

2012

Intent and Consent in the Tort of Battery: Confusion and Controversy

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Intent and Consent in the Tort of Battery: Confusion and Controversy

Keywords

Torts, Negligence, Class actions (Civil procedure)

ARTICLES

INTENT AND CONSENT IN THE TORT OF BATTERY: CONFUSION AND CONTROVERSY

NANCY J. MOORE*

Much of contemporary torts scholarship has been devoted to determining who should bear the costs of unintended injury, that is, whether and when defendants should be strictly liable for the harm caused by their activities, as opposed to limiting plaintiffs to recovery when they can prove that the defendant's conduct was negligent. Comparatively little scholarship has explored the appropriate distinction between the intentional torts and the non-intentional torts, such as negligence or strict liability. Recently, torts scholars have begun to explore some interesting and unresolved questions surrounding the intentional torts, particularly battery, stemming in part from the completion of various stages of the Restatement (Third) of Torts and the current position of the ALI that it will not attempt a restatement of the non-economic intentional torts that were addressed in great detail in the Restatement (Second) on the grounds that intentional tort doctrine is clear and that the Restatement (Second) provisions have been widely adopted.

This Article joins the work of several torts scholars who have recently questioned the clarity of intentional tort law doctrine. These scholars have focused on the ambiguity of the Restatement (Second) provisions with respect to the intent to cause a harmful or offensive bodily contact, that is, whether these provisions require both intent to cause bodily contact and intent to cause harm or offense (dual intent) or whether it is sufficient that the defendant intends a bodily contact that turns out to be either harmful or offensive (single intent). Some of these scholars have also suggested that the essence of battery is not the intent to cause a harmful or offensive contact, but rather the intent to cause an unpermitted contact.

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This Article demonstrates that the current confusion and controversy over battery law doctrine is far more extensive than even these recent torts scholars have demonstrated. It extends beyond the element of intent and includes uncertainty concerning the role of the plaintiff's lack of actual or apparent consent—that is, whether consent is an affirmative defense or whether lack of consent is an element of the plaintiff's prima facie case—and the relationship between intent and lack of consent. Moreover, this confusion and controversy is reflected not only in modern battery court opinions, but also in the cursory and contradictory treatment given to battery law in most torts casebooks and treatises. Finally, despite the ALI's assumption that the Restatement (Second) provisions have been widely adopted, there are many jurisdictions where courts are formulating battery doctrine using terminology that departs significantly from the Restatement (Second) provisions.

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INTRODUCTION

Much of contemporary torts law scholarship has been devoted to determining who should bear the costs of unintended injury, that is, whether and when defendants should be strictly liable for the harm caused by their activities, as opposed to limiting plaintiffs to recovery when they can prove that the defendant's conduct was negligent.¹ Comparatively little scholarship has explored the appropriate distinction between the intentional torts, such as battery, assault, and false imprisonment, and the non-intentional torts, such as the negligent infliction of physical or emotional harm and strict liability for defective products and abnormally dangerous activities. Recently, however, torts scholars have begun to explore some interesting and unresolved questions surrounding the intentional torts, particularly battery. These inquiries stem, at least in part, from the completion of various stages of the Restatement (Third) of Torts² (Third Restatement) and the current position of the American Law Institute (ALI) that it will not attempt a new Restatement of the non-economic intentional torts.³ The ALI's position rests on the ground that these torts were addressed in great detail in the Restatement (Second) of

1. See, e.g., Symposium, *Calabresi's The Costs of Accidents: A Generation of Impact on Law and Scholarship*, 64 MD. L. REV. 1 (2005) (devoting an entire law review issue to analyzing the impact of Professor Guido Calabresi's application of economic theory to the law of accidents).

2. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010). For a brief discussion of the completed or nearly completed stages of the Third Restatement, see AM. LAW INST., A CONCISE RESTATEMENT OF TORTS, at ix-x (Ellen M. Bublick ed., 2d ed. 2010). In addition, the ALI is currently working on a phase of the project concerning economic torts. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM (Preliminary Draft No. 1, 2011).

3. Although the Third Restatement defines "intent," it does not address what consequences need to have been intended for any specific intentional tort, referring to the Second Restatement for those details. See Joseph H. King, *The Torts Restatement's Inchoate Definition of Intent for Battery, and Reflections on the Province of Restatements*, 33 PEPP. L. REV. 623, 624 (2011). At one time, it appeared possible that the ALI might include an additional project on the intentional personal torts, see *id.* at 625 n.8; however, it is now clear that the project will be completed without any attempt to restate the substantive requirements of the non-economic intentional torts. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM xi-xii (2010) (describing contents of completed first volume and projected second and final volume).

Torts⁴ (Second Restatement) and that the Second Restatement “remains largely authoritative in explaining the details of the specific [intentional] torts . . . and in specifying the elements and limits of the various affirmative defenses that might be available.”⁵ Several torts scholars have criticized or questioned this decision, noting the extent to which intentional tort doctrine is far less clear than the ALI apparently believes it is,⁶ as well as the potential benefits of extending the Third Restatement’s search for broader principles, as opposed to detailed rules, to intentional tort law doctrine.⁷

In particular, several torts scholars have recently debated the question of whether battery does (and should) require both intent to cause a bodily contact and intent to cause either harm or offense (“dual intent”) or whether it is sufficient that the defendant intends a bodily contact that turns out to be either harmful or offensive (“single intent”).⁸ In addition, some have argued that the essence of battery is not the intent to cause a *harmful or offensive* contact, but rather the intent to cause an *unpermitted* contact,⁹ thereby raising questions concerning the precise nature of the relationship between the defendant’s intent and the plaintiff’s lack of consent. Finally, torts scholars have debated the question of whether a physician should be held liable in battery, as opposed to negligence, for medical treatment that the physician honestly, but mistakenly, believes has been authorized by the patient.¹⁰ These currently unresolved issues present fundamental questions concerning the

4. RESTATEMENT (SECOND) OF TORTS (1965).

5. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 5 cmt. a (2010); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 5 cmt. c (Proposed Final Draft No. 1, 2005) (“[T]here is a scarcity of judicial opinions that have seriously called into question any of those doctrines.”).

6. *See, e.g.,* King, *supra* note 3, at 624 (expressing disappointment that the ALI did not address what level of intent is necessary to expose an actor to liability for intentional torts, such as battery); Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1062–63 (2006) (suggesting that “the new Restatement might intelligently respond” to the complexity of intentional torts that remains unaddressed).

7. *See* Ellen M. Bublick, *A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts*, 44 WAKE FOREST L. REV. 1335, 1335–36 (2009) (proposing that a new Restatement might present an opportunity to craft a more “principled and useful . . . structure”).

8. *See* King, *supra* note 3, at 629–38; Craig M. Lawson, *The Puzzle of Intended Harm in the Tort of Battery*, 74 TEMP. L. REV. 355, 356 (2001); Osborne M. Reynolds, Jr., *Tortious Battery: Is “I Didn’t Mean Any Harm” Relevant?*, 37 OKLA. L. REV. 717, 723–24 (1984); Simons, *supra* note 6, at 1066–70.

9. *See, e.g.,* DAN B. DOBBS, THE LAW OF TORTS § 28, at 52–53 (2000) [hereinafter DOBBS, HORNBOOK] (footnotes omitted); Lawson, *supra* note 8, at 368.

10. *See, e.g.,* King, *supra* note 3, at 638–41; Lawson, *supra* note 8 at 368–70; *see also* Simons, *supra* note 6, at 1071–76.

nature of intentional torts and their relationship to other forms of tort liability.

Current torts law casebooks devote considerably less space to intentional torts than to non-intentional torts. This dynamic is certainly understandable, given both the greater frequency with which claims are made under either negligence or strict liability¹¹ and the general lack of interest among contemporary torts law scholars concerning the intentional torts. What is less understandable, however, is the extent to which the treatment of intentional torts, such as battery, in most of these casebooks fails to accurately convey either the existence of unresolved issues concerning basic doctrine (such as the debate between single and dual intent and the unclear relationship between intent and consent) or the extent to which many modern torts opinions do not follow the Second Restatement's formulation of the *prima facie* case, but rather formulate the doctrine in a variety of ways, each of which raises its own questions concerning the application of the stated doctrine to particular cases. Similarly, standard secondary sources such as hornbooks and treatises typically fail to accurately convey the current confusion and controversy in tort law doctrine with respect to such intentional torts as battery.

Consider how some of the leading torts casebooks treat the question of intent in the law of battery. Two popular casebooks offer only minimal treatment of the intentional trespassory torts, including battery.¹² As a result, it is not surprising that they make no attempt to alert students to the complexities of the concept of intent or to the disagreement among courts and commentators concerning the object of the required element of intent.¹³ Another casebook begins

11. Aside from the likely greater incidence of harm resulting from inadvertence, as opposed to intentional misconduct, the fact that liability insurance contracts typically cover only accidents easily explains why more claims would be filed alleging negligence or strict liability rather than intentional harm. See MARC A. FRANKLIN ET AL., *TORT LAW AND ALTERNATIVES* 903–04 (9th ed. 2011) (discussing the application of insurance provisions that purport to exclude certain intentional conduct).

12. See *id.* at 897–924; HARRY SHULMAN ET AL., *LAW OF TORTS: CASES AND MATERIALS* ch. 13 (5th ed. 2010). Both casebooks devote a single chapter to the traditional intentional torts (excluding defamation, privacy and the economic torts), including defenses and privileges, and those chapters appear toward the end of the casebooks, rather than at the beginning.

13. The Shulman casebook contains only two cases on the *prima facie* case in battery, neither of which clearly raises the question whether battery requires an intent to harm or offend. SHULMAN ET AL., *supra* note 12, at 763–69 (covering *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955), and *Manning v. Grimsley*, 643 F.2d 20 (1st Cir. 1981)). The casebook provides the relevant black-letter provisions of the Second Restatement, but does not give any indication that they may be ambiguous in application. *Id.* at 766–67. Moreover, the notes prominently quote the draft Third Restatement's explanation that litigation concerning intentional torts is uncommon

with the intentional torts, devotes considerable attention to them, but then fails to clearly address the distinction between single and dual intent.¹⁴ Several casebooks expressly acknowledge that there are diverging views with respect to dual and single intent.¹⁵ However, these casebooks then either fail to provide any meaningful information as to how the issue is addressed by the Second

and “there is a scarcity of judicial opinions that have seriously called into question any of those doctrines [concerning intentionally caused physical harm].” *Id.* at 767 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 5 cmt. c (Proposed Final Draft No. 1, 2005)). The Franklin casebook contains three cases on the prima facie case of battery, including *Garatt v. Dailey*, which focuses primarily on the result requirement rather than the intent requirement. FRANKLIN ET AL., *supra* note 11, at 898–911. The notes following the cases ask what precisely the defendant must have intended, but without giving any guidance that suggests the recognized distinction in some cases between single and dual intent. *Id.* at 901.

14. See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 17–41 (12th ed. 2010). The casebook includes seven principal cases on the prima facie case of battery, with extensive notes. One of the principal cases, *Spivey v. Battaglia*, 258 So. 2d 815 (Fla. 1972), requires intent to harm, *id.* at 817, which is a dual intent standard. A note following *Spivey* describes the opinion in *Wagner v. State*, 122 P.3d 599 (Utah 2005), as holding that “battery require[s] only acting with intent to cause contact that [i]s harmful or offensive, not acting with intent to cause harm,” which is a single intent standard. SCHWARTZ ET AL., *supra*, at 23. The note, however, fails to either acknowledge or comment on the different intent standards adopted in the principal and the note cases; moreover, it does not raise any questions concerning possible reasons underlying the different standards. Indeed, several pages later, the casebook authors include as another principal case the opinion in *McGuire v. Almy*, 8 N.E.2d 760 (Mass. 1937), which held both that “[m]entally disabled persons may be held responsible for their intentional torts as long as the plaintiff can prove that they formed the requisite intent” and that “the jury could find that the defendant [here] was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted on that intent,” thereby adopting what appears to be a dual intent standard. SCHWARTZ ET AL., *supra*, at 27. The notes following *McGuire* do not mention the previously noted contrary holding in *Wagner*, which was also a case involving a mental patient. SCHWARTZ ET AL., *supra*, at 27–28.

15. See RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 8–9 (9th ed. 2008) (explaining that different views of intent applied to the same fact pattern could result in divergent conclusions); JOHN C. P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 577 (2d ed. 2008) (hypothesizing that courts justify the qualification of the black letter law of intent by distinguishing tort law from criminal law); AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS 7–9 (2d ed. 2008) (discussing inconsistent approaches to the same rule). Two other casebooks raise the issue only indirectly. See WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS 4–5 (2d ed. 2009) [hereinafter FARNSWORTH & GRADY, CASEBOOK] (asking whether the Second Restatement’s provisions on intent are consistent with the cases described, including the well-known 1891 opinion in *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891), in which the defendant was held liable for unforeseeable bodily harm despite a lack of intent to injure because he intended “an unlawful act”); JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 13–15 (7th ed. 2007) (presenting the opinion in *Vosburg* and acknowledging that the concept of intent can present difficulties); HENDERSON ET AL., *supra*, at 34 (revisiting *Vosburg* after introducing the Second Restatement provisions, suggesting that it might be explained by the defendant’s intent to cause offensive contact, and asking whether the Second Restatement requires such an intent to offend, but failing to mention modern cases addressing that very question with contrary results).

Restatement,¹⁶ or leave the misleading impression either that the Second Restatement clearly requires dual intent¹⁷ or that it clearly requires only single intent.¹⁸ Only one casebook—Dobbs, Hayden, and Bublick’s *Torts and Compensation: Personal Accountability and Social Responsibility for Injury*¹⁹—prominently includes modern decisions on both sides of the issue, acknowledges the ambiguity of the Second Restatement provisions, and provides more than a passing reference to the competing policy concerns raised by the debate.²⁰ Not surprisingly, Professor Dobbs appears to be the only treatise author who provides a similarly complete picture of the debate over single versus dual intent.²¹

The casebook authors agree that the intent to make some sort of bodily contact is an element of the plaintiff’s prima facie case.²² The casebooks diverge, however, on whether a plaintiff’s actual or apparent consent is an affirmative defense or whether lack of consent

16. See, e.g., TWERSKI & HENDERSON, *supra* note 15, at 7–8 (citing the contrary decisions in *White v. Muniz*, 999 P.2d 814 (Colo. 2000), and *White v. Univ. of Idaho*, 797 P.2d 108 (Idaho 1990), and engaging the co-authors in a brief debate about possible reasons to prefer one position over the other, but failing to address ambiguity of the Second Restatement provisions).

17. See EPSTEIN, *supra* note 15, at 9 (explaining the result in *White v. University of Idaho*, which requires only single intent, by its refusal to adopt the Second Restatement, thereby suggesting that the decision is a likely outlier on this issue).

18. See GOLDBERG ET AL., *supra* note 15, at 566–78 (reproducing the opinion in *Wagner v. State*, in which the court interpreted the Second Restatement as clearly requiring only single intent, without further indicating that there are both cases and commentators that interpret the Second Restatement as requiring dual intent and without acknowledging that the Second Restatement’s provisions may be ambiguous). The authors do at least note that another opinion, *White v. Muniz*, rejects single intent, although the authors do not further explain that the *Muniz* court interpreted the Second Restatement provisions differently from the court in *Wagner*. *Id.* at 577; see also ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS 31–36 (2d ed. 2007) (acknowledging the conflicting approaches taken in *White v. Muniz* and *White v. University of Idaho*, but failing to raise the ambiguity of the Second Restatement provisions); cf. DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 17 (4th ed. 2011) (raising the question of whether battery requires intent to touch or intent to harm or offend, citing cases on both sides, but failing to address the Second Restatement provisions).

19. DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY (6th ed. 2009) [hereinafter DOBBS, CASEBOOK].

20. *Id.* at 48–52 (engaging the reader to see the differences created by each approach).

21. See DOBBS, HORNBOOK, *supra* note 9, § 30, at 58–61 (addressing the ambiguity and presenting arguments in favor of each approach); see also 1 DAN B. DOBBS ET AL., THE LAW OF TORTS § 94, at 87–94 (2d ed. 2011) [hereinafter DOBBS, PRACTITIONER TREATISE] (citing recent cases and responding to an article written by torts professor Kenneth W. Simons on the topic of dual versus single intent).

22. See, e.g., FRANKLIN ET AL., *supra* note 11, at 904 (highlighting the *Garratt* court’s definition of battery as “the intentional infliction of a harmful bodily contact upon another” (quoting *Garratt v. Dailey*, 279 P.2d 1091, 1093 (Wash. 1955))); SHULMAN ET AL., *supra* note 12, at 767 (providing the Second Restatement’s formulation of battery as requiring a “direct[] or indirect[]” contact (citing RESTATEMENT (SECOND) OF TORTS § 13(b) (1965))).

is a part of the plaintiff's prima facie case. Many of the casebooks present consent as an affirmative defense that must be pleaded and proved by the defendant.²³ Other casebooks observe that some courts treat consent as an affirmative defense, while others treat the absence of consent as an element of the plaintiff's prima facie case.²⁴ A few casebooks note the possibility that the plaintiff's consent might negate the offensiveness of a touching, thereby having an effect on the plaintiff's prima facie case even when consent is otherwise viewed as an affirmative defense,²⁵ and at least one casebook observes that some courts go so far as to define the prima facie case for some intentional torts, including battery, as a nonconsensual invasion of the particular interest at stake.²⁶ Casebooks that recognize the possibility of both a dual intent rule and consent as an affirmative defense fail to explain how there can be intent to cause an offensive contact if the defendant believes the plaintiff is consenting.²⁷ Even casebooks that note the absence of consent as a possible element of the plaintiff's prima facie case fail to address the question of whether the defendant must knowingly deviate from the plaintiff's actual or apparent consent or whether it is sufficient that the defendant has an

23. See, e.g., FRANKLIN ET AL., *supra* note 11, at 946–49 (including consent as one of several defenses to intentional torts); ROBERTSON ET AL., *supra* note 18, at 47 (stating that most courts treat consent as a defense to be pleaded and proved by the defendant); see also HENDERSON ET AL., *supra* note 15, at 41, 65 (treating consent as an affirmative defense, but later suggesting that whether a contact is offensive may depend on whether the plaintiff has apparently consented to it).

24. See, e.g., BEST & BARNES, *supra* note 18, at 52; GOLDBERG ET AL., *supra* note 15, at 587–88; cf. EPSTEIN, *supra* note 15, at 35–37 (addressing consent under the section heading entitled “Consensual Defenses,” but then mentioning in a note, without further explanation, “the conventional view that the absence of consent is a matter essential to the cause of action, and it is uniformly held that it must be proved by the plaintiff as a necessary part of his case” (quoting RESTATEMENT (SECOND) OF TORTS § 13 cmt. d (1965) (internal quotation marks omitted))).

