Feminist Judgments: Rewritten Tort Opinions

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Commentary on *Boyles v. Kerr*

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The Texas Supreme Court in *Boyles v. Kerr* rigidly refused to extend the state’s negligent infliction of emotional distress (NIED) precedents to permit recovery for a young woman, Susan Kerr, who alleged severe emotional distress when her lover, Dan Boyles, Jr., surreptitiously videotaped the pair having sex and then shared the video with college fraternity brothers, causing Kerr to become the object of derision. But Professor Cristina Tillelery, rewriting the case as Justice Tilley, makes clear that the salient doctrines are more than capacious enough to have permitted Kerr’s NIED recovery. In fact, the myriad opinions in *Boyles*, as well as their extensive discussion of NIED’s history and precedents, reveal a highly malleable claim, the evolution of which reveals clearly gendered themes and trends.

**THE BOYLES V. KERR LITIGATION**

Susan Kerr was 19 years old, and Dan Boyles, Jr. was 17 in 1985 when they went on their first date and began a sexual relationship. Before Kerr and Boyles each went off to different colleges that fall, the two had sex a few more times. The Texas Supreme Court majority’s characterization of Boyles and Kerr’s relationship rings of judgment, noting that they were “not dating steadily” but “had shared several previous sexual encounters” in the “few months” they had known each other. The majority acknowledges Kerr’s testimony “that she had not had sexual intercourse prior to her relationship

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1 S.W.2d 503 (Tex. 1993).
2 *Id.* at 594.
with Boyles,” though including this fact suggests a vulnerability the court did not elsewhere credit.

One evening in August, Boyles arranged to pick up Kerr and take her to a friend’s home where Boyles had plotted with three male friends to set up a hidden video camera in the bedroom. The friends first recorded crude remarks about the anticipated encounter and then left the home with the camera running. Boyles brought Kerr into the room, and the two had sex; she was unaware that the encounter was being taped. Soon after, Boyles started college at the University of Texas, and he showed the sex tape to fraternity brothers there. Word of the tape soon spread among students at the University of Texas and, eventually, also at the college Susan Kerr attended. Kerr became the target of humiliating ridicule and was labeled a “porno queen.”

Kerr eventually confronted Boyles, who admitted what he had done and gave her the only copy of the tape. Rumors and public ridicule nevertheless hounded Kerr for months. Kerr claimed that she suffered severe distress, impaired academic performance, and difficulty developing healthy relationships with men. She required psychological counseling and was diagnosed with post-traumatic stress disorder. But the court majority seemed dismissive of her allegations of emotional distress, noting that Kerr “had subsequent sexually-active relationships” after learning of the video and its circulation.

While Justice Tilley’s recitation of the facts in her feminist rewritten opinion is not dramatically different from that of the actual majority, she provides additional bits of context that evince more empathy for Kerr. Tilley notes, for example, that one fraternity brother enjoyed the video enough that he “forgave Boyles’s repayment of a $20 football bet.” Justice Tilley also tells us more about the parties’ relationship, including that their first date was their senior prom and that their last “date” was the night the videotape was made. On the latter night, Justice Tilley details that Susan Kerr had invited Dan Boyles to be her date for a wedding, seeking to “spend non-sexual, social time with him ... during which they would presumably talk, dance, and share a...

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1. Id.
2. Interestingly, while media commentators and the drafters of Westlaw headnotes referred to Kerr and Boyles as former boyfriend and girlfriend, neither Tilley nor the Texas Supreme Court used that terminology. David Margolick, Law: At the Bar; For Texas Firm, the Price of Circulating a Videotape Proves Quite Steep, N.Y. Times, June 1, 1990, at B6. Oddly, Margolick also referred to what had transpired between the two as “mak[ing] love,” attributing a romanticism to the encounter that no one else does, which seems especially inappropriate given the hindsight with which the journalist wrote. Id.
3. Boyles, 855 S.W.2d at 394.
4. Id.
meal." Boyles declined the wedding invitation but arranged to pick Kerr up afterwards and take her to his friend's house for "purely sexual purposes." The majority does not reveal such details about Kerr's efforts to establish a meaningful relationship, writing instead simply that Kerr and Boyles "had made plans to go out on the night of the incident." This distinction is salient to Justice Tilley's assertion that Boyles's attitude toward Kerr suggested his failure to see her as fully human, which she argues is highly relevant in relation to his mental state vis-à-vis Kerr's emotional distress. Tilley also shows feminist sensitivity to the reality of women's emotional lives when she notes that Kerr's sexual encounters with other men following Boyles's predatory behavior could show both that she struggled to form healthy intimate relationships, and that she experienced enduring emotional damage.

Kerr initially sued for negligent infliction of emotional distress (NIED) and invasion of privacy, seeking $48 million in damages. Boyles framed the taping as merely "an impromptu, stupid, adolescent mistake," and his defense team minimized Kerr's emotional damage. Indeed, speaking to the press, they blamed Kerr's trauma on the lawsuit itself, which they said was her father's idea. Kerr eventually withdrew her cause of action for invasion of privacy, and only the NIED claim went to trial. A jury of seven women and five men awarded Kerr $500,000 in compensatory damages and $500,000 in punitive damages. Among the four defendants, only Boyles appealed. Each of his male confederates either paid his share of the judgment or settled for a lesser amount.

The Texas Court of Appeals upheld the jury's decision in 1991, but in December 1992 by a 6:3 vote the Texas Supreme Court, composed at that time of nine men, overturned it, reversing a recent precedent that had recognized the tort of NIED. The ruling fueled a sense among women's groups that the decision was highly gendered at best, distinctly sexist at worst. Kerr filed a motion for rehearing, and the Women and the Law Section of the Texas State Bar, the Association of Women Attorneys, the Women's Advocacy Project, and the Texas Women's Political Caucus all filed amicus briefs protesting the reversal. The Women and the Law Section of the Texas State Bar argued that the decision had "turned back the clock to a time when the

7 Id.


9 Margolies, supra note 4.

10 Woman Awarded $1 Million in Videotape Case, supra note 8.

11 Id.
sexual exploitation of unwilling women was socially acceptable, without regard to negligently inflicted emotional distress." More provocatively, the Women and the Law Section alleged that "if the tables had been turned, and Kerr had peddled the videotape as a vignette of Boyles' sexual performance ... the all-male majority in this case would have reached a decidedly different result." In response to Kerr's motion for rehearing, the Texas Supreme Court withdrew its prior opinion and issued a superseding opinion in 1993, reiterating its reasons for reversal and responding to the accusations of gender bias lodged in the amicus briefs. The majority opinion called these charges "grave" and "wholly without merit," asserting that its analysis was gender neutral. Concurring Justice Raul A. Gonzalez protested that the "case ha[de] nothing to do with gender-based discrimination or an assault on women's rights." The majority in that superseding opinion held that "there is no general duty not to negligently inflict emotional distress." Kerr had relied on a then recent Texas Supreme Court decision in *St. Elizabeth Hospital v. Garrard*, which had recognized such a duty, and upheld plaintiff-parents' recovery for negligent infliction of emotional distress after the defendant hospital negligently disposed of the Garrards' stillborn baby without the plaintiffs' knowledge or consent. The *Boyles* majority distanced itself from *St. Elizabeth Hospital*'s reasoning while preserving its result, ruling that "mental anguish damages should be compensated only in connection with defendant's breach of some other duty imposed by law." The result in *St. Elizabeth* could stand, the court reasoned, because tort law had long recognized a duty of care toward surviving family members in handling corpses. The *Boyles* majority rejected the proposition that intimate personal relationships should give rise to a duty to avoid negligently inflicting emotional trauma because granting relief "for every instance of rude, insensitive, or distasteful behavior" would dignify most disputes far beyond their social importance. The court emphasized that Kerr should have brought a suit for intentional infliction of emotional distress (IIED) rather than negligent infliction, and it granted her leave to do so.

