhaps a majority of cases—the defendant will have acted aggressively, knowingly exploiting the plaintiff, even though he now (somewhat disingenuously) contends that he had good reason to believe she was consenting. In this latter subset of cases, although the plaintiff believes that the defendant intentionally raped her, she will often be advised by her attorney that it will be difficult to prove intent (or lack of apparent consent). In this subset of cases, allowing a plaintiff to assert both theories can be of great strategic value, despite her subjective belief that the defendant is guilty of an intentional tort.

187. Similar arguments are replayed in the insurance context in which insurers invoking intentional-tort exclusions to their policies have convinced some courts that recognition of negligence and assault and battery is mutually exclusive or "a contradiction in terms," United Nat'l Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 354 (2d Cir. 1993), while other courts require insurers to defend and indemnify insureds against negligence claims even when intentional torts have also been alleged, Benjamin v. Amica Mut. Ins. Co., 140 P.3d 1210, 1218 (Utah 2006), discussed *infra* text accompanying notes 216–219.

Outside the context of sexual assault, courts often initially allow plaintiffs to plead intentional torts in the alternative to negligence—but then at the summary judgment stage, in jury instructions, and even occasionally on motions for judgment notwithstanding the verdict, courts state that the claims are mutually exclusive.[188] These courts look to discern "the substance" or "essential character" of the claim[189] and take the rigid position "that intentional conduct cannot be negligent conduct and that negligent conduct cannot be intentional conduct."[190]

Other courts, however, have allowed both claims to proceed, permitting negligence claims for behavior that may also amount to a battery. A Washington Supreme Court case involving a police shooting of a mentally ill man is most instructive. In *Beltran–Serrano v. City of Tacoma*,[191] a police officer's conduct preceding the shooting was alleged to be negligent for failing to respond properly to the victim's obvious signs of mental illness and for unreasonably escalating the situation by preventing the man from walking away.[192] The court allowed both a claim for negligence and a claim for battery, noting that "ordinary negligence principles apply in situations that involve both a claim of battery or unprivileged use of force *and* the duty to act reasonably in carrying out law enforcement functions."[193] The court explained that negligence could be located particularly "in the series of actions leading up to the decision to shoot" and required an examination of the totality of the circumstances involved in the encounter.[194] Citing cases from other jurisdictions that had also allowed negligence claims for pre-shooting behavior by police officers,[195] the court regarded the negligence claim based on the course of conduct leading up to the shooting as distinct

188. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS reporters' note to scope note, at 12–13 (AM. L. INST., Tentative Draft No. 1, 2015); *see, e.g.*, Baska v. Scherzer, 156 P.3d 617, 627–28 (Kan. 2007) (affirming the trial court's grant of summary judgment on the plaintiff's negligence claim because the "substance" of the negligence claim was that of an intentional tort, for which the statute of limitations had already passed); Jones v. Marshall, 750 S.W.2d 727, 728 (Mo. Ct. App. 1988) (reversing trial court's negligence instruction because the defendant's acts were intentional and "theories of negligence and intentional tort are contradictory and mutually exclusive"); Waters v. Blackshear, 591 N.E.2d 184, 185–86 (Mass. 1992) (entering judgment notwithstanding the verdict for the defendant, despite the jury finding that the defendant's act of putting a firecracker in the plaintiff's shoe was negligent, on the grounds that "intentional conduct cannot be negligent conduct and . . . negligent conduct cannot be intentional conduct").

189. *Baska*, 156 P.3d at 627.

190. *Waters*, 591 N.E.2d at 185.

191. 442 P.3d 608 (Wash. 2019).

192. *See id.* at 610 (describing the plaintiff's allegations that the defendant officer observed the plaintiff digging a hole and then firing at him as the plaintiff tried to run away).

193. *Id.* at 612.

194. *Id.*

195. *Id.* at 612 (citing, in support of this proposition, Hayes v. County of San Diego, 305 P.3d 252 (Cal. 2013), and District of Columbia v. Chin, 839 A.2d 701 (D.C. 2003)).

from the claim for assault and battery and was careful to "avoid mischaracterizing [the] case as involving 'nothing but' an intentional tort."[196]

The analysis in *Beltram–Serrano*, with its focus on events preceding the shooting and the totality of the circumstances, has obvious parallels to our central argument for giving plaintiffs an option to sue for negligence in the rape context. In our focal cases we also assert that negligence can be found in defendants' actions leading up to the act of penetration, specifically when defendants create conditions that undermine plaintiffs' ability to consent freely or take a risk that a plaintiff has not in fact consented. If *Beltram–Serrano*'s reasoning is applied to the rape context, it provides support not only for our proposal to permit negligence claims but also direct support for allowing plaintiffs to allege both claims of negligence and battery, and to argue in the alternative.

