The Common Law's Resistance to Gender Violence

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ABSTRACT: Over twenty years ago, Congress developed a "mountain of evidence" that state criminal and civil remedies against sexual assault and battering were inadequate. The Supreme Court rejected that evidence in United States v. Morrison*, striking down a federal civil rights remedy for sexual assault and battering. Since then, there have been many civil cases of sexual assault and battering against high-profile individuals, including the recent E. Jean Carroll lawsuit against a former President. This five-year study, surveying fifty states' civil law, asks the question prompted by* Morrison*: Does the civil law today provide adequate remedies to survivors of sexual assault and battery? It argues that reform efforts in the past have failed to focus on the common law, something on keen display in the Supreme Court's recent* Dobbs v. Jackson Women's Health *decision, limiting women's right to an abortion. A common law shadow lives on in the civil law of gender assault embraced sometimes by statute and elsewhere by judicial case law. Among the surprising findings of this study: (1) when state actors (e.g., police) rape they commit a constitutional violation, but damage remedies are limited in most states by immunity doctrines; (2) civil plaintiffs' recovery may be limited by their "fault" for provoking battering and sexual assault, blaming the victim via common law comparative fault doctrines; and (3) in most states, civil plaintiffs' irrelevant sexual history may be admitted even though relevant evidence of perpetrators' prior assaults are excluded. The Article recommends that states "audit" their laws through high-level legal commissions to review states' judicial decisions on civil sexual assault and battering to examine the persistence of the common law limits on civil sexual assault claims.*

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INTRODUCTION

Most citizens would assume that you can sue one who harms you. Presumably, that should apply to sexual assault and battering. One might even think it would be easier to sue today, given highly visible social movements like #MeToo and cases charging everyone from doctors to politicians, talk show hosts to movie moguls, to a former President with sexual assault. But high-profile cases, which settle before trial, can mislead. Is it that easy to sue for sexual assault and battering? The legal story is surprisingly complicated.[1] The common law-inflected legal imagination resists women's injuries, as we saw quite clearly in the Supreme Court's now infamous *Dobbs v. Jackson Women's*

1. Notably, even twenty years ago, the Supreme Court was unlikely to have imagined such claims. *See* United States v. Morrison, 529 U.S. 598, 615–16 (2000) (conflating violence against women with false claims made in divorce).

Health Organization decision, which relied upon ancient common law to deny women's injuries.[2]

In this Article, we argue that the same resistance looms over sexual assault: The common law of tort and crime were built upon ancient stereotypes of lying, grasping, hysterical women for most of this country's history.[3] Criminal law reforms have been many, but tort reform has seriously lagged.[4] Over twenty years ago, Congress tried to address state failures to provide adequate remedies for sexual assault by enacting a civil rights remedy, recognizing the failure of state law, and allowing individuals a backstop forum to sue those committing sexual misconduct, from rape to harassment.[5] But the Supreme Court struck down that law: In the 2000 *United States v. Morrison* decision, the Supreme Court held that Congress had no power to provide a civil rights remedy for sexual assault.[6]

That was over twenty years ago, and since then, we have seen scandal after scandal involving the justice system's failures. High-profile cases reveal that Olympians' doctors, TV network executives, movie moguls, rap stars, religious and political leaders—even a former President—have committed multiple sexual assaults, often discovered many years later after no intervention of the criminal or civil justice systems. Men rightly worry about a system that has been reduced to social shaming via Twitter (now called "X"), offering little in due process. Scholars bemoan the "traditional and common law frameworks" that "have not worked" to reduce the levels of sexual violence in society.[7] Reformers wonder what might have happened if the Supreme Court had not struck down the civil rights remedy in *Morrison*: Would E. Jean Carroll have sued Donald Trump years earlier? Would Harvey Weinstein have stopped his assaults if his general counsel told him his abusers could sue for major

2. We use the term "injury" to denote forced pregnancy and health-related impacts in this context. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 243 (2022) (invoking Sir Matthew Hale as an authority for the claim that the common law at our nation's founding viewed abortion as a crime). Hale is well known as the author of some of the greatest modern errors of the law of rape and sexual assault, including that married women could not be raped because their legal existence dissolved into that of their husband's. *See* Jill Elaine Hasday, *On* Roe*, Alito Cites a Judge Who Treated Women as Witches and Property*, WASH. POST (May 9, 2022, 5:00 PM), https://www.washingtonpost.com/opinions/2022/05/09/alito-roe-sir-matthew-hale-misogynist (on file with the *Iowa Law Review*).

3. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 8–9 (2017).

4. Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39, 46 (2018).

5. We use the terms "sexual misconduct" and "sexual assault" to cover a range of sexual behavior. Because "sexual assault" is legally ambiguous, and could connote something as banal as a hug, we use the word "rape" as well to connote the more traditional and serious offenses. Among some, this may seem controversial, but we believe that the term "sexual assault" has virtues, but also vices, in legal discussions. It expands misconduct in appropriate ways, but it may also downgrade the sense in which the offenses we are discussing in this Article are far more serious.

6. *Morrison*, 529 U.S. at 627 (ruling that the remedy was supported neither by the Commerce Clause nor the Equal Protection Clause).

7. Jennifer A. Brobst, *Vicarious Liability for Systemic Risks of Sexual Violence in the United States: Not a Modest Proposal*, 99 U. DET. MERCY L. REV. 261, 261–62 (2022) (arguing from the perspective of one who has tried to reform the law as a lawyer and advocate).

damages and bankrupt him and his company? Critics of the criminal justice approach rightly ask: Does justice always have to take the form of an orange jumpsuit? The nation-grabbing O.J. Simpson case taught us that in matters involving violence, the civil system can yield accountability when the criminal law does not.[8]

The great rape "reform" movements focused on the criminal justice system, not the civil system. The *Morrison* Court seemed to confuse the two legal systems: It held Congress had no power to address a local crime; but the action sounded in civil law, in damages, not incarceration.[9] More than twenty years later, things have changed. The #MeToo movement has sensitized judges to the problems women face in cases of sexual harassment and rape.[10] Federal courts have recently coalesced to hold that sexual assault by a state actor constitutes a constitutional violation.[11] That makes the question raised in *Morrison* more urgent. Then, the Supreme Court relied upon the assumption, informed by federalism principles, that state law was adequate to handle the problem. But is it? We know that there have been a number of high-profile settlements in cases of repeat offenders,[12] but what about the average sexual assault, including those against women of color or a young man at church or school? Few have worked hard to consider *the ecosystem of legal issues facing a sexual assault civil plaintiff*, both in statute and case law across fifty states, as a system of interconnecting doctrines grounded in the judge-made common

8. Simpson's trial for homicide of his wife led to an acquittal, in part because of hostility to race-based practices of the police, but his wife's parents successfully sued in civil court for wrongful death. It is worth noting that in some of the highest profile cases of multiple victims, the criminal justice system has failed. Jeffrey Epstein plead guilty long before the extent of his conduct was revealed. *See In re* Wild, 994 F.3d 1244, 1248 (11th Cir. 2021). Bill Cosby's conviction was reversed because of a prior plea deal. Commonwealth v. Cosby, 252 A.3d 1092, 1146–47 (Pa. 2021). Harvey Weinstein's conviction was also reversed on appeal. People v. Weinstein, No. 24, 2024 WL 1773181, at *16 (N.Y. Apr. 25, 2024).

9. Ultimately, the Court held that state law was adequate to address the matter; the "mountain of evidence" created by Congress was irrelevant, to quote the dissenters in *Morrison*, 529 U.S. at 628 (Souter, J., dissenting).

10. It has also revealed the ways in which federal law, such as Title VII and Title IX, have failed to address the full scope of the problem. Title VII has been held to cover sexual assault, but its provisions do not cover many young women and women of color because they do not apply to small businesses (most small businesses have under fifteen employees, the threshold requirement for Title VII to apply), and most young women are not in college. Data from the census shows that seventy-eight percent of all businesses have ten or fewer employees. *Facts & Data on Small Business and Entrepreneurship*, SBE COUNCIL, https://sbecouncil.org/about-us/facts-and-data [https://perma.cc/LDQ7-53QK]. As for colleges, see Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Jan. 10, 2024), https://educationdata.org/college-enrollment-statistics [https://perma.cc/97VP-UJG8] ("34.4% of American females aged [eighteen] to [twenty-four] years are enrolled in college or graduate school.").

11. Hess v. Garcia, 72 F.4th 753, 767 (7th Cir. 2023). The VAWA civil rights remedy was enacted in part to address the fact that existing state and federal law, including 42 U.S.C. §1983, had failed to provide an adequate remedy, and based on Congress's view that state law was in fact inadequate.

12. For example, in 2019, Harvey Weinstein settled dozens of claims for forty-seven million dollars and Jeffrey Epstein paid over "$121 million to over 135 people." John Leighton, *The Top 10 Famous Sex Abuse Cases Turned Civil Cases*, LEIGHTON PANOFF L., https://leightonlaw.com/sex-abuse-lawyer [https://perma.cc/5ZZV-7TPU].

law. In theory, it should be as easy as suing someone in a barroom brawl, but is it?

Based on a five-year investigation, a wide survey of scholarship in this field, and an examination of the law in fifty states, this Article urges that state bars or judicial commissions should conduct "gender audits" to reassess the *civil law of sexual assault* in their states. Such commissions were vital in passing the original civil remedy in the Violence Against Women Act.[13] This Article aims to aid that effort, surveying a wide variety of complex legal issues facing civil plaintiffs seeking accountability for sexual assault. These barriers are often embedded in judicial decisions involving common law doctrine[14] and, for that reason, are difficult for reformers to understand or grasp.

Part I discusses how state law may effectively immunize *state actors* who commit sexual misconduct—police officers, school teachers, coaches, and the institutions employing them—even though sexual assault by state actors is a constitutional violation.[15] This Part also shows how state tort law may impose different legal standards for a basic assault than for sexual assault, yielding a persistent inequality resisting review.[16] Part II looks at the failure to reform common law defenses—comparative fault doctrines most particularly, and potentially misplaced efforts focusing on consent. Again, we provide evidence that, in some cases, rules that apply to the average assault are applied differently in sexual assault cases. Part III addresses evidentiary rules.[17] It considers whether courts impose a double standard, applying one rule to a civil plaintiff and another to a civil defendant when they allow into evidence a victim's prior innocent sexual history but not the perpetrator's prior sexual misconduct. It also asks whether evidentiary rules still invite unstated gender stereotyping by judges and juries because reforms in the criminal law area do not apply in civil law cases. Finally, Part IV addresses key procedural issues. It recommends that state auditors consider recent developments in the states on the proper length of time for suit,[18] given that the standard term for typical common law intentional tort is just two years and that recent "look back" windows have prompted a flurry of cases causing controversy. Overall, it suggests that sexual assault civil claims deserve a holistic, thorough-going review on a state-by-state basis; amending statutes may do nothing if the statute

13. FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 309–421 (2009).

14. Notably, courts rely upon common law doctrines to interpret statutes. Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 625 tbl.1 (2022). Common law doctrine is the source of many legal issues raised in this Article.

15. This obviously raises the possibility that individuals can sue under federal civil rights law, 42 U.S.C. § 1983, but such law, too, is bound up in common law immunities. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55–58 (2018).

16. In theory, this means that state law, albeit judge-made law, may violate the Equal Protection Clause of the Fourteenth Amendment, but we know of no challenges based on this theory.

17. Although evidentiary rules are typically codified, they are often grounded in the common law of evidence, such as the rule we consider in this Article on propensity evidence.

18. Again, as in the case of evidentiary rules, although these are codified, they are based on common law categories, such as an "intentional tort."

is interpreted in light of a judge-made common law historically resistant to such claims or if reforms apply unevenly or inconsistently across the law.[19]

I. IMMUNITY

Since the murder of George Floyd, immunity has become a controversial, national issue. Much of the focus has been on excessive force, less so on rape and sexual assault by state officials.[20] Black women have decried that omission because they have traditionally been rape's most insistent victims.[21] Relative to the ink spent on federal "qualified immunity" doctrine, the focus on state immunity statutes is almost nonexistent.[22] Although there are dozens, if not hundreds, of articles discussing the federal immunity standard, we address here *state law immunities*, much more rarely treated.[23] As the Ninth Circuit has held: "[Q]ualified immunity is a doctrine of *federal* common law and, as such, has no application to . . . *state* claims, which are subject only to *state* statutory immunities."[24] The truth is that state immunity statutes abound, they are complex, and they often mean that sexual assault survivors who have been abused by state actors lose when they seek compensation for their injuries.

Courts have known of the risk of sexual assault and policing for some time. In the early 1990s, one state supreme court suggested that sexual assault

19. State immunity is often a function of statute, but these statutes are based on the common law's preference for absolute governmental immunity. On the limitations of local immunity law based on common law standards, see Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 476–77 (2016).

20. Long before George Floyd, Black women have called attention to the fact that standard racial reform efforts have not centered Black women's experience with police sexual violence. *See, e.g.*, Jasmine Sankofa, *Mapping the Blank: Centering Black Women's Vulnerability to Police Sexual Violence to Upend Mainstream Police Reform*, 59 HOW. L.J. 651, 657 (2016) (arguing that "dominant policing discourses often ignore racial and sexualized terror disproportionately impacting Black women" effectively marginalizing these issues in police accountability efforts).

21. Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 74 (2017) (explaining that Black women are likely to fall into the kind of vulnerable categories that even police associations correlate with a tendency to assault: "(1) minors; (2) individuals in prostitution and/or the commercial sex industry; (3) individuals under the influence of drugs or alcohol; (4) immigrants and undocumented persons; (5) individuals with limited English proficiency; (6) people with mental illness or developmental challenges; (7) individuals with physical disabilities; and (8) those who have been victimized previously" (quoting INT'L ASS'N OF CHIEFS OF POLICE, ADDRESSING SEXUAL OFFENSES AND MISCONDUCT BY LAW ENFORCEMENT: EXECUTIVE GUIDE 13 (2011), https://www.theiacp.org/sites/default/files/all/a/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf [https://perma.cc/NCP5-L9WF])).

22. For some of the more prominent discussions, see generally Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737 (2021); Fred O. Smith, Jr., Commentary, *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121 (2021); and Baude, *supra* note 15. We note that this Article focuses on state, as opposed to federal, immunities.

23. For one notable departure, see Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity's 51 Imperfect Solutions*, 17 DUKE J. CONST. L. & PUB. POL'Y 321, 329 (2022) ("There are clear examples of states, by statute or judicial decision, embracing a state qualified immunity doctrine that differs from the federal qualified immunity doctrine.").

24. Cousins v. Lockyer, 568 F.3d 1063, 1072 (9th Cir. 2009).

is far from the rarity it is often assumed to be but entirely foreseeable: declaring that such conduct "is neither [a] startling nor unexpected" misuse of an officer's authority.[25] Twenty years later, the evidence has mounted. In 2010, the Cato Institute—a libertarian think tank—reported sexual violence to be the second-most prevalent complaint citizens filed against law enforcement.[26] In 2014, the Associated Press found that nearly one thousand state police officers nationwide lost their licenses as a result of sexual violence allegations from 2009 to 2014.[27] In 2019, USA Today in conjunction with the Citizen's Police Data Project,[28] found more than two-hundred-thousand police misconduct allegations nationwide resulting in more than thirty-thousand dismissals of police officers. It also revealed more than three-thousand removals for sexual misconduct against adults or children.[29] This data focuses on police officers, not all state actors, including educators and every other kind of state employee, from nurses to janitors to park directors. And, because sexual misconduct—even by non-officers—is chronically underreported,[30] and most chronically underreported by women of color and young boys,[31] these numbers likely capture only a fraction of total assaults by state actors nationwide.

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25. Mary M. v. City of Los Angeles, 814 P.2d 1341, 1350 (Cal. 1991).

26. CATO INST., NATIONAL POLICE MISCONDUCT REPORTING PROJECT, 2010 ANNUAL REPORT 1–2, https://www.leg.state.nv.us/Session/77th2013/Exhibits/Assembly/JUD/AJUD338L.pdf [https://perma.cc/V25A-GW8R] (finding that between January 2010 and December 2010, citizens made sexual misconduct complaints against 618 U.S. police officers).

27. *AP Investigation into Officer Sex Misconduct, by the Numbers*, ASSOCIATED PRESS (Oct. 31, 2015, 11:14 PM), https://apnews.com/general-news-f61d495bb41d47968679c5b89a9907fc [https://perma.cc/R379-2GU7] (examining only state police officers, not federal officers); *see also* Philip Matthew Stinson, Sr., John Liederbach, Steven L. Brewer, Jr. & Brooke E. Mathna, *Police Sexual Misconduct: A National Scale Study of Arrested Officers*, 26 CRIM. JUST. POL'Y REV. 665, 666 (2015) (discussing the difficulty of examining the occurrence of such assaults which are seen as "hidden offenses that are likely to go unreported").

28. John Kelly & Mark Nichols, *Tarnished Brass: Search the List of More than 30,000 Police Officers Banned by 44 States.*, USA TODAY (June 27, 2022, 4:22 PM), https://www.usatoday.com/in-depth/news/investigations/2019/04/24/biggest-collection-police-accountability-records-ever-assembled/2299127002 [https://perma.cc/CA24-VEA6].

29. *An Introduction to the Citizens Police Data Project*, INVISIBLE INST., https://invisible.institute/police-data [https://perma.cc/J9P7-QCE7] (allowing search of Chicago Police Department complaints and investigatory documents). This study also found that officers accounted for three-thousand instances of domestic violence, suggesting a risk of gender violence beyond sexual assault. John Kelly & Mark Nichols, *Tarnished Brass: We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records.*, USA TODAY (June 11, 2020, 8:48 AM), https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002 [https://perma.cc/TLC3-M4CF] (finding "2,307 cases of domestic violence by officers").

30. Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1294 (2016) ("[P]olice failure to investigate sexual assault cases is well documented."); *see id.* at 1293–94 ("In many jurisdictions, the widespread perception that law enforcement officers will likely not pursue allegations of rape is entirely accurate. Police inaction is a particularly acute problem in cases involving women of color, immigrants, LGBTQ individuals, women in poverty, and sex workers." (footnote omitted)).

31. Jacobs, *supra* note 21, at 66–69, 71 (noting the disparate impacts of sexual assault on the young and on Black people).

The state actor who commits a sexual assault does not commit the average injury, nor are they the average perpetrator. Given the contexts—schools, prisons, and policing—one might think the government-employed assailant had a duty to protect, not harm, the victim. One may also think the harm caused by an official who committed sexual assault is worse than one committed by an ordinary citizen, as the perpetrator abused the power of the state. As one judge has admitted, it "seem[s] counterintuitive that our law provides no civil remedy" in such circumstances.[32] Citizens look to state actors as protectors, yet state officials exert enormous power and control over their victims. In many cases, without the power of their position, the sexual assault would not have occurred. Typically, in the private sphere, employers bear the burden of their employee's torts, but not so in many states when the employer serves the public.

Consider the following case, a rather ordinary occurrence in state immunity case law. Brittini Dees faced repeated sexual harassment and assault from her supervisor, Phillip Gentry, at the Georgia Agricultural Exposition Authority ("GAEA").[33] Ms. Dees alleged that, between May and July of 2020, Gentry raped her, threatened her employment, and "told Ms. Dees that if she ever told anybody about what he had done, he would 'absolutely deny everything.'"[34] "'The Office of the State Inspector General . . . conducted an investigation' . . . and 'found that Mr. Gentry had violated the Statewide Sexual Harassment Prevention Policy . . . .'"[35] Ms. Dees brought state claims against her employer, alleging negligence in hiring and supervision, urging that the "GAEA's conduct 'was extreme, outrageous, and utterly intolerable in a civilized society.'"[36] The court rejected her claim, finding her employer immune from suit.[37]

State auditors should worry that the result in *Dees* is typical, not exceptional—that immunity for state institutional actors is the rule, not the exception, in sexual assault cases.[38] Why? The common law of immunity. Sovereign immunity hails from the ancient idea that "the king can do no wrong."[39] Of course, state actors can do wrong, and most states have statutes allowing for a limited waiver of immunity. Although these are sometimes dubbed "tort" acts, after the

32. Larsen v. Davis Cnty. Sch. Dist., 409 P.3d 114, 125 (Utah Ct. App. 2017).

33. *See* Dees v. Ga. Agric. Exposition Auth., No. 22-cv-266, 2022 WL 17070531, at *1 (M.D. Ga. Nov. 17, 2022).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at *5.

38. *See* JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 113–15 (2023) (recounting an early 2010s *Monell* claim against a Houston police officer who was accused of raping several Latina women; the women's civil rights suit revealed that the City of Houston had received twenty complaints involving "forcible sexual assault," but "the judge concluded that there was not enough evidence to support a *Monell* claim 'under current case law'").

39. *Rex Non Potest Peccare*, CORNELL L. SCH., LEGAL INFO. INST. (May 2022), https://www.law.cornell.edu/wex/rex_non_potest_peccare [https://perma.cc/2TCE-LL7K] ("*Rex non potest peccare* originated in English common law and is based on the idea that the king cannot commit a legal wrong.").

Federal Tort Claims Act,[40] "the operative question is . . . whether immunity is waived or not."[41] For that reason, we call these state laws "immunity acts" for short.[42] For example, the Missouri statute provides that "sovereign or governmental tort immunity as existed at common law in this state" prevails except with respect to enumerated exceptions.[43] So too, the Arizona statute provides that it "does not affect, alter or otherwise modify any other rules of tort immunity regarding public entities and public officers as developed at common law and as established under the statutes and the constitution of this state."[44] Some statutes appear to go even further, toward absolute immunity.[45] In recent years, a few states have expressly altered their immunity statutes to bar public immunity for some forms of sexual assault.[46]

Many state immunity statutes bar claims such as assault and battery, thus excluding claims by the victims of sexual assault at the hands of state actors.[47]

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40. *See* 28 U.S.C. §§ 2671–2680 (2018).

41. Eric Wang, Note, *Tortious Constructions: Holding Federal Law Enforcement Accountable by Applying the FTCA's Law Enforcement Proviso over the Discretionary Function Exception*, 95 N.Y.U. L. REV. 1943, 1949 (2020).

42. Some states title these statutes "tort claims acts." *See, e.g.*, Tort Claims Act, N.M. STAT. ANN. §§ 41-4-1–27 (2024). However, others use "sovereign immunity." *See, e.g.*, 42 PA. STAT. AND CONS. STAT. ANN. §§ 8521–8527 (West Supp. 2022). Some use the term "qualified immunity," which is the term that prevails in the federal courts. *See, e.g.*, IOWA CODE § 669.14A (2024). Immunity can vary substantially among the states. Some states may also have separate statutes on state immunity versus local government immunity. In addition, some state immunity statutes require that plaintiffs file their claims before an administrative board or court. *See, e.g.*, KY. REV. STAT. ANN. § 49.040 (West 2022); CONN. GEN. STAT. ANN. § 4-142 (West 2020); 705 ILL. COMP. STAT. ANN. § 505/8 (West 2018) (providing for a court of claims to hear public claims). Precisely because of the complexity of these statutes, we believe the "tort act" nomenclature is too broad and potentially misleading.