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12 *Boyles*, 855 S.W.2d at 605 (Doggett, J., dissenting).
13 *Id.* at 602.
14 *Id.*
15 *Id.* at 604 (Gonzalez, J., concurring).
16 *Id.* at 597.
17 730 S.W.2d 649 (Tex. 1987).
18 *Boyles*, 835 S.W.2d at 596.
19 *Id.* at 602.
20 *Id.* at 603.
Justice Lloyd Doggett, joined by Justices Robert Gammage and Rose Spector, issued a strong dissent, endorsing the gender bias concerns expressed in the amicus briefs and agreeing with their characterization that what Boyles did to Kerr went well beyond “name-calling” and was “tantamount to rape.”

He decried the overruling of St. Elizabeth, a precedent he characterized as affirming respect for human dignity. Doggett also lampooned the majority’s insistence that Kerr’s only recourse should be an intentional infliction of emotional distress claim: “This is tantamount to concluding that a court should not hold accountable one who, through negligence, discharges a loaded gun within inches of another’s head because there is a duty not to shoot intentionally.”

Justice Rose Spector, the sole female justice and new to the court at the time of the Boyles rehearing, also wrote a separate dissent. Spector asserted that claims for NIED were gendered, an argument that had then recently been given academic voice by Martha Chamallas and Linda K. Kerber’s 1990 law review article, Women, Mothers and the Law of Fright: A History. Justice Spector noted that “[i]n the judicial system dominated by men, emotional distress claims have historically been marginalized ... From the beginning, tort recovery for infliction of emotional distress has developed primarily as a means of compensating women for injuries inflicted by men insensitive to the harm caused by their conduct.”

Indignant, Justice John Cornyn (who went on to become a US senator from Texas), wrote a separate opinion in which he undertook a simplistic empirical investigation of NIED claims, reporting that among the thirty-four “Texas appellate cases in which a claim for negligent infliction of emotional distress was alleged, thirteen were brought by women, twelve were brought by men, seven by husbands and wives jointly, one by an executrix on behalf of an estate, and one by a corporation.” Based on his bean-counting approach, Cornyn saw “no factual or legal basis for the suggestion that by choosing not to

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1 Id. at 607 (Doggett, J. dissenting).
2 Id. at 605 (Doggett, J. dissenting).
3 Id. at 606 (Doggett, J. dissenting).
4 Her dissent was officially in the companion case to Boyles, Twymann v. Twymann, but it was offered as a dissent to both cases. 855 S.W.2d 619 (Tex. 1993). Twymann relied on Boyles to reject an NIED claim, while permitting an intentional infliction of emotional distress claim by one spouse against the other during a divorce.
6 Twymann, 855. S.W.2d at 642.
7 Id. at 622–23. Justice Cornyn’s opinion was the majority opinion in Twymann v. Twymann, the companion case to Boyles.
recognize this particular tort, the court demonstrates insensitivity to female claimants."

Following the court's decision on rehearing, Kerr's attorney told the press that he had not pursued a claim of intentional infliction of emotional distress (IIED) because intentional acts were not covered by the homeowner's insurance policy on the house where the young men did the videotaping. He announced, however, that he was prepared to refile an IIED claim.29 The need to do so was alleviated when Boyles settled with Kerr for $460,000.30 With the $500,000 the other defendants had already paid, Kerr ultimately received most of the million dollars the jury had awarded her.

Indeed, because of an indiscretion by Boyles's trial counsel, Kerr settled for another $600,000 from the firm that defended Boyles. Further illustrating the Texas "good ol' boy" culture in which the case was litigated and appealed, that firm violated a court order to limit viewing of the videotape to absolutely necessary attorneys and staff.31 So relieved was defense counsel that the verdict had been only one million dollars, that his firm indulged in a champagne-laced, post-trial celebration that lapsed into what one law firm employee characterized as a "stag" party, with the videotape screened to employees not involved in the case.32 Interestingly, the trial judge fined the law firm a meager $2,000 for this indiscretion.33

THE EVOLUTION OF NIED CLAIMS

While the Boyles majority rejected what it called a "general" tort claim for negligently inflicted emotional distress, it endorsed many types of NIED claims that had evolved over decades. Despite Justice Cornyn's attempt to cast NIED as a genderless tort, as Charnuas and Kerber demonstrated in their seminal article, the major precedents through which the tort developed involved women claiming emotional harm related to disruptions to their roles as procreators or nurturers. Some of the oldest successful NIED claims were

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17 Id. at 525.
19 Id.
20 Margolick, supra note 4.
21 Id.
22 Id.
those based on miscarriages—stillbirth being viewed as a clear physical manifestation of a “fright” when a pregnant woman suffered “nervous shock” and stillbirth due to a defendant’s negligent behavior. The Texas Supreme Court in 1890 had decided one such case, *Hill v. Kimball*, in favor of a pregnant plaintiff who suffered a stillbirth after she saw her landlord carry out a bloody racial assault of two men in her “immediate presence.” Such cases represented an early exception to the old “impact rule,” which privileged physical harms and recognized emotional distress, if at all, as parasitic on the former. As Tilley demonstrates in her rewritten opinion, another category of cases, referred to in *Boyles* as “mishandled corpse” cases, frequently involved grieving mothers such as Garrard, the plaintiff in the 1982 *St. Elizabeth* case. Like miscarriage cases, such claims had become well established in many states’ NIED jurisprudence, including the 1885 Texas decision in *Stuart v. Western Union Tel. Co.*

In miscarriage cases, courts justified recovery because of the physical consequence of the negligence—the lost pregnancy. Indeed, the majority in *Boyles* rationalized *Hill* as a physical injury case, rather than a purely emotional distress claim. In the mishandled corpse cases, courts permitted recovery based on what one commentator had called the “mysticism or aura of death.” In both types of cases, courts relied heavily on the foreseeability of emotional injury in the face of the defendant’s behavior.

Judicial conceptions of when emotional distress was sufficiently foreseeable to justify an NIED claim evolved to encompass two additional categories: “bystander” and “direct victim.” In the former category, family members were permitted to recover for severe emotional distress when they saw a loved one injured in an accident. Relying on the 1968 California bystander case, *Dillon v. Legg*, which allowed a mother to recover when she witnessed a negligent driver kill her child, the *Boyles* majority explicitly embraced bystander NIED recovery.

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1. See Chamallas & Kercher, supra note 25, at 872.
2. 13 S.W. 30, 39 (Tex. 1890).
4. *See generally Julie A. Davies, Direct Actions for Emotional Harm: Is Compromise Possible?*, 6 Wash. L. Rev. 1 (1982), noting criterion of the physical manifestation rule is having no clear link to emotional harm.
5. 18 S.W. 351 (Tex. 1893).
7. 441 P.2d 912 (Cal. 1968).
As in bystander cases, "direct victim" NIED plaintiffs claimed foreseeable distress stemming from physical injury to a loved one. The Boyles majority relied on two key California precedents, Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc. (1989), and Burgess v. Superior Court (1992). In Marlene F., a psychologist was counseling several mothers and their sons when the mothers learned that the psychologist had sexually molested their children, and several asserted claims for NIED. The California Supreme Court upheld the mothers' claim because the psychologist owed a duty to them — and not only to their sons — based on their therapeutic relationship. In Burgess, the "direct" victim was also a mother, this time of an infant who suffered brain damage when the defendant physician's negligence caused the newborn to be deprived of oxygen during delivery. The mother could recover for NIED because the physician owed a duty to her, and not only to her infant child, based on their doctor-patient relationship. In both bystander and direct victim NIED cases, courts reasoned that it was fair to impose a duty on defendants because emotional injury to the plaintiffs was eminently foreseeable. As in the miscarriage cases, judicial analysis of foreseeability relied on the plaintiffs' maternal role.

**MATERNAL ROLES AND GENDER STEREOTYPING**

Boyles v. Kerr tested whether the Texas court would be as solicitous of a woman who was made an object of scorn and ridicule because of her sexual practices as it had been of women injured in relation to maternal roles, e.g., by miscarriage, through trauma in relation to a deceased loved one, or because of physical injury to the plaintiff's child. The Texas court proved not to be as concerned about women's emotional well-being in relation to their sexual dignity. Instead, the Boyles majority declared foreseeability of harm a useless guideline that could lead to limitless liability. Tilley's feminist rewrite, in contrast, embraces the traditional foreseeability principle and permits Kerr's recovery as the foreseeable sufferer of emotional distress that flowed from negligent behavior in the context of an intimate relationship. Recasting the actual Boyles majority as a dissent to her opinion, Tilley makes her most overtly feminist move in unpacking sexual stereotypes underlying the original opinion's selective embrace or rejection of NIED precedents.