25. See, e.g., DOBBS, CASEBOOK, *supra* note 19, at 88 (discussing the “‘defense’ of consent” and asking, “[i]s consent really a ‘defense?’”); FARNSWORTH & GRADY, CASEBOOK, *supra* note 15, at 16 (“Sometimes a defendant will offer a plaintiff’s consent as an affirmative defense, or a ‘privilege’ We discuss consent in this section [on the prima facie case] because it is closely connected to the question of whether a touching is harmful or offensive in the first place.”); HENDERSON ET AL., *supra* note 15, at 65 (stating that whether a contact is offensive may depend on whether the plaintiff has apparently consented to it).

26. See ROBERTSON ET AL., *supra* note 18, at 47 (citing cases where battery is defined as an unpermitted or nonconsensual intentional invasion of the plaintiff’s person); see also GOLDBERG ET AL., *supra* note 15, at 587–88 (“Given that torts such as battery concern, at their core, the subjection of another to unwanted touchings, etc., it is perhaps not surprising that the issue of consent is sometimes singled out for this special treatment [of treating absence of consent as part of the prima facie case].”).

27. See, e.g., BEST & BARNES, *supra* note 18, at 35–36; *id.* at 52 (noting the dispute over the role of consent as a defense or part of plaintiff’s case, without acknowledging the difficulties of applying the dual intent rule when consent is an affirmative defense).

honest but unreasonable belief in the plaintiff's consent.²⁸

What is at stake here with respect to the appropriate formulation of an action in battery? After all, there are many situations in which conduct that does not constitute a battery may nevertheless subject the defendant to liability in negligence. But that is not always the case. For example, when the intended contact is merely offensive and the resulting physical harm is entirely unforeseeable, there is probably no action available in negligence,²⁹ although there may be liability for an offensive battery. Even when there is potential liability in negligence, there are numerous practical consequences of determining that the defendant acted negligently rather than intentionally. For example, insurance coverage,³⁰ governmental immunities,³¹ and workers' compensation³² often turn on the question of whether the victim's injury was the result of intentional conduct. Aside from such ancillary questions—the answers to which need not necessarily dovetail with the precise details of battery doctrine³³—labeling conduct as a battery currently results in other practical consequences, such as the inapplicability of the defense of

28. See *infra* note 370 (raising this issue squarely in some medical battery cases, in which some courts have held that only intentional deviations from authorized treatment can be considered batteries); see also *infra* Part V (expounding upon the issue of consent in the medical battery context). Hornbooks and treatises are not much more illuminating on the subject. For example, Professor Dobbs believes that “the gist of battery is that the plaintiff has been touched, intentionally, in a way that she has not even apparently consented to,” DOBBS, HORNBOOK, *supra* note 9, § 29, at 55, but he does not explain how courts would analyze a case involving a defendant who honestly, but mistakenly, believes that the plaintiff consented, other than to state that “the plaintiff's apparent consent shows that the defendant is not intending to touch in an offensive way,” *id.* § 29, at 56. But that statement appears to be inconsistent with the dual intent rule, which Professor Dobbs both prefers and believes to be the rule adopted by most courts. *Id.* § 29, at 58.

29. Cf. RESTATEMENT (SECOND) OF TORTS § 18(2) (1965) (“An act which is not done with the intention [to cause a harmful or offensive contact] does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.”).

30. See, e.g., *Clayburn v. Nationwide Mut. Fire Ins. Co.*, 871 N.Y.S.2d 487, 489 (App. Div. 2009); *Baldinger v. Consol. Mut. Ins. Co.*, 222 N.Y.S.2d 736, 737 (App. Div. 1961), *aff'd*, 183 N.E.2d 908 (N.Y. 1962); see also *Non-Marine Underwriters v. Scalera*, [2000] 1 S.C.R. 551, para. 7 (Can.) (interpreting an insurance contract containing an exclusion clause for intentionally caused wrongs).

31. See, e.g., *Sheridan v. United States*, 487 U.S. 392, 400 (1988) (finding a claim barred under the Federal Tort Claims Act's intentional tort exception—even though the claim was filed as a negligence claim—because that claim ultimately arose from a battery); *Wagner v. State*, 122 P.3d 599, 610 (Utah 2005) (affirming dismissal of a negligence action on the ground that an attack constituted a battery and the State was immune from lawsuit in battery).

32. See, e.g., *Caudle v. Betts*, 512 So. 2d 389, 392 (La. 1987) (finding that an electric shock administered by the plaintiff's employer was an intentional tort and therefore was not covered by the worker's compensation statute).

33. See, e.g., *Simons*, *supra* note 6, at 1096–97.

comparative negligence, which significantly distinguish battery from negligence.³⁴ As a result, the doctrinal label is an important one for both plaintiff and defendant.

Even so, it might be the case, as some recent commentators have acknowledged, that except for a handful of cases involving young children or adult defendants with seriously diminished mental capacity, courts may reach pretty much the same results regarding what conduct constitutes a battery, regardless of whether they purport to apply the single intent rule or the dual intent rule.³⁵ Similarly, there may be only a few battery cases in which it matters who bears the burden of proving consent or lack of consent.³⁶ Of course, it is difficult to tell if a case would have turned out differently—either at the trial³⁷ or the appellate level—depending on the precise formulation of both the elements of the prima facie case and the identification of who has the burden of proof of consent. And in cases involving medical batteries, it could make a great deal of difference whether battery is limited to intentional unauthorized treatment or whether it includes an honest but unreasonable belief in the plaintiff's consent.³⁸

Even if there is not a great deal at stake from a practical standpoint, I believe that doctrine matters and that, whenever possible, both courts and commentators should attempt to understand and explain as clearly as possible why battery and other intentional tort cases come out the way they do. Indeed, one of the primary purposes of the Restatements is to clarify and simplify the law when it is otherwise confusing and overly complex.³⁹ In any event, neither beginning law students nor experienced lawyers should be

34. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 1 cmt. c (2000) (“Although some courts have held that a plaintiff’s negligence may serve as a comparative defense to an intentional tort, most have not.”).

35. See, e.g., Lawson, *supra* note 8, at 375 (suggesting that although changing the definition “of intent in the tort of battery—intent to act without permission—might alter the elements of battery, it would probably not change the result in many cases”); see also Simons, *supra* note 6, at 1070.

36. See BEST & BARNES *supra* note 18, at 52 (discussing the dispute over whether consent is a defense or lack of consent is an element of the prima facie case and stating that “[t]here have not been enough reported cases where the evidence of consent is in equipoise for the law of all the state to be clear and in agreement on this point”).

37. Cf. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 35 (3d ed. 2007) (explaining that the difference in alternative formulations of consent will be reflected primarily in jury instructions).

38. See *infra* Part V (discussing the difference between cases where a physician deliberately deviates from the patient’s wishes and instances where a physician reasonably believes the patient consented to the course of treatment).

39. See, e.g., King, *supra* note 3, at 650–53 (noting the ALI’s conclusion that the major shortcomings of American law are its complexity and uncertainty).

misled into thinking that modern intentional torts such as battery are relatively simple and straightforward or that the Second Restatement clearly articulates the doctrine as it has been applied by a majority of courts.

This Article focuses more attention on the special problems posed by intentional torts, particularly battery. It addresses not only the debate between single and dual intent (as well as some competing formulations of the intent requirement), but also the difficulty of determining the proper relationship between the element of intent and the requirement that there be a lack of consent on the part of the plaintiff. Part I gives a more detailed account of the current confusion and controversy concerning the identification of the elements of a *prima facie* case in battery. Part II provides a brief account of the historical development of the modern tort of battery, which is necessary to understanding why it is that so many courts do not follow the Second Restatement's formulation of the elements of a *prima facie* case in battery and how these courts came to adopt a variety of different and sometimes contradictory formulations. Part III analyzes the ambiguity of the relevant Second Restatement provisions, rejecting the argument of some torts scholars that only the single intent rule can explain the apparently uniform results in certain kinds of cases, such as those involving practical jokers and those involving physicians and other persons whose purpose is to help, not to harm or offend. This Part argues that these cases are better explained by acknowledging that certain medical procedures, such as operations, necessarily involve harmful contacts (even when ultimately beneficial) and that physicians and others often know that, in the absence of consent, certain bodily touchings will be offensive. By clearly separating the elements of intent and absence of consent, satisfaction of the intent element of battery is easily explained under both single and dual intent rules, thereby leaving resolution of these cases to a determination whether the defendant should be relieved of liability on the ground of actual or apparent consent. Part IV addresses the relevant policy considerations associated with choosing between single and dual intent, considerations that necessarily require a discussion of the appropriate distinctions between intentional and non-intentional torts. It concludes that there is no justification for preferring the single intent rule and thereby departing from the moral fault principle that underlies much of modern tort law. It also rejects the argument from some recent tort scholars that the principle of "bodily integrity" demands fuller protection than that afforded under the dual intent rule. Part V

addresses the special problem of consent in medical cases in which the physician honestly, but mistakenly, believes that the patient has consented to the treatment provided. It agrees with the current majority rule that physicians should not be liable in battery (as opposed to negligence) unless they knowingly depart from the patient's wishes, but then argues that this result is a clear departure from traditional consent doctrine and should, for the most part, be limited to medical cases. The Article concludes by proposing, at least in concept, how a Third Restatement might best formulate intentional tort doctrine in cases involving either harmful or offensive battery.

I. ELEMENTS OF A PRIMA FACIE CASE IN BATTERY

In order to prevail on a tort theory, the plaintiff must plead and prove the elements of a prima facie case, which are different for each individual tort, such as battery, assault, negligence, strict liability for defective products, or strict liability for abnormally dangerous activities. The defendant may prevail either by challenging the plaintiff's ability to establish a prima facie case or by pleading and proving one of a number of affirmative defenses (or privileges), which differ according to which individual tort the plaintiff is pursuing. For example, contributory or comparative negligence is a defense to negligence, but not to the intentional torts of assault or battery,⁴⁰ for which the defendant might claim self-defense or defense of others.⁴¹

A. *Battery Defined: The Second Restatement*

According to the Second Restatement, there are two forms of battery: one that results in a harmful bodily contact and another that results in an offensive bodily contact.⁴² Although different with respect to the result, they are defined identically with respect to the other elements of the prima facie case. For example, battery involving harmful bodily contact is defined in section 13 as follows:

An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or

40. Bublick, *supra* note 7, at 1348–49.

41. See DOBBS, HORNBOOK, *supra* note 9, § 68, at 155–56 (offering examples of privileges and defenses that defeat a claim, including the privilege of self-defense).

42. Compare RESTATEMENT (SECOND) OF TORTS § 13 (1965) (“An actor is subject to liability to another for battery if . . . a *harmful* contact . . . results.” (emphasis added)), with *id.* § 18 (“An actor is subject to liability to another for battery if . . . an *offensive* contact . . . results.” (emphasis added)).

offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) a harmful contact with person of the other directly or indirectly results.⁴³

Battery involving offensive bodily contact is defined identically in section 18, except that paragraph (b) substitutes “offensive” for “harmful” with respect to the resulting contact.⁴⁴ In other words, combining the two forms, battery requires that the defendant perform: (1) an act, (2) with the intent “to cause a harmful or offensive [bodily] contact” (or the imminent apprehension of such a contact),⁴⁵ (3) that directly or indirectly causes, (4) a harmful or offensive bodily contact.⁴⁶ Intent is defined in section 8A “to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”⁴⁷

B. Court Decisions Interpreting Intent

A few courts and commentators have recently debated the question of whether the Second Restatement’s definition of intent is properly interpreted to require both intent to make a bodily contact and, in addition, intent to harm or offend (dual intent), or whether it is sufficient that the defendant intends to make a bodily contact that turns out to be harmful or offensive (single intent). In the 1990 case of *White v. University of Idaho*,⁴⁸ the Supreme Court of Idaho held that battery does not require the intent to harm or offend,⁴⁹ but the court refused to determine which position the Second Restatement had

43. *Id.* § 13.

44. *Id.* § 18(1) (“An actor is subject to liability to another for battery if . . . (b) an offensive contact with the person of the other directly or indirectly results.”).

45. Except in referring to the doctrine of transferred intent, *see infra* note 46, I will ignore, for the remainder of this Article, the intent to cause “imminent apprehension” of a harmful or offensive bodily contact as satisfying the intent element of either harmful or offensive battery. It is cumbersome and, in any event, the same issue of single versus dual intent arises in the interpretation of what it means to intend apprehension of a harmful or offensive bodily contact.

46. The use of identical intent requirements, thereby treating as equivalent the intent to cause either a harmful contact or an offensive contact or merely apprehension of an imminent harmful or offensive contact, reflects one aspect of the doctrine of “transferred intent,” under which courts extend liability in trespassory torts for unintended consequences; liability is extended when offense is intended with resulting harm “or vice versa,” and when the tortious conduct is directed at one person but unexpectedly affects another person. *See* DOBBS, HORNBOOK, *supra* note 9, § 40, at 75.

47. RESTATEMENT (SECOND) OF TORTS § 8A (1965).

48. 797 P.2d 108 (Idaho 1990).

49. *Id.* at 111 (affirming the lower court’s ruling that battery “did not require an intent to injure or harm, but merely an intent to do the act complained of”).

adopted because Idaho does not follow the Restatement.⁵⁰ In 1995, in *Brzoska v. Olson*,⁵¹ the Supreme Court of Delaware interpreted the Second Restatement's definition of battery to require only "the intent to make contact with the person, not the intent to cause harm," thereby implying—although not expressly stating—that the plaintiff also need not prove an intent to cause even offensive contact if the intended contact turned out to be either harmful or offensive.⁵² It was not until 2000 that a court squarely addressed the question of whether the Second Restatement definitions of battery require dual or single intent. In *White v. Muniz*,⁵³ the Supreme Court of Colorado interpreted section 18 of the Second Restatement to require dual intent, claiming that "[h]istorically, the intentional tort of battery required a subjective desire on the part of the tortfeasor to inflict a harmful or offensive contact on another."⁵⁴ By contrast, in the 2005 decision in *Wagner v. State*,⁵⁵ the Supreme Court of Utah interpreted the Second Restatement's definition to require only that the defendant intended to touch the person of another and that the touching was a harmful or offensive one at law.⁵⁶

Although in *Muniz*, the court believed that dual intent was historically required,⁵⁷ it appears that the question had not previously been raised in a court on precisely those terms, with the exception of *University of Idaho*.⁵⁸ Indeed, after *Muniz*, and in direct contrast to that court's view of the history of intent in the law of battery, the Supreme Court of Utah in *Wagner* claimed that the single intent rule had been adopted in the majority of cases in both federal and state courts.⁵⁹

A close examination of the case law reveals many opinions that appear to have adopted either the dual or single intent rule, but not clearly so and often in the context of addressing a somewhat different

50. See *id.* at 111 n.3 (declining to "attempt[] to unravel which position the Restatement (Second) ultimately embraces—for it could be interpreted as supporting either position").

51. 668 A.2d 1355 (Del. 1995).

52. *Id.* at 1360.

53. 999 P.2d 814 (Colo. 2000).

54. *Id.* at 816 (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

55. 122 P.3d 599 (Utah 2005).

56. *Id.* at 603.

57. *Muniz*, 999 P.2d at 816.

58. See *White v. Univ. of Idaho*, 797 P.2d 108, 109 (Idaho 1990) ("[T]he intent required for the commission of a battery is simply the intent to cause an unpermitted contact not an intent that the contact be harmful or offensive.").

59. *Wagner* 122 P.3d at 606 (asserting that the plaintiff's theory of dual intent is "in conflict with the majority of case law on the subject in both federal and state courts").

question. For example, in *Andrews v. Peters*,⁶⁰ the defendant tapped the back of the plaintiff co-worker's knee with his own knee, resulting in the plaintiff's fall and dislocation of her right kneecap.⁶¹ The defendant testified that he did not intend to be rude or offensive, and that the same thing had just been done to him by another co-worker and it had "struck him as fun."⁶² The Court of Appeals of North Carolina upheld a verdict for the plaintiff, stating that the contact was clearly offensive and that the jury had found that the defendant intended to cause a harmful or offensive contact.⁶³ The opinion is vague, but it appears to endorse a dual intent requirement by implying that the jury had rejected the defendant's testimony that he intended no harm or offense.⁶⁴ Similarly, in *Labadie v. Semler*,⁶⁵ the Court of Appeals of Ohio found that the defendant seventeen-year-old committed a battery when he picked up a snowball and threw it at the plaintiff's car after the plaintiff had pulled up in front of the defendant's house and yelled obscenities at the defendant's mother.⁶⁶ Relying on the Second Restatement's definition of battery, the court appeared to endorse the dual intent requirement, stating that the defendant "at the very least, intended to put [the plaintiff] 'in apprehension of either a harmful or offensive bodily contact.'"⁶⁷ In *Labadie*, it seemed clear that the defendant intended to either harm or offend the plaintiff, although the court was perhaps more focused on the possibility that the defendant had intended only to scare the plaintiff without necessarily intending to hit her with the snowball.⁶⁸

Other opinions appear to have endorsed the single intent rule, although the circumstances were such that the dual intent rule was

60. 330 S.E.2d 638 (N.C. Ct. App. 1985), *aff'd*, 347 S.E.2d 409 (N.C. 1986).

61. *Id.* at 639.

62. *Id.* at 640.

63. *Id.* at 641.

64. *See id.* (implying that the jury's verdict finding the defendant liable necessarily entailed a finding that the defendant's touch was intended to be harmful or offensive).

65. 585 N.E.2d 862 (Ohio Ct. App. 1990) (per curiam).

66. *Id.* at 863 (reversing the trial court's verdict that the defendant was merely negligent).

67. *Id.* at 864 (quoting RESTATEMENT (SECOND) OF TORTS § 18 (1965)).