43. MO. ANN. STAT. § 537.600 (West 2019).

44. ARIZ. REV. STAT. ANN. § 12-820.05(A) (Supp. 2024); *see also* FLA. STAT. § 768.28(1) (2024) ("[T]he state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act.").

45. *See, e.g.*, ARK. CODE ANN. § 21-9-301(b) (West 2019) ("No tort action shall lie against any such political subdivision because of the acts of its agents and employees."). Some are drafted specifically as a grant of statutory immunity with very narrow exceptions. *See, e.g.*, UTAH CODE ANN. § 63G-7-101 (LexisNexis 2019); ME. STAT. tit. 14, § 8104-A (2003) (listing precise exceptions to an otherwise overarching immunity). Others provide immunity amplified by judicial interpretation. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2019); *see* J. Bonner Dorsey, *Whither the Texas Tort Claims Act: What Remains After Official Immunity?*, 33 ST. MARY'S L.J. 235, 238–40 (2002) (arguing that the Act has been "limited more narrowly than the legislature envisioned" by applying a common law interpretation of immunity).

46. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 12-104(a)(2)(iii) (LexisNexis Supp. 2023); N.J. REV. STAT. § 59:2-1.3 (2019); UTAH CODE ANN. § 63G-7-301(2)(j) (LexisNexis Supp. 2023) (waiving immunity in cases of sexual assault in educational settings); *see also* N.Y. CT. CL. ACT § 10 (McKinney 2019) (providing for time in which to file intentional tort claims). New Mexico excludes intentional torts from their statutes barring immunity for law enforcement. *See* N.M. STAT. ANN. § 41-4-12 (2020).

47. These exceptions sometimes mirror the Federal Tort Claims Act's similar list of intentional torts excluded. *See* 28 U.S.C. § 2680(h) (excluding any federal tort claim based on "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit"); *see, e.g.*, GA. CODE ANN. § 50-21-24(7) (West 2022) (exempting

These exclusions model the Federal Torts Claim Act, whose authors explained that intentional "torts . . . would be difficult to make a defense against, and . . . easily exaggerated. For that reason it seemed to those who framed this bill that it would be safe to exclude those types of torts . . . ."[48] That statement is eerily reminiscent of the common law assumption that rape allegations were likely to be false. As a general rule, private employers' liability for the torts of their employees depends upon the common law principle of *respondeat superior*: "[L]et the master answer."[49] By contrast, state "immunity acts" provide that the master "may not answer" in many cases. To be sure, there are exceptions, and state law differs widely, both in statutory formulations and judicially created applications of those doctrines. Auditors must pay attention to their own individual state's statutes and case law, but patterns have emerged from our research that are worthy of further study.

A. THE INTENTIONAL TORT EXCLUSION

Many state immunity acts assume that the state should be responsible for negligent but not intentional acts, raising the oddity that the worse the government employee acts, the less likely the government is held liable.[50] The

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the State of Georgia from liability for assault and battery, among other intentional torts); N.H. REV. STAT. ANN. § 541-B:19(d) (LexisNexis 2019) (exempting "any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest"); NEB. REV. STAT. ANN. § 81-8,219(4) (West 2023) (excluding "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution"); ALASKA STAT. ANN. § 09.50.250(3) (2023) (exempting claims arising out of "assault, battery, false imprisonment"); MISS. CODE ANN. § 11-46-5(2) (2019) (exempting "fraud, malice, libel, slander, defamation or any criminal offense"). In some states, the exemption is accomplished by waiving immunity only for "a negligent act or omission," see, for example, TENN. CODE ANN. § 29-20-205 (West 2020) (detailing how the State is only liable for damages to the extent of its employee's negligence, subject to a number of exceptions); and IDAHO CODE § 6-903 (2023), or by limiting the waiver of immunity to specific kinds of government action, thereby excluding intentional torts. *See* ME. STAT. tit. 14, § 8104-A (2003) (listing a narrow set of exceptions from immunity); COLO. REV. STAT. § 24-10-106 (2023) (same).

48. Wang, *supra* note 41, at 1952 (quoting *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Comm. on the Judiciary*, 76th Cong. 33 (1940) (statement of Alexander Holtzoff, Special Assistant to the Att'y Gen.)). The federal government has limited its intentional tort waiver by enacting a "law enforcement proviso," which imposes liability for some intentional torts by law enforcement. *See id.* at 1953–55 (discussing "The Law Enforcement Proviso" and its origins). For the difficulty of pursuing claims against the federal government for sexual assault, see Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731, 742 (2019) (explaining the difficulties of holding the federal government liable for sexual assault under the Federal Tort Claims Act).

49. *See, e.g.*, Patrick Hornbeck, Respondeat Superior *Vicarious Liability for Clergy Sexual Abuse: Four Approaches*, 68 BUFF. L. REV. 975, 986 (2020).

50. Not all states follow this rule. Some state immunity acts do not provide immunity for "crimes" or "willful misconduct." *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8550 (West Supp. 2022); DEL. CODE ANN. tit. 10, § 4001 (West 2024) (excluding from immunity acts done with "gross or wanton negligence"); MICH. COMP. LAWS ANN. § 691.1407(2)(c) (West 2015) (excluding claims of "gross negligence"). Furthermore, state indemnity laws in many cases provide that individual officers should not be indemnified for particularly bad acts or acts done with malice or willfulness. Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 277–78 (2020). One might assume from this that a plaintiff could sue for such bad

premise of this intentional tort exclusion is that the individual (employee), not the state (employer), is principally responsible for an injury, even if the employer clothed the party with the authority necessary to commit the assault. Any claim against the state employee will fall outside the state immunity act because sexual assault is an intentional tort,[51] and states typically only consent to be sued for negligent acts.[52] As a result, plaintiffs frequently add third-party employers, such as a school system or a city police force, alleging that they acted negligently for hiring or supervision. This recharacterization may not always work if a court finds that they were intended to "'circumvent' the [intentional tort] exception" in the state immunity statute.[53] When one Texas plaintiff sued a police officer who raped her and characterized her claim as one of negligence,[54] the court summarily dismissed the claim. The sexual assault would not have occurred without the detention or use of state authority, but the court found the city immune, holding that any other ruling would "render meaningless the Act's intentional tort immunity."[55]

Transforming the claim from an intentional act into a claim of negligence leads to predictable defenses. Once the claim is about negligent hiring or supervision—of a teacher or nurse or corrections officer—that means that a state employer's "discretionary" judgment may prevail on those matters (as opposed to the assault itself).[56] Hiring and supervision are just the

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acts against the state, but the absence of indemnification may prevent these cases from being brought at all. *See* Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305, 333–35 (2020) (explaining that attorneys more often than not seek to recover against indemnified officers, as opposed to those not indemnified, because the government will pay out the judgment in the case of indemnity).

51. The victim can sue the individual state employee in their individual capacity, but it is likely that individual state employees are judgment-proof. Suing them in their official capacity, ironically may lead to indemnification. *See* Schwartz, *supra* note 50, at 313–15.

52. *See, e.g.*, Dion v. City of Omaha, 973 N.W.2d 666, 688 (Neb. 2022) (finding sovereign immunity on the grounds that the estate's claim arose out of an intentional tort of battery for purposes of NEB. REV. STAT. ANN. § 13-910(7) (West 2009)); Boyer-Gladden v. Hill, 224 P.3d 21, 29–30 (Wyo. 2010) (finding Wyoming has not waived sovereign immunity for suits involving intentional torts of their employees, including sexual assault); ALA. CODE § 11-47-190 (LexisNexis 2008) (limiting municipal liability to "neglect, carelessness, or unskillfulness").

53. Dees v. Ga. Agric. Exposition Auth., No. 22-cv-266, 2022 WL 17070531, at *4 (M.D. Ga. Nov. 17, 2022).

54. *See* Limon v. City of Balcones Heights, 485 F. Supp. 2d 751, 753 (W.D. Tex. 2007). Some sexual assault advocates have argued that the claims should be recharacterized as ones of negligence. *See* W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV. 587, 609–20 (2023) (arguing that sexual assault claims should sound in negligence).

55. *See, e.g.*, City of San Antonio v. Dunn, 796 S.W.2d 258, 261 (Tex. App. 1990) ("The transportation to jail in a police car owned by the City of San Antonio by a careless and angry police officer, as a consequence of his intentional tort, certainly cannot be attributed to the city as negligence.").

56. *See, e.g.*, MICH. COMP. LAWS ANN. § 691.1407 (West 2015) ("Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a *governmental function*." (emphasis added)); OHIO REV. CODE ANN. § 2744.02 (West 2019) ("[A] political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of

kind of things over which a state institution has discretion, creating what some courts call "discretionary function immunity."[57] That is not all. Even if a plaintiff hurdles the "discretionary function" barrier, there are standard tort issues, such as proximate causation, that emerge precisely because the plaintiff recharacterizes their claim as one of negligence.[58] The very intentional nature of the sexual assault may break the chain of causation, de-linking the state's institution's own acts of negligence from the sexual assault.[59] Only if there has been a prior assault known to the institutional defendant is recovery likely. As one court put it, this amounts to a "one free rape" rule, producing "the inimical result of the first sexual assault victim lacking a civil claim, while allowing the next victim . . . to receive justice because defendants had notice of the prior rape."[60] To be sure, state practice can vary; in some states, willful or malicious acts are explicitly excluded from state immunity statutes, meaning that state actors will not be immune for sexual assaults meeting such standards. But as we will see, there are other common law doctrines that may yet bar the claim.

B. THE SCOPE-OF-EMPLOYMENT EXCLUSION

Typically, a sexual assault victim of a state actor will sue the perpetrator and his state employer,[61] such as a state police department, public school, or

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the political subdivision or an employee of the political subdivision in connection with a *governmental or proprietary function*." (emphasis added)); MISS. CODE ANN. § 11-46-9(d) (West 2019) (immunizing claims based on the "exercise or performance or the failure to exercise or perform a *discretionary function* or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused" (emphasis added)); Gary v. Crouch, 867 So. 2d 310, 313–14 (Ala. 2003).

57. W. Va. Div. of Corr. & Rehab. v. Robbins, 889 S.E.2d 88, 97 (W. Va. 2023) (collecting West Virginia cases of same); *see, e.g.*, Hollis v. City of Brighton, 950 So. 2d 300, 305 (Ala. 2006); Doe v. Town of Madison, 262 A.3d 752, 772–75 (Conn. 2021) (finding state employees covered by discretionary function immunity in failing to prevent sexual assault by teacher); Doe v. Rankin Cnty. Sch. Dist., 189 So. 3d 616, 620 (Miss. 2015) (finding state had not waived discretionary function defense in sexual assault case and remanding for determination of applicability); Earle v. State, 910 A.2d 841, 298 (Vt. 2006) (finding state immune from suit under discretionary function exemption for liability as their decision to leave child with sexually abusive family was matter of discretion).

58. *See, e.g.*, CAL. GOV'T CODE § 815.2 (West 2012) (limiting the waiver of immunity to claims based on injuries "proximately caused" by a government employee).

59. *See* Jamal P. v. City of New York, 808 N.Y.S.2d 609, 612–13 (N.Y. App. Div. 2005) (reversing the jury's finding that the facility's negligence was a proximate cause of the infant's sexual assault in foster care); J.H. *ex rel.* D.H. v. West Valley City, 840 P.2d 115, 124 (Utah 1992) (holding that plaintiff failed to establish "that any act or omission . . . was a proximate cause of his damages" from the officer's molestation).

60. Gress v. Lakhani Hosp., Inc., 110 N.E.3d 251, 263 (Ill. App. Ct. 2018). In a footnote, the Illinois Appellate Court compares the "one free rape" rule to the "long gone common law 'one bite rule,' where an injured plaintiff had to plead and prove a dog owner either knew or was negligent not to know that his dog had a propensity to bite people." *Id.* at 263 n.7 (citing Harris v. Walker, 519 N.E.2d 917, 918 (Ill. 1988)).

61. *See* Boyer-Gladden v. Hill, 224 P.3d 21, 23 (Wyo. 2010) (noting plaintiff's complaint included both claims for assault against perpetrating officer and the employer); Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 85 (2006) ("[F]requent lines of litigation involve employers' responsibility for sexual assaults committed by their employees . . . .").

group home, each for their own actions.[62] These are "direct" liability claims since they hold the defendant to a duty to the plaintiff.[63] By contrast, "vicarious liability" depends upon the relationship of the employer to the tortfeasor, meaning that the employee commits a tort in some sense "on the job." As we noted earlier, state institutions' defenses under immunity acts vary, but one common law doctrine—scope of employment—stands above the rest as a key doctrinal question in sexual assault cases. Almost every state with an immunity act only covers actions done within the scope of employment.[64] In a study of 147 state and federal assault cases involving state immunity doctrines, we found that 41.7% of those claims depended upon the "scope of employment" doctrine.[65] This reflects well-known consternation by courts about the proper common law tests for "scope of employment," an area of law that has given rise to numerous, conflicting tests.[66] One need only look at one of the more prominent civil sexual assault cases of late, *Carroll v. Trump*, to see the difficulty of the doctrine.[67] The Second Circuit was forced to grapple with whether the former President made his defamatory statements about Carroll's rape charge "in the course of employment," finding the relevant state law (that of the District of Columbia) on the question "sufficiently unclear . . . to predict with any confidence" how the District would rule on the question, certifying the question to the D.C. Court of Appeals for a definitive answer on the controlling "scope of employment" standards.[68]

Although the law varies across states, there is no question that sexual assault claims can flounder because the court holds the employee's actions

62. *See, e.g.*, Cox v. Evansville Police Dep't, 107 N.E.3d 453, 456–58 (Ind. 2018) (describing how plaintiffs who were sexually assaulted by two on-duty police officers brought civil actions against officers' city employers).

63. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 755–56 (1999).

64. *See, e.g.*, MICH. COMP. LAWS ANN. § 691.1407 (West 2015) ("[E]ach officer and employee of a governmental agency . . . is immune from tort liability for an injury . . . caused by the officer, employee, or member while in the *course of employment*." (emphasis added)); CAL. GOV'T CODE § 815.2 (West 2012) ("A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity *within the scope of his employment*." (emphasis added)); OKLA. STAT. tit. 51, § 153 (2017) (providing that the state "*shall not be liable . . . for any act or omission of an employee acting outside the scope of the employee's employment*" (emphasis added)). Although state immunity acts typically specify the scope of employment rule, see, for example, MONT. CODE ANN. § 2-9-101 (West 2009) (defining the term "claim" to cover employees acting "within the scope of employment"), its application depends upon judicially created, common law, doctrine which holds that these statutes are to be construed strictly in favor of immunity. *See* Wang, *supra* note 41, at 1957–58 (discussing the "presumption" of immunity in the federal context).

65. The only other large doctrinal category was the "discretionary function" rule, amounting to 20.8% of the claims. *See* Victoria Nourse et al., Fifty State Analysis of Immunity Laws: Memorandum of Findings 12–13 (Nov. 2022) (unpublished manuscript) (on file with the *Iowa Law Review*).

66. DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 335–37 (3d ed. 2018); *see* Mark E. Roszkowski & Christie L. Roszkowski, *Making Sense of Respondeat Superior: An Integrated Approach for Both Negligent and Intentional Conduct*, 14 S. CAL. REV. L. & WOMEN'S STUD. 235, 236–37 (2005).

67. Carroll sued Trump for defamation and, in a separate suit, sexual assault. *See generally* Carroll v. Trump, No. 20-cv-7311, 2023 WL 2441795 (S.D.N.Y. Mar. 10, 2023).

68. Carroll v. Trump, 49 F.4th 759, 765–66 (2d Cir. 2022).

are "outside" the scope of employment and, therefore, the state employer is immune. Consider the following recent case in Iowa: At two AM one night in 2023, Shari Martin sat in the passenger seat of a car, her intoxicated companion behind the wheel. Police arrested the driver. Martin, alone with no way home, accepted a courtesy ride to her hotel from Officer Thomas Tovar, where he then raped her.[69] One might think Tovar's employer, the city, would be liable for the damage its employee caused while on duty. The facts were undisputed: A criminal court had already convicted Tovar. But the court dismissed Martin's tort claims, finding the city immune. Why? Officer Tovar acted outside his *scope of employment*.[70] Although some courts refuse to rule that sexual misconduct is outside the scope of employment as a matter of law, others do, as the *Martin v. Tovar* case makes clear.[71]

Auditors should worry that rules are being applied in sexual assault cases that might not apply if the assault was non-sexual.[72] Public and private employers have been held liable, based on *respondeat superior*, for intentional torts. For example, state employers are routinely held liable for police officers' excessive force, even if it is a rage-filled beating of a man whom the police unlawfully stopped[73] or a correction officer's cruel twenty-eight-hour restraint of an inmate.[74] If one is liable for such assaults, why not sexual assault? Similarly, in the private sphere, employers can be liable when one employee fights with

69. Martin v. Tovar, 991 N.W.2d 760, 764 (Iowa 2023) ("Tovar's rape of Martin was an egregious departure from the authorized or assigned duties of his employment as a police officer.").

70. *See id.* at 765–66 (citing RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (AM. L. INST. 2006)).

71. *See, e.g.*, Atwood v. Town of Ellington, 427 F. Supp. 2d 136, 144 (D. Conn. 2006) ("In this case, it is abundantly clear that [the officer] could be furthering no business interests of the Town of Ellington when he allegedly sexually assaulted [plaintiff]."). For variability in outcomes, see generally Tracy Bateman, Annotation, *Whether Sexual Misconduct Falls Within Scope of Police Officer's Employment to Support Theory of Vicarious Liability Under State Law*, 70 A.L.R. 7th Art. 4 (2021). *Compare* Doe v. Cramer, No. 17-14382-civ, 2018 WL 8265221, at *4 (S.D. Fla. Aug. 9, 2018) (finding that sexual misconduct was not within scope of employment), *and* L.T. *ex rel.* Hollins v. City of Jackson, 145 F. Supp. 2d 750, 762–63 (S.D. Miss. 2000), *aff'd per curiam*, 245 F.3d 790 (5th Cir. 2000) (unpublished table decision) (finding that sexual misconduct was not within scope of employment), *with* Doe v. City of San Diego, 35 F. Supp. 3d 1195, 1214 (S.D. Cal. 2014) (finding that sexual misconduct was within the scope of employment), *and* Doe v. Roe, No. 12 c 9213, 2013 WL 2421771, at *8 (N.D. Ill. June 3, 2013) (finding that sexual misconduct could be within scope of employment but refusing to rule on the question as a matter of law).

72. Although *respondeat superior* liability typically encompasses negligent acts, it can cover intentional acts. Faragher v. City of Boca Raton, 524 U.S. 775, 794 (1998) ("[S]cope of employment has been defined broadly enough to hold employers vicariously liable for intentional torts . . . ."). Even critics who stress the extreme variability of scope of employment doctrine note that "a master is indisputably liable for at least some intentional torts." Paula Dalley, *Destroying the Scope of Employment*, 55 WASHBURN L.J. 637, 641 (2016); *see* Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 149 (2013).

73. Balt. City Police Dep't v. Potts, 227 A.3d 186, 189–92 (Md. 2020) (discussing officer's lack of reasonable suspicion when stopping Potts on his way home from grocery store and subsequent beating).

74. Crawford v. McDonald, No. 21-0732, 2023 WL 2729675, at *1–2 (W. Va. Mar. 31, 2023) ("He remained in the restraint chair for several shifts—nearly twenty-eight hours.").

another, when an employee assaults a patron, or for barroom brawls.[75] But in the context of sexual assault, the result tends to be different; courts tend to attribute the sexual assault to the individual defendant's own predilections or motives, his "lustful" wishes, finding that the employee could not possibly have a "purpose" to serve the employer.[76]

Traditionally, courts have asked whether the employee had a "motive"[77] to serve the employer when determining whether the employee acted within the scope of employment to benefit the employer. Not surprisingly, many courts find it difficult to see how an employer benefits from sexual assault. In *Martin*, the court decried the officer's "deviant, felonious interest."[78] But that analysis frames the problem in ways that should be troubling. Terms like

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75. Tyson v. Dawkins, No. 346595, 2021 WL 1597378, at *5–6 (Mich. Ct. App. Apr. 22, 2021) (finding a bar liable for patron's assault of other patron); *see also* Patterson v. Blair, 172 S.W.3d 361, 371–72 (Ky. 2005) (finding an employee acted within the scope of his employment when he assaulted a customer by shooting out the tires of the car they were driving); Baker v. Saint Francis Hosp., 126 P.3d 602, 607–08 (Okla. 2005) (finding a question of fact whether a hospital employee was within the scope of employment when they let an infant fall from their crib to the ground and then struck the infant's head against a shelf); Carr v. Wm. C. Crowell Co., 171 P.2d 5, 7–8 (Cal. 1946) (finding an employer liable for actions of a carpenter who attacked a co-employee with a hammer); Leonbruno v. Champlain Silk Mills, 128 N.E. 711, 712 (N.Y. 1920) (Cardozo, J.) (finding an employer liable under a worker's compensation statute for an eye injury sustained when an employee threw an apple at another employee).

76. *See, e.g.*, Martin v. Tovar, 991 N.W.2d 760, 764 (Iowa 2023) (finding assault outside the perpetrator's scope of employment where assault "was not intended to further any purpose or interest of the" employer); Hamed v. Wayne County, 803 N.W.2d 237, 244–45 (Mich. 2011) (finding "no question" that a sheriff acted outside the scope of employment in assaulting detained survivor because "[t]he sexual assault was an independent action accomplished solely in furtherance of [his] own criminal interests" and the employer did not "benefit[] in any way"); Doe v. Purity Supreme, Inc., 664 N.E.2d 815, 820 (Mass. 1996) (finding that an assistant store manager did not act within the scope of employment in committing sexual assault because "rape and sexual assault of an employee do not serve the interests of the employer"); Medlin v. Bass, 398 S.E.2d 460, 594 (N.C. 1990) (finding that a school principal acted outside the scope of employment even though he used professional authority to call "the minor plaintiff to his office" because "in proceeding to assault her sexually he was advancing a completely personal objective" and the "assault could advance no conceivable purpose" of the employer); A–G Foods, Inc. v. Pepperidge Farm, Inc., 579 A.2d 69, 73 (Conn. 1990) ("We have long adhered to the principle that in order to hold an employer liable for the intentional torts of his employee, the employee must be acting within the scope of his employment and in furtherance of the employer's business."); Doe v. Villa Marie Educ. Ctr., No. FBTCV165032101S, 2017 WL 3671352, at *2–5 (Conn. Super. Ct. July 20, 2017) (applying *Pepperidge Farm* to hold that there was no liability for sexual assault as not within the scope of employment).