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41 770 P.2d 278 (Cal. 1989).
42 831 P.2d 1197 (Cal. 1992).
43 See id. at 1201–03.
44 Boyles, 855 S.W.2d at 569.
Tilley contrasts differing views of womanhood — that between women as wives and mothers on the one hand, and women as agents of their own sexuality on the other. Tilley compares the decisions in *St. Elizabeth* (miscarriage 1987) and *Hill* (miscarriage 1890) with the facts in *Boyles*. Moving beyond Justice Cornyn's simple census of whether NIED plaintiffs were female or male, Tilley observes that the offending behaviors in that successful pair of NIED claims were viewed by the court as "self-evidently capable of causing anguish" because female plaintiffs were seeking redress after their attempts to fulfill traditional womanly roles were thwarted by careless third parties. Tilley observes that Susan Kerr, in contrast, "strayed outside orthodox notions of caregiving womanhood."

Tilley suggests that imposing a duty of care on unmarried sex partners might facilitate greater responsibility in nonmarital relationships, and she concludes that fostering such sexual liberation may be the very outcome that the Texas Supreme Court fears. Taking a jab at the "nine middle-aged men, most of whom had long since left the dating world," who sat on the Texas Supreme Court at the time of the initial *Boyles* decision, Tilley notes that while they are entitled to their personal opinions about teen sexual behavior, they are not entitled to impose those views on all Texans. In this aspect of her rewritten opinion, Tilley draws from feminist insights that the gender composition and lived experiences of judges can make a difference in courts' understanding of and empathy for women's lived experiences. She also makes an eloquent plea for tort law to keep pace with evolving social behavior and societal expectations. Tilley acknowledges that while Kerr and *Boyles* may have been at the cusp of what we now call a hook-up culture and thus did not expect enduring romantic commitments, Susan Kerr did not discard expectations of respect for her privacy, dignity, and humanity.

Ironically, Kerr's attorneys were reluctant to be as blunt as Justice Tilley could be — writing in a feminist utopia — about the sexual revolution. In one of their filings, Kerr's attorneys played to the stereotypes of women's roles that they presumed conformed with old white men's expectations of womanhood: "If this court holds that it is alright to film a woman in the act of lovemaking and then show that act to a howling mob then [plaintiff] fears that the traditional role of women in this society will be set back centuries. How can a woman expect to assume her traditional roles in society as mother, care-giver and primary exponent of morals if she is allowed to be portrayed as a porn-queen." Kerr's legal team purported to seek preservation of a separate spheres

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ideology even as they also sought recompense for a harm more obviously associated with sexual liberation.

INTENT VS. NEGLIGENCE

A significant theme of the Texas Supreme Court majority and several concurring opinions was criticism of Susan Kerr and her lawyers for pursuing a claim of NIED rather than IIED. Justice Gonzales, in his concurring opinion, contemptuously accused Kerr's lawyers of pursuing the negligence claim instead of the IIED claim because all they cared about was the "deep pocket" of the insurance company.\(^46\)

Tilley deftly responds to this debate by noting the perversity of requiring the plaintiff to meet the higher bar associated with doctrinal requirements that the defendant's behavior be both intentional and "outrageous."\(^47\) Another of Tilley's feminist moves draws on dignity conceptions of personhood and the longstanding and pervasive male practice of objectifying women without any thought to the impact of male behavior on women's feelings, autonomy, or basic human dignity. Tilley's focus on how Boyles's conduct undermined Kerr's dignity is a theme that resonates throughout tort law.\(^48\)

Tilley separates Boyles's intent to do the acts of videotaping and sharing the sex tape from any intent attendant to the consequences of the actions for Kerr. Tilley quotes Boyles's own testimony that he did not mean to hurt Kerr, and she then affirms the statement's credibility by reasoning that Boyles could not have had the requisite intent to cause Kerr severe emotional distress because he had no "emotional tie or meaningful relationship" with Kerr, who "seems to have been for him no more than an object of sexual gratification." Thus, Tilley asserts, the negligence claim more accurately captures Boyles's utter disregard for Kerr as a feeling human being, as well as his self-centered desire to amuse himself and his friends.

Finally, Tilley insists on Kerr's entitlement to a robust monetary award for her injury, which requires tapping into the homeowner's insurance policy.

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46 Boyles, 855 S.W.2d at 604.
48 See, e.g., Lisa R. Pruitt, Her Own Good Name: Two Centuries of Talk about Chastity, 63 Md. L. Rev. 401 (2004) (focusing on dignity injuries in the context of sexual slander and false light invasion of privacy, particularly with respect to claims defeated as "opinion" under the rhetorical hyperbole doctrine).
She points out that Kerr legitimately was seeking far more than “heartbalm” or a moral victory of unrecoverable damages. Like any seriously injured plaintiff, Tilley argues, Kerr fully deserved monetary recovery rather than relegation to a feminized notion of “moral virtue” as “the coin of the realm.” Moreover, she points out that Kerr’s future economic prospects were impaired by her diminished college grades flowing from her emotional trauma. The often unappreciated economic consequences to women of harm labeled as simply “emotional” is an important feminist insight.

The majority opinion and Justice Gonzales in his concurrence were concerned about opening the door to too much liability, and they deemed it unseemly that Kerr’s lawyer was focused on the best route to securing an actual monetary recovery for his client. While diminishing the importance of monetary recovery for Kerr, they expressed concern for the adverse economic impact on Texas homeowners from the presumed increased cost of homeowners’ insurance policies should the NIED claim prevail. They viewed the “moral victory” of an unrecoverable NIED verdict as sufficient to vindicate Kerr’s human interests, while protecting the larger economic climate.

Justice Tilley, in contrast, sees the economic and dignitary interests of the plaintiff as inextricably connected. Taking seriously the harm Kerr suffered, she notes that money matters to actually vindicate her. Tilley’s feminist opinion reminds us that Susan Kerr is the victim – not Texas insurance companies. She puts the monetary focus on what Kerr deserves, rather than on external financial implications for corporate interests.

**IMPLICATIONS FOR THE “REVENGE PORN” ERA**

Tilley calls for tort law to recognize changing times, which in Boyles means recognizing new technology and the new opportunities for tortious behavior and the injury it facilitates. As Tilley notes, at the time Boyles and his buddies videotaped the sexual encounter, video cameras had been on the market for only two years. The potential of such new technology to wreak havoc was only beginning to be realized.

Indeed, Boyles v. Kerr was only the tip of the iceberg of technological transformations of the ways that men humble and degrade women in relation to their sexuality. The unauthorized public disclosure of sexual practices has become increasingly common in the digital age. Smartphones and social media now facilitate the proliferation of so-called revenge porn and other nonconsensual distribution of sexually graphic images, including those obtained with the subject’s permission, e.g., images initially shared as “sexts.”
but without authorization for further dissemination. Victims in such cases have sought civil redress through various tort claims, including NIED and IIED, along with defamation and invasion of privacy. Some courts have proved very sympathetic to plaintiffs' claims. The district court in Hawaii, for example, awarded damages based on a "revenge porn" victim's claims of public disclosure of private facts, defamation, and NIED. Texas courts, on the other hand, still lag behind, as illustrated by Patel v. Hussain, where an appellate court in 2016 rejected an NIED claim after a jury awarded the female plaintiff $500,000 when the defendant used the Internet to share sexual videos of her following their breakup.

Despite the #MeToo movement and enhanced societal awareness regarding men's sexual misconduct toward women, a number of obstacles deter victims from recovering on tort claims. Among these are the judicial resistance to recognizing NIED claims exemplified in Boyles and the high standards for proving an IIED claim. Further, the tension between competing values underlying various privacy torts and First Amendment free speech guarantees may also limit a victim's options. Thus, while tort law continues to provide the best chances for recovery in cases involving nonconsensual "revenge porn," cases like Patel remind us that the more things change, the more they stay the same. If Justice Tilley's feminist opinion were available as a legal precedent, it would provide lawyers and judges with many powerful arguments for expanding the tort of NIED to recognize women's right to exercise sexual autonomy without selfish, thoughtless, and cruel men undermining women's dignity and fundamental humanity.

