Intentional Sex Torts

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Intentional tort law generally protects personal autonomy and self-determination vigorously by requiring fair disclosure before consent to physical contact is considered voluntary and valid. A glaring exception exists regarding consent to sexual relations. Although American law historically has provided remedies for fraudulent or other tortious inducement of sexual relations, current sex tort jurisprudence offers virtually no protection. The law’s contemporary “caveat emptor” approach to cases of sexual autonomy infringement is inappropriate because it departs from fundamental principles of intentional tort doctrine. In addition, the current law supports a “false” norm that sexual misappropriation is acceptable. Current law fails to protect personal privacy and fails to effectuate its potential to influence social conduct positively.

Intentional sex tort law should be reformed so that it is consistent with prevailing sexual norms and principles of intentional tort doctrine. Allegations of tortious interference with sexual autonomy should be analyzed consistent with traditional battery jurisprudence bearing on the issues of intent to offend and offensive contact. Exceptions to the defense of consent should also be adopted. The fraud exception should apply, utilizing established principles of materiality and justifiable reliance. In addition, the law should acknowledge a heightened duty of disclosure between sexual partners consistent with informed consent doctrine, to encourage honest and fairly informed personal relationships.

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INTRODUCTION

The plaintiff asserts only that, in the course of their [sexual] relationship, the defendant created a duty of honesty, but does not identify any legally cognizable duty between parties in a dating relationship, nor are we aware of any legally defined duty applicable in these circumstances. Accordingly, we conclude the plaintiff has not stated a claim upon which relief may be granted.¹

We live in an era of legal nonchalance relative to a dangerous form of personal rights infringement: sexual autonomy misappropriation.² The concept that "all's fair in love" and "everybody's doing it"³ are exploited in

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¹ Conley v. Romeri, 806 N.E.2d 933, 936 (Mass. App. Ct. 2004); see also McPherson v. McPherson, 712 A.2d 1043, 1044–45 (Me. 1998) (holding that there is no duty to be sexually faithful in marriage); In re Marriage of J.T., 891 P.2d 729 (Wash. Ct. App. 1995) (stating that marital relationship is not a "special" relationship creating a duty of sexual fidelity or a duty to disclose third-party sexual relations).

² Misappropriation usually connotes conversion, a tort meaning that the defendant intended to and did control or exercise substantial dominion over the plaintiff’s chattel, and results in liability without consciousness of wrongdoing. See, e.g., DAN B. DOBBS, THE LAW OF TORTS 130–36 (2000). Traditionally, only tangible personal property could be converted, but some courts have allowed a claim where “conversion” took place electronically, and one court has held that extracting human body parts from a live patient cannot support a conversion claim. Id. at 135. The term “sexual misappropriation” is used loosely herein and in conformity with Merriam-Webster’s definition of “convert” (to appropriate without right) and “appropriate” (to take or make use of without authority or right) because it captures the essence of one person “taking” another’s sexual choice manipulatively, or as if by right, and using it as if she owned it, in derogation of the true owner’s right of unfettered discretion over sexual decisions. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 61, 273 (11th ed. 2003). The terms “sexual fraud” and “sexual battery” may also be used at times herein and often describe the same tortious behavior that could also be termed “sexual autonomy misappropriation.” As a legal matter, battery is the best tort theory to redress conversion of another’s sexual choice through dishonest, manipulative, or socially blameworthy means. See infra Part III. However, “sexual battery” has criminal connotations, and sexual fraud does not capture all forms of sexual autonomy misappropriation suggested herein, so use of these terms is limited. For convenience, throughout this Article, the plaintiff will be deemed masculine, and the defendant will be deemed feminine.

³ The proverb “all’s fair in love and war” has been traced to John Lyly’s Euphues (1578): “The rules of fair play do not apply in love and war.” First attested in the United States in John Pendleton Kennedy’s Horse-Shoe Robinson (1835), the proverb is found in varying forms and “is frequently used to justify cheating.” GREGORY Y. TITELMAN, RANDOM HOUSE DICTIONARY OF POPULAR PROVERBS AND SAYINGS 9 (1996). Ironically, since the adoption of the Geneva Convention in 1864, even war has had clear rules of engagement to avoid unnecessary suffering (albeit not always followed). See, e.g., Yale Law School, Lillian Goldman Law Library, Avalon Project—The Laws of War,
the media despite being contrary to the prevailing sexual norm among Americans. The legal norm is "caveat emptor" (or buyer beware) in the marketplace of sexual relationships, which fails to deter blameworthy interpersonal deception. The prevalence and resigned acceptance, particularly among American youth, of fraudulent inducement of sexual relations is disturbing. The legal norm is bad public policy and has supported the creation of "false" sexual norms that threaten this country's

http://avalon.law.yale.edu/subject_menus/lawwar.asp (last visited Nov. 16, 2008). Love is the only realm left without rules of fair play. Regarding "everybody is doing it," see infra note 37.

4. See Deana A. Pollard, Sex Torts, 91 MINN. L. REV. 769, 821–24 (2007) [hereinafter Pollard, Sex Torts]. Most Americans are far from sexually promiscuous and engage in sexual behavior consistent with traditional norms. Id. at 783–87, 784 n.83 (citing EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 377 (1994) (noting that the most current data available indicates that over 80% of Americans ages eighteen to fifty-nine had zero or one sexual partner in the preceding year; 16% had between two and four partners; and only 3% had more than five partners)). However, television and other influential media portray promiscuous and deceptive sexual practices as common in soap operas, music videos, movies, and documentaries about young celebrities. See PsychiatricDisorders.com, Teenage Sex and Promiscuity, http://www.psychiatric-disorders.com/articles/warning-signs/teenage-sex.php (last visited Nov. 16, 2008). Although only a very small percentage of Americans lead the sexual lifestyle that dominates television and other media, its prominence in the media makes it appear ubiquitous, which creates cognitive familiarity and acceptance. Cf. Jerry Kang, Trojan Horses of Race, 118 HARV. L. REV. 1489, 1498–506 (2005) (discussing cognitive racial bias resulting from implicit associations created by stereotypes and other influences); Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1168–90 (1995) (discussing how information is categorized and stored in the brain, based on exposure to messages that become familiar and then unconsciously impact our perceptions of others in the employment context); Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 DUKE L.J. 345, 354 (2007) (discussing stereotypes and their influence on brain functioning, which can lead to racial bias, and suggesting methods to reverse unconscious bias); Deana A. Pollard, Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege, 74 WASH. L. REV. 913, 917–25 (1999) (discussing the way in which familiar material unconsciously influences cognitive functioning and choices in the employment context). The media has played a powerful role in creating a belief that "everybody is doing it," which tends to create acceptance of, and entrench, the sexual attitudes and behaviors addressed herein. See Pollard, Sex Torts, supra, at 783–87, 810–24 (arguing that Americans make sexual choices based on morality, not physical desire, making them vulnerable to influence and manipulation); see also infra notes 7, 37, 61.

5. See infra note 48 and accompanying text.

6. See infra note 61 and accompanying text.

7. Propagation of a "false consensus," which I refer to as a "false norm," encourages antisocial sexual behavior because sex tort perpetrators rely on the false norm to justify their behavior. See, e.g., Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 MICH. L. REV. 338, 401 (1997) (explaining that when a "false consensus" exists, people may rely on it to engage in antisocial behavior because they believe, incorrectly, that their behavior is typical and comports with social norms, which can also result from selective association); see also Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 VA. L. REV. 349, 373–77 (1997) (describing the role of this false norm phenomenon in gang activity).
economic, cultural, psychological, moral, and physical well-being. The law should be reformed to reverse this trend.\textsuperscript{8}

8. Although there is debate about the law’s impact on human choices, deterrence theory grounded in the “rational actor” assumption—that people respond to legal incentives, a function of price theory generally—is widely accepted. See Pollard, \textit{Sex Torts}, supra note 4, at 812–19. Therefore, increasing the “cost” or “price” of deceptive sexual practices by imposing tort liability may impact sexual choices more than one might expect intuitively, similar to the way increasing the cost of drunk driving impacted drunk driving incident rates. \textit{Id.} at 815–17. Such a cost increase could inhibit deceptive and dangerous sexual behavior that can lead to sexual disease transmission. The current lack of legal sanctions for deceptive sexual practices probably contributed to the United States becoming the country with the highest sexually transmitted disease (STD) rate in the industrialized world, a rate of 50 to 100 times that of other industrialized nations, with resultant costs estimated at about ten to fifteen billion dollars per year. See Mary G. Leary, \textit{Tort Liability for Sexually Transmitted Disease, in 88 AM. JUR. Trials} § 1, at 165 (2003); \textit{AM. SOC. HEALTH ASS’N, SEXUALLY TRANSMITTED DISEASES: HOW MANY CASES AND AT WHAT COST?} 10 (Linda L. Alexander et al. eds., 1998) [hereinafter \textit{ASHA, WHAT COST?}], available at http://www.kff.org/womenshealth/1445-std_rep.cfm; see also Harrell W. Chesson, John M. Blandford, Thomas L. Gift, Guoyu Tao & Kathleen L. Irwin, \textit{The Estimated Direct Medical Cost of Sexually Transmitted Diseases Among American Youth, 2000}, 36 \textit{PERSPS. ON SEXUAL & REPROD. HEALTH} 11 (2004) (citing, inter alia, \textit{ASHA, WHAT COST?}). Costs refer to direct medical and nonmedical costs of treating STDs. Direct medical costs include costs involved with treating acute STDs and the sequelae of untreated or inadequately treated STDs, such as clinician visits, hospitalization, diagnostic testing, and drug therapy. Direct nonmedical costs include the cost of transportation to medical services. These direct costs attributable to STDs must be distinguished from indirect medical costs such as productivity losses, lost wages, and intangible costs such as human pain and suffering. Indirect medical costs are not included in the estimates contained herein. See \textit{INST. OF MED., THE HIDDEN EPIDEMIC: CONFRONTING SEXUALLY TRANSMITTED DISEASES 7} (Thomas R. Eng & William T. Butler eds., 1997). See generally Barbara K. Hecht & Frederick Hecht, \textit{Condoms and Sexually Transmitted Diseases (STDs), EMEICINEHEALTH, May 24, 2007}, http://www.medicinenet.com/script/main/art.asp?articlekey=33590. This figure includes only the eight major STDs: HIV, Genital Human Papillomavirus (HPV), HSV-2, hepatitis B, chlamydia, gonorrhea, trichomoniasis, and syphilis; hepatitis C and bacterial vaginosis were excluded. See Kaiser Family Found., \textit{Q & A: THE TIP OF THE ICEBERG: HOW BIG IS THE STD EPIDEMIC IN THE U.S.?} 3 (1998) [hereinafter \textit{TIp OF THE ICEBERG}], available at http://www.kff.org/womenshealth/loader.cfm?url=/commonspot/security/getfile.cfm&pageID=14668 (estimating that $7 billion results from HIV/AIDS, and another $10 billion a year from other STDs); Chesson et al., supra; Douglas T. Fleming et al., \textit{Herpes Simplex Virus Type 2 in the United States, 1976 to 1994}, 337 \textit{NEw ENG. J. MED.} 1105 (1997). Texas and New York each have costs over $600 million per year, and California’s total costs are over one billion dollars. See \textit{ASHA, WHAT COST?}, supra, tbl.5; Pollard, \textit{Sex Torts}, supra note 4, at 782.

9. Indeed, a number of state legislatures have recently enacted revised rape statutes to allow a rape conviction in the absence of physical force where the victim was induced by fraud or coercion to consent to sex. See, e.g., \textit{ALA. CODE § 13A-6-65} (2005); \textit{CAL. PENAL CODE § 261(5)} (2007); \textit{MICH. COMP. LAWS ANN. § 750.520b} (2003); \textit{TENN. CODE ANN. § 39-13-503(4)} (2005). On February 27, 2008, Peter Koutoujian of Massachusetts filed a similar bill to amend the Massachusetts rape statute, which currently requires a finding of “force” to support a rape conviction, in response to the Supreme Judicial Court’s decision in \textit{Suliveres v. Commonwealth.} 865 N.E.2d 1086, 1091 (Mass. 2007) (reversing the trial court’s denial of the defendant’s motion to dismiss his rape indictment because the defendant’s act in obtaining intercourse with his twin brother’s girlfriend by impersonating his twin brother “did not involve force necessary for rape” under the existing law); see, e.g., Glen Johnson, \textit{Legislation Seeks Stricter State Rape Law, Targets Fraud and Deceit}, \textit{BOSTON.COM}, Feb. 28,
Historically, American tort law regulated deceptive and other undesirable sexual behavior resulting in emotional or dignitary harm through actions now known as "heartbalm" or "amatory" torts. However, contemporary jurisprudence reflects the view that a broken heart is not actionable, a view that resulted in substantial abolition of the heartbalm torts over the past half century. Today, most lawsuits alleging sexual battery or fraud without physical injury are dismissed as a matter of law based on antiheartbalm sentiment. Yet, other intentional torts infringing personal autonomy, such as assault, battery, and false imprisonment, are actionable without physical injury. The deregulation of sexual fraud departs from basic intentional tort principles. Intentional sex tort law should be reformed for this reason alone.

Perhaps of greater concern is the fact that inconsiderate sexual attitudes and irresponsible sexual behaviors encouraged by the false norms have harmed—and even killed—far too many Americans. The sexual disease crisis mandates reform to effect behavioral change engaging the law’s deterrence and expressive, norm-regulating functions. Intentional sex tort law is a prime candidate for norm regulation, because sexual norms are esteem-based and the prevailing social norm already condemns promiscuous and deceptive sex such that norm exposure can efficiently produce norm "cascades" to further social policy. The law is not the only

10. See infra Part I.
11. See infra Part I.
12. See infra Part II.
13. See DOBBS, supra note 2, at 1054 ("[W]ith intentional torts, the violation of the plaintiff’s right has generally been regarded as a kind of legal damage in itself.").
14. For example, every ten seconds, an American teenager contracts a sexual disease. See MEG MEEKER, EPIDEMIC: HOW TEEN SEX IS KILLING OUR KIDS 12 (2002). In 2002, AIDS was the leading cause of death of African American women ages 25–34. See CTRS. FOR DISEASE CONTROL & PREVENTION, HIV/AIDS AMONG WOMEN 1 (2008); Pollard, Sex Torts, supra note 4, at 779 n.59. The sexual disease epidemic per se necessitates a reassessment of public policy on all levels, including the proper legal standards in cases alleging sexual misconduct.
15. Cass R. Sunstein, On the Expressive Function of Law, 114 U. PA. L. REV. 2021, 2035 (1996); see also McAdams, supra note 7, at 393–95. Highly internalized norms conform to a country’s traditional value system, such as heritage (Puritan) or religion (Christianity). Sexual deceit and manipulation is not consistent with traditional American values, so to the extent that there is some societal acceptance that “all’s fair” in sexual relationships, including deceit, such norms are esteem-based, as opposed to highly internalized, and therefore more amenable to legal manipulation. See Pollard, Sex Torts, supra note 4, at 819–24, for a detailed analysis of the law’s normative impact on sexual conduct. The divergence between American sexual norms and the media’s portrayal of sexual norms can be compared to the divergence between the public’s actual consensus regarding public smoking and the media portrayal of the consensus before antismoking laws publicized both the health risks and the majority’s sentiment. People may be afraid to speak their minds if the fact that they are in the majority is not exposed: smokers disproportionately represent restaurant patrons, silencing the majority who did not perceive themselves as such. Id. at 823–24. Of course, the media’s role in producing false norms cannot be regulated directly because the First Amendment to the U.S. Constitution has been
or even primary tool to address the problem of irresponsible sexual conduct. But the law can be improved considerably to educate the public and to further social policy. Sexual autonomy infringement should be actionable as battery actions to expose prevailing norms, sanction wrongful behavior, and shift the costs of socially destructive behavior to the perpetrators, instead of allowing cost externalization as the current law does.16

This Article does not argue for the revival of the heartbalm torts. These torts were dismantled to a large degree in recognition of their propensity to perpetuate antifeminist sexual stereotypes, which may cause social harm per se.17 This Article argues that cases of sexual autonomy misappropriation should be analyzed in accordance with gender-neutral, traditional battery doctrine and the fraud and informed consent exceptions to the defense of consent. This would serve to protect the sexual autonomy of men and women alike,18 consistent with the feminist goal of gender equality.

interpreted to strictly scrutinize content-based regulations of speech. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 932–33 (3d ed. 2006). Education—both in school and at home—is also critical, but beyond the scope of this Article.