77. Bateman, *supra* note 71, § 2 (discussing a variety of tests used, including: whether the assault benefits the employer, whether the officer abused their position of power, or whether the opportunity to assault arose because of the employment relationship). The most common formulation follows the RESTATEMENT (SECOND) OF AGENCY §228 (AM. L. INST. 1958):

> (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master . . . .

78. *Martin*, 991 N.W.2d at 766; *see, e.g.*, L.B. *ex rel.* D.B. v. United States, 515 P.3d 818, 829 (Mont. 2022) (Sandefur, J., dissenting) (explaining that the majority erroneously applied Montana law on the scope of employment since there was no basis to "conclude that the officer was acting with any motive or purpose other than for his own personal sexual gratification").

"felonious" suggest that the case belongs only in criminal court, but few say that of the barroom brawl. Although excessive force can be a criminal offense associated with "felonious" intent, few argue this criminality precludes victims from receiving damages in tort based on state actors who use such force.[79] As Professor Martha Chamallas has written,[80] the difference between the results in assault cases from sexual assault cases "stems from a traditional belief that sexual misconduct is qualitatively different from other types of misconduct."[81] Such views assign sexual assault as individual deviancy, rather than a systemic risk.

Given the wide variety of state immunity acts and differences in how state courts address the scope of employment, states should audit their statutes and case law to assess whether courts impose unequal burdens on sexual assault victims, creating what amounts to one rule for state employee misconduct and another rule for state employee *sexual* misconduct.[82] Auditors should ask: Is sexual assault really that different from other intentional tort cases for which state employers *are* liable? Is an employee who brawls with another serving his employer or displaying his own personal anger? What about a hate-filled police officer who kills a suspect he is arresting? Or what about a drunken sailor who sinks a ship—surely, he did not drink to benefit his employer?[83] And, yet, in all of these cases, courts have held the act to be *within the scope of employment* and the employer liable.[84] Auditors should worry that the rules are not being applied consistently; sexual assault, particularly in the public sphere,[85] is treated differently from the average case of assault or excessive

79. *See, e.g.*, *Crawford*, 2023 WL 2729675, at *7 (finding that, in a tort damages claim, corrections officers' excessive force against an inmate was within the scope of employment because it "appear[ed] motivated, at least in part, by a purpose to serve the master"); Balt. City Police Dep't v. Potts, 227 A.3d 186, 192 (Md. 2020) (finding, in a tort damages claim, that two police officers acted within the scope of their employment when brutally assaulting a man who refused to consent to a search); Morales v. City of Okla. City *ex rel.* Okla. City Police Dep't, 230 P.3d 869, 876 (Okla. 2010) (finding, in a tort damages claim, an officer's excessive force against a fourteen-year-old girl was within the scope of employment when he aggressively removed her from a fight with another student); Daigle v. City of Portsmouth, 534 A.2d 689, 700 (N.H. 1987) (finding, in a tort damages claim, officers acted within the scope of employment when severely beating a man during an arrest attempt).

80. Chamallas, *supra* note 4, at 56.

81. *Id.* at 54.

82. *See* Chamallas, *supra* note 72, at 134–37 (discussing the sex exception to vicarious liability that reduces accountability of state employers for employee misconduct on the job if the misconduct is sexual in nature).

83. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 172–73 (2d Cir. 1968) (Friendly, J.) (holding that when a drunken sailor returned to drydock and flooded a ship, the employer was liable, presumably on the theory that sailors are foreseeably drunk, even if getting drunk had a decidedly personal motive).

84. *See supra* note 79 (collecting cases).

85. We recognize that the scope of employment rule can be applied differently in private and public spheres; we make no claim in this paper that all employers should be vicariously liable. We are focused here on immunity of state officials who have special constitutional duties to their citizens.

force in circumstances where the average citizen is likely to think that the state employer should bear a more serious duty to avoid injury.

Why would courts rule one way when it is an assault (excessive force) and another for a different kind of assault (sexual assault)? It may well be easier to see in a case of an arrest-turned-rage-filled murder that the arrest was made on behalf of the employer—an arrest is, after all, part of an officer's job. But there are many cases in which officers arrest an individual and this is a necessary precursor to a sexual assault; for example, an arrest-turned-rage-filled rape. Why is the latter not done on behalf of the employer, but the former is? In part, we believe this reflects what scholars have called disparate "framing effects."[86] In the excessive force case, the inquiry does not focus on the officer's mental state ("hateful"), but it does in the sexual assault case ("lustful"). In the excessive force cases, courts open the frame of reference more broadly. They look beyond the mental state of the state official, recognizing that such force could not have been accomplished "but for" the power conferred upon the officer by the state. Reconsider *Martin*: Would the victim have accompanied the officer if he were not a police officer, sworn to protect her? Who gave him the authority to drive her home? In fact, the police department had a policy authorizing that transportation.[87]

Auditors should recognize that, although scope of employment rules may operate against sexual assault survivors, there are exceptions to the scope of employment rule in a distinct minority of states, most clearly in Indiana and Delaware.[88] Scope of employment doctrine, as even the Supreme Court has recognized, is extremely difficult, and some courts in a minority of cases have held sexual assault does fall within the scope of employment.[89] By far the most

86. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 591–93 (1981).

87. Martin v. Tovar, 991 N.W.2d 760, 763 (Iowa 2023) ("[I]t was the police department's common practice for an officer to give passengers who weren't under arrest a courtesy ride home.").

88. Cox v. Evansville Police Dep't, 107 N.E.3d 453, 464 (Ind. 2018) ("[The police officer] sexually assaulted [plaintiff] by exploiting unique institutional prerogatives of his police employment."); Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 179 (Del. 2018) ("[T]he [o]fficer was 'aided in accomplishing the tort by the existence of the agency relation.'" (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. L. INST. 1958))). California was an early leader in this, holding that sexual assaults, like other assaults, are foreseeable police misconduct, but that holding has not been extended beyond the police context. *See* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1349, 1352 (Cal. 1991); Z.V. v. County of Riverside, 189 Cal. Rptr. 3d 570, 574–77 (Cal. Ct. App. 2015) (detailing *Mary M.*'s lack of application outside of "unique" context of police officers and hesitancy to use it even in those instances).

89. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 793–96 (1998). In *Faragher*, the Court explained that the doctrine varies, and that in some decisions, courts have held third parties liable for sexual assault:

> The rationales for these decisions have varied, with some courts . . . explaining that the employee's acts were foreseeable and that the employer should in fairness bear the resulting costs of doing business . . . and others finding that the employee's sexual misconduct arose from or was in some way related to the employee's essential duties.

Id. at 796 (citation omitted). For other cases in which federal courts have struggled with the scope of employment see, for example, L.B. *ex rel.* D.B. v. United States, 515 P.3d 818, 823 (Mont. 2022)

typical rationale is that the officer exploited "unique institutional prerogatives," or in some way was "aided" by his institutional affiliation.[90] This follows section 219 of the Restatement of Agency which provides that an agent acts for a principal when they are aided in their agency by the principal in some way.[91] Other courts have suggested that assaultive behavior, of whatever sort, is "foreseeable" or "incidental" to the official's conduct.[92] Police excessive force cases give support to that claim. Finally, one commentator has operationalized this inquiry by asking whether the "position assisted the employee in committing the sexual assault."[93] If an ordinary citizen could not have accomplished the same act without the presence of the state, it "[sh]ould fall within the scope of employment."[94]

C. STATE CONSTITUTIONAL DUTIES

State immunity becomes even more troubling when one realizes that whatever state law might say, state actors breach the *Federal Constitution* when they sexually assault. Consider the following case: On February 15, 2019, seventeen-year-old Zailey Hess rode along with an Indiana police officer to fulfill a college course requirement.[95] The officer repeatedly groped Ms. Hess's breasts and buttocks, grabbed her thigh, asked about her sex life, introduced her as an aspiring sex worker to an actual sex worker, and drove her to a secluded area in an attempt to give another officer an opportunity to have

("The test of the employer's liability is whether the act complained of arose out of and was committed in prosecution of the task the servant was performing for his master.").

90. *Cox*, 107 N.E.3d at 464 ("[The police officer] sexually assaulted [plaintiff] by exploiting unique institutional prerogatives of his police employment."); *Sherman*, 190 A.3d at 179 ("[T]he [o]fficer was 'aided in accomplishing the tort by the existence of the agency relation.'").

91. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. L. INST. 1958). The aided-by-agency concept provides for liability against third-party defendants where the harm-causer is aided by the existence of the relationship between the employee and employer in committing the tort. *Id.*

92. Given the incidence of sexual assault in policing, one should worry that a pattern of such conduct establishes foreseeability, even if courts have held that knowledge of many, many incidents does not amount to a policy of subjecting municipalities to liability. State Dep't of Admin. v. Schallock, 941 P.2d 1275, 1284 (Ariz. 1997) (in banc) ("The acts complained of here were part of or incidental to [the assailant's] employment . . . even though done to satisfy [his] aberrant desires."); *Mary M.*, 814 P.2d at 1350 ("In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct."); Samuels v. S. Baptist Hosp., 594 So. 2d 571, 573–74 (La. Ct. App. 1992) (holding that the tortious conduct "was reasonably incidental to the performance of" the nursing assistant's duties in caring for a "helpless [patient] in a locked environment"). There are many other cases holding to the contrary, however. *See, e.g.*, A–G Foods, Inc. v. Pepperidge Farm, Inc., 579 A.2d 69, 73–74 (Conn. 1990) (finding theft did not serve the interests of their employer and therefore did not invoke vicarious liability); Doe v. Villa Marie Educ. Ctr., No. FBTCV165032101S, 2017 WL 3671352, at *4–5 (Conn. Super. Ct. July 20, 2017) (applying *Pepperidge Farm* to hold that there was no liability for sexual assault).

93. Rochelle Rubin Weber, Note, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 MINN. L. REV. 1513, 1539 (1992).

94. *Id.* at 1526–27, 1526 n.51.

95. Z.H. v. Garcia, No. 21-cv-101, 2022 WL 857035, at *1 (N.D. Ind. Mar. 21, 2022), *aff'd in part, rev'd in part, and remanded sub nom.* Hess v. Garcia, 72 F.4th 753 (7th Cir. 2023).

sex with Ms. Hess.[96] After a classmate's similar encounter, Ms. Hess filed a 42 U.S.C. § 1983 action against the police chief and officer,[97] alleging these state actions violated her rights under the Equal Protection Clause, Due Process Clause, and Fourth Amendment.[98] The district court dismissed the claims.[99] The Seventh Circuit reversed, finding that her constitutional rights were violated.[100]

When a state official uses the power and prestige of his office to violate the bodily integrity of a person, state auditors should consider whether they wish to place all the blame for these occurrences solely on individual employees. As *Hess* explains, federal courts disagree about the constitutional basis for the rule that state actors who commit sexual assault violate constitutional rights. Some courts emphasize the Fourth Amendment,[101] others the Fourteenth Amendment's Equal Protection Clause,[102] and still others, the Fourteenth Amendment's Due Process Clause.[103] But they appear to agree on one notion—sexual assault by state actors *is a constitutional*

96. *Id.* at *1–2.

97. 42 U.S.C. § 1983 provides a civil damage remedy against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." It was enacted in 1871, as part of the Ku Klux Klan Act, to deal with racial violence in southern states. Fisk & Chemerinsky, *supra* note 63, at 755–56.

98. *Hess*, 72 F.4th at 757.

99. *Z.H.*, 2022 WL 857035, at *6.

100. *Hess*, 72 F.4th at 768.

101. *Compare* Fontana v. D.E. Haskin, 262 F.3d 871, 880–82 (9th Cir. 2001) (finding sexual assault against handcuffed person to be gratuitous, completely unnecessary, and unreasonable under the Fourth Amendment), *with* Tyson v. Sabine, 42 F.4th 508, 516–19 (5th Cir. 2022) (finding an alleged sexual assault by deputy during a home welfare check did not constitute a search or seizure as required under the Fourth Amendment).

102. *See, e.g.*, *Hess*, 72 F.4th at 760–61 (construing these assaults as violations of the Fourteenth Amendment); Doe v. Smith, 470 F.3d 331, 337–38 (7th Cir. 2006) (concluding sexual abuse by an Illinois school dean may violate the Equal Protection Clause); Johnson v. Martin, 195 F.3d 1208, 1218 (10th Cir. 1999) (concluding that building inspector's sexual harassment "for purpose of one's own sexual gratification" would violate the Equal Protection Clause).

103. *See, e.g.*, Martínez v. Cui, 608 F.3d 54, 63–67 (1st Cir. 2010) (explaining violations of bodily integrity that "shock the conscience," such as sexual assault, are violations of substantive Due Process rights); United States v. Giordano, 442 F.3d 30, 47 (2d Cir. 2006) (finding evidence sufficient to establish a violation of the Due Process right "to be free from sexual abuse by a state actor"); Jones v. Wellham, 104 F.3d 620, 628 (4th Cir. 1997) (finding violations of bodily integrity like sexual assault to be analyzed under Due Process Clause); *Tyson*, 42 F.4th at 517–18 (finding that while the deputy's sexual assault could not be analyzed under the Fourth Amendment, evidence is sufficient to establish violation of Due Process rights to bodily integrity); Haberthur v. City of Raymore, 119 F.3d 720, 723–24 (8th Cir. 1997) (finding plaintiff's allegations of sexual assault by state officer were sufficient to establish a potential violation of the Due Process Clause). *But see, e.g.*, *Hess*, 72 F.4th at 768–69 (Easterbrook, J., concurring) (explaining how the Supreme Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989), and *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), may force claims of sexual assault to be addressed under the Fourth Amendment as the right to bodily integrity may find a more natural home there).

violation.[104] One would think that if a constitutional right were violated—if someone was sexually assaulted by a state official—that individual could sue the governmental agency that gave the offender the power to accomplish that violation. However, as described above, that is not always the case under state tort law.[105] Individuals may sue in federal and state court for constitutional violations under 42 U.S.C. § 1983, but qualified immunity[106] and other common law doctrines may foreclose remedies against state institutions under that federal law as well.[107] Hess, for example, could not recover against the police department.

In theory, state entities have an obligation to uphold the Constitution, and state auditors should consider whether that duty should be imposed on individual officers.[108] Put in other words, auditors should consider whether state institutions have a non-delegable duty not to commit or further sexual assault. Non-delegable duties are not uncommon in constitutional law. For example, prosecutors must make pre-trial disclosure of favorable material in the possession of *any* government employee to defendants.[109] Some state

104. *See Hess*, 72 F.4th at 756 ("Cases from different circuits have relied on different constitutional provisions, but they have agreed on that bottom line, holding that sexual assault can violate the Fourteenth Amendment Equal Protection Clause as sex discrimination, the Fourth Amendment right 'of the people to be secure in their persons,' and the right to bodily integrity protected by the Fourteenth Amendment Due Process Clause.").

105. *See supra* Sections II.A–.B.

106. "Qualified immunity" is the name of the doctrine that applies in federal cases under 42 U.S.C. § 1983. Julie Goldscheid, *Qualified Immunity, Supervisor Liability, and Gender Violence: Barriers to Accountability*, 59 CAL. W. L. REV. 51, 54 (2022). It protects officials from suit unless a plaintiff proves three things: (1) that their constitutional rights were violated, (2) by a person acting under color of state law, and that (3) those rights were "clearly established" at the time of the alleged violation. *See id.* at 54–56.

107. Fisk & Chemerinsky, *supra* note 63, at 774 ("[T]he issue of vicarious liability is narrower under Section 1983 . . . . The Court's answer has been to reject respondeat superior liability in Section 1983 claims, holding that municipalities are liable only for violations resulting from their own policies.").

108. The concept of a constitutional non-delegable duty is both simple and old. For example, prison officials may not be deliberately indifferent to the medical needs of prisoners, regardless of their status as employees of the state. *See* West v. Atkins, 487 U.S. 42, 56 (1988); *see also* Kyles v. Whitley, 514 U.S. 419, 437–38 (1995) ("[T]he prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."); John C. Thomure, Jr., Kyles v. Whitley*: An Opportunity Lost?: An Examination of the Rule of Discovery Concerning the Disclosure of Impeachment Material Contained in Personnel Files of Testifying Government Agents in Federal Criminal Cases*, 83 MARQ. L. REV. 547, 588–91 (2000) (characterizing the burden of providing *Brady* material as "non-delegable"). Some states impose more stringent non-delegable constitutional duties for prisoner medical care, allowing recovery under state tort law for mere negligence of medical treatment. *See, e.g.*, Harrelson v. Dupnik, 970 F. Supp. 2d 953, 974 (D. Ariz. 2013) (quoting DeMontiney v. Desert Manor Convalescent Ctr., Inc., 695 P.2d 255, 258 (Ariz. 1985) (in banc)); *see also* Danielle C. Jefferis, *Delegating Care, Evading Review: The Federal Tort Claims Act and Access to Medical Care in Federal Private Prisons*, 80 LA. L. REV. 37, 55–60 (2019) (summarizing cases and arguing for an extension of the non-delegable duty to federal private prisons).

109. *See Kyles*, 514 U.S. at 437–38 ("[T]he prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."); *see also* Thomure, *supra* note 108, at 588–91 (characterizing the burden of providing *Brady* material as "non-delegable").

courts have imposed a similar non-delegable duty in instances of sexual assault by state officials. Delaware, for example, has adopted the non-delegable duty doctrine in the context of police officers[110] and school officials.[111] In a case where a police department attempted to evade accountability for an officer's coercive elicitations of sexual favors from an arrestee, the Delaware Supreme Court held that "[the department] cannot delegate away its own responsibility to make sure that an arrestee is not harmed by the tortious conduct of its arresting officers."[112] Other states, like California[113] and Indiana,[114] have adopted a similar principle of agency law, at least in some cases, to permit recovery: the aided-by-agency exception. However, most states do not follow this rule, and some have expressly rejected it[115] or severely limited the aided-in-agency theory in the intentional tort context.[116]

Why should an audit consider whether legislatures or courts should impose such a duty? Immunity doctrine has bred controversy in law and public opinion for good reasons.[117] After the George Floyd murders, legislators and judges have urged that federal immunity doctrines be jettisoned particularly in cases of gross police abuse of force.[118] Federal appellate judges, liberal and

110. Sherman v. State Dep't of Pub. Safety, 190 A.3d 148, 182–83 (Del. 2018).

111. Smith v. Liberty Mut. Ins. Co., 201 A.3d 555, 568 (Del. Super. Ct. 2019) (extending non-delegable duty to schools' power over students).

112. *Sherman*, 190 A.3d at 182.

113. *See* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1347–49 (Cal. 1991) (applying aided-in-agency rational to hold city liable for sexual assault of police officer). *But see, e.g.*, Z.V. v. County of Riverside, 189 Cal. Rptr. 3d 570, 574–78 (Cal. Ct. App. 2015) (detailing *Mary M.*'s lack of application outside of "unique" context of police officers and hesitancy to use it even in those instances); Brobst, *supra* note 7, at 279–82 (discussing various applications of agency law to permit recovery, though noting that a more conservative California judiciary has limited its *Mary M.* ruling to its facts).

114. Cox v. Evansville Police Dep't, 107 N.E.3d 453, 459–62, 459 n.3 (Ind. 2018) (collecting cases holding government entities liable under agency law principles but finding liability for sexual assault against government entity under Indiana scope of employment law).

115. Maguire v. State, 835 P.2d 755, 758–60 (Mont. 1992); *see also* L.B. *ex rel.* D.B. v. United States, 515 P.3d 818, 826–28 (Mont. 2022) (stating that the non-delegable duty doctrine is not typically applicable outside of inherently dangerous activities).

116. *See, e.g.*, Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 227 (Mich. 2006) (noting that adopting the aided-in-agency exception to rule against vicarious liability would "potentially be subjecting employers to strict liability" for intentional torts of their employees); Mahar v. StoneWood Transp., 823 A.2d 540, 546 (Me. 2003) (limiting aided-in-agency exemption to narrow set of facts where employee purports to act on behalf of employer or acts deceitfully within the powers delegated by employer); Olson v. Connerly, 457 N.W.2d 479, 483–84 (Wis. 1990) (limiting aided-in-agency vicarious liability to cases where jury finds employee motivated to serve employer—at least in part—when committing intentional tort); Martin v. Tovar, 991 N.W.2d 760, 766–68 (Iowa 2023) (rejecting broad acceptance of aided-in-agency in context of sexual assault); Groob v. KeyBank, 843 N.E.2d 1170, 1179 (Ohio 2006) (requiring employer to have acted in a manner implying employees' authority to engage in tortious act to trigger aided-in-agency theory).

117. *See, e.g.*, Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021, 6:00 AM), https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-ocdf-11ec-aea1-42a8138f132a_story.html (on file with the *Iowa Law Review*).

118. *See* Smith, *supra* note 19, at 476–77.

conservative,[119] have recently questioned its viability.[120] As former Dean of the Yale Law School and Second Circuit Judge Guido Calabresi has urged, the federal immunity doctrine is "misbegotten," "misguided," and "should go."[121] Of course, state courts are in a different position: State immunity is governed by state immunity statutes, not federal statutes, and accompanying common law.[122] But, the same reasoning may apply. As we have seen, state "immunity acts" are interpreted routinely to favor immunity as the common law default rule when they could just as easily be interpreted differently.[123] There are various doctrinal means to address the problem—one could adopt the "aided-in-agency,"[124] or non-delegable duties now controlling in a few jurisdictions, or one could hold, as is done in federal cases under Title VII, that if a part of the motive was to serve the employer (as for example in an arrest), that should be sufficient.[125]

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119. *See, e.g.*, Baxter v. Bracy, 140 S. Ct. 1862, 1864 (2020) (mem.) (Thomas, J., dissenting from denial of certiorari) ("There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe."); Ziglar v. Abbasi, 582 U.S. 120, 159–60 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." (quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012))).

120. *See, e.g.*, Wearry v. Foster, 33 F.4th 260, 278 (5th Cir. 2022) (Ho, J., dubitante) ("Worthy civil rights claims are often never brought to trial. That's because an unholy trinity of legal doctrines—qualified immunity, absolute prosecutorial immunity, and *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978)—frequently conspires to turn winnable claims into losing ones."); Reich v. City of Elizabethtown, 945 F.3d 968, 989 n.1 (6th Cir. 2019) (Moore, J., dissenting) (noting that conservative and liberal judges and scholars have "questioned" the premises of qualified immunity); Goffin v. Ashcraft, 977 F.3d 687, 694 n.5 (8th Cir. 2020) (Smith, C.J., concurring) ("The evolved qualified immunity doctrine is experiencing increased legal and historical scrutiny. That scrutiny is warranted."); Sampson v. Cnty. of L.A. *ex rel.* L.A. Cnty. Dep't of Child. & Fam. Servs., 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part) ("We must also parse the judge-made doctrine of qualified immunity, which is found nowhere in the text of § 1983.").