68. *Id.* at 863-64 (observing that the defendant, "an accomplished high school athlete in football and baseball," threw a snowball at plaintiff's open window from ten to fifteen feet away and therefore "at the very least" intended to scare the plaintiff). In *Snyder v. Turk*, 627 N.E.2d 1053 (Ohio Ct. App. 1993), the defendant surgeon, who had become frustrated during an operation when the plaintiff scrub nurse handed him the wrong instrument, grabbed the plaintiff by her shoulder and pulled her face down toward the surgical opening. *Id.* at 1055. There the court said that reasonable minds could conclude that the defendant intended to commit an offensive contact, implying that the jury could find that he had the intent to offend, as well as to cause the contact itself. *Id.* at 1057.

probably satisfied, and the court may have been addressing an entirely different issue. For example, in *Mink v. University of Chicago*,⁶⁹ the pregnant plaintiffs were administered the drug DES without being told either that they were being given the drug or that they were part of a medical experiment.⁷⁰ The district court for the Northern District of Illinois said that “the plaintiffs need show only intent to bring about the contact,” but the focus of the opinion was the rejection of any requirement that the plaintiff prove intent to harm.⁷¹ The court concluded that the administration of a drug without the patient’s knowledge was clearly an offensive contact, something that the defendants certainly must have known.⁷² Similarly, in *Masters v. Becker*,⁷³ the nine-year-old defendant pried the plaintiff’s fingers off the tailgate of a truck on which they were playing in order to get her turn on the ledge, causing the plaintiff to fall to the ground and sustain severe injuries.⁷⁴ The New York appellate court suggested that the single intent rule applied, stating that the plaintiff “must prove only that there was bodily contact; that such contact was offensive; and that the defendant intended to make the contact.”⁷⁵ The circumstances, however, were such that the defendant must have known that the contact would be offensive, and the court was primarily concerned, as was the *Mink* court, with explaining that the plaintiff did not need to prove that the defendant either intended to cause the specific injuries that occurred or to cause any injury at all.⁷⁶

Still other opinions contain language in one part of the opinion that appears to endorse one position, along with language in another part of the opinion that appears to endorse the opposite position. For example, in *Villa v. Derouen*,⁷⁷ the defendant intentionally pointed a welding cutting torch in the plaintiff co-worker’s direction and intentionally released oxygen or acetylene gas, unintentionally causing second degree burns to Villa’s groin.⁷⁸ At one point in the

69. 460 F. Supp. 713 (N.D. Ill. 1978).

70. *Id.* at 715.

71. *Id.* at 718 (“[A]n intent to do harm is not essential to the action.”).

72. *Id.*

73. 254 N.Y.S.2d 633 (App. Div. 1964).

74. *Id.* at 634.

75. *Id.* at 635.

76. *Id.* Just a few years prior to the decision in *Masters*, another New York court appeared to adopt the dual intent rule when it held that a six-year-old boy who pushed a four-year-old girl was liable for a battery, stating, “[d]efendant’s intent to inflict upon plaintiff an offensive bodily contact, *known to him to be offensive*, has been established by the fair weight of the credible evidence.” *Baldinger v. Banks*, 201 N.Y.S.2d 629, 631 (Sup. Ct. 1960) (emphasis added).

77. 614 So. 2d 714 (La. Ct. App. 1993).

78. *Id.* at 715.

opinion, the Louisiana appellate court stated that “[t]o constitute a battery, [the defendant] need only intend that the oxygen he sprayed toward the plaintiff come into contact with [plaintiff], or have the knowledge that this contact was substantially certain to occur,”⁷⁹ which sounds like single intent. Later in the opinion, however, the court stated that “the harmful or offensive contact and not the resulting injury is the physical result which must be intended,”⁸⁰ which sounds more like dual intent. Similarly, in *Brenneman v. Famous Dave’s of America, Inc.*,⁸¹ the district court for the Southern District of Iowa analyzed the defendant’s motion for summary judgment by examining whether the defendant intended an act resulting in bodily contact that a reasonable person would deem insulting or offensive,⁸² which sounds like single intent, but at another point said that “intent is established if the actor knows that the consequences (i.e. offensive contact) are certain, or substantially certain, to result from his act,”⁸³ which sounds like dual intent.

The confusion evidenced by the loose language sometimes used by courts is compounded by the common use of terminology that differs from the Second Restatement’s formulation of “inten[t] to cause a harmful or offensive contact.”⁸⁴ For example, in the 1891 opinion in *Vosburg v. Putney*,⁸⁵ a casebook favorite, the Supreme Court of Wisconsin described the necessary element of intent as the intent to commit “an unlawful act,”⁸⁶ and indeed, this type of language was common in the nineteenth century.⁸⁷ In 1934, the Restatement (First) of Torts⁸⁸ (First Restatement) rejected this language in favor of what appears to have been an entirely new formulation that the act be done “with the intention of bringing about a harmful or offensive contact or an apprehension thereof.”⁸⁹ Since the First Restatement was published, *Vosburg* has been commonly interpreted as illustrating the intent to commit an offensive contact.⁹⁰

79. *Id.* at 717.

80. *Id.*

81. 410 F. Supp. 2d 828 (S.D. Iowa 2006), *aff’d*, 507 F.3d 1139 (8th Cir. 2007).

82. *Id.* at 846–47.

83. *Id.* at 846.

84. RESTATEMENT (SECOND) OF TORTS §§ 13(a), 18(1)(a) (1965).

85. 50 N.W. 403 (Wis. 1891).

86. *Id.* at 403.

87. *See infra* Part II.

88. RESTATEMENT (FIRST) OF TORTS (1934).

89. *Id.* § 13(a).

90. *See, e.g.*, MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 121 (2008) (concluding that the Second Restatement maintains that the defendant in *Vosburg* intended an offensive contact); James A. Henderson, Jr., *Why Vosburg Comes First*, 1992 Wis. L. REV. 853, 859 (“Whatever substantive test the court adopted [in *Vosburg*], that test eventually developed into what today would be referred to as one defining

Nevertheless, some subsequent decisions persist in requiring the intent to commit an “unlawful” or “wrongful” act. For example, in 1958, more than twenty years after the First Restatement was published, the Supreme Court of Oklahoma held that students engaged in throwing erasers at each other in a classroom were liable for battery when an eraser hit the plaintiff, who had not been participating in the activity.⁹¹ There, the court stated: “[T]he willful and deliberate throwing of wooden blackboard erasers at other persons in a class room containing 35 to 40 students is [not] an innocent and lawful pastime, even though done in sport and without intent to injure. Such conduct is wrongful”⁹² The court concluded that “the intention with which the injury was done is immaterial so far as the maintenance of the action is concerned, provided the act of causing the injury was wrongful, for if the act was wrongful, the intent must necessarily have been wrongful.”⁹³ This language is almost identical to that used in *Vosburg*, which was one of several decisions cited in the opinion.⁹⁴ As recently as 2007, a California court explained that ordinarily the plaintiff must prove that the defendant intended to harm or offend the plaintiff, but then articulated an exception for cases where the defendant’s act was “unlawful.”⁹⁵ In that case, the court stated that the defendant only needs to intend to do the unlawful act in question.⁹⁶

‘offensive contact.’”); *see also* DOBBS, HORNBOOK, *supra* note 9, § 30, at 60 (arguing that the facts of *Vosburg* are consistent with liability based on intent to make offensive bodily contact). *But see* ABRAHAM, *supra* note 37, at 23 (interpreting *Vosburg* as requiring only intent to make contact that is inappropriate under the circumstances, regardless of whether the defendant lacked the intent to harm or offend). Abraham appears to endorse the single intent rule when he interprets *Vosburg* to require only that the defendant intend a touching, not that the defendant intend the touching to be harmful or offensive. ABRAHAM, *supra* note 37, at 23. When distinguishing battery and negligence, however, he appears to endorse the dual intent rule, contending that “when one does not desire harm or offense to occur, his conduct is merely risky until he knows that harm or offense is substantially certain to result from it.” *Id.* at 24.

91. *Keel v. Hainline*, 331 P.2d 397, 398–99 (Okla. 1958). It did not matter that the defendant there did not direct his activity toward the plaintiff. *Id.* at 399. Under the doctrine of transferred intent, a defendant who has a wrongful intent toward one person but who unexpectedly affects another will be treated as if he or she intended to affect the interests of the actual victim. *See supra* note 46 (discussing the doctrine of transferred intent).

92. *Keel*, 331 P.2d at 399.

93. *Id.* (quoting 4 AM. JUR. 128, *Assault and Battery* § 5 (1963)).

94. *Id.* at 400.

95. *Austin B. v. Escondido Union Sch. Dist.*, 57 Cal. Rptr. 3d 454, 464 (Ct. App. 2007).

96. *Id.*; *see also* *Maines v. Cronomer Valley Fire Dep’t, Inc.*, 407 N.E.2d 466, 472 (N.Y. 1980) (describing battery as a lawsuit for “a deliberate and intentional wrongful act” and requiring that plaintiffs prove only a “deliberate intent or conscious choice to do the act which results in the injury”).

Yet another formulation of the intent requirement that departs from the text of sections 13 and 18 of the Second Restatement defines intent as “an intent to bring about a result which will invade the interests of another in a way that the law forbids.”⁹⁷ Still other courts state that the plaintiff need only allege and prove that the defendant intended to do the act that resulted in the plaintiff’s injury.⁹⁸

In some cases, courts have brought into the definition of a battery the requirement that the plaintiff prove the absence of consent, sometimes substituting lack of consent for the intent to commit a harmful or offensive contact.⁹⁹ In *University of Idaho*, for example, the Supreme Court of Idaho adopted the single intent rule in its rejection of any required intent to harm or offend, but also defined

97. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 36 (5th ed. 1984); *see also* Lawson, *supra* note 8, at 365 (labeling this as “[p]erhaps the least satisfying definition on intent”). For opinions adopting this or similar language, see, for example, *Wallace v. Rosen*, 765 N.E.2d 192, 197 (Ind. Ct. App. 2002); *Caudle v. Betts*, 512 So. 2d 389, 391 (La. 1987); and *Andrews v. Peters*, 330 S.E.2d 638, 641 (N.C. Ct. App. 1985), *aff’d*, 347 S.E.2d 409 (N.C. 1986). This language departs from that used in the definitional sections of both the First and Second Restatements, but is similar to language used in the scope note to the First Restatement, which states that, although the writ of trespass had been extended to harms which were not intentional, this particular topic of the Restatement “deals only with bodily harms which are caused directly or indirectly by acts which were intended to invade some interest of personality of the other or of a third person.” RESTATEMENT (FIRST) OF TORTS ch. 2, scope note at 27 (1934). That language does not appear to have been intended as a formulation of the intent necessary with respect to any particular intentional tort, since both Restatements provide that formulation in their definitional sections. Thus, for battery, the Restatements provide that the necessary intent is to make a “harmful or offensive [bodily] contact.” RESTATEMENT (SECOND) OF TORTS §§ 13(a), 18(1)(a) (1965); RESTATEMENT (FIRST) OF TORTS §§ 13, 18(1) (1934). Of course, to the extent that such language is intended to provide a formulation of the necessary intent in battery, it is circular and not at all useful. *See, e.g.*, Lawson, *supra* note 8, at 365. In addition, this language is not helpful in discerning whether the Restatement adopts the single or dual intent rule.

98. *See, e.g.*, *Rajspic v. Nationwide Mut. Ins. Co.*, 718 P.2d 1167, 1171 (Idaho 1986) (approving a jury instruction that for battery “the intent referred to is the intent to do the act complained of”); *see also Maines*, 407 N.E.2d at 472 (observing that New York battery cases require only a “deliberate intent or conscious choice to do the act which results in the injury”). It is unclear whether the courts that use this formulation understand it in the literal way that Professor Lawson appears to think they do when he concludes that the “mere intent to act” is a formulation that would “capture a breathtaking range of cases that include inadvertent injury, whether purely accidental or negligent.” Lawson, *supra* note 8, at 362. In *Rajspic*, for example, the jury instruction in question went on to state that if the jury found that the defendant shot the plaintiff “intentionally, rather than accidentally, she should not be relieved from liability because she was insane at the time of the shooting and incapable of malice or specific intent to do injury.” *Rajspic*, 718 P.2d at 1171. If the defendant intentionally shot the plaintiff, then at the very least she intended bodily contact, which would satisfy the single intent rule.

99. *See, e.g.*, *Mink v. Univ. of Chi.*, 460 F. Supp. 713 (N.D. Ill. 1978); *White v. Univ. of Idaho*, 797 P.2d 108 (Idaho 1990).

battery as the “intent to cause an unpermitted contact.”¹⁰⁰ The *Mink* court similarly defined battery as “the unauthorized touching of the person of another.”¹⁰¹ Adding to the confusion, *Mink*, unlike *University of Idaho*, apparently required that the defendant *know* that the contact was unpermitted, thereby incorporating a form of the dual intent rule.¹⁰² Elsewhere in the opinion, however, the *Mink* court had appeared to reject the dual intent rule, stating that the requisite element of intent is met when the plaintiff shows “an intent to bring about the contact.”¹⁰³ Such cases do not necessarily articulate a single definition of battery; rather, they sometimes appear to adopt slightly different formulations in different parts of the opinion.

C. *Consent Under the Second Restatement and its Implications for the Single and Dual Intent Rules*

The persistent emphasis in many cases on the plaintiff’s lack of consent is puzzling given the absence of any mention of consent in the Second Restatement’s definition of battery in the text of sections 13 and 18.¹⁰⁴ In addition, the comment to section 13 provides a cross-reference to privileges preventing liability, including consent, stating that these privileges will be defined in later sections.¹⁰⁵ This comment suggests that consent, like self-defense, is an affirmative defense and not an aspect of the prima facie case. However, the comment contains the following very important clarification:

The absence of such consent is inherent in the very idea of those invasions of interests of personality which, at common law, were the subject of an action of trespass for battery, assault, or false imprisonment. Therefore the absence of consent is a matter essential to the cause of action, and it is uniformly held that it must be proved by the plaintiff as a necessary part of his case.¹⁰⁶

100. *Univ. of Idaho*, 797 P.2d at 109.

101. *Mink*, 460 F. Supp. at 717.

102. *Id.* Requiring that the defendant know that a contact is unpermitted is the equivalent of requiring knowledge that the contact will be offensive, which is what the dual intent rule requires. *See supra* note 89 and accompanying text.

103. *Id.* at 718.

104. RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965).

105. *Id.* § 13 cmt. d.

106. *Id.* The comment to section 18 does not contain any comparable explanation. *See id.* § 18. Comment f on the effect of “mistake” cross-references sections 892–892D on consent, but does not address the question of whether the absence of consent is part of the plaintiff’s prima facie case or an affirmative defense. *Id.* § 18 cmt. f.

Almost identical language appeared in comment f to section 13 in the First Restatement.¹⁰⁷ The text of the First Restatement, however, defined harmful battery as requiring not only “the intention of bringing about a harmful or offensive contact,”¹⁰⁸ but also a lack of consent or other privilege.¹⁰⁹ Although the text itself did not clarify whether the absence of consent (unlike the non-consensual privileges) is itself an element of the plaintiff’s prima facie case, the First Restatement’s inclusion of the absence of consent in the very definition of battery made it more likely that readers would look to the comment, rather than the text, to determine whether the absence of consent is part of the plaintiff’s prima facie case.¹¹⁰

Unfortunately, discovering the pertinent language of both the First and Second Restatements concerning the absence of consent does not do much to clarify the evident confusion in existing court opinions, casebooks, and many commentaries. The pertinent language does suggest both that it is the plaintiff’s burden to prove absence of consent and that the absence of consent is intended as an additional requirement—not as a substitute for the intent to cause a harmful or offensive contact.¹¹¹ What it does not indicate, however, is whether or how there can be an intent to offend when the defendant honestly believes that the plaintiff has consented (or would consent) to the intended contact. When the defendant’s belief is reasonable, then the plaintiff may be found to have given apparent consent, and the defendant will not be liable regardless of intent.¹¹² But what if the defendant’s belief that the plaintiff has consented is unreasonable? May the plaintiff then prevail because of the lack of apparent consent, or will the court require—with respect to the separate element of intent—that that the defendant must have at least *known*

107. RESTATEMENT (FIRST) OF TORTS § 13 cmt. f (1934) (“[A]bsence of consent is inherent in the very idea of those invasions of interest of personality which at common law were the subject of an action of trespass for assault, battery or false imprisonment. Therefore, the absence of consent is a matter necessary to constitute an actionable assault, battery or false imprisonment . . .”).

108. *Id.* § 13(a).

109. *Id.* § 13(b)–(c).

110. The comment does not say so explicitly, but that is clearly implied in the language of the comment. *See id.*

111. *See* RESTATEMENT (SECOND) OF TORTS § 13 cmt. d (1965); RESTATEMENT (FIRST) OF TORTS § 13 cmt. f (1934).

112. According to section 892(2) of the Second Restatement, it is only when the defendant reasonably believes that the plaintiff has consented that apparent consent is established. *See* RESTATEMENT (SECOND) OF TORTS § 892(2) (1979) (“If words or conduct are *reasonably* understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.” (emphasis added)); *see also* RESTATEMENT (FIRST) OF TORTS § 892 (1939) (describing consent as actual or apparent assent).

that the contact was unpermitted,¹¹³ as the *Mink* court suggested?¹¹⁴ Are these questions relevant to the initial question of whether the Second Restatement adopts either dual or single intent? And what about jurisdictions that have apparently rejected the Restatement definitions in favor of a formulation in which battery is defined as the intent to cause an unpermitted contact?¹¹⁵ Is it necessary in these jurisdictions to prove that the defendant intended to cause a contact that the defendant knew was unpermitted (a version of dual intent) or is it sufficient that the defendant intended a contact that turns out to be unpermitted (a version of single intent)?

In summary, existing court opinions are even more confused than is suggested by the debate over whether the Second Restatement adopts dual versus single intent. Part II provides a brief account of the historical development of the tort of battery, which will be helpful in understanding why so many modern courts do not adhere to the Second Restatement formulation of the definition of a battery and what they might mean when they use a different formulation. Such an historical account may also be helpful in determining the proper interpretation of the relevant Second Restatement provisions and in formulating a clearer approach for a Third Restatement.

II. A BRIEF ACCOUNT OF THE HISTORICAL DEVELOPMENT OF THE TORT OF BATTERY

A. *Origins of the Tort of Battery*

The action in battery originated in the early common law writ of trespass, which included not only battery, but also assault, false imprisonment, trespass to land, and trespass to chattels.¹¹⁶ In its earliest form, trespass had a quasi-criminal character, aiming at “serious and forcible breaches of the King’s peace.”¹¹⁷ Indeed, it was in connection with criminal proceedings that damages were assessed as an incidental matter in favor of the injured victim.¹¹⁸

113. “Intent” is defined in the Second Restatement to denote either “that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” RESTATEMENT (SECOND) OF TORTS § 8A (1965); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 (2010).

114. *See Mink v. Univ. of Chi.*, 460 F. Supp. 713, 717 (N.D. Ill. 1978) (explaining that a defendant must have “intended to cause an unpermitted contact” in order to be liable for battery).

115. *See supra* notes 69–76 and accompanying text.

116. KEETON ET AL., *supra* note 97, § 6, at 29–30.

117. *Id.* at 29.

118. *Id.*

Although conceived originally as covering force and violence,¹¹⁹ at some point early on it became clear that the writ of trespass covered many of what we would now view as offensive bodily contacts, such as “spitting upon a person; pushing another against him; throwing a squib or any missile or water upon him.”¹²⁰ The justification was that minimal levels of force and violence might prompt a breach of the King’s peace and that the law could not ignore such behavior.¹²¹ It was said that “[t]he least touching of another in anger is a battery”¹²² and that “[t]he law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it.”¹²³ In other words, early courts and commentators did not distinguish between “harmful” and “offensive” batteries.