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49 See Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 WASH. FOREST L. REV. 345, 346 (2014); Margaret Talbot, Taking Trolls to Court: The Attorney Fighting Revenge Porn, NEW YORKER (Dec. 5, 2016), http://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn
53 See Hamilton, supra note 50, at 16 (discussing concerns about "not only the high costs of civil litigation, but also the high burden placed on the survivor in these suits and the message it sends to society at large about sexual freedom and expression"); Citron & Franks, supra note 49, at 358 (pointing out that "most victims lack resources to bring civil suits" and some "may be reluctant to sue for fear of unleashing more unwanted publicity").
54 Hamilton, supra note 50, at 15 (noting how victims have had difficulty in showing that "their particular experience was emotionally distressful enough" or proving that "their feelings of embarrassment and humiliation constitute severe emotional harm").
BOYLES v. KERR, 855 S.W.2D 593 (TEX. 1993)

JUSTICE CRISTINA TILLEY ANNOUNCED THE DECISION OF THE COURT ON A MOTION FOR REHEARING

I FACTS

As 17-year-old Dan Boyles, Jr. was preparing to begin his college career at the University of Texas in late May of 1985, he began a sexual relationship with 19-year-old Susan Kerr. The two attended her senior prom together; at the end of the evening, they had sexual intercourse. Every time they met thereafter, the two had sex. In August, Kerr asked Boyles to escort her to a wedding. He declined to go to the event with her but suggested they meet afterwards. Egged on by a friend, Boyles decided to covertly videotape himself having sex with Kerr that evening. The instigator of this plot, Karl Broesche, arranged for Boyles to bring Kerr to the Broesche home for the encounter. Broesche then enlisted Ray Widner and John Paul Tamborello to help him hide a video camera in a bedroom there, and taped some crude preliminary remarks about the scheme and what was about to occur. They left the camera running and secreted themselves so Boyles could execute their plan. Boyles brought Kerr to the prearranged bedroom, and the video camera was running while the two had sex.

Thereafter, on three separate occasions Boyles shared the tape with friends at the Alpha Tau Omega fraternity house at the University of Texas. A total of ten people watched the video. One friend apparently enjoyed watching the tape so much he forgave Boyles’s repayment of a $20 football bet.

The procedural complexity that has produced today’s decision is emblematic of the doctrinal complexity it presents. The events that form the basis of the suit occurred in 1985. The jury completed its work on the case in 1989. The Texas Court of Appeals affirmed the judgment in January of 1991, and overruled two motions to rehear the case Boyles v. Kerr, 855 S.W.2D 245 (Tex. App. 1993). We issued our first opinion in the case in December 1992, overturning the court of appeals and holding that there is no independent right to recover for negligently inflicted emotional distress. That decision included a majority opinion, an opinion dissenting and concurring, and an opinion dissenting and concurring written by Justice Cook, and an opinion dissenting, written by Justice Doggett. After some dissented responses to perceived insensitivity to women and the pervasive problem of sexual abuse in the original opinion, we received a motion for rehearing. We now grant the motion for rehearing, and issue a superseding opinion that affirms the Court of Appeals and the jury’s award of damages to Kerr. Between our original and this superseding opinion, Justices Finch and Specter joined the court, replacing Justices Manz and Cook, respectively. The original majority opinion and concurrences have been recast as dissent, the original dissent has been revised and recast as a concurrence opinion, which have been joined by our new colleagues Justices Finch and Specter.
As Boyles sought and received attention for this exploit, Kerr remained in the dark about the videotape's existence or these viewing parties. Rumors of the tape's existence eventually reached her at the end of the semester. When she confronted Boyles in December of that year, he admitted what he had done and gave her the single existing copy of the tape. Taking possession of the tape did not, however, close down this chapter of her life. Kerr testified that for months thereafter, gossip spread at both the University of Texas and her own school, Southwest Texas State University. She also testified that gossip about her and the tape had spread to friends who attended other colleges. At parties and other events, casual acquaintances sought her out to discuss the video, asking why she agreed to make a sex tape. Ultimately, she testified, she became known socially as a "porno queen." She was humiliated, stigmatized with an unwelcome notoriety, and unable to relate to men in a healthy or appropriate way. Her grades suffered. Ultimately, she sought psychological counseling, and her therapist diagnosed her with post-traumatic stress disorder.

Kerr sued Boyles, Broesche, Widner, and Tamborello. In her initial complaint, she claimed intentional and negligent invasion of privacy as well as negligent infliction of emotional distress. At the close of trial, and before the jury was charged, Kerr dropped the privacy causes of action and asked the court to send the case to the jury solely on the issue of negligent infliction of emotional distress. Despite Boyles's objection to this instruction, the court agreed to Kerr's requested charge. The jury returned a verdict for Kerr in the amount of $500,000 actual damages and another $500,000 in punitive damages. Of the punitive figure, $350,000 was assessed against Boyles and the remainder against the other three men. Broesche settled thereafter, and Widner and Tamborello apparently complied with the court's entry of judgment and did not appeal. Only Boyles has asked reviewing courts—first, the Texas Court of Appeals, and now us—to nullify the conclusion that he negligently inflicted emotional distress on Kerr.

The Texas Court of Appeals affirmed the jury's verdict. Boyles, 806 S.W.2d 255. In our first review of that opinion, we reversed. Kerr has now sought a rehearing, which we hereby grant and conduct. Determining whether to affirm the jury's verdict in this case requires more than a review and construction of Texas precedent. It requires us to think deeply about the purpose of assigning tort liability. It also requires us to unpack the comparative roles of torts based on negligence and intentional acts, and the subtle differences between "injury" and "damages" within tort. Finally, it invites us to consider the role the law can play in reinforcing or disrupting social stereotypes about interpersonal relationships between men and women.
Boyles v. Kerr

II ISSUES PRESENTED

A Recovery for Negligent Infliction of Emotional Distress in Texas

The crucial question of doctrine we must decide is whether Texas recognizes a general cause of action for negligent infliction of emotional distress (NIED). Kerr contends that we do and points to our 1987 decision in *St. Elizabeth Hosp. v. Carrard* as its foundation. 730 S.W.2d 649 (Tex. 1987). Boyles contends that we do not, and says that *St. Elizabeth* created a narrow cause of action limited to its facts, which are not applicable here.

A little history is in order. Traditionally, Texas courts required that both intentional tort plaintiffs and negligence plaintiffs suffer some kind of physical impact or injury as a basis for recovery. Those who can prove a physical injury (along with the other required elements of the tort) are entitled to recover damages that compensate them for the harms that flow from that physical injury. In most cases, the plaintiff’s injury and the actual nature of the harm for which damages are assessed are symbiotic – if the injury is a broken leg, the damages are the costs associated with the loss of the leg’s use and with the necessary repairs to the leg. In some cases, though, the real damages to the plaintiff are only tenuously connected with the physical injury that operates to fulfill the doctrinal requirements. The disconnect between injury and damages tends to be most pronounced in cases where the defendant’s wrongful behavior in the external world has repercussions for the plaintiff’s internal emotional well-being and mental health.

In tacit recognition that recovery is often warranted even when injury and damages are disconnected, we have taken a somewhat flexible approach to what counts as an “injury” for doctrinal purposes. In a garden-variety intentional tort, such as battery, physical contact of some kind is sufficient. These contacts must be “offensive,” but needn’t impose permanent or profound changes to flesh or bone. For example, in *Fisher v. Carousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967), we found liable for battery a hotel whose manager snatched a plate from the hand of an African-American guest at a business lunch, while making racially derogatory comments. Although the man’s physical body was unimpaired by the contact, his dignity was vitiated, and he was permitted to recover emotional distress damages that were parasitic on the negligible physical contact that we counted as an injury. We remarked there that “[d]amages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff’s person and not the actual harm done to the plaintiff’s body.” *Id.* at 630.
In negligence causes of action, where the defendant's behavior typically is not "willful," we have historically required more than a mere physical contact but instead some actual physical harm as proof of injury. Here too, though, we have taken a somewhat flexible approach. For example, in *Hill v. Kimball*, 13 S.W. 59 (Tex. 1890), the defendant landlord assaulted two African-American men in the front yard of his unknowing female tenant, who was pregnant. The defendant's attack drew blood from his victims and involved profane racial epithets. The tenant went into premature labor and suffered a miscarriage. The woman and her husband sued the landlord, and we held that she had a cause of action sounding in negligence. We allowed recovery even though the landlord's behavior was not the direct physical cause of the tenant's injury. We said there was "no doubt" that "operation of the mind" can produce physical injury, so that behavior triggering mental distress could plausibly be deemed the cause of the woman's physical injury. *Id.* at 59. This transitive approach allowed us to locate a physical injury caused by the defendant's negligence in order to satisfy the then existing doctrinal requirement of a physical impact or injury.