121. McKinney v. City of Middletown, 49 F.4th 730 app. at 756 (2d Cir. 2022) (Calabresi, J., dissenting).

122. 42 U.S.C. § 1983 says nothing about immunity. The Supreme Court has created the doctrine based on what it believed to be the common law at the time it was enacted. Recently, a number of conservative scholars have questioned that assessment. *See* Baude, *supra* note 15, at 55–61 (arguing "[t]he Court's account of common-law qualified immunity has several historical problems"); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1400 (2021) ("[T]hese departures from the common law substantiate Justices Scalia and Thomas's criticism that modern precedents engaged 'in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute . . . rather than applying the common law embodied in the statute that Congress wrote.'" (quoting Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting))).

123. *See supra* note 122.

124. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. L. INST. 1958) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . [the servant] was aided in accomplishing the tort by the existence of the agency relation."); *see also* Mary M. v. City of Los Angeles, 814 P.2d 1341, 1347–49 (Cal. 1991) (applying aided-in-agency rational to hold city liable for sexual assault of police officer).

125. *See* RESTATEMENT (SECOND) OF AGENCY § 236 cmt. b ("If the purpose of serving the master's business actuates the servant to any appreciable extent, the master is subject to liability if the act otherwise is within the service . . . .").

State judges defend immunity because it bars the doors for trivial lawsuits involving every arrest or misunderstood schoolhouse hug.[126] But why should trivial cases, as opposed to serious cases, drive the analysis? As Professor Joanna Schwartz has shown, in the federal sphere, and when it comes to civil rights violations, individual officers appear to rarely pay damages.[127] State statutes indemnifying individual state actors abound.[128] As Judge Calabresi has written, "[T]here is a long-recognized better solution: formally make the employer the defendant and the *only* one who pays. Employer liability is the rule in most every other area of tort law, and it makes good sense."[129] Calabresi, a well-recognized economist, explains: "[T]he employer is better positioned to prevent future misconduct and mistakes and to ensure violations of constitutional rights do not go uncompensated."[130] In "shield[ing] the public from the costs and consequences of improvident actions of their governments," sovereign immunity places the burden of shouldering those "costs and consequences" on injured individuals.[131]

Critics will argue that money judgments against states or cities mean fewer dollars to pay for roads and playgrounds.[132] Scholars have questioned—and auditors should consider—whether that argument is overstated. Cities and other institutions may well be paying out damages anyway if the violations

126. *McKinney*, 49 F.4th app. at 757 (Calabresi, J., dissenting) (explaining that immunity serves a balance between protecting officers from distraction due to lawsuits and yet providing compensation for serious harms).

127. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) ("Between 2006 and 2011, in forty-four of the seventy largest law enforcement agencies across the country, officers paid just .02% of the dollars awarded to plaintiffs in police misconduct suits."); James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When* Bivens *Claims Succeed*, 72 STAN. L. REV. 561, 599 (2020) ("[In *Bivens* cases] [i]ndividual officers contributed to settlements and judgments in less than [five percent] of the successful *Bivens* cases filed against employees of the [Bureau of Prisons]."). State auditors should note that these articles focus on federal, not state, claims of immunity. We know of no similar evidence as it relates to state immunity laws.

128. For a survey, see Nielson & Walker, *supra* note 23. *See, e.g.*, MASS. GEN. LAWS ch. 258, § 9a (West 2019) (providing for mandatory representation for any police officer sued for a civil rights violation, and mandatory indemnification for members of certain bargaining units); IDAHO CODE § 6-903(2)(i) (2023) ("A governmental entity shall provide a defense to its employee, including a defense and indemnification against any claims brought against the employee in the employee's individual capacity when the claims are related to the course and scope of employment.").

129. *McKinney*, 49 F.4th app. at 758 (Calabresi, J., dissenting) (first citing Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1740–41 (1996); and then citing Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1236–39, 1245–56 (1984)).

130. *Id.*; *see also* Chamallas, *supra* note 72, at 151–59 (2013) (arguing that corrective justice and economic theories of tort law support vicarious liability to avoid sex exceptionalism in the law).

131. Tooke v. City of Mexia, 197 S.W.3d 325, 332 (Tex. 2006).

132. In federal cases, for example, the Supreme Court has held that immunity preserves "the allocation of scarce resources among competing needs and interests lies at the heart of the political process." Alden v. Maine, 527 U.S. 706, 751 (1999). State courts express similar deference to the "political judgments" of the legislature on the nature of the budget. *See, e.g.*, Edwards v. Douglas County, 953 N.W.2d 744, 750–56 (Neb. 2021) (discussing a statutory "intentional tort" exemption); Brown & Gay Eng'g, Inc. v. Olivares, 461 S.W.3d 117, 122 (Tex. 2015) ("[T]he legislature determines when and to what extent to waive that immunity.").

amount to constitutional violations, given the complexity of the doctrines governing federal civil rights claims under 42 U.S.C. § 1983. In federal cases, for example, Professor Joanna Schwartz found the federal government indemnified officers, even those guilty of sexual assault.[133] Schwartz helpfully shows that settlements and judgments in police misconduct suits are a relatively small portion of municipal budgets.[134] In many cities—such as Atlanta, Baltimore, Chicago, Detroit, and Los Angeles—annual police spending amounts to between one-fifth and one-third of general fund expenditures.[135] In these same cities, settlements and judgments in police misconduct suits amount to between 0.06% and 0.64% of general expenditures.[136] Perhaps recognizing this, at least some states have enacted legislative exceptions to immunity doctrines specifically to cover sexual assault.[137]

Scholars point to several theories justifying this practice, but two are of particular note: the corrective justice model of tort law (fairness) and the law and economics model of externality internalization (deterrence). The corrective justice model posits that an employer who introduces risk into the community—such as a police officer clothed in the power and prestige of his office—ought to pay the costs resulting from the risk they created as an issue of fairness.[138] The law and economics theory of tort liability posits that when an employer creates a negative externality, harm to the community, or to a specific person, they should be required to bear that burden, internalizing the cost, as such internalization will encourage the employer to prevent future harm, serving the deterrence function of liability.[139] These two theories are not mutually exclusive, and both justify the burden-shifting framework of tort liability. State liability deters wrongdoing because it provides an incentive to control employee behavior and prevent violations. This deterrence is the standard rationale for vicarious liability throughout tort law. Wrongdoers are expected to internalize the costs of their harmful acts to discourage engaging in those acts.[140] By contrast, the current system "requires victims to subsidize local governments and the public by bearing the financial losses inflicted by police-

133. Schwartz, *supra* note 127, at 924, 978 app. H.

134. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, app. B at 1224–30 (2016) (detailing the percent—over one hundred percent—that police departments pay each year, generally less than one percent).

135. ACRE, *City Budgets Belong to Us. How Do America's 300 Biggest Cities Spend Our Tax Dollars?*, https://costofpolice.org [https://perma.cc/4NBB-5KZ3] (reporting the budgets of the three-hundred largest cities in the United States based on most recent publicly available budget).

136. *See* Schwartz, *supra* note 127, at 978 app. H; *see, e.g.*, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 861 (2001); SCHWARTZ, *supra* note 38, at 202–08 (describing how indemnification of officers and drawing upon general funds of cities and municipalities incentivizes gamesmanship in civil rights defense by city attorneys whereas drawing from general police budget for settlements internalizes cost of police misconduct and results in behavior changes).

137. *See infra* note 253.

138. *See, e.g.*, Chamallas, *supra* note 72, at 156–59.

139. *See, e.g.*, *id.* at 151–56.

140. Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. LEGAL STUD. 401, 401–03 (2001).

involved violence and other constitutional torts."[141] Auditors should consider whether that allocation best represents the fundamental purposes of civil liability in the context of state actors.

II. COMMON LAW DEFENSES

The common law of torts was never meant to encompass sexual assault,[142] and yet, today, rape and sexual assault victims are filing more tort claims than in previous decades.[143] Judicial hesitancy to stray from the well-trod common law path when handling torts has resulted in the clumsy imposition of doctrines that end up blaming sexual assault victims for their abusers' actions, reinventing stereotypes long thought dead in the public sphere, and by their continued focus on consent, keeping the focus on the victim rather than the defendant's actions. As we noted earlier, although many states have statutes on these topics, judicially created doctrines govern their application. We examine comparative fault in Section A and consent in Section B of this Part.

A. COMPARATIVE FAULT

Imagine if critics claimed a sexual assault victim brought on her own injuries by inviting a guest into a hotel room;[144] walking to her van despite noticing a car parked nearby;[145] opening her door after hearing a knock;[146] locking her door incorrectly;[147] leaving her windows unsecured;[148] or being drunk.[149] Worse, imagine someone blaming an eleven-year-old for consenting

141. *See* Reinert et al., *supra* note 22, at 784.

142. *See generally* Allan L. Schwartz, Annotation, *Applicability of Comparative Negligence Principles to Intentional Torts*, 18 A.L.R. 5th 525 (1994) (discussing the "general rule" that comparative negligence principles are not applicable where intentional torts are involved).

143. *See* Cardi & Chamallas, *supra* note 54, at 591–92 ("[E]vidence suggests that the incidence of tort claims for rape and sexual assault has increased in recent decades . . . .").

144. Malone v. Courtyard by Marriott Ltd. P'ship, 659 N.E.2d 1242, 1243–49 (Ohio 1996) (finding a survivor "fifty-one percent comparatively negligent" for her rape because she let a man into her hotel room for drinks); *see* Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1415 (1999) ("Under existing law, defendants may successfully argue that a rape victim's conduct is a legal cause of her rape.").

145. *See generally* Storts v. Hardee's Food Sys., Inc., 210 F.3d 390 (10th Cir. Apr. 6, 2000) (unpublished table opinion) (finding a survivor thirty percent comparatively negligent for her rape because "like everyone else, [she] has a general duty to . . . avoid harm to herself and others," and walking to her van in a parking lot, despite noticing a car parked next to it, "breached this duty").

146. *See generally* Wassell v. Adams, 865 F.2d 849 (7th Cir. 1989) (finding a survivor ninety-seven percent comparatively negligent for her assault in her hotel room because she opened the door after hearing a knock).

147. *See generally* Kukla v. Syfus Leasing Corp., 928 F. Supp. 1328 (S.D.N.Y. 1996) (finding a survivor forty percent comparatively negligent for incorrectly locking the door to her hotel room).

148. *See generally* Raven H. v. Gamette, 68 Cal. Rptr. 3d 897 (Cal. Ct. App. 2007) (acknowledging an issue of fact remained as to whether any lack of security measures caused the survivor's injuries, but the survivor's failure to secure her window may have contributed to her rape).

149. *See, e.g.*, Martin v. Prime Hosp. Corp., Nos. A-3989-99T3, L-13810-97, 2001 WL 36243671, at *5 (N.J. Super. Ct. Law Div. Nov. 14, 2001) ("[P]laintiff's inappropriate conduct . . . included plaintiff drinking to a point where plaintiff's reason was impaired . . . . Despite knowing that she

to sex.[150] In the public sphere, these would be criticized as victim-blaming, but these are all examples taken from case law involving sexual assault claims. How do these claims arise? Via the "comparative fault" doctrine. "While most jurisdictions do not allow rapists themselves to raise rape victim comparative fault defenses . . . these same jurisdictions allow negligent third parties like hotels and landlords to raise virtually unlimited defenses of rape victim 'fault.'"[151] In those cases, comparative fault reduces recovery based on a victim's conduct.[152]

Recent attempts to invoke comparative fault have led to public outcry. In Massachusetts, after a university asserted comparative fault against a student who was raped while studying abroad, the public lashed out.[153] In response, the school said it had not "'vetted or approved' the approach and that the lawyers work[ed] for an insurance company no longer employed by the university."[154] Institutional defendants in Pennsylvania[155] and Florida[156] have also feigned ignorance of and later apologized for using the comparative fault defense in gender-based violence cases. At least one state, New Mexico, has judicially held that comparative fault should not be considered when a perpetrator, by virtue of their employment, has "substantial power or authority" over the victim.[157] And, yet, because comparative fault doctrine

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had a drinking problem, [plaintiff] drank in the [s]ports bar."); Wilson *ex rel.* Wilson v. Bellamy, 414 S.E.2d 347, 359–60 (N.C. Ct. App. 1992) (holding that "plaintiff was contributorily negligent as a matter of law" where "plaintiff admitted that she voluntarily consumed half a bottle of champagne, at least five or six beers, and a shot of Southern Comfort liquor").

150. *See, e.g.*, Miss. State Fed'n of Colored Women's Club Hous. for Elderly in Clinton, Inc. v. L.R., 62 So. 3d 351, 362 (Miss. 2010) (allowing a jury to consider if an eleven-year-old consented to repeated rape and subsequent impregnation by a man in her apartment complex to decide "causation, damages, and credibility").

151. Bublick, *supra* note 144, at 1415 (footnotes omitted); *see, e.g.*, Birkner v. Salt Lake County, 771 P.2d 1053, 1056 (Utah 1989) (finding the survivor, a patient with multiple personality disorder resulting from sexual abuse endured as a child, ten percent comparatively negligent in her suit against her therapist and the county for sexual battery and negligence).

152. *See, e.g.*, *Kukla*, 928 F. Supp. at 1330 (finding a survivor forty percent comparatively negligent, and thus, reducing her damages by forty percent).

153. *See* Jake New, *Blaming the Victim*, INSIDE HIGHER ED (June 16, 2016), https://www.insidehighered.com/news/2016/06/17/colleges-sued-students-negligence-turn-victim-blaming-defense (on file with the *Iowa Law Review*).

154. *Id.*

155. *See "Contributory Negligence" Defense Is Never Appropriate in Sexual Assault Civil Cases*, PCAR, https://pcar.org/blog/"contributory-negligence"-defense-never-appropriate-sexual-assault-civil-cases [https://perma.cc/VFY3-JP26]; Lori Falce, *Kane Responds to Rockview Rape Victim Suit in Filing, Says Woman Partly Responsible for Brutal Assault*, CTR. DAILY TIMES (Sept. 24, 2014, 3:00 PM), https://www.centredaily.com/news/local/crime/article42863088.html (on file with the *Iowa Law Review*).

156. Scott Travis, *Palm Beach County School Board Slams Abuse Defense; Awards $3.6 Million*, S. FLA. SUN SENTINEL (Mar. 9, 2020, 6:38 PM), https://www.sun-sentinel.com/2017/10/18/palm-beach-county-school-board-slams-abuse-defense-awards-36-million (on file with the *Iowa Law Review*).

157. Spurlock v. Townes, 368 P.3d 1213, 1217 (N.M. 2016) (The court limited their "adoption of aided-in-agency principles extending vicarious liability to 'cases where an employee has by reason of his employment substantial power or authority to control important elements of a vulnerable tort victim's life or livelihood.'" (citing Ayuluk v. Red Oaks Assisted Living, Inc., 201 P.3d 1183, 1199 (Alaska 2009))).

remains integral to tort law, attorneys claim it would be malpractice *not to raise such claims*. As one lawyer explained: "While it is certainly victim blaming to assert that a victim's own alcohol use and partying contributed to a sexual assault . . . it would simply be actionable malpractice for a lawyer not to assert contributory or comparative negligence as a defense."[158]

States differ on comparative negligence law. Twelve states apply pure comparative fault, in which liability is directly proportional to respective fault determined by the fact finder.[159] The majority of states apply modified comparative negligence, which bars the plaintiff from recovery if their fault exceeds—or in a majority of these states, equals—the fault of the defendant.[160] A small minority of states use pure contributory negligence, barring plaintiffs from recovery if they are at all at fault.[161] Based on our research, we are not aware of a single state that statutorily bans comparative fault as an affirmative defense in the sexual assault context.[162]

Although the most egregious comparative fault cases are older decisions, comparative fault still shadows sexual assault claims today. Comparative fault defenses have recently appeared in California, Florida, Iowa, and Tennessee. In a 2014 California case, a victim sued a homestay program for failing to appropriately screen a perpetrator who stayed with the victim's family; in response, the defendant raised comparative fault.[163] In Florida, comparative fault has been used against victims of sexual abuse in schools in at least eight lawsuits between 2010 and 2022.[164] In Tennessee, defendants in recent

158. New, *supra* note 153.

159. These states are Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington. *Litigation, Comparison Table - Apportionment of Fault Rules*, BLOOMBERG L., https://www.bloomberglaw.com/product/blpg/document/X45J1CG8000000 (on file with the *Iowa Law Review*). Comparative fault is also called comparative negligence. This table was compiled by Bloomberg Law using its online litigation analytics tools "Points of Law" and "BCite links." These tools are available within Bloomberg Law for refining legal research: "The Points of Law tool identifies legal principles in court opinions that can then be filtered by jurisdiction. . . . BCite links are used when the relevant legal principle is discussed in a seminal case. The link takes [the user] to that case and other cases citing to it." *Id.*

160. These states are Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. *Id.*

161. These states are Alabama, Maryland, North Carolina, and Virginia; the District of Columbia also uses this standard. *Id.*

162. Conducting a search of "comparative fault" AND "sexual assault" OR "rape" in each state's statutory compilations revealed no specific statute prohibiting the use of comparative fault as a defense to rape or sexual assault.

163. *See* Doe v. EF Educ. Homestay Program, No. 34-2012-00126971-CU-PO-GDS, 2014 WL 12633334, at *1–2 (Cal. Super. Ct. Jan. 22, 2014) ("[Defendant] is alleged to have sexually assaulted and raped Plaintiff Jane Doe, a [seventeen]-year-old girl."). The defendant asserted eleven affirmative defenses, including comparative fault. *Id.*

164. *See* Benjamin D. Andreozzi & Nathaniel L. Foote, *Florida School Districts Blame Victims in Sexual Assault Cases*, ANDREOZZI + FOOTE: SEXUAL ABUSE LAWS. (May 20, 2022), https://www.victimscivilattorneys.com/florida-school-districts-blame-victims-in-sexual-assault-cases [https://perma.cc/26ZX-567T].

lawsuits between 2009 and 2023 have raised comparative fault in their answers.[165] In 2023, nine victims filed a civil lawsuit against a police department after their alleged sexual assaults by an officer, claiming the department was aware of the officer's crimes and took no action.[166] The defendant's answer argued the victims "knew or should have known that choosing to partake in illegal drugs and/or alcohol" would make them "vulnerable" to assault.[167] In a 2023 Iowa case, the victim's mother sued a shelter where she and her daughter lived, arguing it failed to adequately screen prospective residents after another resident raped her fourteen-year-old daughter.[168] In its response, the shelter asserted comparative fault.[169] In this case, the victim encountered the perpetrator when she woke to use the restroom during the night. The perpetrator spoke to her and allegedly brought her to his room before raping her.[170]

Even if a court finds the victim without comparative fault, raising this defense risks turning the jury's attention to the survivor's, rather than the defendant's, conduct. In a 2021 Vermont case, the court employed comparative fault analysis yet attributed no fault to the victim, a high school football player sexually assaulted by two of his teammates.[171] But the harm may already have been done: The comparative fault inquiry asked the jury to analyze a victim's conduct leading up to the assault, raising the risk that the victim would be "blamed in part for their assault."[172] As we know from other areas of sexual assault law, such as rape shield doctrines,[173] scrutinizing the victim's actions

165. *See, e.g.*, Jamie Satterfield, *Jailer Who Sexually Assaulted Inmate Gets 2nd Chance at Judicial Diversion*, KNOXVILLE NEWS SENTINEL (Jan. 29, 2014) (on file with the *Iowa Law Review*) (writing that a county raised comparative fault after an officer bought the survivor food and cigarettes while transporting her to receive mental health services before forcing her to perform oral sex on him); Mark Bell, *County Responds to Bus Assault Suit*, DAILY NEWS J. (June 12, 2009) (on file with the *Iowa Law Review*) (finding that a school district raised comparative fault in response to a fourteen-year-old survivor's sexual assault on a school bus).

166. *See generally* Answer of the City of Johnson City, Tenn., Karl Turner, in His Individual & Off. Capacities, Captain Kevin Peters, in His Off. Capacity, & Investigator Toma Sparks, in His Off. Capacity, Doe v. City of Johnson City, No. 23-cv-00071 (E.D. Tenn. Aug. 25, 2023).

167. *Id.* at 4.

168. Jeff Reinitz, *Waverly Shelter Taken to Court over Sexual Abuse*, SW. IOWA HERALD (July 20, 2023), https://valleynewstoday.com/news/state-regional/crime-courts/waverly-shelter-taken-to-court-over-sexual-abuse/article_3fa8c067-a222-50e9-ad20-8e9c6e2271ef.html (on file with the *Iowa Law Review*).

169. Friends of the Fam.'s Answer, Affirmative Defs. & Jury Demand at 6, Moore v. Cedar Valley Friends of the Fam., No. LACV006789 (Iowa Dist. Ct. July 18, 2023).

170. Reinitz, *supra* note 168.

171. Blondin v. Milton Town Sch. Dist., 251 A.3d 959, 971 (Vt. 2021) ("The fact that plaintiff was aware of homophobic slurs made by some team members against other players in the past and that he had recently been injured during a consensual boxing match with another player at an earlier team dinner did not make it reasonably foreseeable for him to know that he could be subjected to a sexual assault by teammates at a later team dinner.").

172. *See* Victoria Brown et al., *Rape & Sexual Assault*, 21 GEO. J. GENDER & L. 367, 436 (2020) (discussing revictimization when survivors' actions are scrutinized to determine and assign comparative fault).

173. *See infra* Part III.

provides an opportunity for gender stereotyping irrelevant to the case. While rape shield rules help to refocus the inquiry onto the defendant's conduct, comparative fault still poses barriers to accountability and may deter victims who worry they will be retraumatized by the trial process.

Critics may be reluctant to bar comparative fault in sexual assault cases because of its prominent place in tort law's negligence doctrine.[174] Plaintiffs in standard tort suits have a duty not to act negligently. The problem is that, in sexual assault cases, the comparative fault doctrine appears to impose a duty to avoid rape altogether.[175] A vast difference exists between reducing damages "for a plaintiff who is so enraged by the defendant's obnoxious conduct that he then batters him, and reducing damages because plaintiff's conduct supposedly encouraged the defendant to rape the plaintiff."[176] Historically, juries and judges have blamed sexual assault plaintiffs for everyday actions: for not knowing an area was dangerous, failing to lock their doors, or going to the party where their assault occurred.[177] It falls on the "reasonable woman" to be "always on guard"[178] (while it is perfectly fine for the perpetrator to be "motivated by sexual desire, gratification, or lust").[179] The law does not necessarily ask this of other tort plaintiffs. Many states do not even "allow failure to wear a seatbelt to be considered comparative fault" in the standard auto accident claim.[180] Auditors should worry that comparative fault doctrine embraces outmoded social norms that encourage an unreasonable burden on individuals to prevent sexual assault.[181] As Twerski and Farber argue, "precluding comparative fault is necessary to prevent juries from . . . applying

174. Aaron D. Twerski & Nina Farber, *Extending Comparative Fault to Apparent and Implied Consent Cases*, 82 BROOK. L. REV. 217, 221, 237 n.117 (2016) (arguing that comparative fault should be broadened "in cases involving violent crime, particularly sexual assault, [because] only a clear and unambiguous communication that the plaintiff consented should absolve the defendant from liability").