Unfortunately, the courts' struggle with the mutually exclusive problem has not generally been analyzed by legal scholars, despite its seemingly fundamental character. One exception is an early law review article by Professor Henry Edgerton, who offered a forceful argument that the two claims are not inconsistent because intentional tort claims are based on state of mind while negligence claims are based on conduct.[197] Under his view, the same set of facts could give rise to two distinct claims based on different legal theories, similar to how contemporary courts now permit both negligence and strict liability claims to be brought for physical injuries produced by defective products or abnormally dangerous activities. Edgerton's "it's just a different theory" approach presumably would authorize plaintiffs to bring both intentional tort and negligence claims without even having to argue in the alternative.

Admittedly, things get a little messier when courts are asked to apply the different-theory approach to cases involving emotional harm. Thus, there has been a reluctance to allow an NIED claim if the claim could have been brought as an IIED case, thereby allowing plaintiffs to circumvent the requirement of proving that the defendant's conduct was outrageous.[198] However, even in this context, results vary. For example, one court did allow an NIED claim to go to trial where an investigator attempted to force a plaintiff to perform oral sex on him, even though an IIED case arguably could

196. *Id.* at 612.

197. Henry W. Edgerton, *Negligence, Inadvertence, and Indifference; the Relation of Mental States to Negligence*, 39 HARV. L. REV. 849, 869–70 (1926); *see also* DOBBS ET AL., *supra* note 95, § 31, at 78 ("If the evidence warrants either a finding that the defendant acted with substantial certainty or that he took an unreasonable risk, the jury might be permitted to find either negligence or intent."); Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 928–31 (2004) (arguing against mutual exclusivity).

198. *See, e.g.*, Boyles v. Kerr, 855 S.W.2d 593, 595–96 (Tex. 1993) (disallowing an NIED case involving surreptitious videotaping of the plaintiff having sex).

have been brought because the defendant knew of the plaintiff's vulnerability (she was a rape survivor and the investigator had been hired by the plaintiff's attorney).[199] The hesitancy of courts to allow both IIED and NIED claims may stem from a distinctive concern with limiting liability claims for emotional distress generally, a concern not present in physical harm cases.

Not surprisingly, there is little case law on point in the context of sexual assault specifically. In one unpublished appellate case, *MacKenzie v. Fischer*,[200] a mistaken identity case, the court allowed the plaintiff to bring a negligence claim for sexual assault even though the jury found that the victim had consented to battery (because the plaintiff's consent was not vitiated by her mistaken belief that the defendant was her boyfriend).[201] The court ruled that a finding of consent was not incompatible with a negligence claim based on the same conduct.[202] In another unpublished case, an appellate court allowed a jury verdict for the plaintiff to stand in a sexual assault case in which the plaintiff alleged that the defendant had intercourse with her after she had taken a sedative pain medication.[203] The jury's answers to interrogatories revealed that they concluded that the defendant had not committed an intentional tort but was liable for negligence because he "kn[e]w or ha[d] reason to know" that the plaintiff was helpless at the time of intercourse.[204]

If our proposal gains traction, we can expect that defendants will resist Edgerton's different-theory approach and will characterize rapes as qualitatively different from negligent conduct. On this view, the two claims should be regarded not only as inconsistent but as mutually exclusive in the sense that allowing a plaintiff to simultaneously pursue both negligence and intentional tort claims would threaten to eviscerate the careful limitations placed on recovery for intentional torts or the reasoning underlying differences in collateral rules such as statutes of limitations. Defendants may raise the specter of ordinary battery cases (e.g., the classic punch in the nose) being reframed as negligence cases (although in most battery cases, defendants may not plausibly claim that they mistakenly hit the plaintiff). In this respect, our focal cases are unusual because defendants frequently assert that the incident was a misunderstanding based on the differing perspectives of the parties to the encounter.

In this uncertain legal landscape, there is no predicting what position courts might ultimately take. In many respects, the mutually exclusive

199. Bacas v. Falgoust, 760 So.2d 1279, 1281 (La. Ct. App. 2000).

200. No. 52908–1–I, 2004 WL 2378418 (Wash. Ct. App. Oct. 25, 2004).

201. *Id.* at *2.

202. *Id.* at *3.

203. Florek v. Vannet, No. 31-CV-15-2675, 2019 WL 1320619, at *1, *3 (Minn. Ct. App. Mar. 25, 2019) (relying on a negligence per se theory).