*Hill* represents an early understanding by this court about the purpose of assigning tort liability. We observed in *Hill* that "one who had been injured in his person . . . by the wrongful or negligent conduct of another should . . . get a redress of his wrongs." *Id.* at 60. In other words, tort law provides a forum in which a community can identify wrongful behavior on the defendant's part and restore the plaintiff to equal dignity by compelling a redress of the wrong at issue. Too cramped a view of what constitutes "personhood," and consequently what counts as an injury, can prevent tort law from fulfilling its social role. First, it prevents full plaintiff redress. Second, by shielding the defendant from the judgment of his peers, it signals that the underlying behavior is socially condoned. Consequently, one way to understand *Hill* and *Fisher* is that they prioritize the restorative and deterrent tort function over rigidly formalistic notions of physical injury. In both cases, we stretched the notion of "injury" within the doctrinal framework in order to generate just outcomes for blameworthy defendants. When technicalities of doctrine impeded the identification and compensation of wrongs, we massaged those technicalities.

These two lines of doctrine were married in *St. Elizabeth Hospital v. Garrard* to achieve the same goal in a more direct and transparent fashion. There, a woman gave birth to twins—one live, and one stillborn. Her husband and the attending physician agreed an autopsy was warranted, but the stillborn infant's body was instead "delivered to a mortuary and disposed of in an unmarked, common grave" without either parent's consent or knowledge. 530 S.W.2d at 650. The parents sued the hospital and the pathologist, alleging
negligence and claiming as their sole injury mental suffering. Unlike Hill and Fisher, the plaintiffs did not attempt to claim or prove any physical manifestations of injury at all. Nevertheless, we recognized their claim as legitimate under Texas law.

In waiving the requirement that plaintiffs prove physical injury in order to recover for negligence that caused profound mental suffering, we held that "freedom from severe emotional distress is an interest which the law should serve to protect." Id. at 653. We described our decision as recognizing a general common law action for negligent infliction of mental anguish that did not carry a physical injury requirement. Id.

Our dissenting colleagues now seem to me the high level of generality in that holding because they think this specific jury erred in applying its principles to authorize compensation for Susan Kerr. The dissenters suggest that St. Elizabeth intended a claim for negligent infliction of emotional distress to be available only within the context of mishandling of corpses. But this reading of St. Elizabeth is not supported by the text. We said in general terms that physical injury was "no longer required [in Texas] to recover for negligent infliction of emotional distress" where such distress was foreseeable. We never stated nor implied that mental anguish was foreseeable only in cases involving corpses. In fact, we purposefully left undetermined the precise fact patterns in which the probability of severe emotional distress was foreseeable. Instead, we stated that juries in individual cases were more competent than we were to "determine whether and to what extent the defendant caused compensable mental anguish." Id. at 654. The dissent now seeks to nullify that allocation of latitude to the jury and to rewrite St. Elizabeth so that it is limited to its facts.

This zigging and zagging is consistent with the halting progression of NIED over the past several decades. Tort law has historically privileged property interests and physical integrity over emotional well-being and relational ties. See, e.g., Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort, 35 J. LEG. F.D. 3, 37 (1988). In this respect, tort doctrine has replicated American culture, which historically assigned men and women to two distinct “spheres.” The market sphere, occupied by men, “structure[d]... productive life[,]” while the family sphere, occupied by women, “structure[d]... affective life[,]” Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1499 (1983). The family sphere was seen as a “safe repository for the virtues and emotions,” and within it, women were expected to be “nurturant, giving, submissive, sensual, mother, housekeeper... all things that man wants her to be.” Id. at 1499. Bender, supra, at 38. In fact, women who did not fit this mold were not considered “real or proper wom [en].” Bender, supra, at 38.
While this gendered understanding of the world prevailed, counting physical injuries that impair “productive” capacity as compensable, and emotional injuries that devastate “affective” life as uncompensable, matched doctrine with culture. Over time, both doctrine and culture have evolved. Our society has come to realize that emotional harm is quite real and can seriously impair human health and wholeness. Emotional well-being has similarly assumed an increasingly legitimate place within tort doctrine over time. Pain and suffering “parasitic” on bodily injury have long been recoverable damages. Bodily harm that arose absent an impact but following the infliction of mental anguish began to count as a legitimate tort injury early in the twentieth century. See Martha Chamallas & Linda K. Kerber, Women, Mothers, and the Law of Fright: A History, 88 MICH. L. REV. 814, 819–20 (1990). Eventually, those emotionally frightened by their own physical jeopardy at the hands of a careless defendant were said to have been injured. And, in some cases, those forced to watch their loved ones suffer were permitted to recover for their shock. Id. at 821. Notably, the majority of early “fright” claimants were women, often complaining of rough behavior or threats to unborn or living children. Leon Green, “Fright” Cases, 27 U. ILL. L. REV. 873 (1933), cited in Chamallas, 88 MICH. L. REV. at 842–44.

This path represents the law’s increasing sensitivity to the lived experience of women, by expanding the notion of injury to include emotional and relational harms. But the path has too often privileged only a narrow class of female relationships and emotional interests.

For example, Garrard claimed in St. Elizabeth that she was injured by the botched burial of her stillborn infant, an injury to her role as mother and nurturer. To evoke the words of Professor Bender, the defendant’s cavalier treatment of her deceased baby kept her from being the “things that man wants her to be.” Thus, it is not surprising that the judges on this court, all of whom were men at that time, recognized and compensated her injury. In contrast, Susan Kerr claims injury from the taping and broadcast of her sexual relationships. Her injury was an obstacle to safe and dignified nonmarital sex. The defendants’ actions and her subsequent humiliation kept her from being something that society traditionally did not think women should be (and the dissenting men on this court apparently still do not think women have the right to be), and her pain was not classified as a compensable injury in our original opinion. St. Elizabeth did not condition NIED access on expectations that female plaintiffs had behaved “properly” in the course of sustaining their injuries. It conditioned liability solely on a jury finding that the defendant’s behavior would foreseeably cause the plaintiff emotional distress. Susan Kerr’s jury thought she satisfied that condition.
Having established this cause of action, and having left the question of foreseeable distress to the jury, this court has no just reason to rewrite St. Elizabeth so that it offers succor solely to wives, mothers, and "good girls."

B Boyles's NIED Liability

1 Negligence or Intent?

Boyles argued on appeal that even if an NIED cause of action exists in the state, it is not the proper repository for Kerr's claims. Instead, he suggested that Kerr's suit was properly one for intentional infliction of emotional distress (IIED). Boyles argued that "the case was tried start to finish as an intentional tort." Boyles, 855 S.W.2d at 601. Our dissenting colleague Justice Gonzales seems to agree, observing that "the young men who videotaped Ms. Kerr's sexual encounter intentionally positioned the camera to capture the event on film. They intentionally showed the videotape to their friends. There was nothing accidental or careless about their outrageous conduct." Id. at 602.