175. *See* Bublick, *supra* note 144, at 1433.

176. Twerski & Farber, *supra* note 174, at 237 n.117.

177. *See* SUSAN ESTRICH, REAL RAPE 19 (1988) (noting that juries in criminal cases in the past imposed rules that required that the woman had no "'contributory behavior,' . . . includ[ing] the victim's hitchhiking, dating, and talking with men at parties").

178. Bublick, *supra* note 144, at 1433.

179. Chamallas, *supra* note 72, at 146–50 (arguing that courts treat sexual abuse as exceptional in tort law, limiting a survivor's recovery by not applying vicarious liability to employers because sexual misconduct is treated as "personal, private, and unconnected to employment").

180. Bublick, *supra* note 144, at 1416–17; *see, e.g.*, Hopper v. Carey, 716 N.E.2d 566, 574–75 (Ind. Ct. App. 1999) (barring comparative fault because drivers had no duty to wear seatbelts); Davis v. Knippling, 576 N.W.2d 525, 528–29 (S.D. 1998) ("A clear majority of states have judicially refused to admit evidence of a plaintiff's nonuse of an available seatbelt as proof of failure to mitigate damages likely to occur in an automobile accident.").

181. *See* Carin C. Azarcon, Comment, *Battered Child Defendants in California: The Admissibility of Evidence Regarding the Effects of Abuse on a Child's Honest and Reasonable Belief of Imminent Danger*, 26 PAC. L.J. 831, 834 (1995) (showing that a survivor subject to periods of abuse may have an "honest but *unreasonable* belief of imminent danger," causing them to anticipate and react to threats at a danger to others around them).

a heightened standard as to what a person must do to avoid rape that might be influenced by gender biases."[182]

Auditors should consider whether this doctrine imposes burdens on plaintiffs in sexual assault cases not applied in other intentional tort cases. While courts may fault sexual assault survivors for actions such as failing to secure their windows,[183] in other nonsexual assault cases, lawyers do not argue "that a plaintiff was negligent in choosing to shop in an unsafe area" prior to being robbed.[184] Consider two cases in which injured plaintiffs were claimed to be comparatively negligent for precipitating their own assaults. In a sexual assault case, *Storts v. Hardee's Food Systems*, the jury found a survivor thirty percent responsible for her rape because "like everyone else, [she] has a general duty to exercise ordinary or reasonable care to avoid harm to herself and others," and walking to her car in a parking lot, despite noticing a van parked next to it, "breached this duty."[185] However, in a different case, *Georgia CVS Pharmacy v. Carmichael*, the plaintiff was shot during an armed robbery that took place near his car in the defendant store's parking lot.[186] There, the jury found the store ninety-five percent at fault, attributing only five percent comparative negligence to the plaintiff.[187] Given how comparative fault so easily absorbs and perpetuates victim-blaming arguments,[188] auditors should consider reform of the doctrine in sexual assault cases.

B. CONSENT

Consent is a standard defense in civil sexual assault cases. Historically, consent has been an area of much reform attention, particularly in the criminal law context, but far less so in the civil context. Stereotypes about women's passive behavior have traditionally infected ideas of consent. For example, forcible sex between "a man and his wife was not rape" in many states for well into the twentieth century: Sexual "*availability* . . . was expected of her."[189] For many years, the criminal law of rape presumed consent based on the perpetrator's "reasonable belief" that the victim consented, and

182. Twerski & Farber, *supra* note 174, at 221.

183. *See, e.g.*, Raven H. v. Gamette, 68 Cal. Rptr. 3d 897, 902, 904 (Cal. Ct. App. 2007) (acknowledging an issue of fact remained as to whether any lack of security measures caused the survivor's injuries, but the survivor's failure to secure her window may have contributed to her rape).

184. Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1386 (2010) (endorsing the willingness of "some courts to articulate a concept of reasonable care that contemplates an equal level of safety for both sexes").

185. Storts v. Hardee's Food Sys., Inc., 210 F.3d 390, at *14 (10th Cir. Apr. 6, 2000) (unpublished table opinion).

186. Ga. CVS Pharm., LLC v. Carmichael, 890 S.E.2d 209, 218 (Ga. 2023).

187. *Id.* at 230.

188. Twerski & Farber, *supra* note 174, at 218–21.

189. Robin West, *Sex, Law and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 236 (Franklin G. Miller & Alan Wertheimer eds., 2009).

reasonable belief included rape in the face of passivity.[190] To surmount the deeply-seated stereotype of women as service-providers of men's sexual pleasures, reformers have focused over and over again on definitions of consent, including "affirmative consent." But critics have noted that these efforts may well backfire. Here, we surface the issues that affect civil sexual assault plaintiffs. As commentators have recognized, the common law of consent[191] in any battery or assault case is far more complex than one might think,[192] which should raise questions for auditors about whether the law of sexual assault imposes a standard different from that of assault.

1. Sexual Assault for Minors

Auditors should consider that a minor cannot consent to sex in a criminal context but can consent in the civil law context.[193] For example, courts have found that an eleven-year-old can consent to acts amounting to statutory rape,[194] a thirteen-year-old with "minimal intellectual and social skills" can consent to sexual activity when "[s]he verbally protested and cried, but did not attempt an escape or otherwise try to prevent the act."[195] Similarly, at least one court has stated that prohibiting evidence of minors' consent might wrongly allow victims to tell a "one-sided version of events,"[196] and that third parties should not be bound by the criminal law's determination of consent.[197] That a minor has the incapacity to consent to a criminal act (presumably a

190. *Id.*; *see* Lisa Avalos, *Seeking Consent and the Law of Sexual Assault*, 2023 U. ILL. L. REV. 731, 736 ("This presumption of consent, and its corresponding default position that a complaining victim is sexually available, ignores a real-world reality that is both simple and critical: most human beings do not consent to sex with the vast majority of the people with whom they come into contact.").

191. The common law doctrine of consent, and its different iterations of actual consent, apparent consent, and presumed consent, apply to consent to sexual contact. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 (AM. L. INST., Tentative Draft No. 6, 2021).

192. *See generally* Alex Geisinger, *Does Saying "Yes" Always Make It Right? The Role of Consent in Civil Battery*, 54 U.C. DAVIS L. REV. 1853 (2021) (underlining the complicated nature of consent in all civil law because some jurisdictions use non-consent is an element of the tort, whereas others use consent as an affirmative defense to the tort).

193. *See, e.g.*, Doe *ex rel.* Roe v. Orangeburg Cnty. Sch. Dist. No. 2, 518 S.E.2d 259, 262 (S.C. 1999) (holding that consent was not relevant to liability but might be relevant to damages); LK v. Reed, 631 So. 2d 604, 605 (La. Ct. App. 1994) (reducing a thirteen-year-old survivor's damages because she "consented" to a sexual encounter in a school storage shed).

194. Miss. State Fed'n of Colored Women's Club for Elderly in Clinton, Inc. v. L.R., 62 So. 3d 351, 354–74 (Miss. 2010) (holding that a trial court did not abuse its discretion by admitting evidence that an eleven-year-old consented to statutory rape).

195. *LK*, 631 So. 2d at 605, 608 (La. Ct. App. 1994) (holding a minor's consent reduced the defendant's liability by five percent and, thus, the damages to the survivor by five percent).

196. *Orangeburg Cnty. Sch. Dist.*, 518 S.E.2d at 261 (deciding evidence of a fourteen-year-old survivor's "consent" to a sexual encounter in the school bathroom is relevant to her claim for damages; stating "evidence" of consent for minors would allow victims to "tell a one-sided version of events" without "cross-examination or impeachment as to the damage actually suffered.")

197. *L.R.*, 62 So. 3d at 360 (finding it fundamentally "unfair" to a third-party owner of building subject to a premises liability claim "to obtain monetary judgments against non-perpetrators of the crime," given that the eleven-year old's consent was relevant to "credibility" and "damages").

more serious charge) *but* can meaningfully consent in civil court raises obvious questions about consistency across the civil and criminal realms.[198]

States remain divided on whether or not a minor's age precludes them from giving meaningful consent in sexual activities. "A majority of jurisdictions adopt the Restatement's position and exclude consent as a defense in civil actions arising out of statutory rape,"[199] because a minor being able to consent to sexual activity with an adult is against public policy. In such states, the affirmative defense of consent will not defeat or limit the minor's recovery in a civil claim of sexual assault. Following a trial court decision finding a thirteen-year-old capable of consenting to sex with her teacher, at least one state changed its statutory law.[200] In 2016, California passed a law dictating that "consent shall not be a defense in any civil action . . . [for sexual battery] if the person who commits the sexual battery is an adult who is in a position of authority over the minor."[201] Some jurisdictions have reached similar results in selected cases, not by statute.[202]

A minority of jurisdictions still allow consent as a defense in a minor's civil sexual assault suit.[203] For example, in 2004, a Maryland Court of Appeals

198. This case does not consider sexual grooming, in which a perpetrator gains a child's trust with intention to be sexually abusive. For more information, see Daniel Pollack & Andrea MacIver, *Understanding Sexual Grooming in Child Abuse Cases*, 34 CHILD L. PRAC. 161 (2015). That these issues are still serious today and pose questions for minor sexual assault plaintiffs, see Dave Ring, *"Consent" in Civil Cases Involving Sexual Misconduct*, PLAINTIFF MAG. (Mar. 2019), https://plaintiffmagazine.com/recent-issues/item/consent-in-civil-cases-involving-sexual-misconduct [https://perma.cc/4UNP-R34S]; David M. Ring & Natalie Weatherford, *Seven Key Evidentiary Issues in Sexual Assault, Abuse and Harassment Cases*, ADVOCATE MAG. (Oct. 2015), https://www.advocatemagazine.com/article/2015-october/seven-key-evidentiary-issues-in-sexual-assault-abuse-and-harassment-cases [https://perma.cc/KGM2-WXWA].

199. *See, e.g.*, Bjerke v. Johnson, 727 N.W.2d 183, 193 (Minn. Ct. App. 2007), *aff'd*, 742 N.W.2d 660 (Minn. 2007) (holding that it is impossible to separate pressures that give rise to a victim's consent, and thus, this defense is void); Wilson v. Tobiassen, 777 P.2d 1379, 1384 (Or. Ct. App. 1989) (holding that a person's incapacity to consent extends to civil cases); Christensen v. Royal Sch. Dist. No. 160, 124 P.3d 283, 286 (Wash. 2005) (en banc) (holding that the consent defense in minor sexual misconduct cases is against public policy); Watson v. Taylor, 131 P. 922, 925 (Okla. 1913) (holding that proving "the female consented will not mollify the statute, neither should it avail as a defense to a civil action for damages for an assault upon her committed in such manner and under such circumstances as to constitute rape as defined by the statute"); Elkington v. Foust, 618 P.2d 37, 40 (Utah 1980) (holding that a perpetrator could not use consent as a defense to sexual conduct with a minor because "[i]t . . . would be rejected by the law as against public policy and void").

200. S.M. v. L.A. Unified Sch. Dist., 192 Cal. Rptr. 3d 769 (Cal. Ct. App. 2015) (unpublished order); *see also* Ring, *supra* note 198.

201. CAL. CIV. CODE § 1708.5.5 (West 2019).

202. *See* C.C.H. *ex rel.* T.G. v. Phila. Phillies, Inc., 940 A.2d 336, 339 (Pa. 2008) (holding "where the [survivor] is less than [thirteen] years of age," consent will not stand as a defense).

203. *See* Miss. State Fed'n of Colored Women's Club for Elderly in Clinton v. L.R., 62 So. 3d 351, 354–74 (Miss. 2010) (holding that trial court did not abuse its discretion by admitting evidence that eleven-year-old consented to statutory rape); Doe *ex rel.* Roe v. Orangeburg Cnty. Sch. Dist. No. 2, 518 S.E.2d 259, 259–62 (S.C. 1999) (reducing fourteen-year-old survivor's damages because she "consented" to a sexual encounter in the school bathroom); Michelle T. *ex rel.* Sumpter v. Crozier, 495 N.W.2d 327, 329 (Wis. 1993) (holding that a minor survivor's consent to inappropriate

held that although the victim was a tenth-grade student, and thus, her attacker could not assert consent as a defense to criminal charges, the victim was "competent to consent for civil litigation purposes."[204] These jurisdictions base

> their determination on . . . the belief that minors acquire the capacity to consent to different types of conduct at different stages in their development, the broad range of situations in which minors are deemed to be legally capable of consenting, and the difference in purpose between the civil and criminal justice systems.[205]

Some may suggest the criminal age of consent *should* be lower because the criminal law reflects important social values—preventing sex under a certain age—whereas the civil law balances private interests—allowing individuals to make their own risk assessments.[206] But these rationales have not persuaded many jurisdictions who worry that nonadults are not capable of making the risk assessments attributed to civil adult plaintiffs and that civil accountability complements the criminal law's aim for deterrence. Some courts, however, feel incapable of making those judgments, arguing that changes should be made by the legislature, not the judiciary. In *C.C.H. ex rel. T.G. v. Philadelphia Phillies, Inc.*, Chief Justice Castille of the Supreme Court of Pennsylvania wrote in concurrence and dissent that the victim's perpetrators should have been able to establish the minor's consent, stating that "whether a minor's consent should be available as a defense in civil proceedings for sexual offenses is a question of public policy which is best left to the [l]egislature."[207] This explains why auditors should consider whether to recommend statutory changes.

2. Defining Consent and Affirmative Consent

Auditors should also consider their state's definition of consent. The statutory definition of consent varies from state to state. Seven states define "consent," and fourteen states define "without consent" in criminal statutes.[208] Definitions vary. In California, for example, consent must be "positive cooperation in act or attitude pursuant to an exercise of free will."[209] In Colorado, the word "positive" is omitted from this definition.[210] In Florida, "'consent' means intelligent, knowing, and voluntary consent and does not

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touching defeated civil-battery charge); Kravitz v. Beech Hill Hosp., L.L.C., 808 A.2d 34, 37–44 (N.H. 2002) (reducing minor's damages because the sexual conduct was deemed consensual). *See generally* Bublick, *supra* note 61 (addressing the rise of tort suits for sexual assault cases).

204. Tate v. Bd. of Educ., 843 A.2d 890, 892 (Md. Ct. Spec. App. 2004).

205. Bjerke v. Johnson, 727 N.W.2d 183, 194 (Minn. Ct. App. 2007).

206. *See generally* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193–201 (1991).

207. *C.C.H.*, 940 A.2d at 350–51 (Castille, C.J., concurring in part and dissenting in part).

208. David DeMatteo, Meghann Gallow, Shelby Arnold & Unnati Patel, *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCH. PUB. POL'Y & L. 227, 233 (2015) (analyzing statutory elements of state sexual assault statutes).

209. CAL. PENAL CODE § 261.6 (West 2024).

210. COLO. REV. STAT. § 18-3-401(1.5) (2023).

include coerced submission."[211] An encounter in one state, therefore, may constitute sexual assault while the same act may be "consensual" in a state with a different standard of consent.

Reform movements in some states have led them to adopt an "affirmative consent" standard in the civil context, meaning that silence is not sufficient to establish consent.[212] In criminal statutes, at least nine jurisdictions require affirmative consent in determining consensual contact.[213] In the past nine years, states such as California, New York, Connecticut, and Illinois have adopted an "affirmative consent" definition for sexual misconduct in educational settings.[214] The definition of affirmative consent under California education law, for example, is entitled, "affirmative, conscious, and voluntary agreement to engage in sexual activity," and provides that "[l]ack of protest or resistance does not mean consent, nor does silence mean consent."[215] "As of 2015, over [fourteen-hundred] colleges and universities in the United States used an affirmative consent standard for sexual assault claims."[216]

Under this standard, an individual's lack of physical resistance or acquiescence in an otherwise dangerous situation does not equate to consent.[217] Affirmative consent avoids presuming sexual availability and that passivity

211. FLA. STAT. § 794.011(a) (2024).

212. *See* Abigail R. Riemer, Kathryn Holland, Evan McCracken, Amanda Dale & Sarah J. Gervais, *Does the Affirmative Consent Standard Increase the Accuracy of Sexual Assault Perceptions? It Depends on How You Learn About the Standard*, 46 LAW & HUM. BEHAV. 440, 441 (2022) (explaining in what ways the affirmative consent standard may be the most efficacious in increasing sexual assault awareness and decreasing consent confusion).

213. Avalos, *supra* note 190, at 773–75 (reporting these jurisdictions are the District of Columbia, Minnesota, Montana, New Hampshire, New Jersey, Oklahoma, Vermont, Washington, and Wisconsin).

214. *See* Jayma M. Meyer, *It's on the NCAA: A Playbook for Eliminating Sexual Assault*, 67 SYRACUSE L. REV. 357, 370–73 (2017) (discussing California's "Yes means Yes" bill and New York's "Enough is Enough" law); ANDREW EHLER, GILLIAN NATANAGARA & KAITY TUOHY, UNIV. OF VT., AFFIRMATIVE CONSENT POLICIES AT THE FEDERAL, STATE, AND UNIVERSITY LEVELS 1 (Mar. 27, 2019), https://www.uvm.edu/sites/default/files/Department-of-Political-Science/vlrs/New%20folder/Affirmative_Consent.pdf [https://perma.cc/5ASB-T3Q3] ("Since the introduction of the California affirmative consent law, New York, Illinois, and Connecticut have also passed bills which require affirmative consent prior to and during sexual activities.").

215. CAL. EDUC. CODE § 67386(a)(1) (West Supp. 2024).

216. Avalos, *supra* note 190, at 772.

217. *See* N.Y. EDUC. LAW § 6441 (McKinney 2016) ("Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent."); CONN. GEN. STAT. ANN. § 10a-55m (West 2020) ("'Affirmative Consent' means active, clear and voluntary agreement by a person to engage in sexual activity with another person."); Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 442–68 (2016) ("[A] requirement of affirmative consent formalizes an understanding that is, or is becoming, uncontroversial: a victim who is unconscious, sleeping, or immobilized by fright does not consent to intercourse simply by virtue of not resisting.").

(due to fear or shock) amounts to consent.[218] Reformers hope that affirmative consent standards will reduce assault on college campuses[219] by requiring individuals in a sexual encounter to affirmatively say "yes."[220] Perpetrators must show the survivor actively assented to the sexual activity to avoid liability.[221]

Critics of affirmative consent argue this standard does not change the task of interpreting verbal and nonverbal signals in a sexual encounter.[222] Some critics even argue that affirmative consent does not aid in determining intentions behind the words "yes" and "no." In a 2014 Alabama district court case, the court deemed that whether a survivor of rape said "no" to be "sincere or playful, is for the jury to decide."[223] Critics of affirmative consent standards argue that these standards punish honest mistakes, do not address the issue of fraudulently obtained consent, or worse, allow one to bring an action for kissing a sleeping person.[224] Of course, all battery laws could potentially allow for abusive suits for hugs, but the law recognizes that abuse of a law does not undermine its worth. Affirmative consent still centers the "consent" inquiry on the survivor's conduct rather than the perpetrator's actions, making it more likely that harmful or false stereotypes about sex or gender will influence a jury.[225]

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218. Others recommend the affirmative consent standard as a response to equal protection considerations. *See* Avalos, *supra* note 190, at 747–51 (arguing that a presumption of consent disproportionately affects females).

219. *Id.*; *see* Jacobson v. Blaise, 108 N.Y.S.3d 515, 517–20 (N.Y. App. Div. 2019) (upholding a finding that a perpetrator did not have affirmative consent when engaging in sexual intercourse because the survivor was asleep or unconscious).

220. Zoë D. Peterson, *Sexual Consent Research and Affirmative Consent Policies: From* Saturday Night Live *to State Legislatures*, SOC. SCI. RSCH. COUNCIL (July 30, 2019), https://items.ssrc.org/sexuality-gender-studies-now/sexual-consent-research-and-affirmative-consent-policies-from-saturday-night-live-to-state-legislatures [https://perma.cc/PF73-7U8J] ("[U]nder an affirmative consent standard, 'no' is assumed unless 'yes' is explicitly communicated.").

221. Tuerkheimer, *supra* note 217, at 442–68 ("[T]o convict, the prosecution must demonstrate that the defendant engaged in intercourse without the alleged victim's consent, which must be manifested in an affirmative manner."); Avalos, *supra* note 190, at 733 ("Any legal presumption of consent to sex contrasts sharply with how people think of their own sexual agency and how they negotiate consensual sexual relationships in real life."); Doe v. Cornell Univ., 80 N.Y.S.3d 695, 698 (N.Y. App. Div. 2018) ("[T]he complainant was unable to provide affirmative consent to the sexual encounter by virtue of her incapacitation by alcohol, and that petitioner knew or should have known by a reasonable, sober person standard, that the complainant was incapacitated.").

222. *See, e.g.*, Jonathan Witmer-Rich, *Unpacking Affirmative Consent: Not as Great as You Hope, Not as Bad as You Fear*, 49 TEX. TECH. L. REV. 57, 57–88 (2016) ("[T]he problem is not in determining whether *some* affirmative signal was sent but in determining whether the combination of words and conduct, on balance and in context, indicated agreement to sex.").

223. Osburn v. Hagel, 46 F. Supp. 3d 1235, 1243–44 (M.D. Ala. 2014).

224. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1386 (2013) (discussing the affirmative consent standard in the Yale student code).

225. *See generally* Margaret Moore Jackson, *A Different Voicing of Unwelcomeness: Relational Reasoning and Sexual Harassment*, 81 N.D. L. REV. 739 (2005) (illuminating how centering the inquiry on "unwelcome conduct" in workplace harassment scrutinizes the plaintiff's behavior). The same is true of the affirmative consent standard: "By conducting this inquiry as to plaintiff's behavior, the legal system discounts the assertion of the plaintiff that she didn't want sexual attention . . . and instead examines her conduct for signs that she actually provoked or positively reinforced the advance." *Id.* at 740.

3. Refocusing the Law on Coercion

To avoid the pitfalls of an affirmative consent approach, scholars have argued that sexual assault reforms should focus on the perpetrator's behavior and, more particularly, on coercion.[226] This turns the fact finder's attention away from the victim's words or actions in consenting and toward the question of whether coercive or fraudulent conditions vitiate consent; then, it is less likely that stereotypes about gender or sex will contaminate the inquiry.[227] This follows the general legal idea that consent is not freely given if induced by force, fraud or coercion.[228] Courts, however, have not necessarily followed this logic. For example, in 2009, the Supreme Court of North Dakota found that a detained prisoner may consent to sexual conduct with her jailer; the court found that "a trier-of-fact [can] consider[] consent in allocating fault or determining the existence and extent of damages."[229] That analysis focuses on the act or behavior of the victim, not the coercive conditions in which the consent was given.