204. *Id.* at *1.

question simply recapitulates the debate underlying the more basic question of whether a negligence claim should ever be allowed. If a court is persuaded that the law should protect individuals against negligent conduct resulting in sexual penetration—whether the harm is classified as physical or emotional—there will likely be less concern for protecting the "integrity" of intentional torts or for keeping the domain of intentional torts and negligence separate and distinct. Multiple analogies can be enlisted to support pursuing both claims, including battery claims for intentional killings and negligence claims for wrongful death, or tort claims for fraud and negligence claims for negligent misrepresentation. Particularly if courts consider these cases to involve physical harm, they will not have to contend with the skepticism surrounding NIED more generally and can approach negligence-based claims for sexual assault as ordinary negligence claims that simply reinforce tort law's fundamental commitment to protection against physical harm.

However, if courts cling to the traditional view that the sexual-conduct claims are exceptional and that the legal doctrine of consent should be the sole touchstone of tort liability, procedural arguments about the mutual exclusivity of the two claims will appear more convincing. The determination to police the boundaries of intentional tort and negligence is at its soundest when there are doubts about the validity of the negligence claim. At bottom lies the deeper policy determination of whether courts regard the status quo as acceptable or whether they believe that the huge gulf between the incidence of rape and the tiny number of tort claims is unacceptable and support expanding the reach of tort law to encourage plaintiffs and their lawyers to bring more claims.

D. Availability of Insurance

Casting a shadow over the mutually exclusive debate as well as the basic question of allowing a negligence claim is the question of the availability of insurance. The problem stems from the existence of intentional-acts exclusion clauses in insurance policies that deny coverage for intentional torts (as opposed to negligence claims).[205] As practicing attorneys and insurance scholars are well aware, insurance drives litigation[206]—so much so that plaintiffs' lawyers far prefer suing a defendant with insurance than even

205. For a general discussion, see RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 105 reporters' note to cmt. f (AM. L. INST., Tentative Draft No. 1, 2015). Insurance policies also often provide coverage only for an "occurrence" that results in "bodily injury," a requirement that might preclude injuries from sexual assaults that courts view as causing only pure emotional harm. Weiner, *supra* note 14, at 968–69.

206. Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1114–15 (1990).

a wealthy defendant who has no insurance.[207] "Without insurance, there is typically no reliable pool of assets from which to satisfy judgments: retirement assets are shielded from tort judgments by federal law, and jointly owned residences are often not available for tort compensation."[208] The upshot is that the lack of insurance coverage means that rape (and domestic violence) survivors often have a very difficult time finding a lawyer to take their case, what Merle Weiner describes as a "justice gap" for victims of gender-based violence and abuse.[209]

To close the gap, feminist scholars have mainly focused on curing the insurance problem in intentional tort claims. For example, in 2001, Jennifer Wriggins proposed a plan that would include coverage against domestic violence as part of an individual's mandatory automobile liability insurance policy.[210] A more recent proposal by Merle Weiner would create a new insurance product—civil recourse insurance—which would require insurers to pay the costs of a plaintiff's attorney's fees and other legal expenses in sexual abuse cases, similar to prepaid legal services plans in Germany and the United Kingdom.[211] So far, however, attempts to expand insurance coverage for intentional torts have run into "moral hazard" arguments from insurers, often accepted by courts,[212] that allowing insurance for intentional torts is against public policy, citing the distasteful prospect of perpetrators being able to purchase insurance to protect themselves against their own aggression and worries that insurance would increase victimization because perpetrators would purportedly have less incentive to refrain from

207. *See* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 281–83 (2001) (describing an unwritten "union rule" that plaintiffs' lawyers will not pursue money from individual defendants).

208. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 71 (2010); *see also* Weiner, *supra* note 14, at 971 (explaining that tortfeasors with assets are "judgment-proof in law" even when they are not "judgment-proof in fact").

209. Weiner, *supra* note 14, at 979.

210. Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 152 (2001).

211. Weiner, *supra* note 14, at 962–63.

212. *See, e.g.*, Altena v. United Fire & Cas. Co., 422 N.W.2d 485, 490 (Iowa 1988) ("[I]nsurance to indemnify an insured against his or her own violation of criminal statutes is against public policy and therefore void."); Regence Grp. v. TIG Specialty Ins. Co., 903 F. Supp. 2d 1152, 1161 (D. Or. 2012) (recognizing the long-held principle that a clause in an insurance contract purporting to indemnify the insured for damages resulting from his intentional conduct is unenforceable on public policy grounds); Nat'l Fire Ins. Co. of Hartford v. Lewis, 898 F. Supp. 2d 1132, 1146 (D. Ariz. 2012) (stating that public policy prohibits indemnifying a person against loss resulting from his willful wrongdoing); Chiquita Brands Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA., 988 N.E.2d 897, 900 (Ohio Ct. App. 2013) (same); Pins v. State Farm Fire & Cas. Co., 476 F.3d 581, 583 (8th Cir. 2007) (applying South Dakota law) (same); J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 992 N.E.2d 1076, 1081 (N.Y. 2013) (same).