The writ of trespass was initially the remedy for all forcible, direct injuries to either person or property and did not necessarily require any form of fault.¹²⁴ Subsequently, the writ of trespass on the case was developed, in order to provide a remedy for “obviously wrongful” conduct causing injuries that were either “not forcible or not direct.”¹²⁵ From the beginning, the case writ required some form of fault.¹²⁶ Ultimately, that writ came to be used for all cases alleging mere negligence, whereas trespass remained the appropriate remedy for intentional wrongs.¹²⁷

This shift to the current division between intentional torts and negligence was gradual.¹²⁸ By the mid-nineteenth century, there was growing recognition that there should be no liability for pure accident,¹²⁹ but this recognition did not lead to any clear distinction between an action in battery and an action in negligence. Rather, it was commonly said that with respect to an action in battery (no separate tort of negligence then being recognized), “the plaintiff

119. DOBBS, HORNBOOK, *supra* note 9, § 28, at 54.

120. 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 191 (1859) (footnotes omitted).

121. See 2 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 84, at 71 (Edward Avery Harriman ed., 16th ed. 1899) (“The degree of violence is not regarded in the law . . .”).

122. HILLIARD, *supra* note 120, at 191 (quoting *Cole v. Turner*, (1704) 87 Eng. Rep. 907 (K.B.) 907; 6 Mod. 149, 149).

123. *Id.* at 192 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *120).

124. See KEETON ET AL., *supra* note 97, § 6, at 29 (recounting that this conduct was most likely to provoke retaliation). The threshold for “forcible” was low; “so long as the defendant applied some physical force to the victim or his property, trespass was in principle available.” GOLDBERG ET AL., *supra* note 15, app. at B-7.

125. KEETON ET AL., *supra* note 97, § 6, at 29.

126. *Id.*

127. See *id.* § 6, at 30 (arguing that the split into separate actions for intentional torts and negligence was unintentional).

128. *Id.*

129. *Id.* § 67, at 31.

must come prepared with evidence to show, either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be liable.”¹³⁰ Thus, in describing the various acts for which a defendant might be liable, treatise writer Greenleaf stated that if a defendant “[d]rives a horse too spirited, or pulls the wrong rein, or uses a defective harness, and the horse taking fright injures another,—he is liable for battery.”¹³¹ On the other hand, “if the injury happened by unavoidable accident, in the course of an amicable wrestling-match, or other lawful athletic sport, if it be not dangerous, it may be justified.”¹³²

In other words, there was at this time such a thing as a “negligent battery.”¹³³ For example, in an 1829 case, the twelve-year-old defendant shot an arrow from a bow, striking the plaintiff and putting out one of his eyes.¹³⁴ The plaintiff had been hiding from the defendant, who shot at a nearby basket.¹³⁵ When the plaintiff unexpectedly raised his head, the arrow struck him.¹³⁶ The court upheld a trespass judgment for the plaintiff, instructing the jury that shooting an arrow in a school room where there were a number of boys assembled was “at the least, grossly negligent and unjustifiable.”¹³⁷ Similarly, in an 1822 decision, the New York Supreme Court found a defendant liable for trespass when he went up in a balloon and inadvertently came down in the plaintiff’s garden.¹³⁸ The court held that it was foreseeable that a crowd would be drawn into the garden, thereby damaging the plaintiffs’ vegetables

130. GREENLEAF, *supra* note 121, § 85, at 72; *see also* 1 EDWIN A. JAGGARD, HANDBOOK OF THE LAW OF TORTS § 150, at 435 (1895) (delineating that battery requires both exerted force and either “[f]ault or intention on the part of the wrongdoer”); KEETON ET AL., *supra* note 97, § 6, at 31 (noting the growing recognition that “the defendant must be found to be at fault, in the sense of being chargeable with a wrongful intent, or with negligence”). Greenleaf’s treatise has a section on assault and battery and no separate section on negligence; rather, negligence is discussed in a subsection within the assault and battery chapter. GREENLEAF, *supra* note 121, § 85, at 72–73; *see also* HILLIARD, *supra* note 120, at 187, 191 (including no separate chapter on negligence, but including a chapter on assault and battery that discusses batteries in which the bodily contact is negligent, but not intentional). An earlier version of Greenleaf’s treatise was cited by the court in *Vosburg*, the 1891 casebook favorite opinion relying on intent to commit an “unlawful act.” *See Vosburg v. Putney*, 50 N.W. 403, 403 (Wis. 1891).

131. GREENLEAF, *supra* note 121, § 85, at 72 (footnote omitted).

132. *Id.* at 72–73.

133. 1 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 3.3, at 313 (3d ed. 2006).

134. *Bullock v. Babcock*, 3 Wend. 391, 391 (N.Y. Sup. Ct. 1829).

135. *Id.*

136. *Id.*

137. *Id.* at 392.

138. *Guille v. Swan*, 19 Johns. 381, 383 (N.Y. Sup. Ct. 1822).

and crops.¹³⁹ It is notable that in these cases, and in other similar cases,¹⁴⁰ the courts failed to find not only that the defendant intended to injure the plaintiff, but also that the defendant intended to make or cause any contact with the plaintiff's person or property.

B. Historical Defenses to the Tort of Battery

Because battery included both intentional and unintentional (but direct) bodily contacts, the defense of contributory negligence was available not only in case, but also in trespass for battery, regardless of whether the defendant's conduct was willful or merely negligent. In an 1854 decision, for example, the defendant was found to have committed a trespass when he assaulted, beat, and pushed the plaintiff into a running railroad car.¹⁴¹ In its opinion, the Supreme Court of Indiana held that the plaintiff was not required to flee to avoid injury, but that "if [the plaintiff] use[d] ordinary care to prevent injury, and injury ensue[d] from the wrongful act of the defendant, the plaintiff will be entitled to recover," thereby indicating that contributory negligence would have precluded recovery.¹⁴² Similarly, in an 1877 decision, the Supreme Court of Indiana found that the fourteen-year-old defendant had committed a clear assault and battery when he picked up a piece of mortar and threw it at one boy, hitting another and causing serious injury, there being "no question of contributory negligence, 'or of mutual consent to engage in play of a dangerous character.'" ¹⁴³

In insisting that the action in trespass required some degree of fault on the part of the defendant, courts often said that the plaintiff must show "either that the intention was unlawful, or that the defendant was in fault."¹⁴⁴ Fault, in this sense, clearly referred to conduct that would now be described as negligent.¹⁴⁵ With respect to

139. *Id.* at 383.

140. For example, in a 1846 case, the plaintiff alleged that the defendant carelessly and negligently drove his horse, causing his sleigh to collide with plaintiff's horse and killing it. *Clafin v. Wilcox*, 18 Vt. 605, 605 (1846). The Supreme Court of Vermont held that the plaintiff had the option of bringing the action in either trespass or case. *Id.* at 609–10; *see also* *Honeycutt v. Louis Pizitz Dry Goods Co.*, 180 So. 91, 92 (Ala. 1938) ("It is settled in this jurisdiction that to maintain a civil action for an assault and battery, it is not essential that the infliction of the injury upon the plaintiff should be intended. And it can often be sustained by proof of a negligent act resulting in unintentional injury." (citation omitted)).

141. *Heady v. Wood*, 6 Ind. 82, 82 (1854).

142. *Id.* at 83.

143. *Peterson v. Haffner*, 59 Ind. 130, 131–33 (1877) (internal quotation marks omitted) (discussing how neither the injured boy nor the intended target threw anything at the defendant).

144. GREENLEAF, *supra* note 121, § 84, at 72.

145. *Cf. KEETON ET AL.*, *supra* note 97, § 6, at 31 ("This transition was accompanied

an unlawful intention, courts appeared to be placing the emphasis on the *unlawful* nature of the act rather than on the *intent of the actor*. Thus, all that must have been intended is the act causing the harm, certainly not the harm, and at least initially, not even the bodily contact that caused the harm.¹⁴⁶ A defendant's conduct was unlawful if he did "an illegal or mischievous act, which [was] likely to prove injurious to others," and even in the absence of such unlawful conduct, the defendant would be liable if "he [did] a legal act in such a careless and improper manner that injury to third persons may probably ensue."¹⁴⁷ In other words, although the modern conception of battery focuses on the intention of the actor, older law focused more on the relation of the act to the injury and the character of the act itself.¹⁴⁸

C. *The Shift to the Current Distinction Between Negligence and Battery*

At some point courts began to distinguish between an action in negligence and an action in battery. Assault and battery came to be viewed as requiring something more than mere negligence on the part of the defendant, that is, a bad intent or willfulness.¹⁴⁹ Even then, however, courts struggled to determine what a bad intent might be. In an 1889 case before the Supreme Court of Indiana, for example, the defendant rode a bicycle into the plaintiff, who was standing on a broad public sidewalk.¹⁵⁰ The court noted that the defendant was clearly negligent, but that the plaintiff had sued for assault and battery, not negligence.¹⁵¹ In determining whether the plaintiff had successfully proved a battery, the court stated that it was "not essential that there should be a direct or specific intention to commit an assault and battery at the time violence is done a plaintiff."¹⁵² Rather, "[t]he facts may be such as to create an implied or constructive intention to do a wrongful act, although there is no direct or specific unlawful intention."¹⁵³ With regard to the facts of

by a growing recognition that, regardless of the form of the action, there should be no liability for pure accident, and that the defendant must be found to be at fault, in the sense of being chargeable with a wrongful intent, or with negligence.").

146. See *supra* notes 141–43 and accompanying text.

147. HILLIARD, *supra* note 120, at 94 (quoting *Vandenburgh v. Truax*, 4 Denio 464, 465 (N.Y. Sup. Ct. 1847)).

148. HARPER ET AL., *supra* note 133, § 3.3, at 316–17.

149. See, e.g., *Mercer v. Cobin*, 20 N.E. 132, 132 (Ind. 1889) ("There must be something more than a mere negligent touching of a plaintiff's person in order to constitute an assault and battery.").

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

that case, the court held that the facts stated in the jury's verdict "justif[ied] the finding . . . that the act of the [defendant] was a rude and reckless one," thereby "justify[ing] the legal conclusion that there was such a reckless disregard of consequences as to imply an intention to assault the [plaintiff]."¹⁵⁴ Similarly, in a 1902 decision, the Appellate Court of Indiana also invoked the concept of a "constructive intent which makes a wrongful act willful."¹⁵⁵ There, the court rejected the defendant's claim that he had no intent to injure the plaintiff because there was "such a reckless disregard of consequences on the part of the [defendant] as to imply an intention to assault plaintiff."¹⁵⁶

The concept of unlawful or wrongful conduct was also invoked in cases in which the defendant may have intended to benefit the plaintiff, but the court nevertheless found a battery because the bodily contact was against the will of the plaintiff. This was usually the case when surgeons operated without the consent of the patient in non-emergency situations. For example, in a 1905 decision, the Supreme Court of Minnesota stated, "[i]f the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful."¹⁵⁷ Citing a treatise to the effect that "any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery," the court concluded that the surgery was a "violent [act], not a mere pleasantry."¹⁵⁸ Similarly, in an 1878 decision involving a defendant who intervened in a scuffle between the intoxicated plaintiff and another person, inadvertently breaking the plaintiff's leg, the Supreme Court of New York held that the defendant need not have acted in anger and that he could be liable even if his act was done in good nature and from good motives, so long as it was against the will of the plaintiff.¹⁵⁹ Further, in a 1920 case involving a sexual

154. *Id.* at 133.

155. *Reynolds v. Pierson*, 64 N.E. 484, 485 (Ind. App. 1902).

156. *Id.* Professor Deana Sacks discussed the concept of "constructive intent" in her recent article on sexual batteries. See Deana Pollard Sacks, *Intentional Sex Torts*, 77 *FORDHAM L. REV.* 1051, 1078 (2008). Professor Sacks apparently assumes that battery requires intent to harm or offend, but then advocates an approach whereby a defendant who "exceeds the bounds of ordinary social usages and violates social norms . . . will be held to have done so with constructive intent to offend." *Id.*

157. *Mohr v. Williams*, 104 N.W. 12, 16 (Minn. 1905); see also *Rolater v. Strain*, 137 P. 96, 98 (Okla. 1913) ("[T]he removal of the sesamoid bone by the surgeon was without the consent of the patient, and was therefore unlawful and wrongful, and constituted a trespass upon her person.").

158. *Mohr*, 104 N.W. at 16.

159. *Johnson v. McConnel*, 22 N.Y. Sup. Ct. 293, 294 (1878).

touching of a young woman by the woman's employer, the Supreme Court of Washington held that it was not necessary to demonstrate that the assault was made in an angry or insolent manner, but that "[a]n indecent assault [on a woman] consists in the act of . . . taking indecent liberties . . . without her consent and against her will."¹⁶⁰

D. *The First Restatement's Approach to Battery*

This was more or less the state of affairs when the First Restatement was adopted in 1934. In its definitional sections on battery, the First Restatement distinguished between harmful and offensive contacts.¹⁶¹ It also limited the action in battery to contacts that were intended (thereby relegating merely negligent or even reckless contacts to the action in negligence)¹⁶² and with respect to the required intent, apparently originated the phrase "intention of bringing about a harmful or offensive contact"¹⁶³ as a substitute for the prior emphasis by courts and commentators on "unlawful," "wrongful," or "constructive" intent.¹⁶⁴ The First Restatement recognized that absence of consent was an essential aspect of battery;¹⁶⁵ it did not, however, clearly indicate whether the defendant must have intended harm or offense,¹⁶⁶ nor did it explain the relationship between absence of consent and intent to cause a harmful or offensive contact.¹⁶⁷

III. THE SECOND RESTATEMENT

A. *Ambiguity of Intent Provisions*

In *Muniz*, the first decision to squarely address the question of whether the Second Restatement clearly required dual intent, the Supreme Court of Colorado found that the Second Restatement clearly required dual intent, and that this requirement was in accord

160. *Martin v. Jansen*, 193 P. 674, 674–75 (Wash. 1920), *aff'd en banc per curiam*, 198 P. 393 (Wash. 1921).

161. RESTATEMENT (FIRST) OF TORTS § 13 (1934) (harmful contacts); *id.* § 18 (offensive contacts).

162. *Id.* at ch. 2, scope note at 27.

163. *Id.* §§ 13(a), 18(a). I have not been able to locate any cases or commentary using the phrase "intending to cause a harmful or offensive contact" prior to its usage in the First Restatement.

164. *See supra* notes 142–47 and accompanying text.

165. RESTATEMENT (FIRST) OF TORTS § 13(b) (1934) (requiring that "the contact is not consented to by the other").

166. *See id.* § 13 cmt. e (referring to "the intention described in this Section," but not defining what that intention entails).

167. *See id.* § 13 cmt. f (discussing consent as "a matter necessary to constitute an actionable . . . battery" but not in reference to intent).

with the general view of courts and commentators, including Prosser and Keeton's treatise.¹⁶⁸ In *Wagner*, the next case to squarely address the same question, the Supreme Court of Utah found, to the contrary, that the Second Restatement clearly requires only single intent and that this requirement was in accord with the general view of courts and commentators, including the same Prosser and Keeton treatise.¹⁶⁹ How is it that these two courts held such diametrically opposed views of both the Second Restatement provisions and the Prosser and Keeton treatise? As some recent commentators have correctly observed, the Second Restatement provisions are ambiguous, particularly with respect to various statements in the comments, including references to the types of cases for which defendants will be held to have the requisite intent.¹⁷⁰ The same ambiguity can be found in the Prosser and Keeton treatise.¹⁷¹

In its finding that the Second Restatement endorses the dual intent rule, the *Muniz* court relied primarily on the plain language of the text, i.e., the requirement that a defendant must have acted "intending to cause a harmful or offensive contact."¹⁷² Although the court did not explain its reasoning, it may have believed that the most natural reading of this phrase was that there must be intent to harm or offend, as well as to cause bodily contact, and conversely, that it would be unnatural to interpret this phrase to mean that the actor must intend to cause a contact that turns out to be harmful or offensive.¹⁷³ Similarly, the Prosser and Keeton treatise states that

168. *White v. Muniz*, 999 P.2d 814, 816 (Colo. 2000).

169. *Wagner v. State*, 122 P.3d 599, 605 (Utah 2005).

170. See *supra* notes 5–20 and accompanying text.

171. See KEETON ET AL., *supra* note 97, § 8, at 33–34.

172. *Muniz*, 999 P.2d at 816 (emphasizing this language in a block quote of section 18); see, e.g., RICHARD L. HASEN, *THE GLANNON GUIDE TO TORTS* 22–23 (2009) ("[U]nder the Restatement approach it is not enough for the defendant to intend *contact*. The defendant must intend to cause a harmful or offensive contact [S]ome jurisdictions reject the Restatement's intent standard for battery in favor of proof of an intent to cause contact."); EDWARD J. KIONKA, *TORTS IN A NUTSHELL* 170–71 (5th ed. 2010) (acknowledging the split between dual and single intent, but citing section 13 of the Second Restatement as support for dual intent requirement); Lawson, *supra* note 8, at 356–57 ("In the tort of battery, the actor must intend a harmful or offensive contact with another. Consequently, the actor's intent must have two objects: contact with another, and a harm or offense resulting from that contact." (footnote omitted)).

173. See *Muniz*, 999 P.2d at 817–18 (reviewing case law and commentaries supporting single intent but settling on dual intent as "the Restatement's definition on intent"). In addition to citing to the text of section 18, the Colorado Supreme Court cited to the following language in comment e:

[I]t is necessary that an act be done for the purpose of bringing about a harmful or offensive contact . . . to another or to a third person or with knowledge that such a result will, to a substantial certainty, be produced by his act. It is not enough to make an act intentional that the actor realize that it involves any degree of probability of a harmful or offensive contact . . . less

“‘[i]ntent’ is the word commonly used to describe the purpose to bring about *stated physical consequences*,” that intent also includes “those consequences . . . which the actor believes are substantially certain to follow from what the actor does,” and that battery requires a “harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer *such a contact*, or apprehension that *such a contact* is imminent.”¹⁷⁴ The *Muniz* court likely viewed the most natural reading of the phrase “such a contact” as referencing the earlier phrase “harmful or offensive contact.”

In finding that the Second Restatement endorses the single intent rule, the *Wagner* court began with a discussion of Section 8A, which defines the term “intent” to “denote that the actor desires to cause the consequences of his act or that he believes that the consequences are substantially certain to result from it.”¹⁷⁵ In its discussion, the court described an example involving shooting a gun in comment a to section 8A.¹⁷⁶ The example was designed to clarify that the actor must intend not only the act of pulling the trigger, but also the consequence of hitting a person, thereby distinguishing between an accidental and an intentional shooting.¹⁷⁷ The court then concluded that “[b]attery liability, rather than liability sounding in negligence, will attach only when the actor pulled the trigger in order to shoot

than a substantial certainty that it will so result.