As of 2011, eighteen states protect victims who assent to sexual activity because of coercion, but these protections may be limited.[230] For example, "six states explicitly criminalize sexual acts where the perpetrator's threats to the victim's property caused the victim to submit to the sexual act," and "fourteen states criminalize the use of extortion, intimidation, public humiliation, or coercion."[231] Nevertheless, "[t]here is a distinct lack of case law involving coercion . . . . Many states that include 'coercion' language in their sex crime statutes do not have any case law on topic."[232] Further, coercion remains intellectually distinct from forcible compulsion, yet "courts often conflate coercion with forcible compulsion in practice."[233] Coercion can exist due to fear of violence, but also fear of retaliation, expulsion, religious

226. Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759, 774–93 (2017) (separating consent into a two-step process of "assent plus freedom, knowledge, and capacity" and the ways in which coercion can prevent assent from becoming consent).

227. *Id.* at 774 ("Once a person, B, actually assents to sexual intercourse with A, the normative issue that remains is whether B did so under legally sufficient conditions of freedom, knowledge, and capacity to deliberate.").

228. *See generally* PETER WESTEN, THE LOGIC OF CONSENT (2004) (discussing consent "in moral and political discourse" and the law).

229. Grager v. Schudar, 770 N.W.2d 692, 698 (N.D. 2009).

230. John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1119 (2011).

231. *Id.* at 1119–20.

232. *Id.* at 1122 n.274 (explaining these states are "Alabama, Arizona, Connecticut, Delaware, Idaho, Illinois, Kansas, Louisiana, Montana, Ohio, and Vermont").

233. *Id.* at 1123; *see* People v. Seifert, 727 N.Y.S.2d 607, 609–12 (N.Y. Cnty. Ct. 2001) (holding that in a case in which a survivor felt coerced to have sex with a police officer, the court dismissed the coercion charge because the grand jury did not have enough evidence for the element of forcible compulsion).

obligation, and community pressure.[234] State auditors should consider clarifying the standard of coercion and its relationship to consent.[235]

III. EVIDENCE

Historically, attorneys for sexual assault defendants have used sexual history evidence to portray victims as promiscuous and, therefore, neither credible nor deserving of recovery—often with great success.[236] The common law, and even modern reforms of the common law, gave legitimacy to the idea that rape was a charge easily made and likely fraudulent.[237] Today, evidence codes have been reformed, but these codes still operate in the shadow of the common law's presumption against the credibility of rape victims and in favor of defendants who engage in a pattern of misconduct. In part, civil reforms have not kept up with criminal law reforms. More difficult to see is the double standard that the law of evidence may impose across rules affecting both plaintiffs and defendants, allowing courts to include evidence of a plaintiff's innocent sexual history but exclude evidence of a defendant's repeated misconduct.

A. RAPE SHIELD LAWS

Assume you are a lawyer representing a sexual assault victim. During trial, the defendant seeks to admit evidence of your client's previous sexual conduct, such as the dress she was wearing that night and evidence of her flirting with another person, to prove that your client is falsely accusing the defendant of sexual assault. Despite the prejudicial conclusions a jury might reach from it, the court chooses to admit the evidence, and your client's private and intimate sexual history is exposed to the judge and jury. This story is not a hypothetical one. Such were the events in the 2016 case, *Glazier v. Fox*.[238] Why does this happen? Because state civil trials do not necessarily exclude such evidence.

Every state has codified rape shield protections to safeguard victims of sexual assault, but in a vast majority of jurisdictions, these apply only to

234. *See generally* Robin West, *Marital Rape, Consent, and Human Rights: Comment on "Criminalizing Sexual Violence Against Women in Intimate Relationships"*, 109 AJIL UNBOUND 197 (2015) (discussing the turn to coercion).

235. Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951, 954 (2018) ("[W]hen coercion is present, it renders this act of consenting null and void. If someone points a gun at you and then asks whether he may enter your home, your 'yes' is neither morally nor legally efficacious.").

236. *See, e.g.*, State v. Muhammad, 162 N.W.2d 567, 571 (Wis. 1968) ("The law recognizes that a woman of previous unchaste character is more likely to consent to an act of sexual intercourse than is a woman who is strictly virtuous." (quoting Kaczmarzyk v. State, 280 N.W. 362, 362–63 (Wis. 1938))).

237. This was the conclusion of the Senate Judiciary Committee as early as 1991. This report explains that common law rules and defense manuals proceeded on the assumption that survivors should be disbelieved. It quoted a prominent evidentiary text recommending that all rape complainants be subject to psychiatric examinations to determine whether the survivor had "fantasized" the attack. S. REP. NO. 102-197, at 45–46 (1991).

238. Glazier v. Fox, No. 2014-106, 2016 WL 827760, at *1 (D.V.I. Mar. 2, 2016).

criminal proceedings, not civil cases.[239] As one court has explained, "[t]he use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have."[240] However, only seven states explicitly extend rape shield protections to civil cases by statute.[241] And, these statutes often provide less protection to civil litigants than they would receive in a criminal trial because they give judges more discretion to admit prior sexual conduct evidence.

Some courts have judicially extended criminal rape shield rules to civil cases, despite the plain language of the statutes, which typically focus on "prosecutions." For example, in *Lisa I. v. Manikas* in 2020, a New York appellate court considered, without deciding, whether the New York shield law applies to civil cases,[242] even though the law states that "[e]vidence of a victim's sexual conduct shall not be admissible in a *prosecution* for an offense."[243] The court cited a prior case in which a New York court found that evidence of a victim's prior sexual conduct "often serves only to harass the victim and confuse the jurors,"[244] concluding that "[a] female plaintiff seeking damages for assault or rape need not be humiliated simply because she seeks compensatory damage[s]."[245] Similarly, in *In re K.W.*, a North Carolina appellate court held that North Carolina's rape shield rule[246] applied to "civil cases."[247] The court cited a previous case, *Wilson v. Bellamy*, which explained that "the logic applied behind the law . . . is of similar import in the civil arena."[248]

But other state courts reject this reasoning based on statutory plain meaning. In *Doe ex rel. Roe v. Orangeburg County School District*, a South Carolina appellate court explained that the "[S]tate's 'rape shield statute' applies by its terms only to 'prosecutions' and is not applicable in civil cases."[249] Similarly, in *Abdulkadir v. State*, the Georgia Supreme Court emphasized the word "prosecution" in Georgia's rape shield statute to find it inapplicable to a civil case.[250] In *Sonia F. v. Eighth Judicial District Court*, the Nevada Supreme Court

239. *See generally* AEQUITAS, STATUTORY COMPILATION: RAPE SHIELD LAWS (2013) (presenting a fifty-state and territory survey of rape shield laws and related rules).

240. Doe v. Superior Ct., 532 P.3d 1065, 1073–74 (Cal. 2023).

241. HAW. REV. STAT. § 626-1, Rule 412 (LexisNexis 2020); KY. R. EVID. 412; ME. R. EVID. 412; NEB. REV. STAT. ANN. § 27-412 (West Supp. 2023); N.M. STAT. ANN. § 30-9-16 (2020); S.D. CODIFIED LAWS § 19-19-412 (2016); WASH. REV. CODE § 9A.44.020 (West 2015).

242. Lisa I. v. Manikas, 183 A.D.3d 1096, 1097 (N.Y. App. Div. 2020).

243. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2019).

244. *Lisa I.*, 183 A.D.3d at 1098.

245. *Id.* (quoting Mason v. Cohn, 438 N.Y.S.2d 462, 464 (N.Y. Sup. Ct. 1981)).

246. N.C. GEN. STAT. ANN. § 8C-1, Rule 412 (West 2016).

247. *In re* K.W., 666 S.E.2d 490, 493 (N.C. Ct. App. 2008).

248. *Id.* (quoting Wilson *ex rel.* Wilson v. Bellamy, 414 S.E.2d 347, 355 (N.C. Ct. App. 1992)).

249. Doe *ex rel.* Roe v. Orangeburg Cnty. Sch. Dist. No. 2, 495 S.E.2d 230, 233 (S.C. Ct. App. 1997), *aff'd*, 518 S.E.2d 259 (S.C. 1999).

250. Abdulkadir v. State, 610 S.E.2d 50, 51–52 (Ga. 2005) ("Because the language of the rape shield statute limits its application to prosecutions for rape, we conclude the Court of Appeals

explained that "[w]hen a statute is facially clear, this court will . . . not go beyond the plain language," and that "where the [l]egislature has, for example, explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule's application to other types of proceedings."[251]

Most states' rape shield laws model Federal Rule of Evidence 412, which presumes the inadmissibility of sexual conduct evidence, except in three scenarios:

> (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
>
> (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
>
> (C) evidence whose exclusion would violate the defendant's constitutional rights.[252]

Notably, thirty-four states, and the District of Columbia, have exceptions similar or identical to the federal exceptions.[253] Of all the states that explicitly extend rape shield protections to civil cases, New Mexico is the only state deploying the same standard for criminal and civil cases.[254] Most civil rape shields do not presume inadmissibility but instead provide for a balancing test, giving judges vast discretion in determining whether the probative value of the evidence outweighs its prejudicial effect.[255]

Auditors should worry that the standard rape shield laws in civil cases operate today more like a sieve than a shield, as some commentators have

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erred in its determination. . . . [W]hile we disapprove of the ruling allowing application of the rape shield statute in prosecutions for crimes other than rape, we affirm appellant's conviction.").

251. Sonia F. v. Eighth Jud. Dist. Ct., 215 P.3d 705, 707–08 (Nev. 2009).

252. FED. R. EVID. 412. *See generally* AEQUITAS, *supra* note 239 (presenting a fifty-state and territory survey of rape shield laws and related rules).

253. *See* COLO. REV. STAT. § 18-3-407 (West 2023); CONN. GEN. STAT. ANN. § 54-86F (West 2009); D.C. CODE ANN. § 22-3022 (West 2017); FLA. STAT. § 794.022 (2023); HAW. REV. STAT. ANN. § 626-1, Rule 412 (LexisNexis 2020); IOWA R. EVID. 412 (2022); KY. R. EVID. 412; LA. CODE EVID. ANN. art. 412 (2016); ME. R. EVID. 412; MD. CODE ANN., CRIM. LAW § 3-319 (LexisNexis 2021); MICH. COMP. LAWS ANN. § 750.520 (West 2004); MINN. STAT. § 609.347 (2023); MISS. R. EVID. 412; MO. ANN. STAT. § 491.015 (2001); MONT. CODE ANN. § 40-15-202 (West 2009); NEB. REV. STAT. ANN. § 27-412 (West Supp. 2023); N.J. STAT. ANN. § 2C:14-7 (West 2015); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2019); N.D. R. EVID. 412; OHIO REV. CODE ANN. § 2907.02 (LexisNexis 2020); OKLA. STAT. ANN. tit. 12, § 2412 (West 2016); S.C. CODE ANN. § 16-3-659.1 (2015); S.D. CODIFIED LAWS § 19-19-412 (2016); TENN. CODE ANN. § 29-26-207 (West 2020); UTAH R. EVID. 412; VT. STAT. ANN. tit. 13, § 3255 (2018); VA. CODE ANN. § 18.2-67.7 (West 2012); WIS. STAT. ANN. § 972.11 (West Supp. 2023).

254. N.M. STAT. ANN. § 30-9-16 (2024).

255. *See, e.g.*, KY. R. EVID. 412 ("In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.").

charged.[256] Why? Because the civil rape shield rule does not in fact prevent the use of a plaintiff's prior sexual history and, as a result, may deter the filing of lawsuits by plaintiffs who worry that discovery alone will become a nightmarish effort at indicting her sexual past.[257] Furthermore, even when a woman does bring suit, these laws allow evidence to be admitted based on sex-stereotyping. Consider *Beard v. Flying J, Inc.*, a hostile work environment sexual harassment case in which the plaintiff alleged that her supervisor frequently touched her in a nonconsensual, sexual manner.[258] The defendant moved to admit evidence of the plaintiff's previous sexual behavior including her "suggestive" public speaking (the defendant's characterization)—to prove that she welcomed his subsequent sexual advances.[259] The court ruled that such evidence *was* relevant and that its probative value outweighed the prejudicial effect it would have on the plaintiff. The court found that "[t]he evidence related to Ms. Beard's non-intimate sexual behavior in a public place that she clearly had no intention to hide from others."[260] Under the balancing test typically applicable to civil rape shields, a judge is free to conclude that a woman speaking in a sexually suggestive manner in public, even if not directed at the defendant, welcomes subsequent sexual advances by the defendant.[261] This reasoning is unsettlingly reminiscent of the antiquated, victim-blaming notion that a woman wearing sexually suggestive clothing in public implicitly welcomes sexual advances by men in the vicinity.

Beard is not alone among civil cases. In *Boeser v. Sharp*, a plaintiff sued her former employers for sexual harassment.[262] The court denied her motion to exclude prior sexual behavior evidence. The court admitted Boeser's previous public conduct before her employment as long as the defendants were aware of the conduct.[263] As one commentator has explained, "such evidence is only 'relevant' because it plays into stereotypes regarding female sexuality; it carries an assumption that a woman's prior sexual conduct, not involving the defendant, is probative of her 'welcomeness' to sexual harassment."[264] Rape

256. Richard I. Haddad, *Shield or Sieve?* People v. Bryant *and the Rape Shield Law in High-Profile Cases*, 39 COLUM. J.L. & SOC. PROBS. 185, 185, 196 (2005).

257. Candace Mashel, *A Crack in the Armor?: How the Reforms to the New York State Human Rights Law May Expose Weaknesses in Civil Rape Shield Laws*, 88 FORDHAM L. REV. 1443, 1457 (2020) ("This type of humiliation could have the effect of deterring victims of sexual harassment from pursuing their claims. . . . [T]o leave every sexual harassment plaintiff vulnerable to an . . . assault on their personal lives in an effort to portray her personal life as somehow welcoming sexual harassment, risks chilling all sexual harassment victims from complaining." (internal quotation marks omitted)).

258. Beard v. Flying J, Inc., 266 F.3d 792, 796 (8th Cir. 2001).

259. *Id.* at 798.

260. *Id.* at 802.

261. Ramona C. Albin, *Stereotyping Evidence: The Civil Exception to the Federal Rape Shield Law and Its Embedded Sexual Stereotypes*, 30 AM. U. J. GENDER SOC. POL'Y & L. 1, 33 (2021) ("The court did not require the 'sexual behavior' or 'suggestive terms' to be directed at the defendant or even in the defendant's presence. According to the court, the plaintiff speaking in a 'sexually suggestive' manner at work is probative of 'welcomeness.'").

262. Boeser v. Sharp, No. 03-cv-00031, 2007 WL 1430100, at *1 (D. Colo. May 14, 2007).

263. *Id.* at *3.

264. Albin, *supra* note 261, at 34.

shield laws were initially created to prohibit the use of such antiquated sex stereotyping that assumed an unchaste woman would more likely consent to sex; yet, with the civil exception in the majority of state rape shield laws, such sex stereotyping is possible and apparent in published case law.[265]

A similar problem emerged in *Glazier v. Fox*. There, the plaintiff filed a sexual battery suit.[266] The plaintiff sought to exclude a photograph of her dress the night of the sexual battery, as well as evidence that she kissed another person that night.[267] Her attacker argued that the picture of the dress would help a jury better determine if he could have physically performed the actions that the plaintiff alleged.[268] He maintained that the plaintiff's "flirtatious conduct" with another guest showed that she was lying about the sexual assault and was engaging in a "shake down" to obtain money from him.[269] The court denied the plaintiff's motion in part, holding that the probative value of the photo of the plaintiff's dress and her alleged flirtation with another guest substantially outweighed its prejudicial effect.[270]

Rape shield critics argue that these rules undermine the defendant's ability to offer relevant evidence in their defense,[271] particularly on consent[272] or false allegations.[273] Early critics of rape shields in criminal cases worried

265. *See* Wilson v. City of Des Moines, 442 F.3d 637, 639 (8th Cir. 2006); Browne v. Signal Mountain Nursery, L.P., 286 F. Supp. 2d 904, 923 (E.D. Tenn. 2003) ("How [p]laintiff acted with regard to sex in an employment setting certainly was probative of what she subjectively believed to be harassment."); Cassidy v. CSX Transp., Inc., No. 03-376, 2005 WL 6740409, at *2 (E.D. Ky. May 17, 2005) ("Further, it can be argued that employment in a strip club is not necessarily 'behavior' of the type covered by Rule 412."); Ferencich v. Merritt, 79 F. App'x 408, 415 (10th Cir. 2003) ("Ferguson testified that he thought the sexual conduct with plaintiff was consensual, and that plaintiff had flirted with him over the previous few months. As an example of plaintiff's flirting, Ferguson indicated that plaintiff stuck her tongue out at him, and that to him, the sexual purpose of a tongue ring was 'obvious.'"); *see also* Albin, *supra* note 261, at 37 ("This sexual stereotype that alleged flirtatious conduct at a prior workplace is probative of 'welcomeness' at all, let alone at a subsequent workplace, is precisely the type of evidence the Rule was meant to exclude. But, because of the broad civil exception and the discretion given to the court, the court admitted it. In fact, the district court explained that it was 'soundly within its discretion in balancing prejudice and probativity.'").

266. Glazier v. Fox, No. 2014-106, 2016 WL 827760, at *1 (D.V.I. Mar. 2, 2016).

267. *Id.*

268. *Id.* at *2.

269. *Id.*

270. *Id.* at *3–6.

271. This was particularly true of early reform movements imposing shields in criminal cases. J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 545 (1980) ("In the attempt to protect the sensibilities of rape victims, the defendant's right to present evidence to the jury is infringed.").

272. I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 847 (2013) ("Put differently, feminists argue that consent to sex is not transferable and that consent to sex on a prior occasion cannot possibly evidence 'consent always.' For starters, this argument misses a crucial distinction. While consent to sex is not probative of 'consent always,' it is slightly probative of consent in the future, and that is the critical issue for assessing relevance in a given case." (footnote omitted)).

273. *See* Olden v. Kentucky, 488 U.S. 227, 231 (1988) (ruling that a state's rape shield law prevented a defendant from admitting evidence of the accuser's living situation with her lover to show that she lied under oath and was fabricating the charges to protect an affair).

that they acted more like swords than shields, "tip[ping] the scales against innocence."[274] More modern critics concede that "consent to sex is not probative of 'consent always,' [but] it is slightly probative of consent in the future, and that is the critical issue for assessing relevance in a given case."[275] Rape shield laws aim to balance the scale, not tip it. Typically, courts view character inferences with suspicion in the law of evidence.[276] Character inferences related to a woman's sexual history should be no different. Legislatures and courts created rape shield rules to challenge normative stereotypes about a women's character: that the unchaste woman was unworthy of belief or more likely to consent.[277] Recent work shows how the "credibility discount" has proven resistant to change.[278] Even relevant evidence can exploit ancient gender stereotypes, and auditors should worry that evidentiary rules still provide too much opportunity for courts to indulge such stereotypes.

Critics of civil rape shield laws argue that civil protections should be less protective than criminal ones. Plaintiffs in civil cases have more control over case proceedings, such as determining the type of remedy to pursue or whether to settle.[279] Furthermore, tort law differs from criminal law in that, in many criminal rape laws, the prosecution must prove that the defendant's conduct included certain levels of force, whereas in tort law, this requirement does not apply.[280] These substantial differences in civil law, coupled with the existence of a financial incentive, allow for the argument that having fewer rape shield protections in civil law balances the scales. However, these scales

274. Capers, *supra* note 272, at 828.

275. *Id.* at 847.

276. *See generally* Edward J. Imwinkelried, *Using the Concept of Specific Propensity to Reform the Administration of the Rape Sword Rules, Federal Rules of Evidence 413-415: An Exclusionary Rule Criticized as Too Broad with Exceptions Also Faulted as Too Broad*, 58 CRIM. L. BULL. 433 (2022) ("[Federal] Rule 404(b)(1) announces a categorical prohibition . . . 'Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.'"); FED. R. EVID. 413–415 (detailing exceptions to this suspicion).

277. Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1462 (2012) ("Over three decades ago, rape law advanced to reflect the general proposition that a woman's past sexual conduct is not evidence that she consented to an alleged rape. In the past, behavior deemed unchaste was thought to suggest a greater likelihood that a rape victim willingly engaged in sex with the defendant." (footnote omitted)).

278. *See generally* Tuerkheimer, *supra* note 3 ("Credibility discounts have endured by relocating to the realm of law enforcement practice.").

279. Patrick J. Hines, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 889 (2011) ("Civil actions also provide victims with more control over the proceedings. In the criminal context, the government makes the ultimate decisions about how to prosecute a case. However, a tort plaintiff gains significant control over decisions such as settlement and the presentation of evidence. Victims can also determine the type of remedy sought, which is especially important given that the damages suffered by rape victims are wide ranging and unique to each victim." (footnotes omitted)).

280. Bublick, *supra* note 61, at 73 ("Traditional staples of the criminal law rape case, such as penetration, are simply not required in tort . . . . Similarly, the element of force is irrelevant as long as the victim can prove the defendant had an actual intent to harm or offend.").

remain unbalanced when these diminished protections are exclusively present in sexual assault suits rather than all lawsuits. In all lawsuits, plaintiffs hold more control over case proceedings than in criminal courts. Similarly, a financial incentive exists in all kinds of lawsuits, not just sexual assault suits, meaning there is always a danger that the plaintiff will shade the truth in their favor. Opponents might argue that the financial incentive in rape suits requires particular attention;[281] however, this notion relies on the stereotype that women generally lie about sex to gain financial advantage.[282] Beyond this stereotype, there is little justification for only addressing this danger when the plaintiff brings a sexual assault suit. The benefits of civil remedies and proceedings are not balanced out by the broad exceptions to rape shield protections in civil cases; to the contrary, these exceptions may create an imbalance by stripping away protection from irrelevant stereotypes solely in the realm of civil sexual assault suits.

The "financial incentive" arguments defendants typically raise in all civil suits have a particularly negative set of stereotypes associated with the history of sexual assault: the assumption that women lie about sexual assault.[283] The "gold-digging," or "grasping woman" stereotype is prevalent in our society, in pop culture, science, and literature.[284] And it colors claims by women for relief. As Professors Deborah Epstein and Lisa Goodman have written, it would be "laughable" to discount a claim by a business owner that he was "grasping"

281. *See* Glazier v. Fox, No. 2014-106, 2016 WL 827760, at *1 (D.V.I. Mar. 2, 2016).

282. *See* Stephanie Hunter McMahon, Book Review, 55 LAW & SOC'Y REV. 365, 365–66 (2021). *See generally* Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in* Jones v. Clinton, 31 U.C. DAVIS L. REV. 123 (1997) (describing this stereotype in the context of presidential immunity).