violence.[213] In turn, strong counterarguments have been mounted disputing the contention that potential abusers are currently deterred by the threat of lawsuits and pointing out that survivors' need for compensation also constitutes a strong public policy.[214] Although no reform has yet taken hold to expand coverage for intentional torts, the debate is not over, as reflected by a comment in the Restatement of the Law of Liability Insurance stating that courts need not interpret intentional tort exclusions broadly due to the public policy of protecting the victim's interest in compensation.[215]

The only other route to insurance for plaintiffs is to bring negligence claims for sexual assaults in hopes of avoiding the intentional acts exclusion. This strategy directly implicates our proposal and increases the prospects of victims being able to tap into offenders' insurance policies. After all, courts are apt to treat negligence claims as presumptively triggering coverage under most insurance policies. Thus, in *Benjamin v. Amica Mutual Insurance Co.*,[216] a case involving two women who sued their co-worker for raping them, the Utah Supreme Court ruled that the insurer had a duty to defend and indemnify the insured with respect to a successful claim for negligent infliction of emotional distress arising from the assault.[217] The court declared that the victims had a right to allege negligence as an alternative theory of liability, even though they also alleged that the co-worker committed an intentional tort.[218] Significantly, the court noted that negligence liability (and the right to access insurance) was appropriate in the case because the jury ruled against the plaintiff on the intentional tort claim but for the plaintiff on the negligence claim, apparently believing that the sexual contact was "consensual" but "that any emotional distress associated with the sexual contact was the result of [the insured's] negligent belief that [the victim] had consented."[219] *Benjamin* is a thus a good example of our focal cases in which the claim is based on the unreasonableness of a defendant's beliefs or actions, even when the technical requirements of lack of consent are not proven.

However, the issue of availability of insurance is more complicated than it initially appears, in large part because courts are used to thinking about

213. *See* Cont'l Ins. Co. v. McDaniel, 772 P.2d 6, 8 (Ariz. Ct. App. 1988) (noting that a perpetrator would have "the security of knowing that his insurance company will 'pay the piper' for the damages"); W. Cas. & Sur. Co. v. W. World Ins. Co., 769 F.2d 381, 385 (7th Cir. 1985) (observing that an insured person will take greater risks because the insured bears less of the cost of his conduct).

214. Wriggins, *supra* note 210, at 165–67.

215. *See* RESTATEMENT OF THE LAW: LIABILITY INSURANCE § 45 cmt. g (AM. L. INST. 2019) ("[T]he presence of liability insurance can promote, rather than hinder, the objectives of tort law, by providing compensation for the victim . . . .").

216. 140 P.3d 1210 (Utah 2006).

217. *Id.* at 1216.

218. *Id.* at 1214–15.

219. *Id.* at 1215 n.2.

sexual assaults exclusively as intentional tort claims and have become comfortable enforcing the intentional acts exclusion. Thus, using terminology that suggests that a negligence claim is merely a workaround strategy (rather than a supportable theory), some courts have been reluctant to allow plaintiffs to circumvent the intentional acts exclusion bar by "underlitigating" their intentional tort claims and framing them as negligence claims.[220] Courts in such cases are likely to scrutinize the facts to determine whether framing the case as a negligence case is plausible. In one case, for example, the New York Court of Appeals refused to allow the plaintiff to reach an insurance policy where the tortfeasor had molested children while his wife was babysitting.[221] The plaintiff had attempted to frame the case as a negligence case, claiming that the offender did not intend to cause harm but only wanted to "comfort" the children.[222] The court ruled for the insurer based on the public policy against sexual abuse of children, concluding that intent to do harm is inherent in the act of child abuse.[223] However, in an earlier case, the same court held that an adult woman who had been sexually assaulted by her dentist was covered by a professional liability insurance policy under the theory that coverage was allowed for unintentional injuries resulting from intentional acts.[224] The different results appear to hinge on the different identities of the victims (children versus an adult woman) and the specific language of the policies.

Without trying to resolve the debate surrounding the availability of insurance, we note only that the issue depends not only on judicial construction of the exact language used in insurance policies but also on each state's evaluation of competing public policy considerations. With respect to both intentional tort and negligence claims, the question of insurance coverage often involves complexities beyond substantive tort law.