16. See Pollard, Sex Torts, supra note 4, at 795–810 (analyzing sex tort cases resulting in sexual disease transmission, discussing the current negligence theory, and arguing that strict liability is the superior theory where sexual disease is transmitted). Although the sexual disease crisis may cause more serious injury than emotional distress resulting from sexual fraud without disease, sexual fraud may impact a larger percentage of Americans and therefore may be just as detrimental to public health as sexual disease. See infra note 61 (discussing survey results regarding the ubiquity of sexual deceit). It is an established principle in public health that a less serious risk to a greater number of persons has a greater overall public health impact than a more serious risk that applies to a much smaller segment of society. See, e.g., ROBERT ROSENTHAL, META-ANALYTIC PROCEDURES FOR SOCIAL RESEARCH 13–35 (rev. ed. 1991); Geoffrey Rose, Sick Individuals and Sick Populations, 14 INT’L J. EPIDEMIOLOGY 427, 431 (2001). Presumably a far greater percentage of Americans have been emotionally harmed by deception perpetrated by a romantic partner than are inflicted with a sexually transmitted disease. See generally TIP OF THE ICEBERG, supra note 8; Pollard, Sex Torts, supra note 4, at 773–75.

17. See infra Part I.

18. It has been argued that gender neutrality is not possible and that “gender-neutrality just masks systemic oppressions.” Leslie Bender, Teaching Torts as If Gender Matters: Intentional Torts, 2 VA. J. SOC. POL’Y & L. 115, 115–17 (1994). Catharine A. MacKinnon argues that women are the group from whom “sexuality is . . . taken” in the same way that workers’ labor is appropriated under Marxism. See Catharine MacKinnon, Feminism, Marxism, Method and the State: An Agenda for Theory, 7 SIGNS 515 (1982). However, informal research indicates that both men’s and women’s sexual choices are misappropriated in today’s world, such that both genders deserve protection. See, e.g., infra note 61 (noting the ubiquity of sexual deceit). Men’s and women’s damages claims may be conceived differently. Thus, although it may be true that the “overwhelming majority of emotional distress claims have arisen from harmful conduct by men, rather than women,” see Bender, supra, at 148, harm to men resulting from sexual deceit may be described by men more commonly in terms of financial losses. For example, based on my own conversation with dozens of men about this topic, their “distress” over deceit in sexual relations often centers on financial investments in relationships that they entered into based on a woman’s misrepresentations, such as by providing financial support in an agreed-upon monogamous relationship and later discovering that the woman is sexually involved with other men. Thus, women may overlook men’s distress from sexual deception in the same way that men
Part I of this Article reviews historical intentional sex tort law, including feminists' critical role in its development, and its normative impact on public sentiment regarding sexual deceit. Part II then discusses contemporary intentional sex tort jurisprudence and argues that it is inconsistent with intentional tort doctrine generally, particularly the law of battery and the exception to consent based on fraud in the inducement. Finally, Part III suggests that cases of sexual misappropriation should be analyzed as battery cases, applying established principles of intent and consent doctrine. This part further argues that, even in the absence of clear proof of deceit, sexual contact should be actionable in the absence of fairly informed consent where the evidence is sufficiently compelling.

I. SEXUAL NORMS AND SEX TORT LAW'S NORMATIVE IMPACT

Victorian attitudes towards sex in that era... [made] sex a taboo subject.... [An] allegation of sexual misconduct could create a public scandal that could utterly ruin a person.... Victorian attitudes towards sex have diminished and yielded to a much more frank and open attitude, as is evident from sexually explicit material regularly published in magazines, newspapers, television, movies, and books.\(^{19}\)

Historically, and through the beginning of the twentieth century, American tort law offered considerable protection against socially undesirable or deceitful sexual behavior that can fairly be termed "intentional" torts.\(^{20}\) Before the mid-nineteenth century, the focus was on economic harm to women's fathers resulting from premarital "seduction," which led to the father's inability to "marry off" the daughter, and the attendant long-term paternal support obligations.\(^{21}\) Nineteenth century feminists organized moral reform societies to lobby state legislators to enact laws penalizing seduction to protect women from its devastating social and financial consequences in an era of Victorian sexual norms even before they organized an effort to seek suffrage.\(^{22}\)

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21. Larson, supra note 20, at 382–86.
22. Id. at 391–93.
By the late 1800s, the law began to recognize that premarital sex based on seduction harmed not just fathers' property interests, but women's personal interests in social standing, reputation, and ability to become financially secure, whether by marriage or by gainful employment. These cases often involved allegations that the plaintiff was tricked into premarital sex by virtue of her lover's marriage promises, thereby suffering a complete loss of social standing and esteem, particularly when a child was conceived. Thus, in the decades surrounding the turn of the century, American courts entertained "heartbalm" torts, such as seduction and breach of marriage promise, to compensate fathers, and later the women themselves, for damages resulting from premarital sex. Indeed, by the latter part of the nineteenth century, actions for seduction were among the most common forms of civil actions and were usually successful. The theory unifying the various heartbalm torts was that women needed the

23. Id. at 386–87.
24. See, e.g., Mary Coombs, Agency and Partnership: A Study of Breach of Promise Plaintiffs, 2 YALE J.L. & FEMINISM 1, 9–11 (1989). Fathers were considered victims of their daughters' seduction starting in the mid-seventeenth century, since the father could have trouble marketing "damaged" (nonvirgin) goods in the marriage marketplace. They thus suffered economic losses as a result of their daughters' dependence on them, and loss of services as well if pregnancy resulted. See Larson, supra note 20, at 382–85.
25. See infra note 29. Other heartbalm actions were also available to men whose women were converted to the use of others. For example, alienation of affections provided a remedy for a third party's interference with a marital relationship that destroyed the affection that existed between spouses prior to the interference. This tort was known as "enticement" in English common law and could be brought against any meddling third party, even without sexual involvement, such as mothers-in-law. Some scholars assert that "alienation of affections did not evolve from enticement." Jill Jones, Comment, Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited, 26 PEPP. L. REV. 61, 66–67 (1999). Criminal conversation was another tort that provided a remedy for a third party's adulterous relationship with a plaintiff's spouse. This tort was a strict liability tort, as there were no real defenses, such as the spouse living alone and representing herself to be unmarried. This tort was known as "seduction" in English common law. See Jones, supra, at 66–68.
26. Seduction went through some changes in American law. This tort was codified in many states beginning in Iowa in 1851 and allowed women to sue in their own names for damages resulting from the devastating social injury that resulted at that time from premarital sex or unwed motherhood. See Larson, supra note 20, at 385–86.
27. See id. at 382–85, 394 & n.85.
28. Id. at 383–84
29. The four torts generally referred to as the amatory or heartbalm torts are (1) alienation of affections (a third party causes estrangement between spouses); (2) criminal conversation (a third party's adulterous relationship with a plaintiff's wife, usually); (3) seduction (an unmarried woman's father—and, since the mid-nineteenth century, the woman herself—could sue for damages grounded in social injury resulting from premarital sex or unwed motherhood); and (4) breach of marriage promise (a promise of future marriage induced a woman to engage in sexual behavior that she would not have but for the promise and expectation of marriage). See, e.g., William R. Corbett, A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career, 33 ARIZ. ST. L.J. 985, 1002–03 (2001); Larson, supra note 20, at 385–86, 394 n.85; Jones, supra note 25, at 65, 67–69.
law's protection from men's intellectual persuasion and sexual influence.30

Early-twentieth-century feminists balked at the concept that women's power and self-worth should be defined primarily by their relationships with men, whether the relationship was marriage or a less respectable sexual liaison.31 By the 1930s, female legal reformers began to view the law as paternalistic and to equate civil actions grounded in seduction with obsolete and harmful stereotypes portraying women as economically dependent upon men and easily influenced by men's power and persuasive charm.32 They felt that such stereotypes—and the attendant misogynist portrayal of women as "gold-diggers" by the media—undermined the concept of the newly emancipated woman, including social equality, economic independence, and sexual freedom.33 Feminists supported the first antiheartbalm movement during this era based on a progressive view of women's role in society and seduction law's paternalistic connotations.34

Efforts to keep "broken heart" claims out of the court system by abolishing the heartbalm torts began in the 1930s but were fairly unsuccessful until the 1960s.35 The "sexual revolution"36 and attendant sweeping rejection of traditional American values, spurred in part by the release of the Kinsey reports,37 women's reproductive freedom resulting

30. Originally, the torts emanated from the concept that women were their fathers' chattels and, if their marriage potential was damaged due to premarital sex, the fathers suffered property damages grounded in their daughters' maintenance, since it was hard to marry off damaged goods. See Larson, supra note 20, at 382–83. Later, the torts mutated to redress injury to reputation and emotional harm to the woman herself who suffered as a result of men's trickery or sexual deceit. Id. at 390–91.

31. See id. at 397–98.

32. See, e.g., id. at 393–401.

33. See Coombs, supra note 24, at 4–7. Early feminists viewed seduction torts as counterproductive to advancing women's personal power and sexuality, and believed that "as long as women seek to profit materially from their relationships with men... there will be no new era for the sex as a whole." Id. at 13 (quoting Dorothy Dunbar Bromley, *Breach of Promise—Why?*, 12 *WOMAN CITIZEN* 8, 40 (1927)).

34. See Larson, supra note 20, at 393–401.


36. The sexual revolution of the 1960s was really the second American sexual revolution, the first one having taken place in the 1930s when women joined the work force and became more financially and sexually liberated. See Pollard, *Sex Torts, supra* note 4, at 790 n.120. Early feminists sought freedom from paternalistic laws grounded in the concept of women as property, and the first antiheartbalm movement ensued. See *id.* at 789.

37. Alfred Kinsey's "scientific" data on men's sexuality and women's sexuality were published in 1948 and 1953, respectively, and, despite having serious methodological errors and probably gross inaccuracies, were instant best sellers and had an enormous impact on Americans' perceptions of Americans' sexual practices. See LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 231 (2002); ALFRED C. KINSEY, WARDELL B.
from the availability of the birth control pill, and popularization of pornography (through periodicals such as Playboy), had an enormous impact on tort law and criminal law: the sexual revolution became a legal revolution. Convergent with the sexual revolution of the 1960s, and in large part influenced by the feminist movement and radical departure from traditional sexual norms, courts and legislatures began to eviscerate the heartbalm torts. During this era, feminists focused on legal reform to protect women from rape and sexual harassment, which were viewed as

POMEROY & CLYDE MARTIN, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); ALFRED C. KINSEY, WARELL B. POMEROY & CLYDE MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948). Kinsey has been dubbed a sexual pervert and a “scientific fraud” and ultimately died of “orchitis,” a lethal infection of the testicles caused by masochistic masturbation. Judith A. Reisman, Crafting Bi/Homosexual Youth, 14 REGENT U. L. REV. 283, 312 (2002). Of far greater concern is the probability that Kinsey’s false report had a great impact on Americans’ sexual practices, i.e., the belief in Kinsey’s “scientific” data probably contributed to people’s subsequent, riskier sexual behavior, based on the belief that “everybody is doing it.” See ROBERT T. MICHAEL, JOHN H. GAGNON, EDWARD O. LAUMANN & GINA KOLATA, SEX IN AMERICA 20 (1994); Pollard, Sex Torts, supra note 4, at 819–24. What is clear is that prior to Kinsey’s publications regarding male and female sexual behavior, the only common sexually transmitted diseases were gonorrhea and syphilis, both bacterial and both usually easily treatable with antibiotics, but now, the sexual disease epidemic involves so many incurable, viral infections that they cannot even be counted accurately. Id. at 772–81.


39. Pollard, Sex Torts, supra note 4, at 790–91; see also FRIEDMAN, supra note 37, at 230–37.

40. This period, of course, involved a sweeping rejection of traditional American values. Traditional beliefs about sexual morality and gender roles were abandoned as more women moved from the home into the workforce and, perhaps above all, women gained substantial control over their reproductive function by the development of the birth control pill. Some scholars believe that this control over childbirth ushered in an “era of liberated sexual practices, where openness and sexual freedom would reign.” See EDWARD A. WYNNE & KEVIN RYAN, RECLAIMING OUR SCHOOLS: TEACHING CHARACTER, ACADEMICS, AND DISCIPLINE 225–26 (2d ed. 1997). “[S]ex came out of the closet and into the streets, and consensual sex outside of marriage, masturbation, cohabitation, birth control, and even abortion became more accepted.” Pollard, Sex Torts, supra note 4, at 791.

41. See Larson, supra note 20, at 400–01. For a comprehensive overview of feminist tort scholarship, see Leslie Bender, An Overview of Feminist Torts Scholarship, 78 CORNELL L. REV. 575 (1993). Recent feminist scholarship has addressed a number of aspects of tort law, including the “reasonable woman” standard, the gender-disparate realities of the “no duty” rule, and types of injuries that are disproportionately suffered by women, such as emotional distress. See, e.g., Gary T. Schwartz, Feminist Approaches to Tort Law, 2 THEORETICAL INQUIRIES L. 1, 5–19 (2001). See generally Susan Estrich, Rape, 95 YALE L.J. 1087 (1986); Catharine MacKinnon, Mainstreaming Feminism in Legal Education, 53 J. LEGAL EDUC. 199 (2003); Jennifer B. Wriggins, Toward a Feminist Revision of Torts, 13 AM. U. J. GENDER SOC. POL’Y & L. 139 (2005). One feminist scholar has characterized the various feminist schools of thought in tort jurisprudence as three recurring “moves”: (1) suspicion of explicit sex-based distinctions; (2) revelation of implicit male bias in “gender-neutral” rules and law; and (3) focus on female experiences and how the law may fail to recognize gender-based experiences and injuries. See Martha Chamallas, Importing Feminist Theories to Change Tort Law, 11 WIS. WOMEN’S L.J. 389, 390–93 (1997). Perhaps fundamentally, as a broad statement, feminists seek foremost to “increase women’s sphere of consensual freedom” to make it equal to that of men, since “there exists a correlation between objectively equal distributions of power—including sexual power—and
direct assaults on women's personal autonomy and ability to achieve economic independence. To the contrary, theories underlying the heartbalm torts were still considered antithetical to gender equality and women's self-determination. The mid-twentieth-century movement to abolish the heartbalm torts was quite successful: today, only a handful of states entertain actions grounded in sexual deceit in the absence of sexual disease transmission.