283. Other courts have made similar assumptions based on the claimant's financial interests. *See* Sonia F. v. Eighth Jud. Dist. Ct., 215 P.3d 705, 707 (Nev. 2009) ("Nevada's rape shield law does not apply in civil cases because the element of damages differentiates the civil case from a criminal charge."); Giron v. Corr. Corp. of Am., 981 F. Supp. 1406, 1408 (D.N.M. 1997) (recognizing that the plaintiff's previous experiences may be relevant as to issue of damages "but only to the extent that such sexual contact caused pain and suffering"); Doe *ex rel.* Roe v. Orangeburg Cnty. Sch. Dist. No. 2, 495 S.E.2d 230, 233 (S.C. Ct. App. 1997), *aff'd*, 518 S.E.2d 259 (S.C. 1999) ("[O]ther states addressing this issue have held that evidence of the victim's consent and prior sexual history, while not relevant in a criminal prosecution, may be relevant in a related civil suit to refute the plaintiff's claim for damages.").

284. Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 629–30 (2000) ("In Sigmund Freud's writings, he refers to women's 'hysterical' fabrication of sexual abuse claims. The stereotype can also be traced to an early psychiatric diagnosis of women called erotomania. The cornerstone of the diagnosis was the belief that when a woman accused a man of sexual assault, she was often delusional or simply fabricating the story. Throughout recent history, western civilization's perceptions of sexual violence have defined women as liars, often in order to portray men as innocent." (footnotes omitted) (citing SIGMUND FREUD, COLLECTED PAPERS 32–33 (Ernest Jones ed., 1959))); *see also* Francine Banner, *Honest Victim Scripting in the Twitterverse*, 22 WM. & MARY J. WOMEN & L. 495, 495 (2016) ("A key, feminist critique of rape law is that the determination of the perpetrator's guilt or innocence too often hinges on an assessment of the victim's character. This is borne out on social networking sites, where terms such as 'gold digger,' . . . are engaged with regularity to describe those who come forward alleging an assault by a public figure.").

for damages by filing a civil suit.[285] All civil defendants claim that plaintiffs are biased by the damage remedy they seek, but this particular stereotype—that women should not be believed because all they want is money—is something different: It trades upon the idea that women are inherently more likely to lie about rape.[286] Criminal justice reforms have worked to rid that stereotype from the law, but as *Glazier* shows, it may well live on in the civil law.

The lack of rape shield protection in the civil context further promotes the view that sexual assault is best remedied by the criminal justice system, as it suggests the plaintiff is merely trying to profit off the assault.[287] To many victims of rape and sexual harassment, justice does not look like their attacker in an orange jumpsuit behind bars. To many, justice means compensation for financial loss and the extreme emotional and psychological trauma that resulted from the assault. States that refuse to extend rape shield protections in the latter circumstances pave the way for lawyers and juries to perpetuate the antiquated notion that scorns women who seek empowerment from their own assault on their own terms.

B. SEXUAL HISTORY PROPENSITY EVIDENCE OF CIVIL DEFENDANTS

Just as rape shield evidence rules raise issues for a gender audit, so too does the converse: evidence of the defendant's propensity for sexual misconduct. The rape shield rule aims to prevent irrelevant sexual behavior of a plaintiff from receiving consideration, but it remains possible, given the limits on rape shield discussed above, that a civil plaintiff will face revelations of their sexual history even as a civil defendant's history of *sexual misconduct* will be excluded by the ban on character evidence. It is possible, then, that a survivor's benign sexual activity will make its way into discovery or trial while a defendant's serial misconduct will be excluded. Recent high-profile cases against well-known defendants such as Bill Cosby, Harvey Weinstein, and Jeffrey Epstein show that sexual assault can be a patterned offense. Although federal law provides for

285. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 426, 429 (2019).

286. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634–36 (London 1800) ("It is true rape is a most detestable crime . . . but it must be remembered, that it is an accusation easily to be made and hard to be proved . . . . I only mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.").

287. *See* Ronner, *supra* note 282, at 136–37 ("[T]he female liar can be the woman of money lust. This creature, often denominated as the 'gold digger,' supposedly sees the sexual harassment suit as an economic opportunity. In a somewhat perverted entrepreneurial spirit, she, cognizant of the accused's fear of negative publicity and scandal, aims to extort the defendant into a settlement. If the defendant fails to surrender, however, money lust will propel her to try to dupe a trier of fact into infusing her bank account with ready cash. She too is not presented as the victim, but instead is seen as the villainous perpetrator of a fraud." (footnote omitted)).

the admission of propensity evidence in civil cases of sexual misconduct,[288] most states bar such evidence.

State auditors should consider whether a defendant's sexual misconduct history should be excluded. E. Jean Carroll's recent sexual assault case[289] against Donald Trump illustrates how federal law allows propensity evidence in civil sexual offense cases. The trial court admitted Trump's infamous *Access Hollywood* tape[290] and testimony from two women who alleged Trump had sexually assaulted them.[291] The court explained that the *Access Hollywood* tape was used to show propensity: "Mr. Trump almost certainly is correct in arguing that the quoted statements . . . [we]re offered . . . 'to suggest to the jury that Defendant has a propensity for sexual assault and therefore the alleged incident [with Ms. Carroll] must have in fact occurred.'"[292] Though no one besides the parties themselves witnessed Trump's sexual assault of Carroll, Carroll prevailed in both cases.[293] While it is unclear how much the propensity evidence aided her, these cases show propensity evidence can play a role in civil sexual assault cases.

Auditors should evaluate their states' propensity evidence laws in light of the potential utility of propensity evidence demonstrated by *Carroll v. Trump*. As a general rule, courts reject character evidence based on prior bad acts lest juries find defendants guilty based on their character rather than the actions for which they are on trial.[294] The ubiquity of this aversion demonstrates how the character rule is deeply embedded in our sense of a fair trial. But the character rule also lives alongside a variety of exceptions. Routinely, character evidence is admitted to prove something other than character, like motive or state of mind.[295] The Federal Rules of Evidence also provide another exception for sexual assault cases: Federal Rule 415 and its criminal counterparts, Rules 413 and 414.[296] Under these rules, "the court may admit evidence that the party committed any other sexual assault."[297]

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288. FED. R. EVID. 415.

289. Carroll sued Trump for defamation and, in a separate suit, sexual assault. *See* Carroll v. Trump, 660 F. Supp. 3d 196, 198–99 (S.D.N.Y. 2023).

290. *Id.* at 200. In the *Access Hollywood* tape, Trump described to television host Billy Bush how, when one is a "star," one can kiss women without their consent and just "grab [women] by the pussy." *Id.* at 201.

291. *Id.* at 199–200, 203–05.

292. *Id.* at 201.

293. *See* Larry Neumeister, Jennifer Peltz & Michael R. Sisak, *Jury Finds Trump Liable for Sexual Abuse, Awards Accuser $5M*, ASSOCIATED PRESS (May 9, 2023, 7:00 PM), https://apnews.com/article/trump-rape-carroll-trial-fe68259a4b98bb3947d42af9ec83d7db [https://perma.cc/YMD5-YCKJ].

294. The ban on character evidence exists to ensure defendants receive the presumption of innocence, which courts have long believed propensity evidence threatens. *See generally* Imwinkelried, *supra* note 276 (explaining how a jury may be likelier to convict someone because of their criminal past).

295. FED. R. EVID. 404(b)(2) ("[Character] evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.").

296. FED. R. EVID. 413–415.

297. FED. R. EVID. 415(a).

Most states, however, have no equivalent rule. Only Arizona, Georgia, Louisiana, and Nebraska have adopted state versions of Rule 415.[298] In all other states, a civil defendant's sexual misconduct may only be admitted for non-propensity purposes, such as to show intent, plan, or absence of mistake.[299] Some legal scholars believe that, even without explicit propensity exceptions, courts have admitted propensity evidence in sexual assault cases by using various exceptions to the no-character-evidence rule.[300] Others believe that the rule should be revised to allow for high-value probative evidence of prior misconduct.[301] To determine whether a state would bar the equivalent of the *Access Hollywood* tape in a sexual assault case or prior sexual assault allegations, auditors should review their state courts' trial court rulings.[302]

Similarly, auditors should realize that states' case law still includes the "lustful disposition" doctrine in sex offense cases, which long predates the enactment of the Federal Rules, is rooted in colonial common law, and applies today most often in child sex abuse cases.[303] The doctrine holds that evidence of repeated acts of sexual misconduct is admissible in three primary categories: (1) under a narrow exception, restricting the use of prior-sexual-misconduct evidence to cases where the victim of both the uncharged and the charged crimes is the same person;[304] (2) under a broader exception, which allows "evidence of prior sexual offenses against persons *related to the victim*" to

298. ARIZ. R. EVID. 404(c); GA. CODE ANN. § 24-4-415 (2024); LA. CODE EVID. ANN. art. 412.5 (Supp. 2024); NEB. REV. STAT. ANN. § 27-415 (West Supp. 2023).

299. State evidentiary rules with "non-propensity purposes" exceptions tend to mirror Federal Rule 404(b). *Compare* FED. R. EVID. 404(b), *with* IOWA R. EVID. 5.404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.").

300. *See, e.g.*, Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 216 (2005) ("Uncharged misconduct evidence may be admissible under a comforting legal theory, i.e., to prove a non-character intermediate issue. However, its real value to the prosecution is the forbidden innuendo: uncharged misconduct proves that the defendant committed other crimes, thereby making it more likely that the defendant committed the crimes charged in the indictment because the defendant has an evil character."); Jeffrey G. Pickett, Comment, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413–415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 WASH. L. REV. 883, 890 (1995) ("Nevertheless, observers of Rule 404(b) have concluded that many courts will more readily find that evidence of prior, similar acts satisfies one of the enumerated exceptions in sexual-offense cases than in other criminal cases.").

301. *See* Steven Goode, *It's Time to Put Character Back into the Character-Evidence Rule*, 104 MARQ. L. REV. 709, 712 (2021) (discussing the Rule's "incoherence" and need for reform particularly for highly probative prior misconduct, but not for low probative value evidence).

302. Appellate court decisions on evidentiary matters are rare.

303. Goode, *supra* note 301, at 746.

304. *See, e.g.*, State v. Floyd, 250 So. 3d 1165, 1171 (La. Ct. App. 2018) ("[Because] the prior sexually assaultive behavior involved the same victim, . . . its probative value is more substantial. Accordingly, we conclude the trial court did not abuse its discretion by determining that the prior sexually assaultive act was admissible under [Louisiana Code of Evidence] arts. 403 and 412.2."); State v. Porter, 151 So. 3d 871, 889 (La. Ct. App. 2014) (using prior evidence of sexually assaultive behavior by the same abuser towards the same survivor in convicting the abuser).

be "used to prove the defendant's propensity for similar conduct;"[305] and (3) a still broader "exception," in which courts focus on a pattern of behavior, suggesting "the defendant's general sexual deviance or aggressiveness."[306]

Notably, the State of Washington rejected the lustful disposition doctrine altogether in 2022, suggesting the doctrine characterizes sexual misconduct as something inherent and irrepressible and, in doing so, feeds into the rape myth that victims bring sexual assault upon themselves by creating desire.[307] The court explained that "lustful disposition" evidence—repeated acts of sexual misconduct by the abuser—when perpetrated against a child is, in fact, evidence of sexual grooming that would fall under the "purpose" and "intent" exceptions to the character evidence rule.[308] The court cited its ban on propensity evidence as a reason for rejecting the term "lustful disposition": "[U]se of that term wrongly suggests that evidence of collateral offenses relating to a specific victim may be admitted for the purpose of showing that the defendant has a propensity for committing sexual misconduct."[309]

West Virginia, meanwhile, allows propensity-type lustful disposition evidence in specific types of cases involving sexual misconduct towards children, a rule its supreme court sets forth in *State v. Edward Charles L.*[310] and which remains valid today:

> [C]ollateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition to children generally, or a lustful disposition to specific other children, provided such acts occurred reasonably close in time to the incident(s) giving rise to the indictment.[311]

While this exception does not apply to cases involving adult victims, it suggests that some state courts retain broad flexibility in admitting some propensity evidence in sexual assault cases nonetheless.

A total of sixteen states allow the admission of propensity evidence in at least some types of *criminal* sexual assault cases. Alaska, Arizona, Florida, Georgia, Illinois, Kansas, Maryland, Michigan, Nebraska, Nevada, Oklahoma, and Wisconsin each allow propensity evidence in criminal prosecutions of

305. Pickett, *supra* note 300, at 889 (emphasis added).

306. *Id.*

307. *See* State v. Crossguns, 505 P.3d 529, 534–35 (Wash. 2022) (en banc).

308. *See id.* at 534–37.

309. *Id.* at 531.

310. State v. Edward Charles L., 398 S.E.2d 123, 133 (W. Va. 1990); *see also* STEPHEN P. MEYER, TRIAL HANDBOOK FOR WEST VIRGINIA LAWYERS § 31:14 (database updated Nov. 2023) (explaining West Virginia's lustful disposition rule).

311. *Edward Charles L.*, 398 S.E.2d at 133.

sexual assaults of both adults and children,[312] subject to various limitations.[313] Missouri, Louisiana, Utah, and Virginia allow propensity evidence in criminal prosecutions of sex crimes committed against children but not adults.[314] Because criminal defendants have long been afforded more generous due process rights than civil defendants, the choice to afford civil sexual assault defendants *more* protections than criminal sexual assault defendants should raise serious questions of legal inconsistency.

This paper devotes much ink to arguing that the legal system should *not* treat sexual misconduct cases differently from other types of misconduct,[315] so why encourage auditors to entertain the notion that sexual assault cases *should* receive extraordinary treatment regarding propensity evidence? The answer to this question lies in the American legal system's, particularly juries', well-documented bias against women claiming to have experienced sexual assault.[316] Ideally, juries would treat sexual misconduct plaintiffs as they do nonsexual misconduct plaintiffs. In such a world, a propensity evidence exception for sexual assault cases would seem to be the "scarlet" letter for offenders that its critics suggest.[317] But we do not live in such a world. Juries treat women claiming to have experienced sexual assault with heightened skepticism.[318] Propensity exceptions for sexual misconduct seek to *level* the playing field already tilted by a long history of bias against plaintiffs rather than give sexual misconduct plaintiffs any special advantage.

Auditors should consider that justifications for the character evidence ban assume juries cannot be trusted to assign appropriate weight to prior bad

312. ALASKA R. EVID. 404(b)(2)–(3); ARIZ. R. EVID. 404(c); FLA. STAT. ANN. § 90.404 (2024); GA. CODE ANN. §§ 24-4-413 to -414 (2024); ILL. R. EVID. 413; KAN. STAT. ANN. § 60-455 (West 2008), MD. R. EVID. 5-413; MICH. COMP. LAWS ANN. § 768.27b (West 2000); NEB. REV. STAT. ANN. § 27-414 (West Supp. 2023); NEV. REV. STAT. ANN. § 48.045(3) (West 2018); OKLA. STAT. ANN. tit. 12, §§ 2413, 2414 (West 2020); WIS. STAT. ANN. § 904.04(2)(b) (West 2022).

313. *See, e.g.*, ALASKA R. EVID. 404(b)(2)–(3) (providing that propensity evidence can be admitted in prosecutions of sex crimes committed against children only if the proffered offenses "are similar to the offense charged; and were committed upon persons similar to the prosecuting witness" and limiting admissibility of such evidence in some circumstances to cases in which defendant has raised a consent defense).

314. LA. CODE EVID. ANN. art. 412.2 (2017); MO. CONST. art. I, § 18(c); UTAH R. EVID. 404(c); VA. SUP. CT. R. 2:413.

315. *See supra* Section I.B and Part II.

316. *See generally* Tuerkheimer, *supra* note 3 (arguing that women alleging sexual assault must overcome a "credibility discount" at each step of the legal system).

317. *See, e.g.*, Jennifer Dukarski, Comment, *The Sexual Predator's Scarlet Letter Under the Federal Rules of Evidence 413, 414, and 415: The Moral Implication of the Stigma Created and the Attempt to Balance by Weighing for Prejudice*, 87 U. DET. MERCY L. REV. 271, 272 (2010) ("Rather than following the norm that rejects the notion of a 'once a thief, always a thief' premise, FRE 413, 414 and 415 symbolically create a permanent scarlet letter for the potential sexual predator regardless of conviction or allegation.").

318. *See* Kimberly Kessler Ferzan, *#WETOO*, 49 FLA. ST. U. L. REV. 693, 727 (2022) ("Women's claims of rape are systematically devalued in the eyes of the jury.").

acts evidence or consider this evidence for appropriate purposes.[319] Considering the heightened potential sexual misconduct evidence, in particular, has to elicit juror disgust, one could argue prior sexual misconduct evidence epitomizes exactly the type of evidence from which the character evidence ban seeks to protect defendants. And perhaps it does; however, auditors should keep in mind that, even if evidence rules do not exclude propensity evidence *per se*, judges still weigh the probative value of nearly every type of evidence, including propensity evidence when allowable, against its potential to sow prejudice when determining its admissibility.[320] A propensity exception for sexual misconduct cases does not *require* judges to admit propensity evidence; it only allows judges to do so if they find admission appropriate. Auditors should consider whether judges should be wary of admitting low-level evidence of sexual misconduct but should think twice, as increasingly judges have, when the evidence is highly probative.

IV. PROCEDURAL RULES

Of all things, one might think that procedures in civil rape cases have been modernized. In many states, however, the failures of the past continue to haunt reform. Recently, recognizing that the civil law has not been particularly friendly to these claims and that women have often failed to bring civil claims, states have aimed to reform the statute of limitations to rescue it from the common law approach, lumping sexual assault in with other intentional torts. These new reforms create what are "look-back" windows, short periods of time in which claimants can refile claims. This has led to a flurry of high-profile claims against pop stars and other prominent persons, but these stop-gap measures should invite questions about more lasting reform. This is just one example of a broader principle found in this Article: Reform can fail when it does not consider case law and judicially created rules as well as statutes adjacent to sexual assault.

319. *See id.* at 746 ("In terms of everyday inferences, the fact that the defendant did something in the past might increase the probability that he is the sort of person to do it again. For instance, you make assumptions about whether someone is 'trustworthy' or 'chronically late' from which you then infer whether she is acting in accordance with her character on a particular occasion. However, evidentiary rules forbid this very inference . . . . Although it is commonplace to rely on this sort of reasoning in our lives, it is pernicious in the courtroom because jurors may seek to punish the accused for the earlier act and not the crime on trial, and they may give too much weight to the predictive accuracy of character traits.").

320. *See. e.g.*, FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

A. STATUTES OF LIMITATIONS AND LOOKBACK WINDOWS FOR SEXUAL ASSAULT CLAIMS

In June of 2023, nine plaintiffs sued Bill Cosby[321] for sexual assaults that took place decades earlier.[322] Why the long wait? Nevada had just eliminated its civil statute of limitations for sexual abuse-related actions;[323] thus, these formerly time-barred victims could now seek justice.[324] A long-shut door had been opened, and the victims brought claims for their harms based on intentional and negligent infliction of emotional distress, false imprisonment, battery and sexual assault.[325] Still, victims in other states aren't as successful in their attempts to seek justice.[326]

State auditors should consider whether very short statutes of limitation pose unfair barriers for sexual assault victims. Traditionally, sexual assault falls under the state's general statute of limitations for common law intentional torts, leaving survivors with a short (typically two-year) deadline to file a suit.[327]

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321. Cosby has been accused by over sixty women of sexual assault and harassment. He was convicted in Pennsylvania of aggravated indecent assault in 2018 and sentenced to prison, but the conviction was overturned on appeal. A variety of civil suits have been filed. *See supra* note 8; *infra* notes 324–25.

322. Complaint at 3, Lotte-Lublin v. Cosby, No. 23-cv-00932 (D. Nev. June 14, 2023).

323. Although each jurisdiction places different time limitations to initiate both criminal and civil proceedings, when this Article uses the term "statute of limitations," we are referring to the statutes governing civil sexual assault cases. Typically, as well, we are referring to limitations governing claims by adults rather than minors.

324. Complaint, *supra* note 322, at 3.

325. *Id.* at 18–25. One plaintiff alleges that she met Cosby in a hotel room in Las Vegas so that he could help her improve her acting. *Id.* at 4. Cosby gave her two drinks to "help her relax." *Id.* at 5. Shortly thereafter, she fell unconscious, was dragged into a bedroom, where Cosby touched her while masturbating. *Id.* In 1990, another plaintiff alleged that Cosby told her that she was going to meet with producers for a television show. *Id.* at 6. When she met Cosby in his hotel room in Las Vegas, she drank a nonalcoholic sparkling cider and fell unconscious. *Id.* When she awoke, she alleges she was naked and later raped by Cosby, who placed a pillow on her face to silence her protests. *Id.* at 7.

326. In 2020, a class action lawsuit was filed against defendant David Hyles, who was a leader in a ministry college named and still remains an active member in the church community. *See* Ryder v. Hyles, No. 20-cv-01153, 2021 WL 7285358, at *1–2 (N.D. Ill. July 29, 2021), *aff'd*, 27 F.4th 1253 (7th Cir. 2022). The plaintiff and at least ten other victims alleged years of rape by Hyles as teenagers, some occurring on a weekly basis. *Id.* at *1; Complaint at 4, Miles v. Hyles, No. 20-cv-07153 (N.D. Ill. Dec. 3, 2020). Perhaps acknowledging that state law does not provide an avenue to sue given the statutory deadlines, the plaintiffs were forced to sue under the federal RICO statute because Hyles allegedly traveled with the plaintiffs across state lines to rape them. In dismissing the action for lack of standing, the court was unsympathetic to the reasons that their personal injury claims were impeded, noting that "Plaintiffs' injuries were not hidden from them, as [they] allege they personally experienced Hyles's alleged misconduct directly." *Ryder*, 2021 WL 7285358, at *4. In Indiana, where alleged abuse occurred, an action arising from child sexual abuse must be commenced within seven years after the cause of action accrues, and in Illinois, where abuse had also allegedly occurred, a victim of child sexual abuse has twenty years from the date of abuse or reasonable discovery of the abuse. *See* IND. CODE ANN. § 34-11-2-4 (West 2024); 735 ILL. COMP. STAT. ANN. 5/13-202.2 (West 2019).

327. *See generally* ARK. CODE ANN. § 16-56-104 (West Supp. 2024); ARIZ. REV. STAT. ANN. § 12-542 (2016); DEL. CODE ANN. tit. 10, § 8119 (West 2008); GA. CODE ANN. § 9-3-33 (2024); HAW.