One point should not be lost in the controversy over insurance: whether sexual assault plaintiffs who pursue negligence claims should be able to reach insurance policies is a separate issue from the basic question of whether plaintiffs should be authorized to bring a negligence claim for sexual assault

220. *See* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEXAS L. REV. 1721, 1753 (1997) (explaining that courts sometimes conduct an inquiry into whether a complaint has been drafted as a negligence claim solely to bring an insurer into the case).

221. Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 369 (N.Y. 1992).

222. *Id.* at 369.

223. *Id.* at 369–70. New York courts have also sided with insurers in claims involving non-sexual injuries, refusing to allow the insured to "turn" claims of batteries into negligence. United Nat'l Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 354–55 (2d Cir. 1993); *see also* State Farm Fire & Cas. Co. v. Tippett, 864 So.2d 31, 36 (Fla. Dist. Ct. App. 2003) (denying insurance coverage for drugged date-rape victim who alleged that the perpetrators of the rape were negligent in failing to realize she was incapacitated).

224. Pub. Serv. Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810, 814 (N.Y. 1981).

in the first instance. Some courts have expressly so stated and have severed the two issues when adjudicating cases.[225] While the availability of insurance is an important ancillary issue, it is not the driving force behind our proposal. If our proposal were accepted by courts and negligence claims became normalized in the sexual assault context as legitimate claims in their own right, we suspect that courts would also be more likely to rule that such negligence claims do not fall within the intentional acts exclusion. The idea of underlitigating a sexual assault case would then lose some of its meaning.

V. The Social Context: Affirmative Consent and #MeToo

Our proposal to allow negligence claims for rape might strike some as an uphill battle, given the strong tendency to regard rape exclusively as an intentional tort with historical ties to the criminal law. We appreciate that treating certain rape cases as negligence claims entails a resetting of cultural attitudes as well as creative legal arguments. However, we believe that such a resetting is already well underway. As with any law-reform proposal, legal actors will not be evaluating our proposal in a vacuum but in a dynamic social context in which rape and sexual assault have once again emerged as high-profile issues. Specifically, two related social movements—the Title IX affirmative consent movement and the #MeToo movement—have paved the way for a proposal such as ours by raising awareness of the pervasiveness of rape and sexual assault in our culture and providing an impetus for legal reforms that offer more effective remedies for victims. When viewed as part of a constellation of reforms designed to reduce the incidence of sexualized violence by making such offenses more costly, our proposal is not so radical.

In retrospect, the Title IX affirmative consent movement was a precursor to the #MeToo movement. Arising on the heels of the 1990s campus rape crisis, the affirmative consent movement was spearheaded by a grassroots mobilization of college women, including victims of sexual assault, who charged that rape was widespread on their campuses and that their institutions ignored, minimized, or otherwise failed to respond equitably to their complaints. In response, the Obama Administration interpreted Title IX to usher in more protective policies governing student disciplinary actions, encouraging hundreds of colleges to adopt affirmative consent as part of their disciplinary codes.[226] Although some states have also adopted

225. *See* Martinmaas v. Engelmann, 612 N.W.2d 600, 609 (S.D. 2000) (emphasizing that the question of the viability of a medical malpractice claim for sexual misconduct during a gynecological exam is separate from the question of insurance coverage).

226. *See* Nancy Chi Cantalupo, *The Title IX Movement Against Campus Sexual Harassment: How a Civil Rights Law and a Feminist Movement Inspired Each Other*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES, *supra* note 139 (describing the Title IX movement's genesis during the Obama Administration and the nationalization of the

affirmative consent in their criminal[227] or civil statutes[228] governing rape more generally, the concept still represents the minority view on consent in the United States.

Going beyond the mandate that no means no, affirmative consent is commonly associated with the slogan *only yes means yes*. At its core, affirmative consent means that sexual partners have a mutual obligation to obtain active, knowing permission from their partner before engaging in sexual conduct. The affirmative consent duty means that actors cannot proceed in the face of silence, lack of resistance, or ambiguity, later claiming that they were mistaken about their partner's wishes. It is often associated with a "performative" account of consent that focuses not on a person's internal desires or mental state, but on their actions.[229] It generally requires the initiator in sexual encounters to secure either an uncoerced, verbal *yes* from the person consenting, or its behavioral equivalent (e.g., to "stop, explicitly seek permission, and obtain permission").[230] Although not often expressed in the terminology of negligence, the affirmative consent obligation in effect imposes a duty to avoid being negligent with respect to the wishes of one's sexual partner, including an affirmative duty to act to prevent misunderstandings or miscommunications.