Of course, it benefits Boyles to frame this cause of action as one that sets higher bars on every element. Intentional infliction of emotional distress - a tort not explicitly recognized by this state until the companion case of Twyman v. Twyman was issued concurrent with our original opinion in this case - demands substantially more of a plaintiff than does NIED. 855 S.W.2d 619 (Tex. 1993). An IIED plaintiff must show that the defendant acted not just unreasonably, but "outrageously" and beyond all bounds of decency. She must show that the defendant intended or was substantially certain that he would cause the plaintiff severe emotional distress. She must show that the resulting distress was quite severe, and that no reasonable person could have avoided extreme suffering. Id. at 621-22. Our dissenting colleagues say that instead of holding Boyles to the jury's finding that he carelessly and thoughtlessly exploited Kerr, we should instead send her back to a second jury to prove her case under this more demanding framework.

Undoubtedly, the intentional infliction tort - a fairly new entry on the intentional tort menu - plays an important role in holding defendants liable for some instances of egregious behavior that transcend negligence. But the line between intent and negligence is not as crisp as it might initially seem. And it is not as self-evident as the dissenting justices suggest that Boyles's behavior here belongs on the more demanding side of that line for purposes of assigning liability. Kerr might be able to persuade a jury that Boyles had a conscious design to hurt her. But we suspect that is not exactly what happened here. Boyles testified that he intended to have sex with Kerr, intended for his
friends to videotape it, and intended to share that tape with his circle of friends in Houston. But he also testified that "he . . . had *not* meant to hurt her." 855 S.W.2d at 616 (Doggett, J., dissenting, italics added). It does not strain credibility to take him at his word. It is believable that he did not mean to hurt Susan Kerr because the evidence suggests he did not see her as a full human being with dignity or emotions that could be hurt. She was not a person with whom he had an emotional tie or meaningful relationship. Rather, she seems to have been for him no more than an object of sexual gratification.

According to trial testimony, he did not have a single encounter with her that did not end in intercourse. *Boyles*, 806 S.W.2d at 257. In fact, when she sought to spend nonsexual, social time with him at a wedding, time during which they would presumably talk, dance, and share a meal, he turned down her invitation. *Id.* Instead, he arranged to retrieve her at the end of that emotionally meaningful portion of the night and take her to Broesche's house for purely sexual purposes. *Id.* He agreed to let his friends tape the encounter. He showed the tape to his friends in what appears to have been a celebration of his sexual conquest and, in one instance, a basis for bartering away a gambling debt. None of this suggests that he had any understanding of Kerr as a thinking, feeling person who would be anguished by this course of behavior.

Based on this evidence, a finding that Boyles intentionally inflicted anguish on Kerr seems misplaced. Juries tend to find defendants liable for IIED when they act out of some design or malice personalized to their victim. See, e.g., *Prosner, The Law of Torts* 56 (4th ed. 1971) ("The rule . . . is that there is liability for conduct exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause . . . mental distress") (italics added).

Boyles seems not to have seen Kerr as sufficiently three-dimensional to merit any kind of calculated malice. Rather, he seems to have seen her as a fungible object whose role in his life was to provide physical gratification and - on the night in question - derisive amusement. In other words, his behavior seems to reflect a "thoughtless" failure to consider her rather than a "thoughtful" design to diminish her. Consequently, categorizing Boyles's behavior as a possible instance of negligence rather than as an intentional tort actually seems to capture the chain of events in a doctrinally principled fashion.

**2 Duty**

We explained in *St. Elizabeth* that since *Hill*, Texas has recognized a negligent infliction of mental anguish tort "to be administered using traditional tort
Boyle's Kerr concepts. 730 S.W.2d at 652. Accordingly, all that remains is to ask whether Kerr has satisfied those traditional concepts.

The threshold inquiry in a negligence case is duty. The plaintiff must establish both the existence and the violation of a duty owed to the plaintiff by the defendant to establish liability in tort. Moreover, the existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question. We have most recently been willing to "make changes in our understanding of the duty owed in a particular fact setting] as the need [has arisen] in a changing society." El Chico Corp. v. Poole, 732 S.W.2d 306, 310-11 (Tex. 1987). This case is one where the scope of duty is directly tied to social changes. The dissent argues that a consensual nonmarital sexual relationship is not the sort of "special" relationship that should justify a duty to avoid carelessly inflicting foreseeable emotional distress on one's partner. This "no duty" position turns a blind eye to changes in social understandings about nonmarital sex. Our finding that a duty exists acknowledges a growing acceptance that such relationships are common, and that relational duties are owed within them.

Boyles argued below that as a matter of law, he owed no duty to Kerr. Boyle's 806 S.W.2d at 259. Our dissenting colleagues, in a rather perfunctory fashion, agree. Notably, they do so after pointing out the many circumstances in which defendants do owe duties to not to behave in ways that can foreseeably cause distress. Stuart v. Western Union Telephone Co., 18 S.W. 351, 352 (Tex. 1883). tells us that telegraph companies are obliged to timely deliver messages regarding the imminent death of a family member because missing the opportunity to say goodbye and comfort other mourners foreseeably inflicts anguish. St. Elizabeth tells us that hospitals are obliged to exercise care in interring corpses because depriving mourners of burial rituals inflicts anguish. 730 S.W.2d at 658. And Hill tells us that landlords are obliged to refrain from bloody racial assaults in the front yards of pregnant women because watching such violence inflicts anguish. 15 S.W. at 59.

This court concluded that the contested behaviors in Stuart, St. Elizabeth, and Hill were self-evidently capable of causing anguish. Why those wrongful behaviors were sufficient to impose a tort duty, but coughing tapping and then ridiculing Susan Kerr was not, is never analyzed by the dissenters. One possible explanation, we think, is that the cases cited approvingly by the dissenters feature female plaintiffs seeking tort redress after their attempts to fulfill traditional womanly roles were thwarted by careless third parties. In contrast, Kerr sought this court's protection after behavior that stayed outside orthodox notions of virtuous or caregiving womanhood.
Justice Spears, concurring and dissenting in *St. Elizabeth*, remarked that permitting recovery for pure mental injury was only warranted when "anguish or distress is so probable that a [physical] manifestation requirement is unnecessary." 730 S.W.2d at 655. Identifying behavior that is highly probable to cause anguish is really an exercise in basic human empathy and the ability to imagine the inner lives of people who are sometimes unlike oneself. And it seems that the dissenters have limited imagination when it comes to the emotional lives of female plaintiffs outside the confines of motherhood. The existence of a duty of care has been assumed where the negligence at issue harmed female plaintiffs carrying out their socially approved roles as nurturers and caretakers. That the pregnant wife in *Hill* was likely to miscarry because the sight of racially motivated male brutality was so jarring to her quiet domestication seemed unremarkable to this court in 1890. ("[T]he defendant knew 'that the wife was 'well advanced in pregnancy' and ... was also aware that any undue excitement to a lady in that condition was likely to produce a serious injury to her health." 15 S.W. at 60.) That a mother would be distraught when excluded from burial and mourning rituals for her infant was taken for granted by this court as recently as 1987. See *St. Elizabeth*, 730 S.W.2d at 650 noting that Garrard's claim for anguish was based on being "unable to do traditional memorializations such as placing flowers on a grave"). In these cases, the court was able to empathize with the feelings of plaintiffs who were acting out traditional versions of family-oriented womanhood celebrated and shared in the popular culture.²

Our dissenting colleagues cannot make the same leap of empathetic imagination for Susan Kerr. Much like Boyles and his codefendants in this case, they ignore that she has an inner life capable of sustaining harm. Instead, they fixate on how her external behavior deviated from idealized notions of appropriate female sexuality. They note that although she was not dating Boyles "steadily," she nevertheless had sex with him repeatedly. Boyles, 855 S.W.2d at 594. This detail seems to separate her from the wives and mothers in previous NED cases whose emotional lives took place solely within the confines of the family unit. The court could imagine the anguish that would follow when *Hill* and Garrard were stymied from mothering. But they cannot

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² *Shriver* the third in this trio involved a male plaintiff whose effort to keep abreast of his brother's declining health was foiled by a careless telegraph operator who failed to deliver an update on the dying man's condition. 15 S.W.2d at 535-36. The court observed that the delay muted him by preventing him from a final goodbye, and by keeping him from comforting "the bereaved mother." Id. at 535. Thus, all three cases finding a duty to refrain from negligent behavior causing anguish turned, in whole or in part, on an interest in shielding a woman from grief caused by the loss of a nurturing relationship.
imagine the anguish that would follow when Susan Kerr discovered that a tape of her sexual encounter was being shown at fraternity gatherings.