Some states have codified language in their statutes of limitations that account for acts of sexual assault and have enacted tolling provisions that lengthen the time for filing.[328] Piecemeal reforms, however, may trip up an unwary plaintiff. For example, if a survivor wanted to sue a state actor, a different statute would apply: the state tort claims act statute of limitations.[329] Lawyers should also be aware that, in some states, statute of limitations or exhaustion requirements may apply in cases against doctors (because of medical malpractice reform) and against employers (if the claim is characterized as one of sexual harassment).[330]

B. THE SPECTRUM OF STATES' STATUTES OF LIMITATIONS

Limitation periods for sex-related offenses diverge widely across jurisdictions. Pennsylvania sits on one end of the spectrum, as causes of action relating to "injuries to the person" must be filed within two years.[331] In the middle of the spectrum, some states have statutes that explicitly provide for the recovery of damages arising out of sex-related offenses and those typically

REV. STAT. § 657-7 (2024); IDAHO CODE § 5-219 (2023); IOWA CODE § 614.1(2) (2024); KAN. STAT. ANN. § 60-513 (West 2008); LA. CIV. CODE ANN. art. 3492 (2011).

328. For example, in childhood sex abuse cases, states implemented the delayed discovery doctrine, which prevents a claim from accrual until the plaintiff discovers or reasonably should have discovered her injury. Marie T. Reilly, *Retribution Against Catholic Dioceses by Revival: The Evolution and Legacy of the New York Child Victims Act*, 84 ALB. L. REV. 735, 745 (2021). Additionally, pursuant to the equitable estoppel doctrine, courts may allow a plaintiff to pursue her claim regardless of whether the claim is untimely if a defendant prevented the plaintiff from filing her claim through acts of fraud, and the plaintiff reasonably relied on the fraudulent misrepresentation. *Id.* at 758.

329. *See, e.g.*, WYO. STAT. ANN. § 1–39–113(a) (2024) (requiring the claimant to present the claim to the governmental entity within two years of the alleged act, error or omission). These claims may also require that the plaintiff exhaust their remedies before an administrative board, for example, in a very short time period, such as 180 days.

330. In many rape cases, there may be no witnesses and rape myths have posed a "credibility discount" on claimants. *See* Tuerkheimer, *supra* note 3, at 56. As Representative Molinari explained when the federal government passed the federal rules, "[s]exual assault and child molestation do not ordinarily occur in the presence of multiple credible witnesses. The Rules of Evidence need to be changed to improve the ability of prosecutors to obtain convictions against the perpetrators of such crimes." 137 CONG. REC. 28,031 (1991) (extension of remarks on Proposed Amendment to the Federal Rules of Evidence in Cases of Sexual Assault and Child Molestation).

331. *See* 42 PA. STAT. AND CONS. STAT. ANN. § 5524(2) (West Supp. 2022). In *Finnegan v. Archdiocese of Philadelphia*, a plaintiff claimed sexual abuse by a Catholic priest between 1968 to 1970. Finnegan v. Archdiocese of Phila., Nos. 3002-EDA-2014, 3173-EDA-2014, 2015 WL 6457860, at *6 (Pa. Super. Ct. Oct. 6, 2015). The plaintiff attempted to recover damages under this statute nearly forty years later, citing incidents of repressed memory for the delay. *Id.* The court affirmed the lower court's judgment in favor of the Catholic church because the claim fell outside the two-year statute of limitations and would have required the plaintiff to file the complaint in 1972. *Id.*

give victims a longer time to file a lawsuit.[332] California[333] and the District of Columbia[334] have such statutes.[335] At the opposite end of the spectrum, a few states have entirely removed their statutes of limitations.[336] In Colorado, a victim of sexual misconduct may file their lawsuit at any time provided that a victim's injury meets certain criteria, such as a first-degree misdemeanor or a felony offense.[337]

States that have lengthened their statutes have often cited the psychological trauma of sexual assault. When revisiting the Nevada statute, the state legislature considered that victims often experience deep psychological effects after the assault.[338] They explained that "the human brain is good at suppressing and repressing traumatic events so that we can survive the day today."[339] While some states have been adamant about changing their statute of limitations for child victims due to repressed memories, victims of all ages may face similar challenges. "The victim could be a [seven]-year-old who immediately reports the assault, a [fifty]-year-old whose memories come flooding back after an emotional trigger[,] or a [seventy]-year-old who was finally able to let him or herself remember that it happened."[340] The #MeToo movement and other high profile cases involving public figures like Cosby,[341] Harvey Weinstein,[342]

332. *See, e.g.*, KY. REV. STAT. ANN. § 413.2485 (West Supp. 2023) (requiring a filing within five years); ME. REV. STAT. tit. 14, § 752 (2003) (requiring a filing within six years); MINN. STAT. § 541.073 (2023) (requiring a filing within six years); N.J. STAT. ANN. § 2A:14-2a (West 2019) (requiring a filing within seven years); N.D. CENT. CODE ANN. § 28-01-25.2 (West 2023) (requiring a filing within nine years).

333. In California, a victim has ten years to file suit from the time of the injury or within three years that the victim discovered or reasonably should have discovered the injury. *See* CAL. CIV. PROC. CODE § 340.16(a)(1)–(2) (West 2022).

334. In the District of Columbia, a sexual abuse victim under the age of thirty-five may file a lawsuit up until they reach the age of forty, or five years from when the victim knew or reasonably should have known of the injury. *See* D.C. CODE ANN. § 12-301(a)(11) (West Supp. 2023). If older than thirty-five at the time of the injury, the victim must file within five years from when the victim knew or reasonably should have known of the injury. *See id.* § 12-301(a)(12).

335. *See* KY. REV. STAT. ANN. § 413.2485 (West Supp. 2023); MINN. STAT. § 541.073 (2023).

336. *See e.g.*, ALASKA STAT. § 09.10.065 (2023); N.H. REV. STAT. ANN. § 508:4-g (2010).

337. *See* COLO. REV. STAT. § 13-80-103.7 (2023).

338. *Minutes of the S. Comm. on Judiciary: Hearing on S.B. 129 Before the S. Comm. on Judiciary*, 2023 Leg., 82d Sess. 5–8 (Nev. 2023) (statement of Allison Cotton, M.D., Psychiatrist) ("Rape victims uniquely experience shame, guilt, self-hatred and self-blame."). These effects include "mistrust for others, inability to develop confidence and self-esteem, disruption of the victim's education, loss of the ability to form intimate relationships, loss of family relationships, self-medication with drugs and alcohol, development of maladaptive coping strategies which lead the victim to develop chronic diseases, and so much more." *Id.* at 6.

339. *Id.*

340. *Id.*

341. *See supra* notes 321–25 and accompanying text.

342. *See* Ryan Faughnder & Stacy Perman, *Five Things That Have Changed in Hollywood Since the Weinstein Case Broke*, L.A. TIMES (Feb. 24, 2020, 9:15 AM), https://www.latimes.com/entertainment-arts/business/story/2020-02-24/five-things-that-have-changed-in-hollywood-since-the-weinstein-case-broke (on file with the *Iowa Law Review*).

and former President Trump,[343] as well institution-wide sexual assaults within the Catholic Church[344] and Boy Scouts of America,[345] have likely influenced public debate surrounding the statutes of limitations, and may well have "triggered" survivors to remember their own abuse.[346] These high-profile cases have also shown the public that viable claims have been entirely ignored by the criminal justice system, and have left repeat offenders held unaccountable, often for decades. Not surprisingly, advocates and others have suggested that state legislatures change their statute of limitations.

C. LOOKBACK WINDOWS

Recently, some states have passed statutes to reopen time-barred sexual assault cases in what are called "lookback windows." A lookback window is a temporary extension of a state's statute of limitations for previously time-barred victims. In 2019, New York enacted the New York Child Victims Act,[347] and in 2022, it enacted the Adult Survivors Act,[348] which both provided a one-year window to sue for previously time-barred victims. Like New York, New Jersey implemented a similar two-year lookback window,[349] and California implemented a three-year lookback window.[350] Lookback windows are similar to and possibly evolved from the delayed discovery doctrine and the doctrine of equitable estoppel.[351] Supporters of California's lookback window cited to

343. *See* Graham Kates & Clare Hymes, *Trial Begins in E. Jean Carroll's Lawsuit Against Trump for Defamation, Battery*, CBS NEWS (Apr. 25, 2023, 7:35 PM), https://www.cbsnews.com/news/trump-e-jean-carroll-trial-jury-selected-defamation-battery [https://perma.cc/6XKG-RM7T].

344. Kristina Cooke, Mike Spector, Benjamin Lesser, Dan Levine & Disha Raychaudhuri, *Boy Scouts, Catholic Dioceses Find Haven from Sex Abuse Suits in Bankruptcy*, REUTERS (Dec. 30, 2022, 5:07 AM), https://www.reuters.com/world/us/boy-scouts-catholic-dioceses-find-haven-sex-abuse-suits-bankruptcy-2022-12-30 (on file with the *Iowa Law Review*).

345. *Id.*

346. Proponents of the delayed discovery doctrine explain that while a plaintiff may have been aware of the sexual assault when it was occurring, she likely did not connect the emotional and psychological impact of her injury until the occurrence of a "triggering event." Reilly, *supra* note 328, at 752. "In *Wisniewski v. Diocese of Belleville*, the plaintiff alleged that the trigger for his discovery of a claim against the diocese was media reporting in 2002 about the clergy sexual abuse scandal within the Archdiocese of Boston." *Id.* at 753 (footnote omitted). The #MeToo movement and subsequent high-profile cases that reached the media may have served as the triggering event for some victims, both causing them to relive their own injuries, and giving them hope that they would be believed. As more incidents of sexual assault came to light, states were forced to reevaluate their statutes of limitations.

347. N.Y. C.P.L.R. 214-g (McKinney 2019).

348. N.Y. C.P.L.R. 214-j (McKinney Supp. 2024).

349. *See* S.B. 477, 2018 Leg., 218th Sess. (N.J. 2019) (enacted).

350. *See* A.B. 2777, 2021–2022 Gen. Assemb., Reg. Sess. (Cal. 2022) (enacted).

351. *See* Reilly, *supra* note 328, at 745–46; *see, e.g.*, Judicial Council of California Civil Jury Instructions (CACI) § 455 (2024) (stating, in form jury instruction, when the plaintiff reasonably should have discovered that she was harmed by another person's wrongful conduct); Zumpano v. Quinn, 849 N.E.2d 926, 929 (N.Y. 2006) (holding that equitable estoppel did not apply to bar defendant from asserting limitations defense in a child sex abuse case); Gen. Stencils v. Chiappa, 219 N.E.2d 169, 171 (N.Y. 1966) (noting that New York courts have exercised discretion to apply equitable estoppel to the bar of a statute of limitations); Simcuski v. Saeli, 377 N.E.2d 713, 716

the emotional trauma following sexual assault and the lack of understanding of the law as reasons that a victim may wait to file suit and need to rely on a lookback window.[352] In other states, reports of widespread scandals appear to have been influential. The New York law followed the release of a two-year investigative report by the Pennsylvania Attorney General that revealed child sexual abuse against six Catholic dioceses.[353] The report recounted in detail the allegations of hundreds of persons who reported sexual abuse as children by diocesan clergy, and how dioceses responded to those allegations.[354] The report concluded that the dioceses "brushed aside" reports of abuse to protect the abusers and the dioceses.[355] The New York legislature explained that the lookback window was a means for "those who have had justice denied them as a result of New York's formerly insufficient statute of limitations [to] be given the opportunity to seek civil redress against their abuser or their abuser's enablers in a court of law."[356] While these lookback windows are short-lived victories for previously time-barred victims, they should put auditors on notice of state legislatures' recognition of a need for legislative action.

D. INCOMPATIBILITY OF CIVIL AND CRIMINAL STATUTES OF LIMITATIONS

Auditors should also worry about disparities between criminal and civil statutes of limitation. Survivors may be time-barred if they wait to file a civil lawsuit until after the final disposition of the criminal proceeding. The civil statute of limitations is quite different from the criminal statute of limitations, particularly for sex-related offenses constituting felonies.[357] Currently, for

(tolling the statute of limitations by equitable estoppel in a medical malpractice claim based on the doctor's intentional concealment of malpractice).

352. *See* S. Rules Comm., Off. of S. Floor Analyses, Third Reading, A.B. 2777, 2021–2022 Gen. Assemb., Reg. Sess., at 7–8 (Cal. 2022).

353. OFF. OF THE ATT'Y GEN., 40TH STATEWIDE INVESTIGATING GRAND JURY REPORT 1 REDACTED, at 1 (2018), https://www.attorneygeneral.gov/report [https://perma.cc/2CFH-Q8GR]. The Pennsylvania report recounted allegations of sexual abuse perpetrated by clergy affiliated with the Dioceses of Allentown, Erie, Greensburg, Harrisburg, Pittsburgh, Scranton, and the Society of St. John. *Id.* at 4–6. Allegations against clergy associated with the Dioceses of Altoona-Johnstown and Philadelphia were not included in the 2018 report because allegations against clergy associated with those dioceses had been the subject of earlier investigative grand jury reports. *Id.* at 1.

354. *See id.* at 1, 10.

355. *See, e.g.*, *id.* at 1, 7, 223, 299 (noting that church officials who protected clergy who abused children remained in office and got promoted, including Cardinal Donald Wuerl who later became the archbishop of the Archdiocese of Washington, D.C.).

356. *See Senate Bill S66A*, N.Y. STATE SENATE, https://www.nysenate.gov/node/8080937 (on file with the *Iowa Law Review*).

357. *See, e.g.*, Remmick v. State, 275 P.3d 467, 470 (Wyo. 2012) ("Wyoming has no statute of limitations for criminal offenses, and prosecution for such offenses may be commenced at any time during the life of the offender." (quoting Phillips v. State, 825 P.2d 1062, 1069 (Wyo. 1992))); State v. Hardin, 201 S.E.2d 74, 75 (N.C. 1973) ("In North Carolina, there is no statute of limitations barring the prosecution of a felony."); State v. Renfro, No. 0865, 2015 WL 5929321, at *2 (2015), *cert. denied*, 122 A.3d 976 (2015) (unpublished table decision) ("Maryland has no statute of limitations on felonies."); State v. Carrico, 427 S.E.2d 474, 477 (W. Va. 1993) ("West Virginia has no statute of limitations affecting felony prosecutions."); ARK. CODE ANN. § 5-1-109

the most serious felony sex crimes, thirteen states have criminal statute of limitations of ten years or less, ten states and D.C. have criminal statute of limitations between eleven and twenty years, twenty-two states have criminal statute of limitations of twenty-one or more years, and seven states have eliminated their statute of limitations for all felony sex crimes.[358] Despite these advances in the criminal sphere, the civil statutes lag behind.[359]

It may be beneficial for a victim to obtain a criminal conviction prior to commencing a civil action. For example, the plaintiff may reduce the costs of civil litigation by using the evidence presented by the government in the prior criminal proceeding.[360] Moreover, a plaintiff may invoke the doctrine of collateral estoppel in their civil claim to prevent the perpetrator from denying guilt established in the criminal proceeding.[361] Some states, such as Arizona, have already adopted such tolling provisions, which extend the civil statute of limitations by one year from the final disposition of the criminal proceeding, regardless of whether the defendant was convicted or not.[362] Similarly, Connecticut removed the civil statute of limitations if the perpetrator was previously convicted for the same injury.[363] Additionally, while many states have tolling provisions to their criminal statute of limitations when a DNA profile is linked to the perpetrator years later, the civil statute of limitations may still prevent a victim from pursuing a claim.[364] Auditors should consider

(West 2017) (omitting limitations for sexual assault in the first degree); DEL. CODE ANN. tit. 11, § 205(b)(1)–(2), (e) (West 2010) (omitting limitations for unlawful sexual contact); D.C. CODE ANN § 23-113(a)(1)(G) (West Supp. 2023) (omitting limitations for unlawful sexual abuse).

358. *See* RAINN, *State by State Guide on Statutes of Limitations*, https://www.rainn.org/state-state-guide-statutes-limitations [https://perma.cc/HS59-K58L] (noting that Kentucky, Maryland, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming "ha[ve] no statute of limitations for any felony sex crime"). The SOL reforms in the criminal context may be attributed to increased understanding of psychological harm to the plaintiff which inhibits their ability to come forward, the difficulty in prosecuting such crimes, and advancements in DNA testing. *See* Lauren Kearns, Note, *Incorporating Tolling Provisions into Sex Crimes Statutes of Limitations*, 13 TEMP. POL. & C.R.L. REV. 325, 329 (2003).

359. *See 2018 Crime in the United States: Property Crime*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/property-crime [https://perma.cc/S7PL-2B6K] ("In descending order of severity, the violent crimes are murder and nonnegligent manslaughter, rape, robbery, and aggravated assault, followed by the property crimes of burglary, larceny-theft, and motor vehicle theft."). The reasoning behind the focus on the criminal statute of limitations rather than the civil may merely be chalked up to state legislatures' desires to fix criminal procedure before addressing civil procedure due to the social cost of allowing a perpetrator to roam free in comparison to providing a victim an avenue for compensation.

360. Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1579 (2008).

361. *Id.*

362. ARIZ. REV. STAT. ANN. § 12-511 (2016).

363. CONN. GEN. STAT. ANN. § 52-577e (West 2013).

364. *See* BRITTANY ERICKSEN, ILSE KNECHT, STATUTES OF LIMITATIONS FOR SEXUAL ASSAULT: A STATE-BY-STATE COMPARISON (Aug. 21, 2013), https://www.sakitta.org/toolkit/docs/Statutes-of-Limitations-for-Sexual-Assault-A-State-by-State-Comparison.pdf [https://perma.cc/6VTG-9HH2]; Aaron L. Weisman, Annotation, *Validity, Construction, and Application of State Statutes Eliminating, Extending, or Tolling Statute of Limitations for Sexual Offense When DNA Can Provide Identity of Alleged Perpetrator*, 16 A.L.R. 7th Art. 7 (2016).

tolling provisions that are necessary to ensure compatibility of both civil and criminal proceedings for sex-related offenses.

E. ADDRESSING THE LYING, VINDICTIVE WOMAN THEORY

Proponents of short statutes of limitations argue that they pose no real barrier to meritorious claims because truthful victims seek redress immediately after the attack.[365] Auditors should worry that this claim relies upon contestable assumptions. For centuries, "it was 'assumed' that women 'naturally' report rapes as soon as possible."[366] In the seventeenth century, Sir Matthew Hale coined the public outcry doctrine: "[A] court and jury should draw a strong inference of false or feigned testimony if a rape complainant 'made no outcry' at the time of the alleged assault or as soon thereafter as possible."[367] Even well into the late twentieth century, the idea of prompt complaint was used by defense counsel to suggest that the complainant was a "liar and manipulator," if her complaint was not immediate.[368] By the 1970s, however, reformers began to realize that common law rules, like prompt outcry, utmost resistance, and corroboration, depended upon the stereotype of the "scheming, lying, vindictive woman."[369] Even well into the late twentieth century, the idea of prompt complaint was used by defense counsel to suggest that the complainant was a "liar and manipulator," if her complaint was not immediate.[370]

Times have changed. We now know that there are

> numerous reasons why women do not report rape promptly, including . . . society's propensity to blame the victim for provoking the assault by her behavior or appearance, a desire to forget about the traumatic experience, fear of public probing into her prior sexual history, and fear of retribution from a known assailant who has already shown his willingness to resort to violence or other coercion.[371]

We also know that trauma may cause individuals to block out experiences for lengthy periods of time. DNA technology has helped to close the evidentiary gaps flowing from failed memory. Expanding the statute of limitations does not mean that untruthful claims will go unchallenged; it means that the truthfulness of the claim will be tested by the traditional burden of proof at trial: a preponderance of the evidence.

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365. *See* Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 828 (1996).

366. *Id.*

367. *Id.* at 828–29; *see also* MODEL PENAL CODE § 213.6(4) cmt. 5 (AM. L. INST. 1980) ("[E]vidence of prompt notification to the authorities was admissible to rebut a suggestion of fabrication by the complainant.").

368. Ross, *supra* note 365, at 828–29; *see also* MODEL PENAL CODE § 213.6(4) cmt. 5 (AM. L. INST. 1980).

369. Ruthy Lowenstein Lazar, *The "Vindictive Wife": The Credibility of Complainants in Cases of Wife Rape*, 25 S. CAL. REV. L. & SOC. JUST. 1, 3 (2015) (quoting SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 387 (1975)).

370. *Id.* at 29.

371. Ross, *supra* note 365, at 328.

CONCLUSION

As with so much about the law and women, it always seems as if "by now" reforms should have worked their magic. Fifty years ago, the first wave of sexual assault reforms focused on the criminal law, but alas, we know that the criminal law wields a blunt sword and is designed to presume innocence, which makes it difficult to prosecute sexual assault. Even in cases where individuals are alleged to have engaged in repeated behavior, and there are dozens of victims, convictions can be overturned and pleas granted.[372] In such a world, civil sanctions may be the only way to create accountability, and some measure of deterrence, for sexual assault. Despite the clarion call of the Violence Against Women Act on civil remedies two decades ago, the Supreme Court has officially left survivors to recourse under state common law[373] on the theory that state remedies are adequate. In this Article, we have uncovered evidence that this is a decided understatement. To be sure, state law varies quite considerably, but the common law still casts a negative shadow on sexual assault victims. In this Article, we have urged that states create legal commissions to study the adequacy of civil remedies for civil sexual assault. We also urge that these commissions focus their work on areas that are often overlooked, such as rules of official immunity, vicarious liability, scope of employment, and comparative fault. Statutes of limitation and consent have more often been the subject of reform, but work should be done to assess the effect of those reforms in a systematic way. This is not easy work, which is why it still remains, as this five-year effort attests. Surely, survivors in the twenty-first century deserve to be treated with the same respect by today's norms, not the norms of a long-dead common law that so many states have tried to, but not always, banished.

372. *See* discussion *supra* note 8.

373. *See generally* United States v. Morrison, 529 U.S. 598 (2000) (holding that the civil remedy provision was unconstitutional).

APPENDIX

Georgetown Law Civil Rights and Violence Against Women Practicum Students (2019 to 2023)	
Carmen Abella	Deanna Clayton
Casey Chalbeck	Maya Gandhi
Sarah Nesbitt	Makayla Halkinrude-Allmaras
Abigail O'Donnell	Eric Taylor
Olivia O'Hea	Kelly Yahner
Alina Pastor-Chermak	Adedola Adefowoju
Kaitlin Prior	Kira Eidson
Eva Schlitz	Harshita Ganesh
James Wiley	Aubrianna Mierow
Rose Gilroy	Nicole Redmond
Marisa McConnell	Nicole Steitz
Jagir Patel	Jordan Michael Terry
Marianna Quenemoen	Madison Torrez
Eloy Francisco Rodriguez La Brada	Hannah Yozzo
Katherine Shea	Tinesha Zandamela
Juliette Singarella	Madison Akers
Tyler Sloan	Fiona Benson
Karuna Srivastav	Jeremy Brum
Jennifer Waxman	Grace Keogh
Emily Webb	Sara Langone Kyle
Diane Alexander	Rashi Narayan
Rania AlRashoodi	Ndudi Obichi
Sophia Blake	Margaret Roberts