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movement); Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 430–38 (2016) (charting various consent standards, often explicitly adopted by universities); Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 671–72 (2016) (citing increasing recognition of the necessity of consent in school and college disciplinary standards); Jake New, *The 'Yes Means Yes' World*, INSIDE HIGHER ED. (Oct. 17, 2014), https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies [https://perma.cc/6EHG-QYSH] (indicating that a growing number of colleges are adopting affirmative consent policies). *See generally, e.g.*, MODEL PENAL CODE: SEXUAL ASSAULT & RELATED OFFENSES § 213.6 (AM. L. INST., Tentative Draft No. 4, 2020) (demonstrating a trend in favor of requiring affirmative consent).

227. In the criminal context, concerns about mass incarceration and overcriminalization have slowed down reform efforts in the United States. These concerns have little bearing on tort law. Treating rape as negligence is unlikely to impose a disproportionate burden on poor or minority defendants, particularly because plaintiffs and their attorneys generally prefer to sue defendants who have assets or insurance. Unlike criminal law, there is also no need to struggle over how to classify sexual assaults (as either misdemeanors or as felonies) because the relative seriousness of defendant's conduct and its impact on the plaintiff can be reflected in the amount of damages. Other countries, however, have incorporated affirmative (or mutual consent) into their criminal laws. For example, Sweden amended its criminal law to provide that sex without mutual consent is rape, creating two new offenses of negligent rape and negligent sexual abuse. Vanessa Romo, *Swedish Law Declares Sex Without Consent Is Rape*, NPR (May 25, 2018, 6:07 PM), https://www.npr.org/sections/thetwo-way/2018/05/25/614438565/swedish-law-declares-sex-without-consent-is-rape [https://perma.cc/9VGT-LTST].

228. *E.g.*, N.Y. EDUC. LAW § 6441 (McKinney 2015); CAL. EDUC. CODE § 67386 (West 2015).

229. For fuller discussion of the difference between a "mental state" and a "performative" account of consent, see JOAN MCGREGOR, IS IT RAPE?: ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 116–35 (2005), and WERTHEIMER, *supra* note 43, at 145–47.

230. Gruber, *supra* note 226, at 431–39 (discussing varying formulations of affirmative consent).

During the deliberations on the Restatement (Third) of Torts: Intentional Torts to Persons, the ALI debated whether to adopt affirmative consent for intentional tort actions. Although acknowledging the huge gap between the incidence of rape and the number of tort claims,[231] the members ultimately decided to leave the matter to further development in the law of individual states.[232] The Restatement does, however, suggest that courts ought to at least consider adopting affirmative consent in cases of sexual penetration and outlines the following reasons for doing so:

> First, because of the potentially devastating emotional and physical consequences that an unwilling person might suffer, a jurisdiction might deem it appropriate, in the tort context, to require an actor who initiates sexual intercourse to be quite certain that the other is willing to proceed. Second, the unwilling person's interests in bodily integrity and sexual autonomy arguably demand this degree of protection. Third, social norms are undoubtedly evolving towards an affirmative-consent standard in this setting. Fourth, in some jurisdictions, the criminal law punishes an actor who initiates sexual penetration with another if the actor knows or should know that the other has not affirmatively or positively communicated willingness, either by words or conduct. If a jurisdiction's legislature is prepared to impose the harsh sanctions of the criminal law on a defendant who did not obtain the other person's affirmative consent, the courts of the jurisdiction are justified in imposing the less onerous burden of tort liability under the same circumstances.[233]

Thus, although the Restatement leaves room for adoption of affirmative consent, its black-letter provisions still endorse traditional interpretations of actual and apparent consent, creating tension with the main tenet of affirmative consent that places a duty on the initiating party to assure that the other party has affirmatively agreed to the conduct. Perhaps more importantly, the Restatement's definition of apparent consent takes the defendant's perspective, finding consent when the *defendant* reasonably

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231. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 cmt. c (AM. L. INST., Tentative Draft No. 6, 2021).

232. *Id.* § 18 cmt. l.

233. *Id.* Dobbs adds to this reasoning:

> The downside of the objective [apparent consent] rule is that appearances may be misleading. When the people involved differ in gender, ethnicity, or culture, and especially when the conduct in question touches intimate or sensitive matters such as sexual relations, the defendant must not presume too quickly to interpret conduct, custom, or even words as consent. In particular, defendants who possess power or authority over others must be wary of the possibility that appearance of consent is misleading. For example, employers, psychiatrists, and priests must recognize that employees, patients, and parishioners do not necessarily feel free to reject sexual advances and that the appearance of consent is the result of other forces.