Id. at 816 n.6 (quoting RESTATEMENT (SECOND) OF TORTS § 18 cmt. e (1965)). Once again, the only way that this language supports the dual intent rule is through the assumption that the most natural reading of the phrases “purpose of bringing about a harmful or offensive contact” and “such a result” is that there must either be a purpose to harm or offend (as well as to contact) or knowledge that “such a result” will follow. *Id.* at 815, 819.

174. KEETON ET AL., *supra* note 97, §§ 8–9, at 35, 39 (second and third emphases added). While the *Muniz* court cited only section 8 of the Keeton treatise and not section 9, *see Muniz*, 999 P.2d at 816, it is section 9 that addresses the intent required in battery. Section 8 contains only a general discussion of the meaning of “intent.” In addition to citing the Prosser and Keeton treatise, the court cited section 30 of Professor Dobbs’s 2000 treatise. *Id.* That citation is curious because in the cited section, Dobbs clearly states that the Second Restatement formulation is ambiguous. DOBBS, HORNBOOK, *supra* note 9, § 30, at 58 (“The question is whether the plaintiff shows intent by showing merely an intent to touch that turned out to be offensive or harmful, or whether she must show that the harm or offense was also intended. On this point the Restatement and some of the cases are ambiguous.”). Elsewhere in his treatise, Dobbs is himself ambiguous as to whether single or dual intent is required. *Compare id.* § 28, at 53 (“An intent to cause actual harm is a sufficient intent but not a necessary one. It is enough that the defendant intends bodily contact that is ‘offensive’” (footnotes omitted)), *with id.* § 29, at 57 (“[I]n the case of battery, the plaintiff’s burden is to show that the defendant intended to and did cause either harm or ‘offense’”).

175. *Wagner v. State*, 122 P.3d 599, 604 (Utah 2005) (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

176. *Id.* at 604–05 (citing RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1965)).

177. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1965)).

another person, or knowing that it was substantially likely that pulling the trigger would lead to that result.”¹⁷⁸ As for the question of whether the shooter must intend that the bodily contact would cause harm or offense, the *Wagner* court looked first “to the plain language of the law itself.”¹⁷⁹ However, rather than looking to the *text* of section 13, on which the *Muniz* court relied,¹⁸⁰ the *Wagner* court looked to “the plain language of the comments,”¹⁸¹ citing comment c to section 13, which states that “it is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure him” and that “[t]he actor will be liable for battery even if he honestly but ‘erroneously believed[d] that . . . the other has, in fact, consented to [the contact].”¹⁸² The court then described two examples used in the comment to illustrate actionable battery: “an actor playing a good-natured practical joke, under the mistaken belief that he has his victim’s consent to make the contact” and “the healing contact of a physician, acting with helpful intent but against

178. *Id.* at 604. Of course, it would also be sufficient if the defendant intended to cause the imminent apprehension of a harmful or offensive bodily contact. *See supra* note 45 and accompanying text.

179. *Id.* at 605.

180. *White v. Muniz*, 999 P.2d 814, 816 (Colo. 2000). Earlier in the opinion, the *Wagner* court concluded:

[T]he plain language of the Restatement, the comments to the Restatement, Prosser and Keeton’s exhaustive explanation of the meaning of intent as described in the Restatement, and the majority of case law on the subject in all jurisdictions including Utah, compels us to agree with the State that only intent to make contact is necessary.

Wagner, 122 P.3d. at 603. However, the court never explained how the textual language itself supports the single intent rule.

181. *See Wagner*, 122 P.3d at 605 (“The plain language of the comments makes clear that the only intent required to commit a battery is the intent to make a contact, not an intent to harm, injure, or offend through that contact.”); *see also* King, *supra* note 3, at 632 (“The key [textual] language, ‘intending to cause a harmful or offensive contact’ (or its apprehension) does not tell us whether a defendant must have merely intended a contact (or its apprehension) that turns out to be harmful or offensive, or must have also intended that its effect be harmful or offensive.”).

182. *Wagner*, 122 P.3d at 605 (second and third alterations in original) (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1965) (internal quotation marks omitted)). Several commentators also cite this language to support the single intent rule, although they concede that the language is not definitive on that point. *See, e.g.*, King, *supra* note 3, at 633; Reynolds, *supra* note 8, at 729–30; Simons, *supra* note 6, at 1067. The *Wagner* court also cited section 283B of the Second Restatement and its comment c, which addresses the liability of the mentally ill actor for conduct that does not conform to the reasonable person standard, as support for the single intent rule. *Wagner*, 122 P.3d at 608 (citing RESTATEMENT (SECOND) OF TORTS § 283B cmt. c. (1965)). However, this section of the Restatement addresses the liability of the mentally ill for *negligence*, not for intentional torts such as battery. RESTATEMENT (SECOND) OF TORTS § 283B (1965). In battery, mere departure from the reasonable person standard is clearly insufficient to establish liability; no one disagrees that the Second Restatement requires that a battery defendant must, at the very least, intend bodily contact (or the apprehension of an imminent bodily contact).

the patient's wishes."¹⁸³

As for the Prosser and Keeton treatise, the *Wagner* court referenced that treatise's "echo[ing]" of comment c to section 13 when it quoted the treatise to the effect that "[t]he intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do harm" but "an intent to bring about a result which will invade the interests of another in a way that the law forbids."¹⁸⁴ Conceding that this latter statement is itself ambiguous, the court concluded that "all ambiguity on the point is eviscerated by Prosser's next comment, in which he lists as one type of intentional tort the act of 'intentionally invading the rights of another under a mistaken belief of committing no wrong.'"¹⁸⁵

It should be clear by now that neither the text nor the comments to the Second Restatement provide definitive guidance with respect to dual or single intent.¹⁸⁶ My own view is that the *Muniz* court was correct to view the textual language as more naturally supporting the dual intent requirement,¹⁸⁷ but the *Wagner* court was also correct to view the comments as at least appearing to favor the single intent rule.¹⁸⁸ Nevertheless, it is not out of the question to read the text as

183. *Wagner*, 122 P.3d at 605 (citing RESTATEMENT (SECOND) OF TORTS § 13 cmt. c. (1965)).

184. *Id.* at 606 (quoting KEETON ET AL., *supra* note 97, § 8, at 36).

185. *Id.* (quoting KEETON ET AL., *supra* note 97, § 8, at 37).

186. *See supra* notes 5–20 and accompanying text.

187. To the contrary, Professors Henderson, Pearson, Kysar, and Siliciano believe that the text supports the single intent rule, arguing that the objectiveness of the definition of "offensive" in section 19 appears to eliminate the requirement that the defendant subjectively desire to offend the plaintiff, although they do concede that "one could argue that the objective definition of 'offensive' does not necessarily eliminate the 'intent to offend' requirement." HENDERSON ET AL., *supra* note 15, at 34 (noting that under section 19 of the Restatement, a bodily contact is offensive if it is "offends a reasonable sense of personal dignity" (quoting RESTATEMENT (SECOND) OF TORTS § 19 (1965))); *see also* Sacks, *supra* note 156, at 1077 n.127 (arguing that "[t]he element of intent to offend may turn on a community standard insofar as the defendant is bound by community standards about what is reasonable and in accordance with social norms"); *cf.* BEST & BARNES, *supra* note 18, at 30–31 (asking whether dual intent is consistent with the fact that determining whether a contact is offensive depends on an objective test). But this argument apparently confuses *intent* to offend with the requirement that the *resulting contact* be offensive to a reasonable sense of personal dignity, which eliminates liability in the case of the unduly sensitive plaintiff. The Second Restatement purports to take no position on the liability of a defendant who acts with the purpose to offend an unduly sensitive plaintiff, knowing of the undue sensitivity. RESTATEMENT (SECOND) OF TORTS § 19 caveat (1965). However, section 18, taken literally, does not permit such liability when the result is merely offensive contact because the result element of "offensive contact" is clearly defined objectively in section 19. *See id.* § 18; *see also id.* § 19.

188. Comment e to section 18, however, appears to favor the dual intent rule, at least to the extent that the language repeats the language of the text in a way that makes the dual intent rule the more natural reading of such language.

See RESTATEMENT (SECOND) OF TORTS § 18 cmt. e (1965) ("In order that the actor may be liable under the rule stated in this Section, it is necessary that an act be done for

requiring an intent to make contact that turns out to be harmful or offensive, and it is also possible to explain how the comments, as well as the statements in the Prosser and Keeton treatise, are consistent with the dual intent rule. For example, it should be obvious that, even under the dual intent rule, battery does not require either personal hostility or a *desire* to injure because liability is assigned if the defendant *knows* that either harm or offense is substantially certain to occur.¹⁸⁹ Moreover, even the desire to harm can exist without hostility. For example, a defendant who engages in a boxing match under the mistaken impression that the plaintiff consented has the requisite intent to harm when he punches the plaintiff in the jaw, desiring to knock him to the floor. The defendant will be liable if he is mistaken as to his opponent's consent, and his mistake is an unreasonable one.¹⁹⁰ Indeed, this boxing match example can also explain the Prosser and Keeton treatise's inclusion among the intentional tortfeasors a defendant who acts "intentionally invading the rights of another under a mistaken belief of committing no wrong,"¹⁹¹ because a defendant such as the one I have described mistakenly believes that he has the plaintiff's consent and therefore that he is acting appropriately.

B. Implications for Intent Provisions of Restatement's Approval of Results in Certain Cases

1. Vosburg

Even if the language of the Second Restatement text and comments is ambiguous, various commentators have found persuasive support for the single intent rule in the Second Restatement's approval of the results in certain cases or types of cases. For example, facts similar to those in *Vosburg* appear in the comment to section 16, in the form of an illustration explaining the textual provision that "[i]f an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact . . . the actor is liable to the other for a battery although the act was not done

the purpose of bringing about a harmful or offensive contact or an apprehension of such a contact to another or to a third person or with knowledge that such a result will, to a substantial certainty, be produced by his act. It is not enough to make the act intentional that the actor realize that it involves any degree of probability of a harmful or offensive contact . . .").

189. See *supra* note 46 and accompanying text.

190. RESTATEMENT (SECOND) OF TORTS § 892(2) (1979) (providing that defendant is privileged to inflict intentional harm or offense with actual or apparent consent of plaintiff, including "words or conduct [that] are reasonably understood . . . to be intended as consent").

191. KEETON ET AL., *supra* note 97, § 8, at 37.

with the intention of bringing about the resulting bodily harm.”¹⁹² As a result, casebook authors and others often explain *Vosburg* as an example of the intent to make an offensive contact,¹⁹³ which could mean either that the defendant had an intent to offend or that the intended contact turned out to be offensive.¹⁹⁴ Some commentators, however, have remarked that it is implausible that the defendant in *Vosburg* intended to offend the plaintiff,¹⁹⁵ and have therefore concluded that the Second Restatement’s approval of the result in that case represents an endorsement of the single intent rule.¹⁹⁶ This is not necessarily the case; the Second Restatement drafters may simply have misread *Vosburg* as requiring intent to cause either a harmful or offensive contact (as opposed to requiring the intent to commit an “unlawful” act) in an attempt to shoehorn the result in that case in line with the formulations of both the First and Second Restatements.¹⁹⁷ The possibility that the Restatement drafters misread *Vosburg* may not matter because decisions as old as that case, including others that formulated the intent requirement as the intent to commit an “unlawful act”¹⁹⁸—as well as those recognizing a battery when the defendant was merely negligent or reckless with respect to the bodily contact itself¹⁹⁹—would not necessarily survive a court’s

192. RESTATEMENT (SECOND) OF TORTS § 16(1) cmt. a, illus. 1 (1965).

193. See *supra* note 90 and accompanying text.

194. The illustration begins with the statement that “[i]ntending an offensive contact, A lightly kicks B on the shin.” RESTATEMENT (SECOND) OF TORTS § 16 cmt. a, illus. 1 (1965). That language suggests to me that it was to be assumed that A intended offense, but it is possible that what was meant was that the contact A intended, the light kick on the shin, was in fact offensive. Indeed, the illustration goes on to state that the kick, “although offensive,” was unlikely to cause bodily harm; nevertheless, A is said to be liable for the bodily harm that occurred because of the diseased condition of the leg. *Id.* In this respect, I concede that the illustration, along with other language in the comments, is at least ambiguous.

195. See, e.g., GEISTFELD, *supra* note 90, at 121.

196. See *id.* at 120; see also, ABRAHAM, *supra* note 37, at 23 (“That the defendant [in *Vosburg*] intended the touching was sufficient, even though the defendant did not necessarily intend the touching to be harmful or offensive.”).

197. The reference to *Vosburg* appears in both the First and Second Restatements as an illustration to section 16. See RESTATEMENT (FIRST) OF TORTS § 16 cmt. a, illus. 1 (1934); see also RESTATEMENT (SECOND) OF TORTS § 16 cmt. a, illus. 1 (1965). In any event, what single intent proponents appear to ignore is that *Vosburg* clearly required something more than a mere intent to make a bodily contact that turned out to be harmful or offensive. The historical evolution of the “unlawful intent” standard in cases like *Vosburg* indicates that what the court required was some degree of actual wrongdoing—either an unlawful intent or some fault. See *supra* Part I.B (discussing *Vosburg*). The defendant may well have been negligent in failing to understand that the plaintiff would find the contact to be offensive, but “unlawful intent” was supposed to reflect some wrongdoing that was greater than (or at least different from) mere negligence.

198. See *Raefeldt v. Koenig*, 140 N.W. 56, 57 (Wis. 1913) (citing *Donner v. Graap*, 115 N.W. 125 (Wis. 1908), and *Degenhardt v. Heller*, 68 N.W. 411 (Wis. 1896), for the premise that “unlawful intent” is the very premise of assault and battery).

199. See *supra* notes 149–60 and accompanying text (describing situations in which

adoption of either the First or the Second Restatement. As a result, the illustration to section 16 does not shed much light on the question of whether the Restatement provisions should be interpreted as adopting the dual or single intent rule.²⁰⁰

2. *Medical batteries*

Comment c to section 13 of the Second Restatement notes with approval that physicians are uniformly held liable for battery, even when they act with helpful intent but against the patient's wishes.²⁰¹ Commentators often view cases involving medical batteries as problematic under the dual intent rule, particularly when a physician mistakenly believes that the patient has consented. As a result, they view the Second Restatement's approval of these cases as evidence of adoption of the single intent rule. According to these commentators, when physicians act in accord with what they view as the best interests of the patient, under the sincere, but mistaken, belief that the patient has consented, the physician intends neither to harm nor to offend the patient.²⁰² In my opinion, however, these cases can be explained, consistent with the dual intent rule, in either one of two ways.

First, the vast majority of these cases involve operations, and as one court long ago observed, a medical operation is a "violent assault, not a mere pleasantry."²⁰³ In fact, section 15 of the Second Restatement defines "bodily harm" as "any physical impairment of the condition of another's body, or physical pain or illness,"²⁰⁴ and the comment elaborates that "[t]here is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm."²⁰⁵ The illustration to this comment describes an

bodily contact may implicate negligence).

200. Indeed, the illustration itself states that A kicked B on the shin "[i]ntending an offensive contact," perhaps adding a fact that was either missing or obscured in the actual *Vosburg* opinion. RESTATEMENT (SECOND) OF TORTS § 16 cmt. a, illus. 1 (1965).

201. *Id.* § 13 cmt. c.

202. See, e.g., Lawson, *supra* note 8, at 360; Reynolds, *supra* note 8, at 724 (concluding that "[t]he medical situations again illustrate that only intent to contact is required" because these are among the situations in which the trier of fact may agree that the defendant intended no harm or offense but the defendants are nevertheless held liable); Simons, *supra* note 6, at 1067–68 (viewing these medical battery cases as "impossible to explain" under the dual intent view).

203. *Mohr v. Williams*, 104 N.W. 12, 16 (Minn. 1905).

204. RESTATEMENT (SECOND) OF TORTS § 15 (1965).

205. *Id.* § 15 cmt. a. The Third Restatement similarly defines "bodily harm" as "the physical impairment of the human body" as well as "physical injury, illness, disease, impairment of bodily function, and death." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 4 (2010). The comment, however, states that "any detrimental change in the physical condition of a person's body or

operation in which the physician removes a wart on a patient's neck. Although it is stated that "[t]he removal in no way affects [the patient's] health, and is in fact beneficial," the illustration concludes that the patient has suffered bodily harm.²⁰⁶ Thus, as another court recently concluded, operations clearly encompass the alteration of a structure or function of the body and are therefore necessarily harmful.²⁰⁷ As a result, in these cases it is unnecessary to find that the physician intended offense, as it can readily be concluded that the physician intended harm, as defined by the Restatement, although there was no intent to injure.

Second, even when there is no intent to harm, as when the physician conducts an invasive physical examination—such as a gynecological examination—intent to offend may be found by separating the elements of intent and lack of consent. Thus, physicians inevitably will know that, in the absence of consent (including emergencies, in which consent is typically presumed),²⁰⁸ a patient will find either surgery or an invasive physical examination to be offensive.²⁰⁹

3. Other "helpful intent" cases

It is important to keep in mind that even when the element of intent has been satisfied, a physician will not be liable for battery if

property counts as harmful impairment." *Id.* § 4 cmt. c. The comment no longer includes the illustration of the beneficial wart removal, *see* RESTATEMENT (SECOND) OF TORTS § 15 cmt. a, illus. 1 (1965), but that example is cited with approval in the Reporters' Note as a tortious invasion of the patient's "right to bodily integrity," RESTATEMENT (THIRD) OF TORTS: LIB. FOR PHYSICAL & EMOTIONAL HARM § 4 reporters' note to cmt. c (2010). *See also* HENDERSON, *supra* note 15, at 30 (differentiating alterations in the body from physical harm or impairment).

206. RESTATEMENT (SECOND) OF TORTS § 15 cmt. a, illus. 1 (1965).

207. *See* Vitale v. Henchey, 24 S.W.3d 651, 658 n.28 (Ky. 2000) (quoting RESTATEMENT (SECOND) OF TORTS § 15 cmt. a., illus. 1 (1965)).