Our dissenting colleagues raise—and immediately reject—a second route to locating a duty owed from Boyles to Kerr. They acknowledge that select categorical relationships that involve trust and the exchange of intimate information or action can be categorized as sufficiently "special" so as to generate interpersonal tort duties. The mortician–mourner relationship and the telegraph company–recipient relationship are highlighted as "special." Why consensual adult sexual relationships are outside this category is not explained. It appears that "special" duties are imposed on those who steward personal messages and beloved corpses, presumably because those relationships require trust and dependence. The imposition of a legal duty on message senders and morticians pacifies plaintiffs and allows communication and safe burial to thrive. Imposing a similar duty on unmarried sex partners might facilitate and recognize the social validity and importance of nonmarital relationships, and perhaps the dissenters fear this outcome.

For decades, the law has protected women against loutish male behavior primarily through torts that recognize duties of care running to women via their positions of wife, mother, fiancée, or daughter. In other words, female standing was essentially derived through the woman's relationship with a man. For example, the tort of seduction was originally predicated on the belief that men who reduced a daughter's virginal reputation and thus her "marriageability" had wronged plaintiff fathers, but not the women themselves. See, e.g., Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 92 COLUM. L. REV. 374, 382–84 (1992). Similarly, the torts of alienation of affection and breach of promise were predicated on the belief that there was a social duty owed to avoid harming the marital relationship. See, e.g., Nathan Feinsinger, Legislative Attack on "Heart Balm," 33 MICH. L. REV. 979, 980–96 (1935). Susan Kerr has asked Texas to recognize that she has a right to be treated with a reasonable degree of consideration for her humanity and emotional well-being in sexual relationships outside of marriage. The dissent's rejection of that request suggests that if she wants to be treated well, she should not be having sexual relationships outside of marriage.

There is yet another reason the dissenters' "no duty" argument misses the mark. They conceptualize the duty at issue exclusively in terms of what Boyles owed Kerr as a sexual partner. They neglect to consider the duties that follow from the use of a video camera. Duty has long been identified as a platform for consideration of social policy concerns. See, e.g., MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916). In fact, the use of "duty" as a threshold element
has allowed courts to adapt the role of tort law to address the growing recognition of risks presented by new technologies. See id. Deciding that those who use these technologies must take into account the impact they might have on others is a powerful mechanism for setting community expectations about the role of such innovations in daily life.

So, for example, when early courts assigned a duty of care to those who manufactured automobiles on an assembly line and marketed them to remote consumers through independent middlemen, they created a profoundly different car culture than we would have had if no such duty had been assigned. See id. And when this court decided that telegraph operators owed a duty to those sending and receiving messages, they set the stage for responsible use of this new communicative technology. See Stuart, 18 S.W. at 351. Video cameras like the one Boyles used went on the consumer market just two years before Kerr's ordeal. Our court owes it to the community to grapple in a real way with the question of the duty owed by video camera owners to their would-be subjects, especially those who are unwittingly filmed. The dissent says that Boyles owed Kerr no duty to refrain from capturing and broadcasting her intimate behavior without her consent. This conclusion risks creating a "gotcha" culture in which people may be filmed, and those films distributed, at the sole discretion of the camera owner. That rule would reinforce a problematic expectation that women exist to be seen and evaluated by men and are not entitled to control how their own images are captured and used.

3 Breach

We confirm the conclusion of the court of appeals that Boyles's conduct was sufficiently likely to distress Kerr that he owed her a duty. We must now review whether jurors correctly concluded that he failed to exercise reasonable care for her emotional well-being.

Tort law intends "reasonableness" to be an objective, uniform standard. But that aspiration can be a bit problematic, especially in a case like this. The metric for "reasonableness" originated as shorthand for the judgment of a "reasonable man." Although most jurisdictions today use a "reasonable person" test, the fact remains that the original notion of reasonableness was produced by male judges, male lawyers, and male jurors. Bender, supra, at 22. Some would say that the understanding of what is "reasonable" continues to reflect a worldview that may not be shared across gender. For example, in recent years, it has become fashionable to understand "reasonableness" in terms of utility, that is, to ask whether the level of care necessary to avoid invading another's right is cost-justified by the value of that right. Torts scholar
Leslie Bender has suggested that this way of understanding “reasonableness” draws primarily from economics, and purely abstract reasoning devoid of consideration for the complex reality of people’s lives, ethical modes historically understood as male. Id. at 31–32. Another approach, she has suggested, is to understand “reasonableness” in terms of “concern and responsibility for the well-being of others.” Id. at 31. This approach draws primarily from an ethic of empathy and care, ethical modes historically understood as female. It is a small leap to see that a concern-based notion of reasonableness would be friendlier to Kerr in this situation (and to plaintiffs generally).

Even without thoroughly reworking existing notions of reasonableness, we can affirm the jury’s finding that Boyles breached the standard of care here. Applying the garden-variety reasonable person test — would a person of reasonable prudence in a similar setting have foreseen the possibility of injury — yields a resounding “yes.” Remember that the question here is not whether Boyles should have foreseen that having sex with Kerr without the benefit of true affection would foreseeably cause her emotional distress. That is not at all what she alleges as the cause of her injury. Kerr consented to the sexual encounter at issue aware that Boyles was not interested in a full-fledged romance. This is a relatively common occurrence in the life of modern teenagers. Boyles would not have, and would not have been expected to, foresee that this alone would cause her anguish.

However, Kerr did not consent to be filmed during their encounter, or to having the tape shared with strangers. The term “kiss and tell,” and the social disapproval of such a practice, has been with us for centuries. See, e.g., WILLIAM CONGREVE, LOVE FOR LOVE (1695) (Congreve’s play was the first print use of the phrase, according to William Safire, ON LANGUAGE: Kissing and Telling about Kiss and Tell, N.Y. TIMES, June 5, 1988)). Whether engaged in out of love, or for less enduring reasons, sex may be the most private behavior known to human beings. It is precisely because most people would not wish to have these activities watched by strangers that the showings of the tape seem to have provided Boyles and his friends such an illicit thrill. To be filmed unawares during such an encounter and to learn that the tape made the rounds among strangers for purposes of amusement would foreseeably cause emotional injury to any person who does not willingly exhibit him or herself in such a circumstance. That is to say, it would foreseeably cause emotional injury to the vast majority of Texans.

It is possible that our dissenting colleagues have conflated Kerr’s consent to a particular sexual encounter with a complete forfeiture of her sexual dignity and autonomy. In tort language, they seem to feel that by assuming the risk that Boyles would exploit her privately for an evening of sex, she also assumed
the risk he would exploit her publicly for his amusement thereafter. This logic reminds us of the old saw in rape prosecutions that evidence of consensual sexual encounters with past partners operated as evidence of consent with the defendant. See, e.g., Vivien Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1, 15-16 (1977). Sexual agency does not work that way. Susan Kerr had the autonomy to choose what she would—and what she would not—do with Dan Boyles. She did not choose to be taped nor to have the tape distributed, and that the theft of her control over these choices would humiliate and distress her is eminently foreseeable.

This, at any rate, was the conclusion of the twelve Texans on the jury after a trial. Tort law gives the greatest deference to the jury on questions of reasonableness. In fact, jury instructions often equate "due care" with prevailing community views of what is reasonable. One study has indicated that courts often urge jurors to define care according to "everyday community norms." RANDOLPH E. BERGSTRÖM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910, 134-36 (1992). Juries are uniquely suited to inject their daily experiences into deliberations about the relational and social norms that are at the heart of the tort enterprise. "Judges may not know a great deal about driving a farm wagon, boarding a streetcar, operating a rip saw, or the other activities ... common during our period," according to eminent jurist Richard Posner. Richard A. Posner, A Theory of Negligence, 1 J. LEG. STUD. 29, 51 (1972). Juries have a "better feel for the facts in many ... situations." Id. Indeed, jury verdicts often pull against judicial intuition in a way that raises the profession's consciousness, as in the many cases where juries appeared to render verdicts that nullified harsh contributory negligence and fellow servant doctrines. See, e.g., Stephan Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 HASTINGS L.J. 579, 610 (1993).