DOBBS ET AL., *supra* note 95, § 106, at 326–27 (footnotes omitted).

believes that the other party has consented.[234] Thus, to some extent, the Restatement provisions on consent still reflect the legacy of the criminal law; although there is no legal obligation to prove physical force on the part of the defendant nor resistance by the victim, the defendant's perception of the encounter still takes precedence over the plaintiff's experience and viewpoint, making it unlikely that tort law will do much to change the status quo.

As explained previously, we do not regard our proposal to endorse negligence claims in our focal cases as a substitute for intentional tort claims but rather as a supplement or additional avenue of recovery. Thus, if a state determines that it wishes to adopt affirmative consent to govern intentional tort claims for sexual assault, nothing in our proposal would or should prevent it from doing so. Instead, the only question will be how such a court addresses the mutually exclusive question addressed earlier.[235] In our view, the best solution would be to permit the plaintiff to bring both claims, arguing in the alternative.

Nor does our proposal require a court to accept the concept of affirmative consent, specifically because as a doctrinal matter consent plays no role in negligence cases. However, our proposal is compatible with the basic idea of affirmative consent, even though there are some salient differences. Like affirmative consent, our proposal imposes a duty on persons who initiate sex to act reasonably, making it clear that there can be tort liability if a defendant acts unreasonably in response to a plaintiff's silence or ambiguous conduct. Additionally, permitting negligence claims allows sexual assault plaintiffs to avoid the strictures of actual and apparent consent, freeing juries to conclude that although the plaintiff technically "consented"—by, for example, reluctantly saying yes to the defendant's persistent urgings—the defendant nevertheless acted unreasonably in pressuring the plaintiff to give her "consent" or in exploiting the situation to his advantage. As a negligence claim, moreover, plaintiffs will have access to insurance that is unavailable even in those jurisdictions that adopt affirmative consent for intentional torts. Finally, although the burden of proof is on the plaintiff to prove the defendant's negligence, our proposal does not explicitly endorse the defendant's perspective over the plaintiff's but follows the usual tort rule of embracing a neutral or disinterested third-party perspective.

In a few respects, however, our proposal could be viewed as less protective of plaintiff's interests than an affirmative consent regime. Evaluating our focal cases through a negligence lens does not definitively

234. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 cmt. k (AM. L. INST., Tentative Draft No. 6, 2021).

235. *See supra* subpart IV(C).

answer the question of whether the initiator of sexual conduct must always secure agreement from his partner (by words or a behavior equivalent). And, as discussed earlier,[236] it raises the prospect of reducing plaintiffs' recovery through operation of the comparative negligence defense.

Should a court wish to fully endorse affirmative consent within the negligence framework, a court might create a breach-of-duty rule triggering negligence per se in the absence of affirmative consent. Indeed, we would endorse such a rule. At a minimum, courts ought to adopt a negligence per se rule in the presence of a plaintiff's expression of non-consent—i.e., a per se rule that no means no.

In addition to its links to affirmative consent, our proposal is very much in line with the #MeToo movement. As it has developed in its current, hashtag social-media form,[237] #MeToo has encouraged women to speak up about their experiences with sexual assault, harassment, and discrimination, and has amplified the voices of those women who do speak up.[238] #MeToo stories often carry with them detailed allegations of abuse perpetrated by specific prominent individuals, resulting in several high-profile resignations. It has also intensified efforts to develop a more victim-centered definition of consent that does not privilege the viewpoint of the defendant, particularly in cases involving aggressive or persistent behavior used to induce the target's compliance.[239]

The movement gained such momentum in its early stages that it amassed convincing "cultural proof" that rape and other forms of sexualized exploitation remain ubiquitous in our society, and that the law, including tort law, has largely been ineffectual in curbing abuses.[240] Tristin Green explains:

> Much of the immediate change fostered by #MeToo . . . was extralegal in the sense that that the sheer force of social movement pressured and shamed companies and other organizations to fire offenders and investigate abuses; indeed, #MeToo may have been

236. For a discussion of comparative fault, see *supra* subpart IV(B).

237. A decade before the social media movement, African-American social activist Tarana Burke first used the *me too* slogan in connection with her organization to provide support and empathy to young women and girls of color who had survived sexual violence. Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 51–52 (2019).

238. Shelley Cavalieri, *On Amplification: Extralegal Acts of Feminist Resistance in the #MeToo Era*, 2019 WIS. L. REV. 1489, 1491–92 (2019).