208. RESTATEMENT (SECOND) OF TORTS § 892D cmt. a (1965).

209. Professor Simons argues that physicians who honestly, but mistakenly, believe that they are acting with the patient's consent do not have the intent to harm or offend. *See* Simons, *supra* note 6, at 1069 (noting that physicians who honestly believe that a patient consents under the apparent consent doctrine cannot possibly believe that a patient plaintiff will be offended by the touching). Professor Dobbs attempts to refute that argument by conflating the elements of intent and offense. He argues that in the absence of even apparent consent, the physician knows that the contact will be offensive. DOBBS, HORNBOOK, *supra* note 9, § 29, at 55–56. But this argument does not really answer Professor Simons's concern with respect to physicians who honestly believe the patient has consented, regardless of whether that mistake is reasonable or unreasonable. In my view, the answer to Professor Simons clearly requires separating the elements of intent and lack of consent. There is one example that remains hard to explain: the permanently comatose patient who has previously made it clear that life-sustaining treatment is unwanted. *See* Lawson, *supra* note 8, at 359 n.24. However, this case is problematic under both the dual and the single intent rule because even under the single intent rule, it is not obvious how the resulting intended contact is either harmful or offensive.

the plaintiff consented or if there was at least apparent consent.²¹⁰ The point is that the physician's motive to benefit the plaintiff is irrelevant; if the physician knows that the intended treatment will be harmful, in the minimal Restatement sense, or if the physician understands that, in the absence of consent, the treatment will be offensive, then the element of intent has been satisfied. In these situations, the consent or lack of consent is a factor that can (and should) be considered separate and apart from the element of intent.

The same explanation is also available in other "helpful intent"²¹¹ cases that do not involve physicians. For example, in a frequently cited case, the plaintiff alleged that the employees of a skating rink manipulated and pulled the plaintiff's arm after she fell and fractured her arm, over the protestations of both the plaintiff and her husband.²¹² Analogizing the situation to one involving skilled medical personnel, the New Jersey court found that the employees' behavior could have constituted a battery, defined as both "[t]he least manual touching of the body of another against his will" and as an act "unlawful in its own nature."²¹³ In doing so, the court did not discuss intent other than to say that "good intentions" are irrelevant to a finding of battery.²¹⁴ Under the dual intent rule, the decision is easily explained because, despite the defendant's good intentions, the defendant must have known either that the contact was harmful (given that it was clearly painful) or that, in the absence of consent, such manipulations would be offensive. Similarly, a state appeals court in Illinois found a battery when two teachers lifted a minor student after she had been injured, pulling and shoving on her broken leg and hip, causing additional injuries.²¹⁵ Here too, the defendants must have been aware that their actions were harmful and that, in the absence of consent, pulling and shoving on the girl's leg

210. See *supra* note 112 and accompanying text.

211. Lawson, *supra* note 8, at 359.

212. Clayton v. New Dreamland Roller Skating Rink, Inc., 82 A.2d 458, 460 (N.J. Super. Ct. App. Div. 1951).

213. *Id.* at 462.

214. *Id.*

215. Bernesak v. Catholic Bishop of Chi., 409 N.E.2d 287, 288–89 (Ill. App. Ct. 1980). The court's opinion was somewhat confusing in finding that the amended complaint, which alleged a "willful" battery, did not plead either "a 'malicious' or an 'intentional' tort." *Id.* at 291–92. The original complaint alleged ordinary negligence, and the defendant had objected to the amended complaint as radically changing the plaintiff's theory, which should have been alleged in a separate count on which separate forms of verdict could be submitted. *Id.* The court upheld a judgment for the plaintiff, rejecting the defendant's argument. *Id.* at 291–92 (holding that because the amended complaint characterized the battery as willful and not malicious or intentional, there was not a "radical change" in the cause of action). It is unclear how the court concluded that a claim of battery did not allege an intentional tort.

and hip would clearly be offensive.²¹⁶ In both cases, the defendant's liability for battery depended on the separate question of whether the plaintiff had given actual or apparent consent or whether the defendants were otherwise authorized to act as they did.

4. *Practical jokes and one-sided horseplay*

Yet another class of cases sometimes thought to be difficult to explain under a dual intent rule involves practical jokes and one-sided rough horseplay.²¹⁷ As some single intent proponents concede, many of these cases can conform to the dual intent rule because, given the circumstances, the defendant must have understood that the contact would be offensive, at least initially.²¹⁸ Indeed, it is

216. See *id.* at 289 (observing that the girl was shrieking in pain). For an example of an older, similar case, see *Johnson v. McConnel*, 22 N.Y. Sup. Ct. 293 (1878), in which the defendant intervened in an altercation between the intoxicated plaintiff and a third person. In the course of an ensuing scuffle between the defendant and the plaintiff, the plaintiff's leg was broken. *Id.* at 294. The plaintiff clearly resisted the defendant's efforts, and the contact was not a gentle one, suggesting that the defendant understood that the contact was both harmful (painful) and offensive (unwanted). *Id.* However, in *Hoffman v. Eppers*, 41 Wis. 251 (1876), the Supreme Court of Wisconsin held that a defendant who aroused the plaintiff from his drunken stupor and, in a "gentle and friendly manner," assisted him to the court where he was required to testify as a witness did not commit a battery. Regardless of the defendant's intent in that case, the result can be explained under the Second Restatement as a failure to satisfy the result element of the plaintiff's prima facie case; the contact resulted in no harm and the court apparently believed that it would not have offended a reasonable sense of personal dignity, given the particular circumstances. *Id.* at 258.

217. See, e.g., Lawson, *supra* note 8, at 358 (stating that practical jokers clearly intend an end other than harming or offending, yet are still routinely held liable despite not satisfying the dual intent rule); Reynolds, *supra* note 8, at 718-21; Simons, *supra* note 6, at 1068 (labeling practical jokers as a "counterexample" to the dual intent rule because they are routinely held liable despite not satisfying the dual intent rule).

218. For example, Professor Simons concedes that in cases like *Garratt v. Dailey*, the defendant's very purpose may have been to hurt (albeit only slightly) or offend the elderly woman who was about to sit down in the chair he pulled it away from her. Simons, *supra* note 6, at 1068 n.23. Professor Simons similarly concedes that "many other practical-joker cases involve desire to offend or at least knowledge that offense is very likely to result, and thus could be explained by the dual intent approach." *Id.* at 1068 n.25. Rather, Professor Simons, who is clearly a proponent of the single intent rule, relies primarily on the language of some of the practical joker opinions, as well as language in the comments to the Second Restatement, which state that neither "personal hostility" nor "desire to offend" is necessary for liability. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 34 (1965)). This reliance is misplaced. It is irrelevant under the dual intent rule that the defendant acts without "personal hostility." As for the absence of a "desire to offend," the Restatement drafters were surely aware that "intent" is broadly defined to include either desire or knowledge with "substantial certainty" that the relevant consequences will result. See RESTATEMENT (SECOND) OF TORTS § 8A (1965). Practical jokers typically desire offense, at least initially; physicians and other helpers usually do not typically desire either harm or offense, but they will inevitably *know* that those results will occur when they perform operations or other invasive treatments or examinations without the consent of the plaintiff.

difficult to imagine a case—except perhaps for one involving a young child or a mentally deficient adult—in which the dual intent rule would not be satisfied.²¹⁹ Certainly for practical jokes, the very purpose of the joke is to cause at least some initial offense, although the defendant may be hopeful that the victim of the joke will subsequently come to see humor in the situation.²²⁰

A number of these cases involve fairly extreme circumstances, such as the defendant who “suddenly and without warning” jumped onto the plaintiff’s back screaming “boo,” pulled the plaintiff’s hat over his eyes, and rode him piggyback, accidentally causing the plaintiff to fall and strike his face on meat hooks hanging nearby.²²¹ The parties agreed that the accident occurred as a result of “one-sided horseplay with no intention on [the defendant’s] part to injure plaintiff.”²²² In an opinion strongly suggesting the single intent rule, the Second Circuit held that the complaint stated a battery.²²³ Nevertheless, although the defendant intended no harm, it is inconceivable that he did not understand that the plaintiff would, at least initially, be offended by having someone suddenly jump on his back and ride him piggyback while he was at work. Other practical joker decisions can be similarly explained,²²⁴ including those involving children.²²⁵

Professor Reynolds also concedes that in many practical joker cases, particularly those involving adults, the defendant at least knew with substantial certainty that the plaintiff would be harmed or offended. See Reynolds, *supra* note 8, at 719–20. He notes, however, that many of the joker cases involve children, and he questions whether they were capable of realizing that harm or offense was substantially certain to occur. *Id.* at 720. In the cases Professor Reynolds cites, however, the defendant’s very purpose was probably to cause at least offense, as was the case in *Garratt and Ghassemieh v. Schafer*, 447 A.2d 84 (Md. Ct. Spec. App. 1982), in which a thirteen-year-old student pulled a chair out from underneath her teacher.

219. If the plaintiff has previously given some indication of consent to this type of conduct, the defendant may rely on the apparent consent doctrine and will not be liable. If, however, the plaintiff has not previously given some indication of consent, then the defendant will be liable under either the single or dual intent rule.

220. See RESTATEMENT (SECOND) OF TORTS § 13 cmt. c (1965) (noting that the intent element is satisfied “although the actor erroneously believes that the other will regard it as a joke” because “[o]ne who plays dangerous practical jokes on others takes the risk that his victims may not appreciate the humor of his conduct and may not take it in good part”).

221. *Lambertson v. United States*, 528 F.2d 441, 442 (2d Cir. 1976).

222. *Id.* at 443.

223. *Id.* at 443, 445.

224. For example, in *Cole v. Hibberd*, No. CA94-01-015, 1994 WL 424103 (Ohio Ct. App. Aug. 15, 1994), the defendant, who had been drinking, playfully kicked the plaintiff, a friend, in the lower back. When the plaintiff complained that the kick hurt, the defendant and her husband began laughing. *Id.* at *1. The Ohio appeals court found, as did the court in *Lambertson*, that the defendant’s conduct constituted a battery despite the absence of any intent to harm, stating that reasonable minds could conclude only that the defendant intended to kick the plaintiff. *Id.* at *2. Although strongly suggestive of the single intent rule, the decision is just as well explained under the dual intent rule, since the defendant must have desired or known that the plaintiff would be offended by the kick. See also *Fuerschbach v. Sw.*

Of course, it is possible that, if given instructions emphasizing that the plaintiff must prove that the defendant either desired or knew with substantial certainty that the plaintiff would be harmed or offended, a jury might return a verdict in favor of a defendant, particularly when the defendant is a young child or a mentally deficient adult.²²⁶ Whether this is an undesirable result, however, is an open question and one to which I will return in the next section.²²⁷

A more difficult situation involving practical jokes and rough horseplay concerns the defendant who mistakenly believes that the plaintiff has consented to this type of contact. Thus, some commentators believe that the dual intent rule poses problems for cases of mistaken identity; for example, a defendant who intends a joke on a friend with whom the defendant has a mutual pattern of engaging in such pranks, but who mistakes a stranger for his friend.²²⁸ It might be concluded that there is no intent to offend in such a case;

Airlines Co., 439 F.3d 1197, 1200 (10th Cir. 2006) (involving a mock arrest arranged by the plaintiff's co-workers, in which police officers handcuffed the plaintiff in the airport in which she worked before informing her that it was a joke); Villa v. Derouen, 614 So. 2d 714, 715 (La. Ct. App. 1993) (examining a situation in which the defendant pointed a welding torch in the plaintiff's direction, intentionally releasing gas into the plaintiff's groin area); Maines v. Cronomer Valley Fire Dep't Inc., 407 N.E.2d 466, 469 (N.Y. 1980) (discussing a hazing incident in which volunteer firemen pulled a bed sheet over the plaintiff's head, tied a leather belt to his waist, bound his feet with rope, held his arms to restrain him, carried him outside to a parking lot, and threw him in a garbage dumpster); Moore v. El Paso Chamber of Commerce, 220 S.W.2d 327, 328 (Tex. Civ. App. 1949) (concerning a young man who playfully chased the plaintiff, a young woman, for the purpose of roping her and imprisoning her while she was fleeing to avoid him).

225. For example, in *Ghassemieh v. Schafer*, 447 A.2d 84, 85 (Md. Ct. Spec. App. 1982), a thirteen-year-old student pulled a chair from under her teacher as a "joke." Like the defendant in *Garrett*, the defendant in *Ghassemieh* must have desired, or at least known with substantial certainty, that the teacher would be offended when she unexpectedly hit the floor, otherwise the "joke" would not be funny. Professor Reynolds concedes that the minor defendant was "*perhaps* capable of realizing that harm or offense was substantially certain to result to the plaintiff." Reynolds, *supra* note 8, at 720 (emphasis added); *see also* Markley v. Whitman, 54 N.W. 763, 763 (Mich. 1893) (involving high school students playing a game of "rush," in which the students formed a line and each pushed the student ahead until the last student hit an unsuspecting victim; here, the hit to the victim was so hard that it fractured his neck).

226. *See infra* Part IV (highlighting the benefits and criticisms of both the single and dual intent rules).

227. *See infra* Part IV.A (discussing the policy implications of finding for the defendant in practical joke cases and cases where the defendant is a child or adult with developmental problems).

228. *See, e.g.*, Reynolds, *supra* note 8, at 723 n.27 (discussing the theory that contacts that cause harm require only single intent and those that cause offense require dual intent can explain the results of mistaken identity cases but ultimately rejecting the theory as not supported by the cases cited as support (citing Charles E. Carpenter, *Intentional Invasion of Interest of Personality*, 13 OR. L. REV. 227, 235 (1934))).

however, it is unclear whether either courts or the Second Restatement drafters would find a battery in such a situation, as there are but few cases involving mistaken identity, and the situation is typically presented as an acknowledged hypothetical.²²⁹ Moreover, it is unclear whether courts *should* find a battery in cases involving mistaken identity, at least when the mistake is reasonable.²³⁰ However, assuming that there *should* be liability, at least for mistakes that are unreasonable, there is a way to reach that result without insisting on the single intent rule. This involves use of the methodology previously used to explain the medical and other “helpful intent” battery cases: separating the elements of intent and absence of consent.²³¹ Thus, we would first ask whether this defendant knew that, in the absence of consent, this is the type of contact that would be offensive.²³² The answer will typically be yes given the nature of the contacts envisioned for these cases.²³³ We would then invoke the apparent consent rule, which under the Second Restatement must be considered with respect to the plaintiff’s prima facie case and not as an affirmative defense.²³⁴ If the defendant was unreasonable in believing that the plaintiff had consented, then the prima facie case is satisfied, and the defendant will be liable, just as she would be under the single intent rule.²³⁵ As for reasonable mistakes, regardless of whether courts adopt single or dual intent, the defendant can presumably invoke the doctrine of apparent consent.²³⁶ Because the ultimate outcome depends not on

229. *See id.* at 723 (describing mistaken identity cases as “seldom actually encountered”). The only battery case I have found involving mistaken identity is a medical battery case in which a physician performed a spinal test on the wrong patient who had been mistakenly called in from the waiting room by a nurse who did not even inquire as to the patient’s identity. *See Gill v. Selling*, 267 P. 812, 813, *aff’d en banc*, 270 P. 411 (Or. 1928). For a discussion of the possibility that courts are applying specialized rules for cases involving battery in the context of medical care, see *infra* Part V.

230. *See infra* note 238 and accompanying text (discussing the dual intent rule in sexual touching cases).

231. *See supra* notes 213–16 and accompanying text.

232. *See supra* note 209 and accompanying text.

233. *See supra* notes 206–09 and accompanying text.

234. RESTATEMENT (SECOND) OF TORTS § 18 cmt. f (1965); *id.* § 892 (defining apparent consent); *supra* notes 112–23 and accompanying text (discussing how the Second Restatement implies that the plaintiff should bear the burden of proving lack of consent).

235. RESTATEMENT (SECOND) OF TORTS § 892B cmt. c (1979) (stating that the defendant’s mistake in believing that the plaintiff consents to the contact is only effective as apparent consent if the defendant is reasonable in that belief).

236. Commentators posing the mistaken identity hypothetical apparently assume that the defendant in that case is and should be liable, even if the mistake is reasonable. *See, e.g., Reynolds*, *supra* note 8, at 723–24 (citing examples of hypotheticals that would result in liability). They do not explain why, but it may be because the Second Restatement provides in section 892A that the actual or

the element of intent, but rather on the defendant's ability to invoke the doctrine of apparent consent, the result in such cases should be the same under either the single or the dual intent rule.²³⁷

5. *Sexual touchings*

The methodology I am suggesting for analyzing cases involving mistaken identity in practical jokes can also be used to explain the results in sexual touching cases where the defendant unreasonably believes that the plaintiff will welcome the contact or when the plaintiff expressly consents, but the consent is legally invalid, as in cases involving statutory rape. These cases are often understood to be difficult to explain under the dual intent rule.²³⁸ Once again, however, we can usually conclude that a competent adult defendant understands, as most people do, that sexual touchings will offend a person who has not indicated in some manner that such a contact would be welcome;²³⁹ we would then ask separately whether or not

apparent consent must be given "by one who has the capacity to consent or by a person empowered to consent for him." RESTATEMENT (SECOND) OF TORTS § 892A(2)(a) (1979). I have found no cases squarely addressing this question and, for reasons set forth in Part V, I conclude that mistaken identity defendants should *not* be liable when they act reasonably under the circumstances.

237. If the result is different in a case involving a reasonable mistake, it would be because the doctrine of apparent consent is limited to defendants who rely on conduct of the plaintiff and not someone else. *See supra* notes 211, 218 and accompanying text. In my view, holding a defendant liable for battery in such a situation is problematic, given the defendant's lack of any apparent fault. *See infra* notes 245–47 and accompanying text. In any event, hypotheticals involving cases of mistaken identity may not assist in determining whether the Second Restatement adopts either dual or single intent.

238. *See, e.g.*, Lawson, *supra* note 8, at 379–80 (arguing in favor of a formulation in which the intent required is to make an unauthorized bodily contact); *see also* JOSEPH W. GLANNON, THE LAW OF TORTS 15–16 (4th ed. 2010) (stating that, in the absence of a single intent rule, a defendant may be held liable only if "the law will attribute to him an understanding of what the reasonable person finds offensive"). Even Professor Dobbs, a proponent of the dual intent rule, finds problematic cases involving sexual boors and thereby finds it necessary to modify the dual intent rule in such cases. DOBBS, HORNBOOK, *supra* note 9, § 28, at 53 (providing that a caress may be battery unless the circumstances would indicate that it is acceptable).