The demise of the heartbalm torts also reflected the mainstream judicial and public sentiment of that era that sexual matters had no place in court and even "diminish[ed] human dignity." Indeed, some courts found that allegations of sexual misconduct no longer carried social stigma as a result of ubiquitous sexually explicit material in the media and its apparent public acceptance. The law's resultant caveat emptor approach to sexual misconduct sent a clear message to the American public: the government is unconcerned with unfair or manipulative sexual behavior, even when one person misappropriates another's sexual autonomy via blatant fraud. Ironically, this "progressive" legal/sexual revolution took place in an era when sexual disease was a nonissue, and the resultant legal norm probably exacerbated the very attitude that the heartbalm torts sought to control originally, that is, the attitude that "all's fair in love," which in turn encouraged socially undesirable sexual behavior conducive to sexual disease proliferation.

subjectively happy and good lives." See Robin West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 15 WIS. WOMEN'S L.J. 149, 160, 181–82 (2000). The gender-neutral paradigm proposed herein seeks to provide a vehicle through which both women and men can seek recovery of damages for harmful sexual choice misappropriation, recognizing that ultimately it is up to the litigants and their attorneys to reshape and reform the contours of the law based on individual experience. The paradigm, if properly engaged, would advance women's (and men's) sexual autonomy and self-determination by providing a remedy for sexual choice misappropriation that ultimately should create deterrence to dishonest sexual dealings.

42. See generally Larson, supra note 20, at 400–01.
44. See Larson, supra note 20, at 393–401.
45. See Corbett, supra note 29, at 989 & n.7; Dan Subotnik, "Sue Me, Sue Me, What Can You Do to Me? I Love You": A Disquisition on Law, Sex, and Talk, 47 FLA. L. REV. 311, 321–24 (1995). See also infra Part II for a discussion of current law allowing cases to go forward where disease is transmitted, but not allowing cases to go forward generally where no disease is transmitted. For a recent case recognizing alienation of affections and criminal conversation, see Hutelmyer v. Cox, 514 S.E.2d 554 (N.C. Ct. App. 1999).
47. See, e.g., Norton v. MacFarlane, 818 P.2d 8, 12 (Utah 1991) (noting that allegations of sexual misconduct no longer create a public scandal that could ruin a person). Today, "Victorian attitudes towards sex have diminished... as is evident from sexually explicit material regularly published in magazines, newspapers, television, movies, and books." Id.
48. See Larson, supra note 20, at 413 ("Ironically, the principle of caveat emptor remains most vigorously alive in the sexual marketplace.").
49. See generally supra note 37.
The current legal norm does not accurately reflect prevailing sexual norms yet influences people’s perception of them.\textsuperscript{50} Comprehensive research reveals that the vast majority of Americans are monogamous. Yet, young Americans are sexually active at a younger age, have more sexual partners than in prior generations, and believe that dishonesty in sexual relationships is typical.\textsuperscript{51} The false sexual norms created by the media’s portrayal of atypical sexual behavior as the standard, and the legal norm of caveat emptor, probably influenced sexual attitudes and behaviors that have given rise to an American sexual disease epidemic.\textsuperscript{52}

In shaping jurisprudence relative to sexual conduct, it is important to consider the law’s impact on norms and, in turn, norms’ impact on human behavior.\textsuperscript{53} Despite controversy regarding the law’s influence on human behavior, there is substantial empirical evidence that the law can create and

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50. See Pollard, Sex Torts, supra note 4, at 783–87, 821–22.

51. Most Americans are monogamous and behave sexually in a way that reflects internalized sexual norms grounded in traditional concepts of sexual morality. See id. at 783–87. For a detailed discussion of the law’s probable normative impact on Americans’ sexual attitudes, see id. at 810–24. American teens and Canadian teens rank among the youngest for age of first sexual intercourse experience, with some studies showing that half of eighth graders have engaged in sexual intercourse. Id. at 780–81; see also infra notes 60–61.

52. See supra note 37. The statistical chronology of sexually transmitted disease rate increases speaks for itself. See Pollard, Sex Torts, supra note 4, at 772–81. Researchers believe that a very small percentage of Americans are responsible for the vast majority of sexual disease transmissions: a “core” group of sexually active Americans consisting of probably less than 3% of Americans have more than five sexual partners per year, and the number of sexual partners is directly related to the chances of contracting and spreading sexual diseases, making these sexually active, multiple-partner Americans responsible for the vast majority of sexual disease transmission cases in the United States. Id. at 783–84. If this group were deterred (by the law or otherwise) to stop transmitting sexual diseases, theorists believe that all sexually transmitted diseases would die out, since the antigens responsible for sexual diseases need new bodies to stay in circulation. Id. at 783–87; see also id. at 795–803. Unfortunately, the sexual disease epidemic has harmed women disproportionately in an unforeseeable manner: women are physically more vulnerable to contracting sexual disease. See generally id. at 772–803, 776 n.41, 777 n.42, 779 n.59, 780 nn.63–64 (arguing that current law’s failure to regulate sexual relations after the demise of the heartbalm torts, and current courts’ ineffective application of negligence and intentional tort theories of liability in sex tort cases, have been factors leading to the current unprecedented sexual disease epidemic).

53. For example, when Sweden became the first country to ban child corporal punishment in 1979, no enforcement mechanisms or sanctions were created. Deana Pollard, Banning Child Corporal Punishment, 77 Tul. L. Rev. 575, 588 (2003). The law merely informed parents that Sweden had made it illegal to hit a child as a form of discipline. Id. While originally most parents were against the new law, the law created a new social standard that was followed, and today, the vast majority of Swedes favor the law. See id. at 588–89, 588–89 nn.67–77 (citing Joan E. Durrant, The Swedish Ban on Corporal Punishment: Its History and Effects, in FAMILY VIOLENCE AGAINST CHILDREN: A CHALLENGE FOR SOCIETY 19, 23–25 (Dettev Frehsee et al. eds., 1996)); see also Peter H. Huang & Ho-Mou Wu, More Order Without More Law: A Theory of Social Norms and Organizational Cultures, 10 J.L. Econ. & Org. 390, 404 (1994) ("[L]aws create and maintain order ... through the creation or alteration of social norms."); Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453, 471 (1997) ("Criminal law’s influence comes from [it] being a societal mechanism . . . . ").
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shape social norms to advance public welfare. In the past decade in particular, it has become accepted that the public’s perception of social norms impacts personal choices substantially, perhaps more so than legal sanctions per se, because people are social creatures who place enormous value on one another’s esteem. The law’s failure to sanction behavior that damages others can impact how people view such behavior emotionally, cognitively, economically (based on the rational actor assumption), and morally. For example, legislative efforts to control other types of behavior not intuitively amenable to rational choice, such as drunk driving, have been very successful. Inferentially, the contemporary absence of legal sanctions for sexual misappropriation, and attendant perception that the costs of sexually irresponsible behavior may be completely externalized, has encouraged sexual promiscuity, sexual deceit, and sexually irresponsible behavior contrary to public policy. Young Americans’ perception of the ubiquity of sexual deceit—and resigned acceptance of such—is a sad testament to our society’s failure to take seriously the social harm that may be produced in part by a legal norm


56. See Pollard, Sex Torts, supra note 4, at 810–24.
57. See Berger & Marelich, supra note 54, at 518–20.
58. This has led one legal commentator to conclude that “[t]he current lack of penalties for adultery and interference with family relationships is shockingly new.” Jones, supra note 25, at 64.
59. Promiscuous sexual behavior, or “promiscuity,” is not intended to carry a moral connotation but means “not restricted to one sexual partner.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, supra note 2, at 994 (defining “promiscuous”).
60. The law’s historical shift from relatively certain liability for unfair seduction to virtually no consequences for blatant sexual choice conversion in the absence of disease transmission has undoubtedly impacted sexual attitudes. Although all courts that have addressed the issue of liability for transmitting a sexual disease have determined that liability is appropriate if negligence is proven, few courts have sustained intentional tort theories of recovery in the absence of disease transmission. See Pollard, Sex Torts, supra note 4, at 793–803. Regarding the law’s impact on social norms, see id. at 819–24.
that is inconsistent with the prevailing social norm: a false norm can be self-fulfilling in the absence of intervention.\textsuperscript{61}

The public’s perception of contemporary sexual norms may be relatively easily influenced by the law because they are esteem-based as opposed to highly internalized, i.e., based on contemporary values as opposed to deeply entrenched, traditional American values, such as those consistent with Christianity or Puritanism.\textsuperscript{62} Creating, and in this case exposing, sexual norms consistent with public policy can effectively create positive behavioral change and would be costless.\textsuperscript{63} New laws, or the use of traditional battery law analysis in sex tort cases, could attract media attention,\textsuperscript{64} would eventually influence sexual norms consistent with public health and public policy, and should be adopted.

\begin{itemize}
\item \textsuperscript{61} See supra note 37. Informal research demonstrates that most people believe that sexual fraud is not actionable, and some people feel that caveat emptor is appropriate, since the world is not a nice place and people need to learn to be wary of others, particularly in the sexual context. \textit{See, e.g.}, Subotnik, supra note 45, at 393 n.449 (magazine poll revealed that most people would not sue for sexual deceit essentially because it is so common). This accepting attitude toward sexual deceit, ubiquitous in the media, common among young Americans, and even expressed in judicial sentiment, is self-perpetuating. It has created a perception that neither candor nor basic civility is required in sexual relations and has contributed to the sexual disease epidemic. This is bad public policy, has caused tremendous human suffering, and is becoming extremely costly. Education and discussion in public forums and television could effectively reverse the apparent trend toward acceptance of sexual dishonesty. In addition, strengthening legal sanctions for deceptive sexual practices could open up public discourse, attract media attention, and ultimately create different attitudes toward sex, leading to more socially desirable, healthier sexual norms.
\item \textsuperscript{62} See McAdams, supra note 7, at 386–90.
\item \textsuperscript{63} See Pollard, \textit{Sex Torts}, supra note 4, at 819–24; see also Sunstein, supra note 15, at 2026–29.
\item \textsuperscript{64} To the extent that plaintiffs have won sex tort cases, they have drawn tremendous media attention and have become common knowledge, which impacts people’s perception of the behaviors resulting in liability and impacts their feelings about such behaviors. For example, when Georgia healthcare worker Sonia Elliott sued Atlanta Falcons quarterback Michael Vick for giving her genital herpes in 2003, the story was all over the news, no doubt in part because Vick had signed a $130 million contract with the Falcons and is a public figure, but also because these lawsuits are public interest stories and many people do not know that herpes transmission can create civil liability. See \textit{Settlement Reached in Michael Vick Herpes Case}, NBC SPORTS, Apr. 24, 2006, www.msnbc.msn.com/id/12468203/. Similarly, a Harris County (Houston, Texas) jury awarded Michelle Rudolph $950,000 ($475,000 for assault and $475,000 for negligence) in a lawsuit filed against Los Angeles Dodgers pitcher Jose Lima, who gave her genital herpes. See Lima Plans Appeal After He’s Hit with Sizable Damage Award, CBS SPORTS, Dec. 3, 2004, http://cbs.sportsline.com/mlb/story/7955468. In a well-publicized case that became a 1999 Lifetime television movie entitled \textit{The Price of a Broken Heart} (1999), Dorothy “Dot” Hutelmyer discovered that her insurance executive husband had been having an affair with his secretary for years and did not just sue for divorce, but sued the secretary for criminal conversation and alienation of affections (heartbalm torts that survived in North Carolina, but the case could have been brought as an intentional infliction of emotional distress case in a state that had abolished those torts). See Hutelmyer v. Cox, 514 S.E.2d 554 (N.C. Ct. App. 1999), \textit{appeal dismissed}, 542 S.E.2d 211 (N.C. 2000); see also IMDb: The Internet Movie Database, The Price of a Broken Heart (1999) (TV), http://www.imdb.com/title/tt0210921/plotsummary (last visited Nov. 17, 2008) (describing the plot of the movie). In 1997, a North Carolina jury ordered the husband’s adulterous lover to pay his wife one
INTENTIONAL SEX TORTS

II. CURRENT INTENTIONAL SEX TORT ANALYSIS

There are many wrongs which in themselves are flagrant. For instance, such wrongs as betrayal, brutal words, and heartless disregard of the feelings of others are beyond any effective legal remedy in any practical administration of law. To attempt to correct such wrongs or give relief from their effects may do more social damage than if the law leaves them alone.65

"'[P]ublic policy no longer considers money damages appropriate for what is perceived as only an ordinary broken heart.'"66

So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt [to obtain sex], not to take no for a final answer, at least not the first time.... [A] male [will] make promises that will not be kept, ... indulge in exaggeration and hyperbole, or ... assure any trusting female that, as in the ancient fairy tale, the ugly frog is really the handsome prince. Every man is free, under the law, to be a gentleman or a cad.67

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65. C.A.M. v. R.A.W., 568 A.2d 556, 560 (N.J. Super. Ct. App. Div. 1990) (citation omitted) (quoting Richard P. v. Superior Court, 249 Cal. Rptr. 246, 249 (Cal. Ct. App. 1988)) (internal quotation marks omitted) (holding that a defendant who lied about his marital status and claimed that he had a vasectomy was not responsible for compensatory or punitive damages in connection with misrepresentations where normal, healthy baby resulted). This decision is consistent with the vast majority of jurisdictions in relation to wrongful conception jurisprudence, in that recovery is limited or denied where a healthy baby is born. See DOBBS, supra note 2, at 793–801. The courts have reasoned that the benefits of a healthy baby outweigh child-rearing costs, resulting in no net “damages.” See id. at 798–99. But see Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 612 (N.M. 1991) (parents of healthy baby resulting from negligent sterilization can recover costs of raising child from birth to adulthood).


67. People v. Evans, 379 N.Y.S.2d 912, 922 (Sup. Ct. 1975). Although this is a criminal case, the sentiment expressed applies equally to civil cases. In People v. Evans, the defendant was charged with criminal rape for admittedly using false premises and "head games" to induce women into his apartment by claiming to be a psychologist, whereupon he seduced them by means that were very intimidating and despicable, but, according to the court, fell just short of rape. Id. at 921. The court cited various cases explaining that fraud, no matter how despicable, does not vitiate consent for purposes of criminal rape. Id. at 918–19 (citing, inter alia, Lewis v. Alabama, 30 Ala. 54 (1857); Alabama v. Murphy, 6 Ala. 765
The fact that judges—powerful leaders in our communities—have the audacity to publish such sentiment in sexual fraud and rape cases reflects an inappropriate "boys will be boys" mentality and underscores the need for legal reform. Since the main sex tort vehicles for recovery of general damages in the absence of physical injury—the heartbalm torts\(^6\)—have been abolished in most states,\(^69\) victims of sexual deceit have filed civil lawsuits for battery, intentional infliction of emotional distress, and fraud. However, despite the generally comprehensive self-determination protection afforded by intentional tort theory, plaintiffs in these cases have had little success in the absence of physical injury in accordance with antiheartbalm sentiment. Courts are usurping the jury's fact-finding role in sexual deceit cases and dismissing them based on antiheartbalm sentiment as a matter of law.\(^70\) Indeed, several scholars have commented on the grossly disparate analysis employed in economic fraud cases versus sexual fraud cases.\(^71\) The demise of the heartbalm torts has thus created a sharp division in tort law between cases involving fraudulent inducement of sexual relations and other types of autonomy infringement.\(^72\)

In the typical sexual deceit case, the plaintiff learns some time subsequent to the sexual contact that his consent to sex was induced by deception. In general, the issue of whether fraud vitiates consent to physical contact after the fact is a question of fact to be determined in accordance with all of the evidence.\(^73\) However, when a person learns of fraud in the inducement of sex after the fact, the established fraud exception to consent has generally been disregarded, based on the "privacy" of sexual negotiation and the supposed "difficulty" in deciding whether the fraud or

68. See supra notes 25–30 and accompanying text.
69. Some states are still in the process of abolishing heartbalm torts. See, e.g., Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994) (finding that Idaho no longer recognizes criminal conversation). For more information on criminal conversation, see DOBBS, supra note 2, at 1246.
70. Larson, supra note 20, at 401–12 (explaining that a minority of jurisdictions will entertain actions for sexual deceit, and compensation is limited); see also, e.g., Keenan D. Kmiec, The Origin and Current Meanings of "Judicial Activism," 92 CAL. L. REV. 1441, 1444 (2004) (describing the various derogatory connotations of "judicial activism," all of which involve judges improperly usurping power properly belonging to other democratic entities). Juries representing society at large should be deciding questions of minimal civil expectations in social settings, not individual judges who are disproportionately older, white males. See, e.g., Levinson, supra note 4, at 373–87.
71. Larson, supra note 20, at 412.
72. See infra Part III.
73. See infra Part III.C.1.
manipulation involved was sufficiently material to vitiate consent.74 This may explain why fraud-based sexual battery claims resulting in a sexual disease have been much more successful75 than fraud-based sexual battery claims where no disease was transmitted: it seems objectively obvious that sexual disease would materially impact sexual consent.76 Courts seem uncomfortable trying sexual deceit cases lacking tangible physical injury.