The people of Texas, represented by this jury, decided that a woman may consent to sex without consenting to being taped in the act. They decided that videotaping a sexual partner and repeatedly broadcasting the tape was an unreasonable course of action.

One reason we should defer to the jury on this issue has to do with its diversity and our homogeneity. As recently as 1954, this state (along with many others) barred women from jury service. AMERICAN CIVIL LIBERTIES UNION, THE CASE FOR EQUALITY IN STATE JURY SERVICE app. 3 tbl. 1 (1966). It was not until 1968 that all states permitted women to serve on juries. Rhonda Copelon et al., CONSTITUTIONAL PERSPECTIVES ON SEX DISCRIMINATION IN JURY SELECTION, WOMEN'S RTS. L. REP., June 1975, at 5. Even then, many extended automatic exemptions for women who sought
them, until 1978 when the Supreme Court struck them down. Duren v. Missouri, 439 U.S. 357 (1979). Years ago, in Ballard v. United States, 329 U.S. 187, 193-94 (1946), the court told us that diversity of gender viewpoint is a unique strength of the jury: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both." This is especially true in tort, where jurors are asked to evaluate the meaning of contested behavior. Where the contested behavior arises specifically out of relationships between members of the opposite sex, a norm derived from a diverse institution is likely to be superior to a norm that arises from the male experience alone.

The Texas Supreme Court that originally overturned the verdict against Dan Boyles in December 1992 comprised nine middle-aged men, most of whom had long since left the dating world. That court was not legally compelled to overturn St. Elizabeth and find that the jury should not have even been allowed to consider Kerr’s claim for NIED. It chose to disturb the jury’s verdict because it had a different opinion about what men and women should expect from each other as sexual partners. Our dissenting colleagues are entitled to their personal opinions about how young people should court, but they are not entitled to impose those preferences on Texans at large.

4 Injury

We suspect that our dissenting colleagues are also skeptical on the element of injury. As a matter of law, they may wonder whether emotional injury is sufficiently weighty to anchor this cause of action. Kerr claims to have been humiliated and traumatized, and while the dissenters tell us that is regrettable, they also intimate it is beneath the concern of the law. In their original opinion, the majority wrote that “[t]he tort law cannot and should not attempt to provide redress for every instance of rude, insensitive, or distasteful behavior, even though it may result in hurt feelings, embarrassment, or even humiliation.” Boyles, 855 S.W.2d at 602.

Restricting legal injuries to those that could be physically proven seemed an efficient mechanism for screening out trumped up claims of injury when it was originally suggested by Oliver Wendell Holmes in 192. Humans v. Boston Elevated Rwy, 62 N.E. 737 (Mass. 1902). But that doctrine was adopted at a time when physical damage and psychic damage were thought to be distinct, and when mental harm was poorly understood and presumed to be

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1 In the interim, we have welcomed Justice Rose Spector to this court
easy to fake. Science has since adopted a far more nuanced understanding of the brain-body connection and of the diagnosable veracity and seriousness of mental harm. See, e.g., Chamallas and Kerber, supra, at 834. Screening out illegitimate claims of injury can no longer be done by drawing a fallacious line between body and mind.

Further, defining legal "injury" to exclude emotional harm may be a holdover from a nineteenth-century legal system populated entirely by men. Cultural expectations that men act while women feel may have informed a legal conclusion that physical injuries are real and important, while emotional injuries are not. See, e.g., Frances Olsen, The Sex of Law, in The Politics of Law: A Progressive Critique 453–65 (David Kairys, ed. 1990). Tort law originally defined injury to include the devaluation of property or body, both of which resources were leveraged by men as participants in the economic marketplace. It placed diminution of emotional well-being in a secondary position because emotional resources were not obvious drivers of a market system but were thought to belong to the female "sphere." See Lucinda M. Finley, Breaking the Silence: Including Women's Issues in a Torts Course, 1 YALE J. L. & FEM. 41 (1989).

NIED is tort's attempt to give a fuller account of experiences that can injure. Notably, when we recognized the tort in St. Elizabeth, we did not supply a list of fact patterns in which we would accept claims of emotional injury without physical harm. Any such list would likely be both overinclusive and underinclusive. The gravity and genuineness of harm is highly fact-dependent. That is why we did not limit St. Elizabeth to its facts, and why we specifically delegated to the jury the task of identifying the kinds of behavior most likely to cause compensable mental anguish. Having opened the door as a matter of law to liability for negligently inflicting distress, we cannot now yank it shut because some of us may disagree with the jury's conclusion that the distress here was real.

Aside from appearing skeptical that humiliation counts as an emotional injury compensable in tort, the dissenters also seem skeptical that Kerr actually was humiliated. Boyle was her first sexual partner and he exploited that role to

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1 Again, it is no mistake that the plaintiffs in the leading NIED cases are women. Women have historically not been expected to use their bodies to generate wealth or take up space in the public world, but men have been expected to use their bodies as vessels for the creation of life and therefore to use emotional resources to nurture that life. Recognizing injuries to emotional life that grew out of these socially approved familial relations was an early step toward treating women as equally deserving of the law's protection in the event they had been wronged. See, e.g., Chamallas & Kerber, Fright, supra at 816.
Boyles v. Kerr

boost his own social standing at the expense of hers. While the dissenters dutifully report her allegation that the trauma caused by the scandal "made it difficult for her to relate to men," they disparage it by gratuitously remarking that she had multiple sexual partners after the scandal. Boyle, 855 S.W.2d at 394. And they connect the two observations with the conjunction "although," which suggests that the two statements are in tension with each other. Id. They seem to disbelieve that she could both struggle to form healthy intimate relationships and engage in intercourse with men. That she continued to seek sexual partners after this trauma is construed by the dissenters as evidence she was not truly damaged. But, of course, it could also demonstrate the opposite.

C Remedies

Finally, our dissenting colleague Justice Gonzales complains that Kerr framed her complaint as one for negligent infliction of emotional distress rather than intentional infliction of emotional distress solely to access insurance coverage to pay the verdict. This is so, we are told, because homeowners’ insurance policies like the one Boyle’s parents carry cover negligent, but not intentional, torts. He chides Kerr for selecting the cause of action that presents the best chance of a full dollar recovery. Id. at 604. He seems to think she should be grateful for a possible moral victory on remand. Id.

In suggesting that Susan Kerr should content herself with a possible NIED verdict that is unlikely to lead to the actual ability to recover any significant money, the dissenters imply that the best remedy for her is a public declaration that she was not a willing "porno queen." The dissenters seem to think that moral virtue is still the coin of the realm for women, and this declaration might "rehabilitate" Kerr socially. But Kerr made clear by opting for the "deep pocket" NIED cause of action that she didn’t want indirect access to money via a merely declarative judgment. She wanted actual money, and the actual deterrent impact of a real recovery. Id.

Kerr testified that her college performance suffered because of this ordeal. It takes little extrapolation to surmise that this would diminish her career prospects as well. She is a less viable participant in the job market than she would have been without the trauma of this event. She sees herself as

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Boyle’s legal team acted no better than their client. The day of the verdict, attorneys and staff at the firm representing him held a champagne party to celebrate the comparatively low award to Kerr. The centerpiece of the party was a private screening of the videotape, compared by a female employee of the firm to a "stag party." Contrasted with evidence of this event, they preemptively paid Kerr $600.00. — David Mangrill, For Fees From the Price of Circulating a Videotape Proves Quite Steep, N Y TImes, June 1, 1992, at 10.
belonging to the sphere historically reserved for men – the public, economic sphere. She wants to be compensated accordingly.

By diverting her to a tort not covered by Boyles’s insurance, the dissenters would restrict her to recovering her “good name,” rather than recovering the financial wherewithal she has articulated as her true goal. They would deny her the cause of action she has selected. Instead, they promise her an alternate right, although it is one effectively without a remedy. This is a charlatan promise indeed.6

III CONCLUSION

We hereby grant the motion for rehearing, withdraw our opinion of December 2, 1992, reversing the jury’s verdict in Kerr’s favor and replace it with this opinion affirming that verdict.

6 F. Scott Fitzgerald, This Side of Paradise 236 (1920).