239. *See, e.g.*, Brennehan v. Famous Dave's of Am., Inc., 410 F. Supp. 2d 828, 846–47 (S.D. Iowa 2006) (stating that a reasonable person would consider slapping a woman on the buttocks offensive), *aff'd*, 507 F.3d 1139 (8th Cir. 2007); Paul v. Holbrook, 696 So. 2d 1311, 1311 (Fla. Dist. Ct. App. 1997) (involving a defendant who gave an unwelcome shoulder massage to his co-worker); Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 376–77 (Minn. 1990); Liljegren v. United Rys. Co. of St. Louis, 227 S.W. 925, 926 (Mo. Ct. App. 1921) (finding that an intoxicated train passenger who kissed another passenger on the cheek had committed a battery). *But see* J.W. v. Utah, No. 2:05CV00968K, 2006 WL 1049112, at *5 (D. Utah 2006) (following the single intent rule previously adopted in *Wagner* and finding a battery despite the fact that the seven-year old mentally handicapped defendant was incapable of understanding the injurious or offensive nature of a violent sexual assault of the plaintiff), *aff'd*, 647 F.3d 1006 (10th Cir. 2011). Whether mentally deficient children or adults should be found capable of committing a battery is a

the circumstances were such that the defendant reasonably believed that the plaintiff consented to the contact.²⁴⁰ In cases involving sincere, but unreasonable, mistakes as to consent, the plaintiff will still prevail, and the only question remaining is whether the rare defendant who sincerely, but unreasonably, believes that this type of contact is not generally offensive *should* escape liability for lack of intent to offend—a question to which I will return in the next section.²⁴¹ As for cases involving statutory rape, most defendants will acknowledge that, in the absence of consent, the sexual intercourse is a bodily contact that will be highly offensive. Having thereby found the dual intent requirement easily satisfied, at least in most cases,²⁴² we would then analyze consent as an element separate and apart from intent.²⁴³

C. *Necessity of Separating Intent and Absence of Consent*

The suggested methodology to determine whether a defendant intends a contact to be offensive is also useful in clarifying the confusion that exists in the current case law and commentary concerning the relationship between the intent to make a harmful or offensive contact and the absence of consent on the part of the plaintiff. For example, Professor Simons argues that the apparent consent doctrine would be superfluous if the Restatement had adopted the dual intent rule,²⁴⁴ but in my view he is mistaken. The doctrine is certainly not superfluous in cases where the defendant clearly has the intent to harm (as in a surgical operation as well as a boxing match) and the apparent consent doctrine is necessary for the defendant to avoid liability in situations where the defendant mistakenly, but reasonably, believes that the plaintiff has consented.²⁴⁵ It is also not superfluous in cases involving intended contacts that are merely offensive, at least when the defendant understands that, in the absence of consent, such contact would be offensive. In these cases, the doctrine of apparent consent would also

matter of policy as to which courts and commentators disagree. *See infra* notes 334–41 and accompanying text.

240. *See* RESTATEMENT (SECOND) OF TORTS § 892 cmt. c (1979).

241. *See infra* notes 330–34 and accompanying text (discussing the “intuitive fairness” rule in the context of sexual boors).

242. The exception will be in cases involving mentally deficient children and adults. *See infra* notes 266, 349–57 and accompanying text.

243. *See supra* Part I.A.

244. *See* Simons, *supra* note 6, at 1069 (arguing that if a defendant honestly believes that the plaintiff consented, the defendant cannot intend to offend and therefore can never be liable under the dual intent rule).

245. *See supra* text accompanying note 209 (illustrating how a defendant may intend to harm even though he reasonably believes the plaintiff has consented).

exonerate defendants who make reasonable mistakes but not those whose mistakes are unreasonable.²⁴⁶

Professor Simons acknowledges the possibility of using what he calls “conditional intent,” but he argues that treating such consent “the same as an actual intent to offend is artificial and unjustifiable” and “pretty much dissolves the distinction between single and dual intent.”²⁴⁷ With respect to the “artificial” aspect of conditional consent, I assume that he is referring to the fact that the defendant may not, in fact, desire or know with substantial certainty that *this particular plaintiff, in these particular circumstances*, will be offended,²⁴⁸ given the defendant’s belief that the plaintiff has consented to the contact.²⁴⁹ It is not “artificial,” however, to determine whether the defendant knew that, in the absence of consent, this type of contact would be offensive to persons in the plaintiff’s position.²⁵⁰ Moreover, this determination does not undermine the notion of dual intent because it is entirely possible—for example in the case of the insane and small children, as well as in the case of competent adults from an entirely different culture, and possibly even in the case of “sexual boors”²⁵¹—that the defendant in fact did not have such knowledge, and thus the test has not been satisfied. As for any possible injustice, Professor Simons is correct when he concludes that a defendant who has “conditional intent” is less culpable than one who acts with actual intent,²⁵² but the implications of this conclusion are far from clear. After all, a defendant who shoots in the sincere but unreasonable belief that the plaintiff is threatening to harm him is certainly less culpable than a defendant who shoots with no apparent justification,

246. See *infra* notes 256–63 and accompanying text (emphasizing that only reasonable mistakes can be exonerated).

247. Simons, *supra* note 6, at 1069 n.26.

248. His argument appears to be limited to intended offensive contacts because the methodology he calls “conditional consent” is unnecessary in cases in which the defendant intends to benefit the plaintiff, but knows with substantial certainty that harmful contacts will occur. *Id.*

249. I do not see any similar problem with respect to the intent to harm because such intent, as in the medical cases, is entirely independent of any belief as to the plaintiff’s consent. See *supra* notes 205–09 and accompanying text (concluding that under the Restatement, physicians intend to harm when they perform operations). It is only with respect to the intent to offend that we should determine intent—in the sense of knowledge with substantial certainty—independent of any belief as to the plaintiff’s consent.

250. See *supra* note 209 and accompanying text (applying the methodology of separating the elements of intent and absence of consent).

251. A “sexual boor” is a defendant who claims to believe that his sexual advances are welcome, when they are not. See GLANNON, *supra* note 238, at 15–16 (describing “Romeo, who is of the opinion that no woman in her right mind would object to his attentions” and who engages in behavior that a reasonable woman would find offensive).

252. Simons, *supra* note 6, at 1069 n.26.

and yet the sincere but mistaken defendant in that situation will nevertheless be liable for committing a battery.²⁵³

Professor Simons also argues that it is unjustifiable to treat the defendant with “conditional intent” more harshly than another defendant who “honestly (though unreasonably) believes that he will not cause any contact at all.”²⁵⁴ Of course, if the defendant desires or knows that his conduct will cause even apprehension of an imminent harmful or offensive bodily contact, then he will have the requisite intent under the dual intent rule.²⁵⁵ Thus, the hypothetical Professor Simons uses does not work well to illustrate his point because the defendant who “playfully lunges at his friend, pretending to try to tackle him, while believing that there is little chance of contacting him, but . . . accidentally knock[ing] his friend to the ground,”²⁵⁶ will in fact satisfy the dual intent standard because such a defendant intends to cause “imminent apprehension” of a bodily contact, although not an actual contact. As for the defendant who merely acts recklessly or negligently with respect to either contact or the apprehension of contact, I would argue that such a defendant is indeed less culpable than the defendant who intends bodily contact; in any event, the Second Restatement clearly distinguishes and treats differently those who intend bodily contact and those who are merely reckless or negligent with respect to such contact,²⁵⁷ and Professor Simons does not challenge this distinction. Moreover, by treating the elements of intent and lack of consent in different sections,²⁵⁸ the Second Restatement appears to require that the absence of consent be considered separately from the requisite intent to make a harmful or offensive contact, although courts and commentators sometimes view them as different ways of saying the same thing.

Failure to recognize intent as an element separate from the absence of consent poses its own problems. For example, if “intent to

253. Intent is satisfied under both single and dual intent because the defendant clearly intended to harm the plaintiff. The privilege of self-defense is available only when the defendant reasonably believed that the plaintiff was threatening to harm him. See RESTATEMENT (SECOND) OF TORTS §§ 63, 65 (1965).

254. Simons, *supra* note 6, at 1069 n.26.

255. See RESTATEMENT (SECOND) OF TORTS §§ 13(a), 18(1)(a) (1965) (stating that a person is liable for battery if he acts intending to cause apprehension of imminent contact).

256. Simons, *supra* note 6, at 1069 n.26.

257. See RESTATEMENT (SECOND) OF TORTS § 18 cmt. g (1965) (clarifying that actions producing an offensive contact are actionable only as intentional torts *and that an actor is not liable for acts that involve the mere risk of offensive contact*).

258. See RESTATEMENT (SECOND) OF TORTS §§ 8A, 892–892D (1965) (addressing intent just before introducing torts and defining consent in the context of defenses). Underscoring this divide is the fact that the intent was included in volume 1 released in 1965, while consent was not defined until volume 4, published in 1979.

cause an unauthorized contact” is substituted for “intent to make a harmful or offensive [contact]” as some commentators have suggested,²⁵⁹ then it would still be necessary to decide whether the plaintiff must prove that the defendant *knew* that the contact was unpermitted or whether it is sufficient that the contact turned out to be unpermitted. This exercise is simply another version of the dual intent versus single intent debate.²⁶⁰

In addition, formulating the rule in this way suggests that even unduly sensitive plaintiffs should recover whenever they have made their wishes known.²⁶¹ Some commentators have generally approved this result,²⁶² although the Second Restatement expressly declined to take a position on the question,²⁶³ and under the existing text of sections 18 and 19, the unduly sensitive plaintiff apparently would *not* recover (regardless of the defendant’s intent) because the resulting contact would not offend a reasonable sense of personal dignity, as those sections require.²⁶⁴ Even those commentators, however, agree

259. See, e.g., Lawson, *supra* note 8, at 368 (proclaiming this as the “ideal formulation of intent”); cf. DOBBS, HORNBOOK, *supra* note 9, § 28, at 52–53 (“The defendant is subject to liability for a simple battery when he intentionally causes bodily contact to the plaintiff in a way not justified by the plaintiff’s apparent wishes or by a privilege, and the contact is in fact harmful or against the plaintiff’s will.” (footnotes omitted)). There is at least one case in which a court reached that result. See *Cohen v. Smith*, 648 N.E.2d 329, 335–36 (Ill. App. Ct. 1995) (finding battery where a male nurse participated in a caesarian section despite the patient previously informing the hospital that her religion prohibited her from being touched or observed naked by a male).

260. Compare DOBBS, HORNBOOK, *supra* note 9, § 28, at 52–53 (stating that a defendant is liable for battery when he intentionally causes contact in a manner “not justified by the plaintiff’s *apparent* wishes” (emphasis added)), with *id.* § 30, at 58 (referencing “an intent to touch in a way the defendant *understands* is not consented to” (emphasis added)). In fact, there are four possibilities: (1) the defendant knows that the contact is unpermitted; (2) the defendant believes that the contact is permitted, but it is not, and the defendant’s mistake is unreasonable; (3) the defendant believes that the contact is permitted, but it is not, and the defendant’s mistake is reasonable; and (4) the defendant has no belief as to whether the contact is or is not permitted. The last possibility should probably be considered to be the equivalent of the first, leaving three different possibilities for courts to consider in determining what type of consent is required to establish a battery. A version of this debate has occurred in the context of medical batteries, with most courts and commentators opting for requiring knowledge that the contact was unpermitted. See *infra* Part V.C.1.

261. If not, then the defendant may be entitled to presume that the plaintiff has or will consent to contacts that would not offend a reasonable sense of personal dignity.

262. See, e.g., DOBBS, HORNBOOK, *supra* note 9, § 29, at 56 (“[I]f adequately expressed, the plaintiff’s wishes usually count for everything; she has a right to reject unprivileged touching that others would find reasonable.”).

263. RESTATEMENT (SECOND) OF TORTS § 19 caveat (1965) (acknowledging that the section would not cover unduly sensitive plaintiffs).

264. See GLANNON, *supra* note 238, at 15–16 (juxtaposing reasonableness and hypersensitivity, the latter of which does not impose a risk of liability). The result may be different if the resulting contact turns out to be harmful, rather than

that there are some circumstances in which plaintiffs ought not be able to insulate themselves from unwanted touchings, as when a defendant lightly pushes a passenger aside, over the passenger's manifest objection, in order to enter or exit a crowded subway.²⁶⁵ The ability to eliminate liability in favor of such unduly sensitive plaintiffs requires either the clear separation of the elements of intent and the absence of consent (in which case the defendant does not have requisite intent because he understands that the unwanted touching would not offend a *reasonable* sense of personal dignity) or the express recognition of some privilege on the part of defendants to contact unduly sensitive plaintiffs, despite their manifest objection, under at least some circumstances, such as entering or exiting a crowded subway.²⁶⁶

D. The Significance of Choosing Between Single and Dual Intent

In many cases, it will not matter whether a court adopts the single intent or the dual intent rule. Physicians will still be liable for battery in the absence of at least apparent consent, and practical jokers will still be liable in most cases when their rough play is such that it offends a reasonable sense of personal dignity.²⁶⁷ There are, however, some recurring situations in which the choice between single and dual intent *is* likely to make a significant difference. These situations include the "sexual boor" and those defendants, such as the insane or children, who may have the capacity to intend a bodily contact, but who either lack the capacity or are unlikely to appreciate that the intended contact will be either harmful or offensive. It is in these cases that the law must squarely face the policy considerations involved in the choice between single and dual intent, as well as the proposed alternatives. It is thus important for the Third Restatement

offensive, as when the plaintiff suffers from a pre-existing injury or disease. Under the single intent rule, it would be sufficient that the intended contact turned out to be harmful, whereas under the dual intent rule, the defendant would be liable only if he intended to offend.

265. See, e.g., DOBBS, HORNBOOK *supra* note 9, § 29, at 56.

266. See, e.g., *id.* § 29, at 56–57 ("The real point seems to be, not that the plaintiff's wishes are to be evaluated by others, but that others are as entitled as she to ride subways."). It is unclear what the result would be in such a case under the single intent rule if the contact involving the unduly sensitive plaintiff turns out to be harmful. It would appear that the defendant will be liable unless courts explicitly recognize a privilege on the part of the defendant. Cases like *Cohen v. Smith*, 648 N.E.2d 329 (Ill. App. 1995), might be better explained by focusing on the fact that the hospital had agreed to honor the plaintiff's request. See *supra* notes 259–60 and accompanying text. In the absence of such an agreement, perhaps the hospital should *not* have been liable for refusing to accommodate an unusually sensitive plaintiff.

267. See *supra* notes 203–30 and accompanying text.

to clarify which rule should be adopted.

IV. POLICY CONSIDERATIONS IN CHOOSING BETWEEN SINGLE AND DUAL INTENT

A. *Criticism of the Single Intent Rule*

Courts and commentators have criticized the single intent rule on several grounds, arguing that: (1) it causes perverse results in situations involving workers compensation, insurance coverage, and governmental immunity for intentional wrongs;²⁶⁸ (2) it is overbroad because it would make defendants liable for non-offensive contacts that unexpectedly cause harm,²⁶⁹ as well as cases involving adulterated drugs and defective products;²⁷⁰ and (3) it violates the fault principle underlying most of modern tort law.²⁷¹

As for ancillary questions concerning workers compensation, insurance coverage, and governmental immunity—which typically

268. See, e.g., Simons, *supra* note 6, at 1090 (noting that the “perverse effect” is only from the point of view of one who “believes in the fault hierarchy,” which distinguishes between intentional and the non-intentional torts); cf. WARD FARNSWORTH & MARK F. GRADY, *TEACHERS’ MANUAL TO TORTS: CASES AND QUESTIONS* 12 (2004) [hereinafter FARNSWORTH & GRADY, *TEACHERS’ MANUAL*] (questioning whether the application of the single intent rule in *White v. University of Idaho*, to defeat liability under a statute granting the university immunity for intentional torts such as battery, was consistent with the likely point of that statute); Reynolds, *supra* note 8, at 726–30 (accusing several courts of apparently supporting the dual intent rule in order to avoid unduly harsh results under the shorter statute of limitations for battery, as opposed to negligence).

269. See DOBBS, *PRACTITIONER TREATISE*, *supra* note 21, § 94, at 91 (proposing a hypothetical in which “a wife hugs her husband with the unexpected result that, without fault, she causes a broken bone”); *infra* note 282 and accompanying text (discussing the problem with this hypothetical); see also Lawson, *supra* note 8, at 363 (offering that “day-to-day life holds myriad intentional contacts made for benign purposes” that “occasionally go awry, inadvertently either harming or offending others”).

270. See, e.g., GEISTFELD, *supra* note 90, at 120–21; Lawson, *supra* note 8, at 363–65 (outlining how the single intent rule would swallow up medical malpractice and products liability claims); see also *infra* notes 276–80 and accompanying text (observing that most of these cases would not be considered batteries because the consumer has consented to the contact).

271. See, e.g., *White v. Muniz*, 999 P.2d 814, 818 (Colo. 2000) (stating that dual intent does not erode the principle that “where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it” (quoting KEETON ET AL., *supra* note 97, § 135, at 1073)); DOBBS, *HORNBOOK*, *supra* note 9, § 30, at 59; King, *supra* note 3, at 648. Another criticism is that the single intent rule impairs the autonomy of potential defendants and the broader society to engage in activities. See DOBBS, *HORNBOOK*, *supra* note 9, § 29, at 56; King, *supra* note 3, at 649. This criticism is not, in itself, very persuasive, since proponents of the single intent rule would likely respond that the rationale for single intent is to protect the autonomy of the plaintiff. Some ground other than autonomy is needed to determine whose autonomy—potential plaintiffs or potential defendants—is more worthy of protection in the relevant cases. See Reynolds, *supra* note 8, at 731; Simons, *supra* note 6, at 1099–100.

prevent plaintiffs from recovering on the basis of intentional torts—there is good reason to object to a defendant’s ability to avoid liability for torts such as battery when the tortfeasor lacked any intent to harm or injure.²⁷² However, rather than choosing between the single and dual intent rule on this basis, it would probably be better to separate questions of tort coverage from questions involving these ancillary issues.²⁷³ For example, workers compensation laws, insurance policies, and governmental immunity statutes might appropriately be interpreted to exclude only those cases involving an actual intent to injure, regardless of whether tort doctrine would consider the defendant’s conduct to be a battery or mere negligence.²⁷⁴ Similarly, with respect to statutes of limitations, there may be some situations in which the plaintiff should have the option to plead either negligence or an intentional tort.²⁷⁵

Similarly, many of the criticisms regarding the overbreadth of the single intent rule are probably unwarranted. For example, Professor Geistfeld suggests that, under the single intent rule, a drug manufacturer would be liable if a consumer suffered an unforeseeable adverse drug reaction, because the manufacturer intended bodily contact between the drug and the consumer and the contact was in fact harmful.²⁷⁶ Similarly, Professor Lawson believes

272. See, e.g., Bublick, *supra* note 7, at 1348 (discussing the need to identify a “core of culpable entitlement-effacing intentional torts . . . for situations in which . . . intentional torts are treated in the same way as negligence”). The result was particularly perverse in *Wagner v. Utah*, 122 P.3d 599 (Utah 2005), where the defendant was not the same person as the tortfeasor. In that case, the court found that the defendant-state government was not liable for negligently supervising a mental patient who physically attacked the plaintiff, on the ground that the patient had committed a battery and a state statute immunized the government from cases “arising out of” an intentional tort. *Id.* at 601. It is far from clear in *Wagner* that the policies underlying the state immunity statute applied in a case where the mental patient was incapable of formulating the intent to harm or offend and the state was allegedly negligent in failing to supervise him.