For example, in a recent Massachusetts case, Conley v. Romeri,77 the court of appeals declined to recognize that the defendant’s dishonesty regarding his potential to have children could vitiate his girlfriend’s sexual consent, affirming the summary judgment in favor of the defendant.78 The plaintiff alleged that she informed the defendant that she was over forty and wanted children, and that the defendant told her not to worry about it because he had already fathered four children and a psychic told him that he would father two more children.79 The truth was, he had undergone a vasectomy years prior and mislead the plaintiff about his ability and desire to have more children. The plaintiff claimed that, since she had made clear her intent to find a partner with whom to have children, making it material to her sexual decision, the defendant’s omission of the fact of his vasectomy, and various affirmative representations regarding his intent to father more children, materially impacted her decision to engage in sexual relations such that her consent was vitiated by fraud in the inducement.80

74. See, e.g., infra notes 81–84, 148 and accompanying text.
75. Leleux v. United States, 178 F.3d 750 (5th Cir. 1999) (holding that a defendant’s fraudulent concealment of the disease that he transmitted via intercourse constituted battery); Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Cal. Ct. App. 1984) (holding that an action for damages brought by woman against man for contraction of genital herpes was not barred by the right of privacy or the seduction statute); Hogan v. Tavzel, 660 So. 2d 350, 352–53 (Fla. Dist. Ct. App. 1995) (holding that wife’s consent to sex with husband was vitiated by his failure to inform her of his genital warts, and wife’s consent without knowledge was the equivalent of no consent) (citing RESTATEMENT (SECOND) OF TORTS § 892B illus. 5 (1977) (“A consents to sexual intercourse with B, who knows that A is ignorant of the fact that B has a venereal disease. B is subject to liability to A for battery.”)); B.N. v. K.K., 538 A.2d 1175, 1179–80 (Md. 1988) (holding that a cause of action for fraud existed where a nurse alleged that a doctor had genital herpes, was aware of his disease, and nonetheless had sex with her without telling her, causing her to contract herpes); R.A.P. v. B.J.P., 428 N.W.2d 103, 108–09 (Minn. Ct. App. 1988) (allowing a claim for fraudulent transmission of herpes upon a showing that the defendant knew she had the disease and was silent, allowing the plaintiff to contract the disease); Plaza v. Estate of Wisser, 626 N.Y.S.2d 446, 449–50 (App. Div. 1995) (noting that the homosexual defendant failed to tell his partner/plaintiff that his former partner died of AIDS, and that the plaintiff contracted HIV from the defendant); Dubovsky v. Dubovsky, 725 N.Y.S.2d 832, 836 (Sup. Ct. 2001) (holding that one spouse failing to tell the other of sexual disease can constitute fraud); Crowell v. Crowell, 105 S.E. 206, 210 (N.C. 1920) (ruling that a husband was liable to his wife for infecting her with venereal disease); De Vall v. Strunk, 96 S.W.2d 245, 247 (Tex. Civ. App. 1936) (recognizing a woman’s cause of action against a man for fraudulently inducing her to have sex without telling her he had an STD); see also Leary, supra note 8, § 6, 189–93.
76. See infra Part III.C.1 (regarding the legal standard for when fraud vitiates consent).
78. Id. at 938–39.
79. Id. at 935.
80. Id. at 935–36.
The court stated that it was “aware of no jurisprudential standards that [could] be applied in such circumstances,”\(^81\) that “there is no recognized standard of conduct by which [it] reasonably [could] assess the materiality of the alleged misrepresentation,” and that claims such as these “‘arise from conduct so intensely private that the courts should not be asked to nor attempt to resolve such claims.... In summary ... a court should not define any standard of conduct therefor.’”\(^82\) The Conley court determined as a matter of law that the defendant’s statements, made early in the relationship, “may be seen only as an inducement to continue dating,” not

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\(^81\) Id. at 937; see also Doe v. Moe, 827 N.E.2d 240, 244–45 (Mass. App. Ct. 2005) (“We must determine whether the application of a standard of reasonable care to private consensual sexual conduct is appropriate or even workable.... There are no comprehensive legal rules to regulate consensual sexual behavior, and there are no commonly accepted customs or values that determine parameters for the intensely private and widely diverse forms of such behavior. In the absence of a consensus of community values or customs defining normal consensual sexual conduct, a jury or judge cannot be expected to resolve a claim that certain consensual sexual conduct is undertaken without reasonable care.” (footnote omitted)). Ironically, Americans’ sexual practices and customs are more understood now than ever before, based on extensive research on human sexuality. See, e.g., MICHAEL ET AL., supra note 37; Pollard, Sex Torts, supra note 4, at 783–87. This “lack of standards” rhetoric is strikingly similar to most courts’ rationales for dismissing wrongful life cases, based on the “impossibility” of determining whether life may ever constitute damages. See, e.g., Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978) (“Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians.”). These courts dismiss claims as a matter of law that they implicitly recognize should be fully considered by reference to cultural beliefs, philosophy, prevailing moral convictions, and even common knowledge, that is, consideration that could and should be given to a jury. See DOBBS, supra note 2, at 355 (noting that it is the jury’s role to make normative decisions).

\(^82\) Conley, 806 N.E.2d at 937 (third alteration in original) (quoting Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619–20 (Cal. Ct. App. 1980)). The court also stated that, while dishonesty in a personal relationship may be blameworthy, it is not compensable, as the amatory (heartbalm) torts have been abolished in recognition that public policy no longer considers money damages appropriate for what is perceived as only an ordinary broken heart. Id. at 939 n.5 (citing Heartbalm Statutes and Deceit Actions, supra note 66, at 1778). The court also relied on Stephen K. v. Roni L. in determining that fraudulent inducement to sexual relations grounded in fertility dishonesty is not actionable. Conley, 806 N.E.2d at 936–37. However, the Stephen K. court, in dicta, stated that “court[s] [should not] supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct,” Stephen K., 164 Cal. Rptr. at 620, and that courts “should not define any standard of conduct” relative to the highly intimate nature of the sexual relationship, id. One court held that Stephen K. can be readily distinguished on far more pertinent grounds. See Conley, 806 N.E.2d at 939 n.7. In Stephen K., any damages award to the plaintiff/father, who allegedly became a father only because the defendant/mother lied about birth control, would directly impact the financial well-being of the innocent child being cared for by the mother, as the father’s child support obligations were the primary item of economic damages resulting from the fraudulently induced paternity, and any damages award would divest the mother of funds necessary to care for the innocent child. Stephen K., 164 Cal. Rptr. at 619. Public policy and the welfare of children mandate that fathers cannot maintain such claims for damages. See, e.g., Wallis v. Smith, 22 P.3d 682, 684–85 (N.M. Ct. App. 2001) (noting that the child’s need for financial support is the prevailing public policy). When a child is not involved, there is no superseding public policy reason for denying liability for fraudulently induced sexual relations.
as an inducement to have sexual relations. A jury may have viewed the facts pertaining to sexual inducement quite differently, but the judge assured that no trial would ensue.

Utilizing similar analysis, the Maine Supreme Court held that the defendant’s failure to disclose an extramarital affair did not vitiate the plaintiff-wife’s consent to sexual relations with him. The court held that the husband’s dishonesty in relation to an extramarital affair did not constitute misrepresentation or mistake sufficient to vitiate consent to sustain the intentional tort claim, but also noted that failure to disclose a known disease could vitiate consent. This finding was related to the court’s conclusion that there is no duty to be sexually faithful in a marital relationship—a view shared by a Washington court. Other courts have dismissed claims for intentional torts grounded in fraudulently induced sexual relations on a variety of similar bases.

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83. Conley, 806 N.E.2d at 939. Regarding the negligence claim based on the argument that the defendant owed the plaintiff a duty of honesty based on the romantic nature of the relationship, the court stated that no such duty exists. Id. at 936; see also Doe, 827 N.E.2d at 243–46 (stating that “[t]here are no comprehensive legal rules to regulate consensual sexual behavior, and there are no commonly accepted customs or values that determine parameters for the intensely private and widely diverse forms of such behavior”; concluding that no general duty of care exists relative to sexual action during sex; applying a heightened standard of recklessness to sexual action causing harm to another; and affirming summary judgment for the defendant based on her alleged sudden change of position during intercourse that caused the plaintiff to suffer a fractured penis requiring emergency medical attention and long term pain).

84. Doe, 827 N.E.2d at 246.

85. McPherson v. McPherson, 712 A.2d 1043, 1046–47 (Me. 1998). The parties waived a jury trial and the court made findings of fact, including that the defendant ex-husband transmitted HPV to his wife but was not aware of his HPV infection at the time of transmission. Id. at 1044.

86. Id. at 1046. The court relied on section 892(A)(1) of the Restatement (Second) of Torts to find that consent is ineffective if the person consenting is induced to consent by a substantial mistake concerning the nature of the invasion. Id. The court found that, while withholding information about a known disease could vitiate consent because it goes to the nature of the touching, since here the defendant was unaware of his infection, consent was not vitiated. Id. The court’s cryptic analysis of fraud vitiating consent misses the point entirely because the plaintiff’s claim was that her consent was invalid not because of the disease, but because of the deception concerning fidelity. See id. A trier of fact should have been allowed to determine, based on all of the facts, whether the plaintiff would have avoided contact with her husband but for the fraud, and if so, whether he should be liable under battery law for misappropriating her sexual autonomy.

87. Id. at 1044. The court did however recognize a cause of action for negligent infliction of a sexual disease: Id. at 1045; see also In re Marriage of J.T., 891 P.2d 729, 731 (Wash. Ct. App. 1995) (holding that there is no legal duty to be faithful in marriage).

88. In another case, a husband sued his wife on several bases, and one claim sought money damages based on his allegation that prior to marriage, the wife had lied to him about her relationship with her parents and where she grew up. The husband claimed that the lies were intended to and did “induce [his] sympathy, affection and love and . . . cause him to marry” the defendant. R.A.P. v. B.J.P., 428 N.W.2d 103, 109–10 (Minn. Ct. App. 1988) (first alteration in original). The claim was dismissed because the allegations were conclusory. Id. at 109. Yet, the court indicated that it was possible to state a claim for fraud if the facts were specific enough and the plaintiff showed that he married the defendant in reliance on her lies and was damaged thereby. Id. In a recent New York case, a wife failed
Nevertheless, a few cases have recognized that fraud in the inducement of sex may vitiate consent in the absence of physical injury, resulting in battery. In one California case, the court found that the plaintiff's consent to sexual relations was vitiating by the fact that the defendant failed to disclose that he was infected with AIDS: "[T]he essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body . . . ." \(^{89}\) The plaintiff consented unaware of the threat of AIDS, making the consent invalid, regardless of whether physical injury ensued, because his sexual autonomy was misappropriated. \(^{90}\) Similarly, an Idaho court of appeals sustained a wife's claim for battery when she discovered her husband's concealment of an adulterous affair, which she claimed negated her consent to sex based on fraud in the inducement. \(^{91}\) The court found a question of fact regarding the "mistake concerning the nature of the contact or the harm to be expected from it." \(^{92}\) The trial court had concluded that the wife's consent must be measured at the time of the consent, but the court of appeals recognized that such an analysis would eviscerate the fraud exception to consent. \(^{93}\)

to tell her husband that her former husband had died of AIDS, which the husband claimed misled him as to her HIV/AIDS status, and he sought damages under a fraud theory, inter alia. \(^{89}\) In re Louie, 213 B.R. 754, 762 (Bankr. N.D. Cal. 1997) (alteration in original) (quoting \textsc{RESTATEMENT (SECOND) OF TORTS} § 18 (1965)) (internal quotation marks omitted) (finding that the plaintiff need not be aware of the offensive nature of the touching at the time it occurs).

\(^{90}\) Id. at 764.


\(^{92}\) Id.

\(^{93}\) The court stated,

The district court concluded that Thomas Neal's failure to disclose the fact of his sexual relationship with [the mistress] did not vitiating Mary Neal's consent to engage in sexual relations with him, such consent being measured at the time of the relations. We do not agree with the district court's reasoning. To accept that the consent, or lack thereof, must be measured by only those facts which are known to the parties at the time of the alleged battery would effectively destroy any exception for consent induced by fraud or deceit. Obviously if the fraud or deceit were known at the time of the occurrence, the "consented to" act would never occur.

\(^{89}\) Id. at 876–77. The court held that Mary Neal's affidavit at least raised a genuine issue of material fact, and, quoting the affidavit, stated, "[I]f the undersigned had realized that her husband was having sexual intercourse with counterdefendant LaGasse, the undersigned would not have consented to sexual intercourse with counterdefendant Neal and to do so would have been offensive." \(^{89}\) Id. at 877 (alteration in original) (internal quotation marks omitted).
The conflict in the case law reflects the gray areas created by the unfortunate reality that both men and women lie about various factual aspects of their lives in order to obtain, or keep, sexual relationships.\textsuperscript{94} The emerging majority rule appears to be that sexual deception and manipulation, no matter how outrageous, intentional, or malicious, are not actionable unless the plaintiff suffers sexual disease or other physical injury. This apparent emerging majority rule in sexual deceit cases fails to protect personal choices regarding sexual contact.\textsuperscript{95}

The normative impact is that it is socially acceptable to manipulate others' sexual choices through fraud, deceit, or a lack of common decency.\textsuperscript{96} Judges' views of these cases involving "only an ordinary broken heart"\textsuperscript{97} fail to recognize the very real, albeit intangible, injury that often results from deceit in sexual relationships. The loss of an intimate relationship can cause serious emotional and psychological distress, even in the absence of disease.\textsuperscript{98} Symptoms such as sleeplessness, panic attacks, loss of appetite, and deep depression are not uncommon.\textsuperscript{99} Betrayal in intimate relationships can cause lifelong emotional scars and permanent pain, including a lifelong inability to be intimate because of an inability to trust.\textsuperscript{100} The emotional fallout from deception in the most intimate of personal relations may have lasting consequences not just for the deceived person, but for those emotionally attached to him who experience emotional pain vicariously, such as spouses, children, siblings, and parents. Intentional sex tort law should be reformed to more effectively protect sexual autonomy and the emotional and other harm resulting from its infringement.