239. *See, e.g.*, Fiona Chen, *Why the Aziz Ansari Story and Discussions of Grey Areas Are Central to the #MeToo Movement*, THE TECH (Jan. 25, 2018), https://thetech.com/2018/01/25/me-too-aziz-ansari [https://perma.cc/2KWC-NA67] (advocating an affirmative consent standard to combat sexual violence stemming from subtle coercion that relies on socially enforced power imbalances).

240. Jessica A. Clarke, *The Rules of #MeToo*, 2019 U. CHI. LEGAL F. 37, 42–45 (2019); Chamallas, *supra* note 14, at 68.

> born out of frustration with more traditional legal channels, in this sense something of a revolution.[241]

#MeToo has, however, extended into the legal sphere, catalyzing legislative changes that target, for example, short statutes of limitations for harassment and sexual abuse claims,[242] defendant-oriented doctrines in state antidiscrimination laws,[243] and the use of nondisclosure agreements and arbitration provisions in employment contracts and settlement agreements.[244] Beyond these reforms, #MeToo has also likely played a role in inspiring plaintiffs' attorneys to pursue a number of different innovative causes of action to find a way to secure compensation and other legal remedies for their sexual abuse clients. In large part because of the inadequacy of traditional tort and civil rights claims, lawsuits alleging defamation,[245] RICO claims,[246] and antitrafficking remedies[247] on behalf of sexual abuse victims have been filed with some success.

Our negligence proposal belongs on this list of civil causes of action that can be used productively to address the intolerably high incidence of sexual assault in the United States. It directly addresses the failure of tort law to respond to sexual abuse in a way that permits plaintiffs to press their claims free of specialized hurdles, such as apparent consent, which have stymied recovery in the past. It enlists the venerable principle of negligence—the mainstay of torts recovery—to allow juries to make an evaluation of the conduct of the parties in a straightforward fashion that pushes against the sexual exceptionalism that has pervaded tort law, and provides a more secure route to adequate compensation, particularly if courts determine that negligence claims are not subject to the intentional acts exclusions in insurance contracts. Along with intentional tort claims, it gives survivors and their attorneys another option for seeking recovery and one which may resonate with juries and other legal actors charged with deciding cases with highly contested facts and differing perspectives.

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241. Tristin K. Green, *Feminism and #MeToo: The Power of the Collective*, *in* THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES, *supra* note 139.

242. *See* Catharine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, THE ATLANTIC (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/ [https://perma.cc/MV37-8MRB] (discussing the short statute of limitations in employment discrimination suits); CHAMALLAS & WRIGGINS, *supra* note 208, at 73–74 (discussing the short statutes of limitations for intentional torts).

243. Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121, 144 (2018) (explaining that sexual harassment laws have been interpreted in a manner that makes it difficult for plaintiffs to prevail).

244. Green, *supra* note 241.

245. Julie Dahlstrom, *Trafficking to the Rescue?*, 54 U.C. DAVIS L. REV. 1, 43–44 (2020) (discussing defamation claims against Donald Trump, Bill Cosby, and Johnny Depp).

246. *Id.* at 46–47 (discussing RICO claims against Harvey Weinstein).

247. *Id.* at 47–48.

VI. Conclusion

Tort law has shortchanged victims of sexual assault. The paltry number of tort claims brought by victims compared to the vast number of sexual assaults committed each year signifies that something is seriously wrong. We locate one important obstacle to addressing such claims in tort doctrine itself, particularly in the assumption that a rape victim must bring an intentional tort claim to recover against an offender. The labyrinthine doctrine of consent that looms so large in intentional tort cases has deterred plaintiffs from suing and has made it far too difficult for plaintiffs to prevail, even when it is clear that a defendant's sexual conduct is undesired and harmful. Our solution is to allow tort plaintiffs the option of bringing a negligence claim against the offender, centering the litigation on the unreasonableness of the defendant's conduct rather than the consent of the plaintiff. Our proposal responds to countless date- and acquaintance-rape cases in which a defendant's unreasonable conduct has undermined the plaintiff's ability to consent freely—creating a risk of coercion—or cases in which a defendant has placed his interests above the plaintiff's by taking an unreasonable risk that the plaintiff has not in fact consented. Although our proposal is novel, it is not a dramatic departure from established law in which considerations of negligence and unreasonableness are woven into intentional tort consent doctrines. Allowing negligence claims, however, could potentially have a significant impact, allowing plaintiffs to tap into insurance available only for negligence claims and encouraging attorneys to bring such claims in the first instance. Our goal is to increase the number of tort claims brought, reinforce a norm that parties have a duty to act reasonably in this important realm, and make good on the promise that tort law exists to provide redress for serious wrongs that inflict physical harm on individuals, without exception for sexual conduct.