\textsuperscript{94} Indeed, dishonesty in sexual relationships is apparently becoming more common. A magazine survey revealed that only 50\% of survey respondents felt that people should be able to sue for emotional distress when a sexual partner lies to them, and 67\% said they would not sue for sexual fraud even if they could because, e.g., "[p]eople have to learn that the world isn't a nice-nice place and you can't legislate it into one." Subotnick, supra note 45, at 393 n.449 (quoting Should the Law Punish Lovers Who Lie? 84\% Say Yes, GLAMOUR, June 1994, at 133) (internal quotation marks omitted).

\textsuperscript{95} See Pollard, Sex Torts, supra note 4, at 802–03. In Conley v. Romeri, the plaintiff alleged pecuniary losses in the form of business losses resulting from her depression, but the court found these to be insufficient. See 806 N.E.2d 933, 936 (Mass. App. Ct. 2004).

\textsuperscript{96} Susan Estrich believes that rape should be defined to include coercion by false statements as well as coercion by physical force. See Estrich, supra note 41, at 1120 ("[W]e should prohibit fraud to secure sex to the same extent we prohibit fraud to secure money . . . ."). Jane E. Larson has proposed that the lack of remedies for sexual fraud and deception may lead to increased unfair dealings between sexual partners, such as Lorena Bobbitt's self-help remedy, and advocates a return to tort actions to provide a remedy for persons sexually defrauded. See Larson, supra note 20, at 422–24.

\textsuperscript{97} Conley, 806 N.E.2d at 938 n.5.

\textsuperscript{98} See generally Janis Abrams Spring, After the Affair: Healing the Pain and Rebuilding Trust When a Partner Has Been Unfaithful (1996) (discussing emotional pain and healing after a partner's affair).

\textsuperscript{99} See, e.g., Subotnik, supra note 45, at 313 (noting typical symptoms resulting from disappointments in personal relationships).

\textsuperscript{100} See Larson, supra note 20, at 426.
III. TOWARD A UNIFIED INTENTIONAL SEX TORT ANALYSIS

To put it plainly, a man may do things to get a woman's agreement to sex that would be illegal were he to take her money in the same way. . . . By protecting consent in sexual relations less vigorously than in commercial relations, existing law embodies a hierarchy of values that either ranks sexual integrity unjustifiably low or the integrity of market transactions unjustifiably high.\textsuperscript{101}

Cases of sexual autonomy misappropriation should be protected consistent with other types of intentional torts. Intentional tort doctrine protects a person's right of self-determination relative to his person and property.\textsuperscript{102} Proof of damages is generally not necessary,\textsuperscript{103} because the injury is intangible, consisting of interference with the plaintiff's autonomy, which constitutes harm as a matter of law.\textsuperscript{104} The plaintiff's prerogatives are unencumbered by any "reasonableness" analysis provided that they are clearly communicated or otherwise understood by the defendant.\textsuperscript{105} While

\begin{itemize}
  \item \textsuperscript{101} Id. at 412-13; \textit{see also} Bender, \textit{supra} note 18, at 148–50 (arguing that tort law values physical security and property more highly than emotional security, which burdens women, who are more likely to assert emotional claims).
  \item \textsuperscript{102} "[T]he plaintiff's right of self-determination or autonomy [is] the centerpiece of the law on intentional torts . . . ." \textit{Dobbs, supra} note 2, at 217; \textit{see also id.} at 47, 54. Battery protects the right to avoid harmful or offensive bodily contact; assault protects the right to avoid apprehension of an imminent harmful or offensive bodily contact; false imprisonment protects the right to personal freedom of movement; trespass to land protects the right of autonomy regarding one's premises; and trespass to chattels and conversion protect the right of autonomy regarding one's personal property. \textit{See generally G. Edward White, Tort Law in America} (2003).
  \item \textsuperscript{103} The exceptions are conversion and trespass to chattels (damages or lost use must be proven), and intentional infliction of emotional distress (proof of extreme emotional distress satisfies the harm element). \textit{See Dobbs, supra} note 2, at 122–27, 150–53, 824–26. Of course, if one partner incurs financial losses resulting from deceit, such as economic losses incurred in paying housing costs of a deceptive partner, those losses would be recoverable as special damages. \textit{See id.} at 79–80 (discussing damages that may be recovered in intentional tort cases).
  \item \textsuperscript{104} There is an enormous difference in the degree of protection afforded to the plaintiff's autonomy under intentional tort theories and other theories protecting autonomy. Whereas the constitutional right of privacy involves a balance of the interest infringed and the state's interest in the infringement, and the dignitary tort invasion of privacy involves a fact-finder's review of whether the invasion was reasonable, the intentional torts fiercely protect the individual's autonomy without reference to the reasonableness of his choice or the other party's interest in invading his choice. \textit{See, e.g., Jaque v. Steenberg Homes, Inc.,} 563 N.W.2d 154 (Wis. 1997) (holding that the plaintiffs' refusal to allow a neighbor to access his property by traveling over the plaintiffs' property was within the plaintiffs' unfettered discretion, such that ignoring the plaintiffs' decision constitutes trespass; and affirming an award of $100,000 in punitive damages, since the defendant had actual notice of the plaintiffs' decision not to allow the use of their property).
  \item \textsuperscript{105} \textit{See, e.g., Dobbs, supra} note 2, at 54 ("Battery today vindicates the plaintiff's right of autonomy and self-determination, her right to decide for herself how her body will be treated by others, and to exclude their invasions as a matter of personal preference, whether physical harm is done or not."). In some circumstances, what a defendant "understood" may be determined objectively, based on ordinary social usages. \textit{See infra} Part III.B, C.2; \textit{see also, e.g., Cohen v. Smith,} 648 N.E.2d 329 (Ill. App. Ct. 1995) (holding that a hospital's knowledge of a plaintiff's demand not to be seen naked or touched by a male rendered the
there are a few exceptions to automatic liability for infringing another’s personal autonomy. A person may be liable for an intentional tort even if she does not intend to hurt the plaintiff in any way, or even believes she is benefiting him.

Choices regarding sexuality are, a priori, among the most private and protected aspects of a person’s autonomy and implicate the person’s bodily integrity and psychological and spiritual well-being. In nonsexual contexts, personal autonomy is fiercely protected, even relative to consent to sexual touching induced by fraud. An intentional tort action should lie when the facts sufficiently prove that one romantic partner misappropriated another’s sexual autonomy.

A. Personal Autonomy Infringement: The Law of Battery

Battery is the best intentional tort theory for cases of sexual choice misappropriation. Battery protects the individual’s unfettered choice to determine who touches his body and recognizes the importance of the core American values of freedom and self-actualization. Its elements are...
amenable to proof in the context of sexual deceit by reference to existing battery doctrine defining “offensive” contact and “consent.” Dignitary harm is presumed to flow from interference with bodily autonomy, because the right of bodily autonomy is considered integral to self-determination and therefore fiercely protected. Compensatory damages for battery are most comprehensive and include general damages for emotional distress and mental suffering such as fear, anxiety, indignity, or disgrace, in addition to economic losses.

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[The Framers] undertook to secure conditions favorable to the pursuit of happiness.... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred... the right to be let alone—
the most comprehensive of rights and the right most valued by civilized men. 277 U.S. 438, 478 (1928). Tort law is the primary means of vindicating privacy and self-determination in the absence of state action, and intentional tort policy is grounded in the right to be left alone.

112. Although fraud and intentional infliction of emotional distress are viable sex tort vehicles in certain circumstances of sexual misconduct, most sets of facts that would support these claims also support a claim for battery, making these other claims generally less efficient and superfluous. Fraud and intentional infliction of emotional distress require proof of intent that is more difficult to establish than proof of intent for battery purposes. For example, intentional infliction of emotional distress requires proof of intent to cause emotional distress or reckless disregard for the other’s emotional distress, whereas intent to offend may be established by reference to community norms and can be based on substantial certainty. See, e.g., DOBBS, supra note 2, at 56, 826; infra Part III.C.2. Fraud also requires a showing of actual intent to deceive, which is a higher intent burden. Both fraud and intentional infliction of emotional distress also require proof of harm, which should not be required in cases of sexual choice manipulation, because injury is presumed to flow from autonomy infringement. While harm is presumed, parasitic damages for emotional distress, pecuniary loss, and any other losses flowing from the tort’s commission are recoverable. Thus, claims for fraud and intentional infliction of emotional distress are unnecessary to recover any item of damages and are less efficient because they require proof of more elements and create more issues for the trier of fact.

113. The value of bodily autonomy dates back to the old common-law writ of trespass and is entrenched in tort and constitutional law. DOBBS, supra note 2, at 54. Self-determination and autonomy are protected from state interference by the Due Process Clause, which includes the “right to die” as part of self-determination regarding one’s physical body. See generally Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261 (1990) (holding that the constitutional right of liberty protects an individual’s right to refuse life-saving medical treatment, refusal of which results in death). Self-determination regarding one’s body is protected against private interference by tort law, primarily battery (protecting the right not to be touched harmfully or offensively) and false imprisonment (protecting the right to move about freely).

114. For example, the traditional informed consent standard (the medical standard of disclosure, set by the custom of practitioners) has been challenged in recent decades in favor of a standard more concerned with the patient’s right of self-determination. Thus, some recent decisions favor a duty to disclose all information that the patient would want to consider before consenting to a medical procedure because “[r]espect for the patient’s right of self-determination... demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves.” DOBBS, supra note 2, at 655–56 (alterations in original) (emphasis added) (quoting Canterbury v. Spence, 464 F.2d 772, 784 (D.C. Cir. 1972)); see also RESTATEMENT (SECOND) OF TORTS § 18 (1965) (battery law encompasses more than direct contact to the body in recognition of the autonomy and dignity infringed when an object intimately connected to the body is disturbed).

115. See Whitley v. Andersen, 551 P.2d 1083, 1085 (Colo. Ct. App. 1976) (holding that a student who shoved another student near her school locker was liable for battery despite no
The plaintiff's right of autonomy even includes a zone around the plaintiff's actual physical body. Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Thus, grabbing another's plate, or hat, or garment, or even blowing smoke into another's face, may be actionable. The plaintiff need not know that the contact is offensive at the time of the contact, because liability is based on the defendant's intentional invasion of [the plaintiff's] dignitary interest in the inviolability of his person and the affront to [his] dignity . . . . This affront is as keenly felt by one who only knows after the event that an indignity physical injury); see also Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523, 529 (D.D.C. 1981) ("To constitute the tort of battery, a defendant can be found liable for any physical contact with the plaintiff which is offensive or insulting, as well as physically harmful."). As explained by one court, The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good.

Andrews v. Peters, 330 S.E.2d 638, 640–41 (N.C. Ct. App. 1985) (citing W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER & KEETON ON TORTS § 8, at 36–37 (5th ed. 1984) [hereinafter PROSSER & KEETON]) (holding that, where a coworker intended to "tap" the back of the plaintiff's knee with the front of his knee from behind, apparently as a joke, but the plaintiff fell and sustained harm, the lack of foreseeability of harm is not relevant in intentional tort action); see also RESTATEMENT (SECOND) OF TORTS § 13 cmt. c. Of course, if physical injury occurs, a battery action lies even where the defendant intended no harm and could not reasonably foresee that harm could occur, but intended to touch the plaintiff. See, e.g., Caudle v. Betts, 512 So. 2d 389 (La. 1987) (involving an employer who touched an employee with an automobile condenser during horseplay, intending only mild shock, but caused serious nerve injury requiring surgery); see also PROSSER & KEETON, supra, § 9, at 40 ("The defendant's liability . . . extends, as in most other cases of intentional torts, to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim."). 116. This is usually referred to as the "extended personality" rule. See DOBBS, supra note 2, at 61–62.

117. RESTATEMENT (SECOND) OF TORTS § 18 cmt. c. "There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person." Id.

118. See, e.g., Leichtman v. WLW Jacor Commc'ns, Inc., 634 N.E.2d 697 (Ohio Ct. App. 1994) (holding that a talk show guest's blowing cigar smoke into a known antismoking advocate's face during a radio talk show may constitute harmful or offensive contact grounded in smoke particles or "particulate matter" touching the plaintiff's body); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) (asserting that the extended personality rule holds that offensive contact with an object that is intimately connected to the plaintiff's body constitutes "contact" with the plaintiff's body, when a hotel agent snatched the plaintiff's plate from him in offensive manner and refused to serve him because he was a "negro").
Two elements must be proven to establish a claim for battery: intent to cause a harmful or offensive contact, and a resulting harmful or offensive contact. In sexual choice misappropriation cases, the defendant usually does not intend to "harm" the plaintiff's body, but rather seeks sexual gratification to the detriment of the plaintiff's fairly informed decision. These cases therefore require a showing of intent to "offend." Consent is the usual defense, since the plaintiff usually consented at the time of sex but later learned facts that arguably vitiate consent post facto, making the contact "offensive" to the plaintiff in light of after-acquired facts. Analysis of the meaning of "intent to offend" and when consent is vitiated by fraud (particularly relative to after-acquired facts) is necessary to decide most cases of battery based on fraud in the inducement of sex.

B. The Meaning of Intent to Offend

Existing authority provides two separate bases for finding conduct to be "offensive," which are referred to herein as actual and constructive intent to offend. First, if the plaintiff clearly manifests a subjective desire to avoid the defendant's contact for any reason, the defendant's contact thereafter is per se offensive because choices regarding who touches one's body are unfettered and are not subject to review based on reasonableness or sexual expectations. Thus, if a person actually expresses his sexual preference

119. RESTATEMENT (SECOND) OF TORTS § 18 cmt. d.
120. Where no injury (such as sexual disease) is involved, the contact is not "harmful," so the key is whether it was "offensive." Since sexual relations involves bodily contact, there is no issue about contact per se. See id. § 18 cmt. c.
121. Id. §§ 13, 18.
122. The meaning of intent for intentional tort purposes is merely the "intent to bring about a result which will invade the interests of another in a way that the law forbids." PROSSER & KEETON, supra note 115, at 36. Intent to cause offensive contact may be shown by substantial certainty. If it is apparent that the plaintiff is not consenting to the defendant's contact, the defendant's intent in touching her is considered offensive. DOBBS, supra note 2, at 56.
123. Anything that infringes the plaintiff's reasonable sense of personal dignity, that is, his "actual and apparent wishes to avoid," is actionable in a battery case. DOBBS, supra note 2, at 55.
124. There are minor exceptions relating to a plaintiff's subjective feelings about the contact which do not apply in the sexual relations context, such as that a person normally cannot sue another for tapping him on the shoulder to request the time of day. See DOBBS, supra note 2, at 56. Sexual decisions are not amenable to presumed acceptance pursuant to ordinary "social usages" analysis any more than medical choices, because invasion of sexual and medical choices impact a person's subjective moral and religious views and self-determination on a deep level, unlike getting tapped on the shoulder or being jostled in a crowd. See RESTATEMENT (SECOND) OF TORTS § 19 cmt. a (2000); see also Cohen v. Smith, 648 N.E.2d 329, 335–36 (Ill. App. Ct. 1995) (holding that, since the plaintiff specifically demanded not to be seen or touched while naked by any male, whether the hospital was liable for battery based on its disregard of the plaintiff's wishes and its having allowed a male nurse to see and touch the plaintiff while she was naked, presented a jury question on the issue of intent to offend).
to the defendant, or the preference is otherwise actually known to the defendant, and such preference is disregarded by the defendant in order to obtain consent to sex, the defendant will be held to have intended offensive contact because she has knowingly undermined the plaintiff’s right of sexual autonomy. Similarly, if the defendant obtains consent with actual knowledge of the plaintiff’s incapacity to consent, she should be held to have intended offensive contact based on her knowledge of a lack of true consent. This is actual intent to offend.

Second, the Restatement’s concept of “offensive” contact includes contact that violates social usages that are “prevalent” at the time and place of the contact. That is, offensive contact may be established by social standards that bind the defendant constructively, regardless of her actual intent to offend. Some common and minor touchings may be presumed acceptable based on “social usages,” such as tapping another on the shoulder, touching another’s sleeve, brushing past another in a crowded

125. As stated by Professor Dan Dobbs, “Battery today vindicates the plaintiff’s rights of autonomy and self-determination, her right to decide for herself how her body will be treated by others, and to exclude their invasions as a matter of personal preference, whether physical harm is done or not.” DOBBS, supra note 2, at 54.

126. See, e.g., Reavis v. Solminski, 551 N.W.2d 528, 540 (Neb. 1996) (stating that the plaintiff’s “abnormal inability to refuse unwanted sexual contact” as a result of childhood sexual abuse could render consent invalid if the defendant had actual knowledge of such incapacity); Bunce v. Parkside Lodge of Columbus, 596 N.E.2d 1106, 1107 (Ohio Ct. App. 1991) (finding that a patient experiencing drug withdrawals in a drug rehabilitation center may not have given valid consent to sex with her counselor, who knew of her addiction and diminished capacity).

127. The Restatement characterizes the state of the law as follows:

In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

RESTATEMENT (SECOND) OF TORTS § 19 cmt. a; see also DOBBS, supra note 2, at 53 (“Any touching that violates ordinary social usages may thus be a battery unless the plaintiff has given signs that it is acceptable.”). The element of intent to offend may turn on a community standard insofar as the defendant is bound by community standards about what is reasonable and in accordance with social norms. See DOBBS, supra note 2, at 56. Thus, for example, if ordinary social usages require the defendant to disclose that she is two months pregnant with another man’s child before initiating sexual relations with the plaintiff, she has “intended” to offend the plaintiff whether or not she was actually aware that a social expectation of candor in this regard exists. Constructive notice is a concept that appears throughout our legal system and is based on the expectation that people in a society know or should know certain information in order to conform to legal requisites; it is no excuse if they are subjectively unaware of information of which they should be aware. Objective reasonableness, including constructive notice, is the cornerstone of negligence law. Since the Restatement defines “offensive” conduct by reference to objective, prevailing social usages, the defendant is bound by such even if she was unaware of the social usages or incorrectly subjectively believed that her conduct comported with social usages. A jury is the proper body to decide what constitutes “prevailing social usages,” since a jury represents society at large.
subway, or shaking hands upon introduction. This reflects a commonsense approach to inevitable contact in a crowded society. However, if the defendant perpetrates physical contact that exceeds the bounds of ordinary social usages and violates social norms, she will be held to have done so with constructive intent to offend.

The concept of constructive intent to offend is consistent with other intentional tort law doctrine. For example, misappropriation for purposes of a conversion claim is established upon proof that the defendant exercised control over a chattel owned or possessed by the plaintiff inconsistent with the plaintiff's property rights, even if the defendant is unaware that her actions violated the plaintiff's rights: "[T]he focus of inquiry is not on the defendant's conduct but on the plaintiff's property rights." No proof of "wrongful" intent is required; the defendant may even be operating under a mistaken belief that she owned the property. This is the same type of minimal intent required for trespass to land: a simple, perhaps innocent, intent to enter land owned by the plaintiff establishes a case because the plaintiff's property rights have been violated, whether or not the defendant intended any violation. These rules place an onus on all persons to exercise care to avoid trampling on others' property rights, which translates

128. See, e.g., Restatement (Second) of Torts § 19 cmt. a, illus. 1–4. Note that some socially acceptable touchings could result in battery liability if the plaintiff has clarified his desire to avoid the contact and the defendant ignores his decision. For example, if a person obviously manifests his intent to avoid a handshake and another person nonetheless grabs his hand, his right to control contact with his body has been disturbed, and his autonomy infringed. Although the Restatement expresses no opinion regarding liability in these circumstances (where the actor knows his contact is offensive to another's known but abnormally acute sense of personal dignity) and some touchings are not amenable to this consent analysis because they are simply too ubiquitous and uncontrollable (e.g., brushing past another in a crowded subway), the gist of battery law recognizes complete respect for another's choice whether to be touched when that choice is clearly manifested, whether or not it comports with societal expectations. See Dobbs, supra note 2, at 54–55 ("[D]efendant must respect the plaintiff's apparent wishes to avoid intentional bodily contact... [P]laintiff's right to avoid unwanted intentional contact does not depend upon... the reasonableness of the plaintiff's wishes... [I]t depends upon violating the plaintiff's right to herself.").

129. For example, in Boyles v. Kerr, 855 S.W.2d 593, 594 (Tex. 1993), the defendant's intent to perpetrate offensive sexual contact by videotaping his girlfriend during sex without her knowledge could be demonstrated by community standards and expectations of privacy during sexual acts, regardless of his subjective intent to harm or offend her, assuming the plaintiff would not have consented to the sexual contact had she understood the risks at hand resulting from the videotaping (such as the later dissemination of the tape to third parties). Thus, although Boyles's actual intent may have been to amuse himself and his friends, and not to harm Kerr, he would be held to a standard of constructive intent to offend if his "hidden camera" escapade fell below minimal civil expectations under the circumstances, i.e., violated prevailing "social usages." Similarly, failure to disclose an extramarital affair in obtaining consent to sex with a spouse could vitiate consent if, but for the omission, the other spouse would not have consented, and if the omission violates social expectations of candor in marital relations. See Neal v. Neal, 873 P.2d 871, 876–77 (Idaho 1994).

130. Dobbs, supra note 2, at 127.
131. Id. at 128–29.
132. Id. at 129.
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into a due diligence duty to determine ownership, because ignorance is no defense. Constructive notice is sufficient to warrant liability for a variety of intentional torts.\footnote{133}{For example, a person bound by a duty of care in keeping premises reasonably safe does not get off the hook simply because she did not have actual notice of a dangerous condition. The duty of care includes inspecting the premises for danger in a reasonable manner. See, e.g., Thoma v. Cracker Barrel Old Country Store, Inc., 649 So. 2d 277, 278–79 (Fla. Dist. Ct. App. 1995) (holding that restaurant is liable for slippery floor despite lack of actual knowledge of spill if restaurant employees caused the spill or failed to notice it and clean it up within a reasonable amount of time); 62A AM. JUR. 2D Premises Liability §484 (2005).}

Surely a person’s right of bodily and sexual autonomy deserves the same type of protection against others’ infringement. Providing such legal protection validates the Restatement’s conception of “offensive” conduct: bodily autonomy must be respected, and it is infringed when the defendant fails to abide by minimal social standards of respect for others, regardless of whether the defendant subjectively intended to offend the plaintiff or interfere with his autonomy.\footnote{134}{See Restatement (Second) of Torts § 19 cmt. a (2000).} Constructive intent to offend has already been applied in romantic touching battery cases: a well-intentioned kiss is actionable in the absence of the plaintiff’s consent because it exceeds what is presumably allowed without consent in our society.\footnote{135}{See generally id. at 216-43 (discussing consent as a bar to recovery for battery).} The Restatement’s conception of constructive intent to offend reflects a reasonable approach to “offensiveness” grounded in social norms that require consideration of others’ personal prerogatives, and is an appropriate way of proving intent in cases of sexual misappropriation.

C. Bases for Invalidating Consent to Sexual Relations

Consent is a defense to battery, provided it was reasonably informed and not induced by fraud.\footnote{136}{DOBBS, supra note 2, at 217. There are other ways of vitiating consent, such as abuse of power and incapacity, which are not relevant to this Article. See generally id. at 216–43 (discussing consent as a bar to recovery for battery).} Consent is vitiated by fraud if the plaintiff’s consent was made in reliance upon one or more untrue facts that were material to the plaintiff’s decision to consent, and the defendant was aware
of the plaintiff’s reliance on such material, untrue facts. Consent should also be vitiates in the absence of actual fraud where the plaintiff’s consent was uninformed because he had no reason to know of the risks within the defendant’s knowledge that the defendant, despite constructive knowledge that the risks would be material to the plaintiff’s refusal to consent, failed to disclose. This “uninformed consent” analysis adopts the Restatement’s constructive intent to offend analysis. These two bases for vitiating consent are discussed separately below.

1. Fraud Vitiates Consent

For consent to be vitiates by fraud, a fact-finder must determine that the plaintiff reasonably relied on one or more false facts that were material to his decision to consent. In addition, the defendant must be guilty of lying about, or concealing, the material facts in order to gain the plaintiff’s consent. Thus, for example, if a person concealing material facts receives consent to enter another’s land, that consent is invalidated, resulting in liability for trespass to land. In economic fraud cases subsequent to the laissez-faire era of U.S. economics, materiality has been broadly construed in favor of a plaintiff’s autonomy in making economic decisions based on a fair and adequate presentation of the facts relating to the transaction.

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137. See id. at 231.
139. A jury must determine whether, under all of the circumstances involved in the case, the information omitted or misrepresented (1) would have caused a reasonable person to make a different decision (materiality) and (2) would have been believed and relied upon by a reasonable person. See PROSSER & KEETON, supra note 115, at 750; see also China Family P’ship v. S-K Group of Motels, Inc., 622 S.E.2d 40, 44-45 (Ga. Ct. App. 2005) (noting that courts of equity require justifiable reliance—meaning that the plaintiff could not, by reasonable diligence, have ascertained the truth—since to hold otherwise would encourage culpable negligence); Rozen v. Greenberg, 886 A.2d 924, 929–30 (Md. Ct. Spec. App. 2005) (“[F]raudulent inducement ‘means that one has been led by another’s guile, surreptitiousness or other form of deceit to enter into an agreement to his detriment.’” (quoting Sec. Constr. Co. v. Maietta, 334 A.2d 133, 136 (Md. Ct. Spec. App. 1975))).
140. CAL. CIV. CODE § 3294(c)(3) (West 1997) (“‘Fraud’ means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.”).
142. See Larson, supra note 20, at 412–13 nn.169–71; see also, e.g., Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (2006). Most states have created state acts modeled after these acts, and many provide for treble damages and attorneys’ fees upon successfully demonstrating consumer fraud, which may include failure to disclose material facts regarding products, resulting in economic loss to the consumer. See, e.g., TEX. BUS. & COM.
Fraud and exceeding the scope of consent related to physical risks have been held to vitiate consent in battery cases. For example, failing to inform another that brass knuckles would be used during a fight vitiates consent to the fight because the consent was grounded in a mistaken understanding about the degree of risk. In the sexual context, failure to disclose physical risks can vitiate consent. A number of cases have held that where the plaintiff mistakenly believes the defendant to be infertile or free of sexual disease, and the defendant knows of the plaintiff’s mistaken belief and does not correct it, consent is vitiated, resulting in liability for battery.

In certain types of intentional sex tort cases involving dignitary and emotional risks only, fraudulently induced consent has been held to vitiate consent. For example, if a medical professional represents that she is touching the plaintiff’s genital area for medical purposes when in fact she is seeking sexual gratification, the plaintiff’s consent to the physical contact is invalid. The idea apparently is that the plaintiff in such cases did not

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143. PROSSER & KEETON, supra note 115, at 114, 118–20.
144. Id. at 118 n.40.
145. See, e.g., Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 274, 277 (Cal. Ct. App. 1984) (herpes transmitted to the plaintiff); Barbara A. v. John G., 193 Cal. Rptr. 422, 425 (Cal. Ct. App. 1983) (a lawyer induced sex with his client by telling her that he was infertile, which was untrue, causing her ectopic pregnancy (where the fetus developed outside of the uterus) and infertility); Hogan v. Tavzel, 660 So. 2d 350, 352–53 (Fla. Dist. Ct. App. 1995) (stating that a failure to disclose the presence of genital warts may vitiate consent to sex); De Vall v. Strunk, 96 S.W.2d 245, 246–47 (Tex. Civ. App. 1936) (defendant failed to disclose that he had “crabs”). At least one court has held that, in the sexual context, consent can be vitiated by substantial mistake regarding the nature of invasion, but only if the consent was induced by fraud; that is, both parties were ignorant of the defendant’s sexual disease, so consent was valid because it was not induced by fraud. McPherson v. McPherson, 712 A.2d 1043, 1046–47 (Me. 1998). Another court indicated that the defendant’s intent could be proven by substantial certainty, which could expand liability substantially, since persons with no actual knowledge that they have a sexual disease could be held responsible for passing it along if the fact-finder decides that they were “substantially certain” that they could have a disease and failed to warn the plaintiff nonetheless. See Doe v. Johnson, 817 F. Supp. 1382, 1396–97 (W.D. Mich. 1993). But note that contraceptive fraud is not actionable to avoid child support obligations. See, e.g., C.A.M. v. R.A.W., 568 A.2d 556, 556 (N.J. Super. Ct. App. Div. 1990); Wallis v. Smith, 22 P.3d 682, 686 (N.M. Ct. App. 2001) (citing Stephen K. v. Roni L., 164 Cal. Rptr. 618, 618–19 (Cal. Ct. App. 1980)).
146. See Boyett v. State, 159 So. 2d 628, 630–31 (Ala. Ct. App. 1964) (noting that the defendant was liable for battery by falsely representing that he was a medical doctor and thereby obtaining consent to contact the plaintiff, because consent was vitiating by fraud); Lisa M. v. Henry Mayo Newhall Mem’l Hosp., 907 P.2d 358, 360, 367 (Cal. 1995) (technician obtained consent to fondle nineteen-year-old pregnant woman by fraud regarding the need to penetrate her); People v. Ogunnola, 238 Cal. Rptr. 300, 302 (Cal. Ct. App. 1987) (holding that consent was vitiating where a patient who consented to a gynecological
consent to sexual touching at all, but was fraudulently induced to consent to what he believed was necessary medical treatment. The fact remains that, in these cases, when consent to sexual touching is induced by fraud relating to the purpose of the touching, and the true purpose is the defendant's sexual gratification, consent is vitiated by fraud in the inducement with or without resulting physical injury. Yet, in the romantic context, where the plaintiff is fraudulently induced to consent to sex, and only dignitary and emotional risks are at stake, courts have frequently reasoned that fraud does not vitiate consent as a matter of law due to a lack of standards for materiality. However, materiality is an issue properly

examination was in fact subjected to a sex act); State v. Bolsinger, 709 N.W.2d 560, 562, 564–65 (Iowa 2006) (program supervisor of home for delinquent boys obtained consent to sexual touching under pretense of checking for bruises, testicular cancer, etc.); McNair v. State, 825 P.2d 571, 575 (Nev. 1992) (holding that a physician's penile penetration of a patient under guise of performing medical examination constituted sexual assault, because consent was induced by fraud and deceit, rendering it invalid); Bartell v. State, 82 N.W. 142, 143 (Wis. 1900) (defendant obtained consent to “massage” naked eighteen-year-old under false pretenses).

147. Some courts distinguish “fraud in the factum,” which refers to fraud as to the nature of a legal instrument, from “fraud in the inducement,” which refers to a misrepresentation that leads another into a transaction by giving a false impression as to the risks, duties, or obligations involved. See Suliveres v. Commonwealth, 865 N.E.2d 1086, 1090–91 (Mass. 2007). In the sexual context, fraud in the factum has been applied where a doctor obtained consent to penetrate a victim with a medical instrument, then penetrated her with his penis. See, e.g., Boro v. Superior Court, 210 Cal. Rptr. 122, 124–25 (Cal. Ct. App. 1985). Generally, however, sexual fraud cases are based on fraud in the inducement of sexual touching, because the fraud relates to inducement of consent, as opposed to the nature of the contact. Bolsinger, 709 N.W.2d at 564; Suliveres, 865 N.E.2d at 1090–91.

148. See supra Part II; see also, e.g., Conley v. Romeri, 806 N.E.2d 933, 939 (Mass. App. Ct. 2004). The Conley court held as a matter of law that a defendant boyfriend’s lies about his ability to have more children, knowing that the plaintiff wanted children, could be seen only as “an inducement to continue dating,” not inducement to sexual intercourse, and therefore, the fact of his vasectomy did not vitiate consent to sex as a matter of law, despite the plaintiff’s claim that her biological clock was ticking at age forty and she intended to date only men who wanted and could have children. Conley, 806 N.E.2d at 939; see also C.A.M., 568 A.2d at 557–58. In C.A.M. v. R.A.W., the court dismissed a variety of tort claims against a man who told a woman that he was unmarried and had had a vasectomy because his misrepresentations resulted in a normal, healthy baby. The court did not discuss the right of autonomy and battery law specifically, but, as a policy determination grounded in privacy, it noted that courts should not regulate “promises made between two consenting adults as to the circumstances of their private sexual conduct.” C.A.M., 568 A.2d at 557–58. However, the dissent argued that other cases have found that consent to sex can be vitiated by fraud and argued that the delicate issues presented in the case, although difficult, should not be dismissed without giving the plaintiff a full opportunity to prove her case. Id. at 563–65 (Stern, J., dissenting). But see, e.g., Neal v. Neal, 873 P.2d 871, 877 (Idaho 1994) (holding that a husband’s failure to disclose the fact of his sexual relationship with a woman other than his wife could vitiate consent, and, therefore, the trial court erred in holding that it did not vitiate consent as a matter of law); Dobbs, supra note 2, at 232; see also Piggott v. Miller, 557 S.W.2d 692, 694–95 (Mo. Ct. App. 1977) (holding that, where the plaintiff agreed to sexual relations in reliance on the defendant’s assertion that he intended to marry her, the defendant’s misrepresentation vitiated her consent, resulting in a claim of battery); Slawek v. Stroh, 215 N.W.2d 9, 20 (Wis. 1974) (holding that misrepresentations regarding marital status supported a claim of seduction, and misrepresentations regarding the purpose of injections and manipulation by a defendant-doctor supported a claim of battery).
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decided by a jury or other fact-finder, and standards for materiality are readily available by reference to existing fraud case law.149

Materiality requires that the false statement upon which the plaintiff relied (1) relates to a past or present fact, (2) relates to a material aspect of the agreement, as opposed to a collateral aspect, (3) is not mere "puffing," and (4) is not a mere prediction of future events over which the defendant lacks control.150 Thus, statements not amenable to factual proof, such as "I love you" or "you are the one for me" are akin to puffing or prediction, and should not establish fraud in the inducement of sex as a matter of law.151 However, there are other types of statements that are amenable to factual proof, such as marital status, or whether the defendant is currently sexually involved with other persons.152 Misrepresentations regarding such factual matters create a relatively simple jury question regarding materiality and validity of consent.

Factual issues involved in fraudulently induced sex cases in the romantic context are no more difficult to decide than factual issues in other types of fraud cases where a jury must determine whether, under all of the circumstances, the allegedly fraudulent statement was factual, or whether it was mere puffing, prediction, or opinion.153 Whether the plaintiff justifiably relied, i.e., whether he somehow was on notice of the

149. See, e.g., Neal, 873 P.2d at 877 (holding that whether a husband's affair was material enough to vitiate consent to sex is a question of fact); Star Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 77 (Minn. 2002) (stating that materiality is ordinarily a question of fact). The materiality component of the tort is rooted in the element of justifiable reliance on the misrepresentation. See Rozen v. Greenberg, 886 A.2d 924, 930 (Md. Ct. Spec. App. 2005); RESTATEMENT (SECOND) OF TORTS § 538 (1977) ("Materiality of Misrepresentation (1) Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. (2) The matter is material if (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it."); see also Kmiec, supra note 70, at 1444, 1451 (discussing generally the problem of "judicial activism" and the concept that judges improperly self-allocate power properly left to others, thereby "misusing authority").

150. See DOBBS, supra note 2, at 1363–70.

151. There is always the possibility that a promise about the future could be factual. If, for an obvious example, the defendant told the plaintiff that he planned to marry her, and she discovered that he had made the same statement to several other women on the same day, this should suffice to prove that his statement was not mere opinion, but factually untrue. See, e.g., Piggott, 557 S.W.2d 692.

152. Misrepresentation regarding a sexual disease vitiates consent to sex. See supra note 145 and accompanying text. Similarly, in cases where the emotional risks are very different from those represented, such as where the defendant is married and represents that she is single, or where she fails to disclose unapparent health conditions such as the fact that she is pregnant with another man's embryo, consent may be vitiated.

153. See, e.g., Kennedy v. Flo-Tronics, Inc., 143 N.W.2d 827 (Minn. 1966); Miller & Sons, Inc. v. Earl, 502 N.W.2d 444 (Neb. 1993); Transport Ins. Co. v. Faircloth, 898 S.W.2d 269 (Tex. 1995).
misrepresentation but failed to heed such notice, is also a jury question.\textsuperscript{154} The fraud/mistake exception to valid consent is often grounded in the defendant's intentional misrepresentation of facts in order to gain consent, but could also be based on the defendant's failure to disclose material facts when it is evident that the plaintiff is unaware of such facts and is relying on inaccurate factual assumptions.\textsuperscript{155}

The defendant's intentional misrepresentations or omission of facts regarding marital status, extramarital affairs, relationship status, family background, or other objective, material, factual aspects of her life should vitiate consent in order to protect the plaintiff's sexual autonomy, provided causation is established.\textsuperscript{160} The law should protect personal choice in sexual matters consistent with the longstanding rule that fraud vitiates consent and should leave case-by-case decisions to a finder of fact, as in other types of intentional tort cases.

\textsuperscript{154} Generally, the plaintiff is allowed to rely on the defendant's material misrepresentation without an investigation for purposes of transactional efficiency. See DOBBS, supra note 2, at 1362. These cases are necessarily fact-intensive, making them particularly appropriate for jury decision making.

\textsuperscript{155} See, for example, ALA. CODE § 6-5-102 (2005), where "suppression of material facts" is defined as follows: "Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case." See also McLellan v. Raines, No. 94115, 2006 WL 851394, at *3 (Kan. Ct. App. Mar. 31, 2006). The McLellan v. Raines court held that, to establish fraud by silence, the plaintiff must show by clear and convincing evidence that (1) the defendant had knowledge of material facts that the plaintiff did not have and that the plaintiff could not have discovered by the exercise of reasonable diligence; (2) the defendant was under an obligation to disclose the fact; (3) the defendant intentionally failed to disclose the fact; (4) the plaintiff justifiably relied on the defendant to disclose the material fact; and (5) the plaintiff sustained damages as a result of the defendant's failure to disclose the material fact. Id.

\textsuperscript{156} It is apparently fairly common for people to lie about marital status. In one interview I conducted, a woman dated a man for a few months, then drove by his house and saw a tricycle in his driveway. On their next date, she asked if he was married, and he said "yes." She asked why he had not told her this, and his response was, "it never came up."

\textsuperscript{157} See Neal v. Neal, 873 P.2d 871 (Idaho 1994).

\textsuperscript{158} For example, it would be a misrepresentation of relationship status to assure a sexual partner that the relationship was sexually monogamous, then engage in sexual relations with a third party without disclosing such to the original sexual partner. In this example, the fraudulently concealed risks are both emotional and physical, but the misrepresentation should be actionable with or without physical injury or the transmission of disease.

\textsuperscript{159} See R.A.P. v. B.J.P., 428 N.W.2d 103, 109–10 (Minn. Ct. App. 1988) (dismissing a husband's fraud claim based on his wife's misrepresentations about her relationship with her parents and where she grew up because of pleading deficiencies). The court's opinion appeared to support a fraud-based claim grounded in background misrepresentations upon proper pleading and proof of causation. Id.

\textsuperscript{160} For example, a false statement that the defendant is a member of a certain religion may not be material, unless the defendant knew that it was a significant factor in the plaintiff's consent. See, e.g., Farnsworth v. Duffner, 142 U.S. 43, 54–55 (1891) (stating that a seller's false statement that he was a member of the Baptist Church probably not material). The plaintiff still must prove causation, i.e., but for his reasonable reliance on the fraud, he would not have consented to sex.
2. Uninformed Consent

Consent may be rendered invalid retroactively because it was "uninformed" at the time it was given. Informed consent requires informed persons in trusting relationships to disclose all material information that reasonably could impact another's consent to a transaction prior to closing the transaction, or the consent is invalid.\textsuperscript{161} This fiduciary-type disclosure requirement is no novel concept in tort law and is manifested in many forms, such as the requirement of disclosure of latent defects in real estate sales and the requirement of warning labels on dangerous products.\textsuperscript{162} The tort duty to disclose information to another is based on the concept that a person with superior knowledge or information should not abuse her superior position to the detriment of another, or cause another to accept a transaction that he would have rejected had she made fair factual disclosure.

In the context of battery law, informed consent has been applied only in the medical context.\textsuperscript{163} Informed consent requires that medical professionals provide adequate information regarding risks that "a reasonable patient would consider in deciding whether to undergo the medical procedure."\textsuperscript{164} Although usually analyzed as medical malpractice...
cases, a number of courts have recognized that, since the patient's right lies in self-determination, whether information should have been disclosed should turn on a legal test for materiality, not a medical negligence standard. The patient has the right to weigh his subjective, individualized fears and values against the risks involved, so the personal, not medical, question should be reserved to the patient alone. What must be disclosed for informed consent is therefore an issue to be determined by a finder of fact, using a reasonableness standard that includes the defendant’s knowledge of the plaintiff’s particular fears, preferences, and values.

A critical issue in informed consent jurisprudence is establishing a duty to disclose adequate information prior to obtaining consent. The informed consent rule has been applied to doctors and other medical professionals for two reasons. First, a confidential, fiduciary relationship exists between a doctor and a patient relative to invasive and potentially harmful physical contact, giving rise to disclosure obligations. Second, a doctor has superior access to medical information that a patient needs in order to make an informed choice, but the patient’s lack of experience or medical

165. DOBBS, supra note 2, at 656.
166. Id.
167. Even with the informed consent medical standard, there is an issue about what precisely must be disclosed. Generally, the materiality standard is engaged, which requires disclosure of all information that a reasonable patient would consider in deciding whether to undergo the medical procedure. Id. at 658–59. Some states have statutory guidelines on what must be disclosed for various medical procedures, which answers the question of what must be disclosed. Id. If the doctor knows that a patient is concerned by some particular matter, even if most people would not be, the doctor is under an obligation to disclose information pertaining to that particular matter based upon his knowledge of the patient’s subjective concerns. Id. at 659.
168. See, e.g., Cohen v. Smith, 648 N.E.2d 329, 334–35 (Ill. App. Ct. 1995). Although most female hospital patients may not object to a male nurse touching them while naked, the plaintiff in this case informed her doctor that her religion prohibited a male nurse from touching her naked; here, the defendants’ actual knowledge of the offensive nature of the contact sustained a battery claim. Id.; see also DOBBS, supra note 2, at 660. The issue of materiality relative to informed consent is a jury question generally. But see Albany Urology Clinic, 528 S.E.2d at 778–80, where the court held as a matter of law, based in part on a statute requiring certain types of disclosures prior to surgery, that doctors do not owe their patients a duty to disclose “unspecified life factors” such as the doctor’s illegal cocaine use, and so omission of such information—which the patient claimed was material—cannot provide a basis for fraud and cannot vitiate consent to surgery to support a battery claim. The dissent in Albany Urology Clinic argued that, “[e]xcept in plain and palpable cases, the issue of materiality must be submitted to the jury.” Id. at 784 (Hunstein, J., dissenting).
169. DOBBS, supra note 2, at 654–56.
ignorance renders him unable to protect himself by asking all questions relevant to his medical decision.\textsuperscript{170} Fraud or mistake need not be shown in order to vitiate consent because the plaintiff is entitled to rely on fair interpersonal dealings and candid disclosure to protect his right of self-determination.\textsuperscript{171}

A similar expectation of candor requiring informed consent may be appropriate between sexual partners considering the high emotional and health risks involved in sexual intimacy and the public policy favoring protection of sexual autonomy.\textsuperscript{172} Whether a confidential relationship exists should be a question of fact, depending on the circumstances involved, such as the length and nature of the sexual relationship.\textsuperscript{173} A sexual decision may present a more compelling case for applying the doctrine of informed consent than some medical decisions. In many circumstances, medical intervention is necessary for proper health or survival. Therefore, as a practical reality, a patient's decision may not be impacted by a lack of full disclosure of all of the medical risks. That is, but for the lack of disclosure, the patient probably would have made the same medical decision based on medical necessity. The sexual decision, on the other hand, is always entirely discretionary with no physical risks resulting from refusal to consent: cause-in-fact is clearer in the sexual context.

What information must be disclosed in order for sexual consent to be sufficiently informed should be a reasonable/materiality fact issue, based on all of the evidence. Adopting this informed consent approach would create

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\textsuperscript{170} Id.; see supra notes 164–65; see also Friter v. Iolab Corp., 607 A.2d 1111, 1115–16 (Pa. Super. Ct. 1992) (hospital failed to disclose FDA-required information to persons in a clinical study). This case is well known for its holding that a hospital can be liable for battery grounded in lack of informed consent where the court found as a factual matter that the hospital had assumed a duty to obtain informed consent as part of its obligations under FDA regulations when engaged in experimental treatment. \textit{Id.} So far, courts have limited \textit{Friter v. Iolab Corp.} to its facts concerning a hospital's liability for lack of informed consent, as it is generally just the doctors themselves, not the hospitals, that may be liable for failing to provide informed consent prior to medical procedures. \textit{See also generally} Stalsitz v. Allentown Hosp., 814 A.2d 766 (Pa. Super. Ct. 2002); Bryant v. HCA Health Servs. of N. Tenn., Inc., 15 S.W.3d 804 (Tenn. 2000). Note also that some recent cases appear to be using the term "informed consent" to refer to situations in which consent was never given. \textit{DOBBS, supra note 2,} at 243 n.6 (citing Fox v. Smith, 594 So. 2d 596 (Miss. 1992); Moure v. Raechle, 604 A.2d 1003 (Pa. 1992)).
\textsuperscript{171} DOBBS, supra note 2, at 652–58.
\textsuperscript{172} Considering the level of personal security that may be compromised by sexual activity, it is fair to hold sexual partners to a duty to disclose facts that are material to the sexual decision. For a good standard for such a duty, see, for example, \textit{supra} note 155 and accompanying text.
\textsuperscript{173} At least in some states, whether a confidential relationship exists between the parties is a question of fact for the jury or trial judge. \textit{See} Barbara A. v. John G., 193 Cal. Rptr. 422, 432 (Cal. Ct. App. 1983) (citing Rieger v. Rich, 329 P.2d 770 (Cal. Dist. Ct. App. 1958); Wilson v. Sampson, 205 P.2d 753 (Cal. Ct. App. 1949); \textit{In re} Llewellyn's Estate, 189 P.2d 822 (Cal. Dist. Ct. App. 1948)). Thus, for example, some jurors may feel that a one-night stand does not create a confidential relationship, but a long-term monogamous relationship does. Allowing the jury to decide this issue comports with a tort system grounded in social expectations, i.e., a civil jury system.
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a convergent analysis between the prima facie element of intent to offend grounded in social usages and the exception to consent based on a lack of information: both are grounded in reasonable social expectations of candor and respect for others' bodily autonomy. In addition, both place an onus on the defendant to avoid misappropriating the plaintiff's right of self-determination, similar to the onus placed on defendants in other intentional tort matters. This proposed uninformed consent analysis is also consistent with the consent counterpart in negligence law: consent that is not adequately informed should not constitute a defense to battery any more than assumption of the risk should bar a negligence claim when the party against whom the defense is asserted voluntarily encounters the risk without understanding it.

D. Making Sense of the Proposed Duty of Disclosure Based on the Doctrine of Informed Consent

Informed consent analysis is necessary in intentional sex tort cases because there are subtle forms of sexual misappropriation that flout

174. See supra notes 128–47 and accompanying text.

175. Assumption of the risk is the negligence counterpart to consent for intentional torts, "except that [to] consent is to run the risk of unintended injury, to take a chance, rather than to accept the greater certainty of intended harm [in the case of consent to an intentional tort]." PROSSER & KEETON, supra note 115, at 480–81. The test for whether the plaintiff assumed the risk generally requires that the plaintiff have voluntarily consented to relieve the defendant of an obligation of conduct toward her and to accept responsibility for injury from a known risk. See, e.g., Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 447 (Cal. 1963) (holding that assumption of the risk is not "voluntary" where a plaintiff was required to execute a release in favor of the hospital in order to get treatment); PROSSER & KEETON, supra note 115, at 480. Various courts have recognized that if the plaintiff is unaware of the specific risks created by the defendant, she cannot truly voluntarily assume them and thereby relieve the defendant of liability. See, e.g., Haugen v. Lazy K Enters., Inc., No. 15049-6-III, 1998 WL 123059, at *4 (Wash. Ct. App. Mar. 19, 1998) ("For implied primary assumption of the risk to be found, the evidence must establish the plaintiff had full subjective understanding of the presence and nature of the specific risk and voluntarily chose to accept the risk." (citing Kirk v. Wash. State Univ., 746 P.2d 285 (Wash. 1987))). Generally speaking, courts review the etiology of the harm to determine whether it was within the contemplation of the plaintiff at the time she allegedly assumed the risk, i.e., was the harm that occurred caused by a risk she agreed to accept, thereby relieving the defendant of responsibility? Or, was the harm or injury caused by a risk that was outside of the scope of those risks to which she consented? The cases often involve sporting events. For example, a tennis player does not assume the risk of tripping over a torn net on a tennis court even if he was aware of the torn net prior to playing tennis, as it is not a risk inherent in playing tennis. Cf. Werbelow v. State, No. 101194, 2005 WL 858064, at *2 (N.Y. Ct. Cl. Mar. 14, 2005) (holding that a rollerblader who fell on sidewalk crack that she had known was there and attempted to avoid had assumed the risk); Haugen, 1998 WL 123059, at *4.

176. Some savvy courts are already recognizing that false impressions of fact can be created in subtle ways and have incorporated such into their definition of "fraud." See, e.g., Nelson v. Gas Research Inst., 121 P.3d 340, 343 (Colo. Ct. App. 2005) ""[A] false representation of a past or present fact is any words or conduct which create[] an untrue or misleading impression of the actual past or present fact in the mind of another."" (first alteration in original) (quoting Russell v. First Am. Mortgage Co., 565 P.2d 972, 975 (Colo. Ct. App. 1977))).
social expectations and convert plaintiffs' sexual choices, yet are not amenable to the proof requirements for fraud or mistake to vitiate consent. The rules invalidating consent based on fraud or mistake place the burden of proof on the plaintiff to establish the defendant's actual knowledge that the plaintiff's consent was based on a factual mistake; there is no such burden of proof under informed consent analysis. Under the Restatement, the plaintiff can prove the prima facie element of intent to offend by reference to social usages in the absence of proving the defendant's actual knowledge that her conduct was offensive to the plaintiff. The plaintiff's responsibility to demonstrate that consent was invalid should not be greater than his burden of proof on the element of intent to offend. Since social usages set the standard for expectations regarding what contact is presumably "offensive" (to sustain the prima facie intent element per the Restatement), the plaintiff should be allowed to rely on social usages regarding reasonable expectations of disclosure to meet his burden of proof that consent was not reasonably informed and therefore invalid.

An example of two similar scenarios—where a claim for battery could lie in one scenario in accordance with the rules invalidating consent based on fraud or mistake (assuming material risks include dignitary and emotional risks), but would be denied in the other similar scenario unless an informed consent analysis were adopted—explains the need for an informed consent analysis that adopts the Restatement's intent to offend analysis. Suppose a married woman tells a man that she is single and will have a monogamous sexual relationship with him if they become sexually involved, and he

177. Existing "fraudulent suppression" case law could be helpful in determining whether nondisclosure, i.e., lack of informed consent, should vitiate consent. Consider, for example, Alabama's general rule:

Ex parte Life Ins. Co. of Ga., 810 So. 2d 744, 748 (Ala. 2001).

178. Lack of information as a basis for vitiating consent is different from fraud or mistake. Mistake means that the plaintiff gave consent while operating under mistaken assumptions regarding the risks involved. Fraud means that the defendant deceived the plaintiff about a material fact on which the plaintiff justifiably relied in giving consent. Lack of information can vitiate consent when the plaintiff was neither defrauded nor mistaken, but lacked information altogether about the nature of the risks, and only the defendant had access to that information as a practical reality. For example, if a patient knows that an operation has risks and also knows that she does not know what they are, she is not mistaken about the risks, because her beliefs about them are not inconsistent with the true facts; rather, she simply is uninformed. DObBS, supra note 2, at 242. To the extent that the defendant did not induce consent by fraud and the plaintiff is not mistaken about the essential nature of the contact, the plaintiff cannot claim "mistake" to vitiate consent and must rely on the doctrine of informed consent instead. Id. at 242-43.


180. Id.
agrees to a committed sexual relationship with her in reliance on her assertions. Suppose further that his value system allows for unmarried sexual relations in the context of a monogamous relationship, but not for adultery. When he learns of her marriage, he suffers dignitary, emotional, and spiritual harm, as well as lost wages and expenses for psychological counseling. Since she is married, she should be liable for battery based on her actual intent to misappropriate his sexual autonomy. That is, she was aware that her marital status was material to his sexual decision (or, presumably, she would not have lied about it) and induced his consent by deceit. His consent could be vitiating by fraud if a fact-finder determines that he reasonably and detrimentally relied on her false statements and that they were material to his decision to consent to sex.

Now suppose that the woman simply does not wear a wedding ring and does not actually tell the man that she is single. Assume all other facts are the same, i.e., he believes that she is unmarried and would never knowingly commit adultery. Now, assuming that failing to disclose marital status prior to sex violates social usages, her intent to offend can be established by reference to social usages, whether or not she subjectively intended to offend him. The prima facie case could be established under the Restatement’s constructive intent to offend analysis. However, the defense of consent could not be vitiating under the fraud exception in the absence of proof that she actually knew that his consent was materially influenced by his mistaken belief that she was not married. That is, unless he proves that she was actually aware of his mistake, he cannot establish fraud to vitiate consent, despite establishing intent to offend based on social expectations in the prima facie case. If informed consent analysis were adopted, he may be able to establish that his consent was vitiating by her failure to disclose marital status in a sexual relationship if such failure violates prevailing social expectations (which may turn on length of relationship, inter alia) and results in misappropriation of his sexual self-determination. The informed consent analysis would thus converge with the Restatement’s constructive intent to offend analysis.

One might argue that the burden should be on the plaintiff to ask all questions to discover all material facts prior to consenting to sex. The question really is: Who should bear the burden of making sure that sexual consent is informed? Arguably, it could depend on the type of information unknown to the plaintiff, i.e., whether it relates to a “patent” issue in sexual relations, so that anyone reasonably could expect it to be an issue and make

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181. Adultery is defined as “voluntary sexual intercourse between a married man and someone other than his wife or between a married woman and someone other than her husband.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, supra note 2, at 18.

182. See Jones, supra note 25, at 65 & nn.29–33. Although the media portray adultery and sexual promiscuity as common behavior, the available research indicates that the majority of Americans have very few sexual partners. See, e.g., Pollard, Sex Torts, supra note 4, at 784 & nn.83–84. Whether behavior violates community standards is a jury question to be decided in each case.

183. RESTATEMENT (SECOND) OF TORTS § 19 cmt. a.
an inquiry, or whether it relates to a “latent” issue, i.e., one that a reasonable person would not even think to inquire about, such that only the defendant is in a position to assure informed consent. Recognizing a duty to ask about marriage makes sense, because it is an obvious issue in sexual relations for most people. However, there are latent conditions about which the plaintiff may have no notice, such as the other’s noncontagious terminal disease or the other’s early pregnancy that cannot be detected visually, both of which may powerfully impact the plaintiff’s decision whether to become sexually involved.\textsuperscript{184}

Informed consent analysis requires recognizing a duty by someone to make sure that consent is informed. A consistent, clear duty rule is superior to a case-by-case review for the same reasons that strict liability is superior to negligence when one party has superior access to information about risks.\textsuperscript{185} From an economic standpoint, the duty should be imposed on the person with actual knowledge. That is, liability should be placed on the “cheapest cost avoider,” which is the party who has easier, cheaper access to the information needed to accurately calculate accident costs and avoidance costs.\textsuperscript{186} The superior rule would place the burden of disclosing material facts to a sexual transaction on the person who has actual knowledge of such facts,\textsuperscript{187} so that the other person can conduct his own subjective cost-benefit analysis before consenting. This rule would require each person to obtain informed consent for sexual relations or risk tort liability.\textsuperscript{188} This is consistent with the informed consent rule as applied to

\begin{footnotes}
\item[184] The analysis should be consistent with the Restatement. See \textit{Restatement (Second) of Torts} § 538 (1977); see also id. § 540 (“The recipient of a fraudulent misrepresentation of fact was justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.”). An exception arises where, “under the circumstances, the facts should be apparent to [a person with the plaintiff’s] knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived.” \textit{Prosser} & \textit{Keeton}, \textit{supra} note 115, at 752 (citation omitted).
\item[185] See Pollard, \textit{Sex Torts, supra} note 4, at 804–10.
\item[186] Guido Calabresi & Jon T. Hirshoff, \textit{Toward a Test for Strict Liability in Torts}, 81 \textit{Yale L.J.} 1055, 1060 (1972). In the short run, administrative costs could increase as a function of a greater number of claims filed resulting from the certainty of recovery. That is, the universe of claims may be enlarged such that the overall administrative costs increase despite lowered costs of each lawsuit resulting from streamlined legal analysis. See, e.g., Richard A. Posner, \textit{Strict Liability: A Comment}, 2 \textit{J. Legal Stud.} 205, 209 (1973). However, since liability will be more certain, settlements are facilitated, which are cheaper than trials. Thus, any temporary increase in administrative costs resulting from more lawsuits will be outweighed by expedited trials, more settlement, and, ultimately, more responsible sexual behavior resulting from strict liability’s deterrent effect.
\item[187] This allows the jury to focus on what is material as opposed to who should have the duty to disclose or inquire about the fact allegedly vitiating consent.
\item[188] Perhaps more importantly, increasing the certainty of liability directly impacts individual cost-benefit analysis by increasing the potential costs of irresponsible sexual activity, which enhances the deterrent impact of law, ultimately reducing the number of emotionally risky personal transactions. See Pollard, \textit{Sex Torts, supra} note 4, at 812–19.
\end{footnotes}
doctors and properly places the burden of disclosure on the party with superior knowledge of material facts that are unknown to the plaintiff.189

The truth is, most perpetrators of sexual autonomy misappropriation are probably aware that they are not respecting their sexual partner’s right of unfettered sexual self-determination and are choosing deception to attract partners who would otherwise reject them.190 Perhaps the informed consent analysis is best conceived as creating convergent analysis between the Restatement’s prima facie intent to offend analysis grounded in social usages and a realistic analysis of whether the plaintiff truly consented in situations in which fraud-vitiating consent cannot be established. In addition to the benefit of creating convergent analysis between establishing intent to offend and establishing the plaintiff’s lack of true consent, there are other fundamental tort principles that support the proposed informed consent analysis. That is, even assuming that the defendant did not intend to take advantage of the plaintiff’s ignorance, imposing the cost of uninformed consent on the defendant is still appropriate. The “paradigm of reciprocity” holds that, as between two innocent parties, the person causing harm should pay for it as opposed to the person who is harmed, particularly where the risk created by the injurer is disproportionate to any risk created by the victim.191 In the sexual context, each partner is uniquely aware of information about herself or himself that bears on the other’s emotional (and physical) risks; sometimes this information is not accessible through any other source. The sexual battery paradigm proposed herein would create a duty not just to avoid lying, but to disclose all facts that one could reasonably expect that a sexual partner would want to know in order to make a truly voluntary decision about whether to consent to sex.192 Such

189. A doctor cannot defend failure to inform a patient of a material risk because the doctor assumed the patient would know the risk, and also cannot blame the patient for failing to ask. See supra note 164 and accompanying text. However, if for any reason the plaintiff has actual notice of the facts the defendant allegedly failed to disclose, the plaintiff’s claim that consent was uninformed would be undermined.

190. These are likely the same “core” group of promiscuous people that are responsible for the vast majority of disease transmission cases. See Pollard, Sex Torts, supra note 4, at 783–87; see also supra note 60.


192. This proposed sexual battery tort paradigm grounded in “offensiveness” and “consent” analysis is more comprehensive than similar proposals to protect sexual autonomy, such as Larson’s 1993 proposal. See Larson, supra note 20, at 453 (“I propose the following addition to the Restatement (Second) of Torts: One who fraudulently makes a misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it, is subject to liability to the other in deceit for serious physical, pecuniary, and emotional loss caused to the recipient by his or her justifiable reliance upon the misrepresentation.”). First, the paradigm proposed herein strengthens the onus of disclosure regarding material facts on the person with superior knowledge. Under this analysis, purpose to deceive need not be proven, and intent to “offend,” would be a jury question based on community standards. Under Larson’s sexual fraud paradigm, intent to deceive must be proven. Id. at 466 & n.3. Second, damages would be presumed upon a showing of sexual battery, which vindicates the real harm—to the plaintiff’s autonomy—without necessitating proof of emotional distress or other damages, as
an analysis could serve to encourage candid communications in romantic relationships. This could discourage miscommunication as well as intentional deceit, in addition to protecting personal autonomy and avoiding emotional injury and sexual disease transmission. The plaintiff's burden of proving causation appropriately limits the universe of these claims.\textsuperscript{193}

CONCLUSION

Intentional tort law's protection of personal autonomy should be consistent, whether the risk is economic, physical, or emotional. The current law's failure to protect sexual autonomy is not consistent with prevailing sexual norms and undermines the law's consistency while influencing norms contrary to public policy. Cases of sexual autonomy infringement grounded in battery law should be left to a jury based on social expectations, not dismissed as a matter of law. The importance of sexual autonomy, and the very serious harms that can flow from interference with it, justify adopting a civil sexual battery analysis consistent with traditional battery law, fraud jurisprudence, and the doctrine of informed consent, to allow a jury to determine each case based on minimal social expectations of interpersonal civility. Adopting the analytical paradigm proposed herein will more fairly reflect American sexual norms, enhance protection of sexual autonomy for all persons, and encourage candid and healthy interpersonal relations consistent with public policy.

\textsuperscript{193} For example, people who engage in one-night stands would probably find it difficult to prove that their sexual choice rested on factual assumptions regarding monogamy. Realistically, informed consent would only be required in established relationships where a minimal duty of candor is reasonable according to normative social expectations.