273. See, e.g., HENDERSON ET AL., *supra* note 15, at 69 (analyzing a decision involving insurance coverage by separating contractual issues from the battery issues); Simons, *supra* note 6, at 1096–97 (arguing for ancillary questions to be determined, at least in part, by the “policies and principles that operate in those domains” ancillary to tort law).

274. See, e.g., *Rajspic v. Nationwide Mut. Ins. Co.*, 718 P.2d 1167, 1170 (Idaho 1986) (finding that an insurance policy exclusion for intentional torts was limited to cases involving an intent to injure, but that intent under the insurance policy was not the same as intent required for battery). See generally Bruce Chapman, *Allocating the Risk of Subjectivity: Intention, Consent, and Insurance*, 57 U. Toronto L.J. 315 (2007).

275. See Reynolds, *supra* note 8, at 729–30 (discussing the validity of treating some cases involving intentional conduct under the more flexible negligence principle and concluding that “the solution to problems raised by a short limitation period on battery, or by the rigidity of battery requirements, is not the redefining of ‘battery’ so as to exclude all cases except those in which harm or offense is intended” because “the concepts of negligence and battery are not mutually exclusive”).

276. GEISTFELD, *supra* note 90, at 120–21.

that cases involving adulterated drugs, defective products, medical malpractice, and even serving too-hot coffee could be treated as batteries under the single intent rule.²⁷⁷ But surely none of these cases are actionable batteries, even under the single intent rule, because the consumers will have been aware of and will have consented to the bodily contacts in question.²⁷⁸ Professor Lawson argues that such consent would be ineffective in cases where the consumer did not understand “the probable impact which the contact [would] have on the plaintiff’s protected interests,” i.e., that the drug would cause an adverse reaction or that it, or some other product, was adulterated or otherwise defective.²⁷⁹ Under current doctrine, however, consent will be ineffective only in situations where the defendant *knew* of the defect and failed to inform the plaintiff—i.e., when the defendant fraudulently obtained the plaintiff’s consent.²⁸⁰ Admittedly, there will be some situations in which the defendant has at least statistical knowledge that some of its products will be defective and will cause harm to at least some consumers at some time in the future, but this type of statistical knowledge is probably insufficient to establish fraud in securing the plaintiff’s consent to contact with a product.²⁸¹ Even if such statistical

277. Lawson, *supra* note 8, at 362–65 (illustrating how the single intent rule could cause battery to replace much of negligence and strict liability laws).

278. *Id.* at 365. Despite acknowledging the existence of this consent, however, Professor Lawson claims that application of the single intent rule would result in “absolute liability” or “near-absolute liability” in all cases involving such defective products, “save perhaps when injury stems from risks about which the [consumer] was informed, and to which she consented.” *Id.* at 364. Professor Geistfeld does not acknowledge the likelihood that many of the cases will not result in liability as a result of the plaintiff’s actual consent to the contact in question. See GEISTFELD, *supra* note 90, at 120–21.

279. Lawson, *supra* note 8, at 365 n.59 (citing a case in which the plaintiff’s consent to an eye operation was ineffective because he had not been informed that the “new lens was still under experimental investigation and had not been approved by [the] FDA”). In the medical context, such informed consent is required when physicians are aware of a material risk, but fail to inform the plaintiff; under modern law, these cases are not considered to be batteries but rather are treated as a form of negligence on the part of the physician. See *infra* Part V.

280. See RESTATEMENT (SECOND) OF TORTS § 892B(2) (1979) (“If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it *and the mistake is known to the other or is induced by the other’s misrepresentation*, the consent is not effective for the unexpected invasion or harm.” (emphasis added)).

281. According to the Third Restatement, a defendant is liable for an intentional tort only when “the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims.” See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1, cmt. e (2010); see also Anthony J. Sebok, *Purpose, Belief and Recklessness: Pruning the Restatement (Third)’s Definition of Intent*, 54 VAND. L. REV. 1165, 1179–80 (2001); Simons, *supra* note 6, at 1063 n.3. See generally Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1 (2012). These sources do not

knowledge is sufficient to establish fraud, under these circumstances, defendants will be liable under *both* the single and the dual intent rule because they will know with substantial certainty that harm will occur in at least some cases.

Professor Dobbs posits a different sort of hypothetical to illustrate the overbreadth of the single intent rule. In his hypothetical, a “wife hugs her husband with the unexpected result that, without fault, she causes a broken bone.”²⁸² He acknowledges that the apparent consent doctrine should ultimately exonerate the defendant wife, but he is disturbed that battery could impose even *prima facie* liability or that the defendant might be forced “into an over-elaborate and costly ‘defense.’”²⁸³ Under the Second Restatement, as well as in the vast majority of jurisdictions, the absence of consent is part of the plaintiff’s *prima facie* case, a fact that should eliminate both of Professor Dobbs’s objections.²⁸⁴ In the few jurisdictions in which consent is a true affirmative defense, I share Professor Dobbs’s concern that the single intent rule would even impose *prima facie* liability, thereby placing the burden on the defendant to prove actual or apparent consent, but that will not be the usual case.²⁸⁵

Professor Dobbs’s hypothetical does not accomplish his intended purpose because he acknowledges that the wife should ultimately prevail under the apparent consent doctrine.²⁸⁶ A better hypothetical

specifically address the question of the requisite knowledge with respect to a defendant’s fraud that renders a plaintiff’s consent ineffective; rather, they address the initial question of a defendant’s intent to cause particular consequences. Nevertheless, the same reasoning should apply in determining whether the defendant fraudulently obtained the plaintiff’s intent to a particular bodily contact. *See* *Wadja v. R.J. Reynolds Tobacco Co.*, 103 F. Supp. 2d 29, 36 (D. Mass. 2000) (refusing to allow a battery claim for a plaintiff suing a tobacco company for distributing cigarettes without revealing harmful tendencies because the claim was essentially one for fraud and did not bear indicia of an intentional tort claim).

282. DOBBS, PRACTITIONER TREATISE, *supra* note 21, § 94, at 91–92.

283. *Id.*; *cf.* Lawson, *supra* note 8, at 365 (arguing that even if the plaintiff’s consent relieves the defendant from liability, cases involving defective products should not be viewed “as batteries to which a plaintiff has consented”). In response to both Professor Dobbs and Professor Lawson, I would argue there is a distinction between concluding that the plaintiff’s *prima facie* case has been met but that the defendant has a valid defense and the conclusion that the defendant’s conduct constituted a battery regardless of whether the defendant may claim an affirmative defense. In my view, when the defendant prevails, the defendant has not committed a battery. The more important question is whether it is fair to shift the burden of proving actual or apparent consent to the defendant when the defendant did not intend any harm or offense. This appears to be Professor Dobbs’s primary objection to the single intent rule.

284. *See* RESTATEMENT (SECOND) OF TORTS § 13 cmt. d (1965); *supra* note 24 (describing the majority rule as requiring that the plaintiff must prove the absence of consent).

285. *See, e.g.*, EPSTEIN, *supra* note 15, at 37 (stating that the conventional view places the burden of proving the absence of consent on the plaintiff).

286. *See* DOBBS, PRACTITIONER TREATISE, *supra* note 21, § 94, at 91–92 (pointing out

would be one in which there is neither intended offense nor apparent consent, and yet the result is an unexpectedly harmful contact. Consider, for example, a variation of *Vosburg*.²⁸⁷ A young student lightly kicks a classmate after the class has been called to order. He neither desires to offend or even to annoy the classmate, nor does he know with substantial certainty that this will be the result; rather, he acts simply to get the classmate's attention. Unknown to the student, however, the classmate has a pre-existing injury such that the light kick causes serious bodily injury. Under the single intent rule, the defendant will presumably be liable because he intends a bodily contact that turns out to be harmful, and because the classmate has done nothing to indicate even apparent consent to being kicked, lightly or not, in a classroom that has been called to order.²⁸⁸ Under the dual intent rule, however, the defendant will not be liable because he neither desires nor knows with substantial certainty that the plaintiff would be either harmed or offended.²⁸⁹ Here I share what I assume would be Professor Dobbs's concern that the single intent rule would impose not only *prima facie* liability, but *actual* liability on the defendant without any moral fault on his part.²⁹⁰

Indeed, the most persuasive argument against the single intent rule is that it is inconsistent with the "fault principle,"²⁹¹—the principle of modern tort law that, except in unusual situations, which require justification, there will be "no legal liability for conduct that has no element of moral fault."²⁹² Recognized exceptions to this rule include strict liability for abnormally dangerous activities²⁹³ and strict liability for defective products,²⁹⁴ as well as the adoption of the objective reasonableness standard for evaluating both defendants' and the plaintiffs' conduct in negligence actions.²⁹⁵

that such contact is likely consented to in the marital context *but* that it would be "needlessly costly" for the wife to have to show her affirmative defense in court).

287. For a description of the actual case, see *supra* notes 192–200 and accompanying text.

288. Even if the question of apparent consent went to the jury, the jury could easily and justifiably find that there was no apparent consent and return a verdict for the plaintiff.

289. See *supra* note 8 and accompanying text.

290. *Id.*

291. See DOBBS, HORNBOOK, *supra* note 9, § 30, at 59 (explaining that the "wife's hug" example is inconsistent with the fault principle because she did not intend to harm or offend); see also King, *supra* note 3, at 648.

292. HARPER ET AL., *supra* note 133, § 3.3, at 313.

293. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 (2010); RESTATEMENT (SECOND) OF TORTS § 519 (1977).

294. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 (2010); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

295. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 20 (2010).

B. Defense of the Single Intent Rule

Some defenders of the single intent rule have argued that the single intent rule is consistent with the fault principle, at least with respect to intended contacts that offend a reasonable sense of personal dignity.²⁹⁶ This is because, just as under the theory of negligence, the single intent rule holds the defendant to the standard of the reasonable member of the community, who is expected to know and abide by the community's social norms.²⁹⁷ The "sexual boor," for example, might be characterized as negligent and therefore at fault in failing to understand existing community standards.²⁹⁸ This argument, however, will not work in cases like my hypothetical version of *Vosburg*, in which the intended contact turns out to be unexpectedly harmful (rather than offensive), especially in situations where defendants cannot take advantage of the apparent consent doctrine to avoid liability.²⁹⁹

More importantly, even if the defendant is to some extent at fault, at least with respect to offensive contacts, the potential liability of a defendant in battery is significantly greater than in it would be in negligence.³⁰⁰ For example, a defendant who is negligent only with respect to the indignity that would result from an intended but unwanted touching is liable in battery for any resulting harm, no matter how unforeseeable.³⁰¹ In negligence, however, the plaintiff

296. See, e.g., HENDERSON, ET AL., *supra* note 15, at 30; Sacks, *supra* note 156, at 1077–78.

297. See, e.g., DOBBS, HORNBOOK, *supra* note 9, § 30, at 59; HENDERSON ET AL., *supra* note 15, at 30; Sacks, *supra* note 156, at 177–78. These authors do not expressly adopt a negligence standard. Indeed, Professor Dobbs describes the single intent rule as one of *strict liability*, although he also suggests that a defendant with no intent to offend might be found negligent if the contact results in actual harm. DOBBS, HORNBOOK, *supra* note 9, § 30, at 59. The cases involving actual harm, however, tend to involve entirely unforeseeable physical harm, in which case the defendant would not be liable in an action in negligence. See *infra* note 303 and accompanying text.

298. See, e.g., Sacks, *supra* note 156, at 1077–78.

299. See *supra* notes 287–90 and accompanying text.

300. See *supra* note 174 and accompanying text (discussing the doctrine of transferred intent); see also, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 33(b) (2010) ("An actor who intentionally or recklessly causes harm is subject to liability for a broader range of harms than the harms for which the actor would be liable if only acting negligently."); Mark Strasser, *A Jurisprudence in Disarray: On Battery, Wrongful Living, and the Right to Bodily Integrity*, 36 SAN DIEGO L. REV. 997, 1001 (1999) (distinguishing battery from negligence on the ground that in battery, damages may be awarded even if not reasonably foreseeable; noting that the rationale for this distinction is that "intentional torts are viewed with more disfavor by the law than are merely negligent acts").

301. See, e.g., *Caudle v. Betts*, 512 So. 2d 389, 389 (La. 1987) ("[D]efendant's liability [in battery] for the resulting harm extends . . . to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim.").

would recover neither for the indignity itself (because there is no general duty to avoid the merely negligent infliction of emotional distress, even severe emotional distress)³⁰² nor for any resulting bodily harm (because such harm was unforeseeable).³⁰³ This concept of “transferred intent,” applicable in battery but not in negligence, includes not only liability for harmful bodily contacts when only offensive contacts were intended,³⁰⁴ but also liability for either harmful or offensive bodily contacts when only the apprehension of such a contact was intended.³⁰⁵ Even more significantly, in an action in battery, the plaintiff’s own negligence is no defense,³⁰⁶ whereas in an action in negligence, the plaintiff’s conduct could result in either non-liability or reduced liability, depending on which approach to comparative negligence the jurisdiction has adopted.³⁰⁷

According to Professor Simons, these inconsistencies between battery and negligence actions may be irrelevant because the interests

302. There is no general duty to avoid the merely negligent infliction of emotional distress, even severe emotional distress. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 (Tentative Draft No. 5, 2007) (stating that a defendant whose negligence causes serious emotional harm is subject to liability only when the plaintiff is placed in danger of immediate bodily harm or when the emotional harm occurs “in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance”).

303. A plaintiff may not recover if the harm was unforeseeable. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (2010) (setting forth that a defendant’s liability in negligence “is limited to those harms that result from the risks that made the actor’s conduct tortious”). The situation I am describing here is different from situations involving a so-called “eggshell skull” plaintiff, in which some physical harm was foreseeable, but the *extent* of the harm is not foreseeable. See *id.* § 31 cmt. b. The foreseeability of at least some physical harm is what makes the defendant liable, and the unforeseeable extent of the harm is typically considered only with respect to the measure of damages. The eggshell skull doctrine is presumably justified by the administrative difficulty (and expense) of determining, in each case, what measure of damages was reasonably foreseeable. In addition, victims of intentional torts such as battery—unlike victims of mere negligence—need not prove any actual damage, but rather are entitled to recover nominal damages. See, e.g., Alan Calnan, *The Fault(s) in Negligence Law*, 25 QUINNIPIAC L. REV. 695, 729 (2007).

304. See *supra* note 43 and accompanying text (discussing the Second Restatement definitions of intent).

305. See *supra* note 44 and accompanying text (defining both harmful battery and offensive battery); see also DOBBS, HORNBOOK, *supra* note 9, § 40, at 75–77 (describing how transferred intent extends liability).

306. See, e.g., DOBBS, HORNBOOK, *supra* note 9, § 200, at 498. Recently, however, some courts and legislatures have recognized that comparative fault can be a defense to the intentional torts, in at least some situations. See *id.* § 206, at 517–22; see also Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 UCLA L. REV. 585, 594–96 (2002) (urging radical reform of tort law in which intentional torts and negligence would be collapsed into a single principle based on fault).

307. See, e.g., DOBBS, HORNBOOK, *supra* note 9, §§ 199–210, at 494–534 (describing the approaches to comparative negligence).

at stake are incommensurable.³⁰⁸ In other words, whereas battery protects against intentional invasions of personal dignity and bodily autonomy,³⁰⁹ negligence protects primarily against the unreasonable risk of physical harm.³¹⁰ To some extent Professor Simons is correct, but the question remains whether the law *should* go as far as the single intent rule does in protecting the plaintiff's interest in physical integrity.³¹¹

The contours of battery have evolved over time, in response to modern conceptions of the appropriate basis for liability. For example, it was once the case that battery included negligent as well as intentional bodily contacts, but no one involved in the single versus dual intent debate is arguing that liability in battery in such cases ought to be restored.³¹² Similarly, it was once the case that battery included cases in which the defendant intended neither harm nor offense, but there was nevertheless liability because of some other "unlawful" or "wrongful" aspect of the defendant's conduct;³¹³ however, it is doubtful that anyone wants to return to such a vague and potentially overbroad formulation of battery's requisite intent.³¹⁴ On what basis, then, is it *fair* to subject defendants to liability in battery absent any intent to offend or harm, in circumstances under which a defendant would not be liable in a negligence action?³¹⁵

In partial response to this question, Professor Simons and other commentators note that there are other intentional torts, including

308. Simons, *supra* note 6, at 1080–83 (noting that the legal standards for intentional torts and negligent torts are very different because they protect different interests).

309. DOBBS, HORNBOOK, *supra* note 9, § 29, at 54 ("The central core of the battery rules is [that] the defendant must respect the plaintiff's apparent wishes to avoid intentional bodily contact."); Lawson, *supra* note 8, at 368 (stating that the "dignitary interest behind the tort of battery" is "the plaintiff's interest in personal autonomy"); Simons, *supra* note 6, at 1070.

310. See Simons, *supra* note 6, at 1082 (comparing false imprisonment, which "most directly safeguards the interest in freedom from physical confinement, and only incidentally secures the more general interest in avoiding physical and emotional harm," with negligence, which prohibits "causing physical harm by creating unreasonable risk").

311. See *id.* at 1070 ("At a deeper level, the dispute between single- and dual-intent approaches is a dispute about how strongly battery law protects the interest in physical integrity . . .").

312. Outside of this debate, there are some commentators who would radically alter tort doctrine by collapsing intentional torts and negligence into a single tort that focuses upon the defendant's fault. See, e.g., Sugarman, *supra* note 306, at 594–96; cf. Bublick, *supra* note 7, at 1350.

313. See *supra* notes 91–96 and accompanying text.

314. See, e.g., HENDERSON ET AL., *supra* note 15, at 29–30 (criticizing the circularity of the formulation of the intent requirement in battery); Lawson, *supra* note 8, at 366–68 (rejecting "unlawful" intent as an appropriate basis for articulating the intent requirement in battery).

315. See FARNSWORTH & GRADY, TEACHERS' MANUAL, *supra* note 268, at 12.

trespass to land and trespass to chattels, that entail a form of strict liability (and not even negligence).³¹⁶ This is because a defendant will be liable for at least nominal damages even when the defendant reasonably believes that the land or chattels belong to the defendant.³¹⁷ There may be justifications for strict rules governing trespass to property that are not present with battery; for example, the trespass action may be used as a means of resolving disputed claims of ownership of real and personal property.³¹⁸ However, there may also be aspects of those property torts that are similarly unjust—such as the liability of a defendant for any harm caused by the defendant’s trespass to land or chattels, even when the defendant exercises reasonable or even the utmost care with respect to such harm³¹⁹—and might be altered by a Third Restatement treatment of the intentional torts. For example, Professor Bublick suggests that trespass to land and chattels might be better treated along with other property rules, rather than with the rules concerning intentional torts involving interests of personality.³²⁰ Professor Bublick also suggests that a new Restatement should distinguish between “core” cases in which the extended liability now available for intentional torts could apply and other “intentional torts” in which extended liability concepts of transferred intent and less strict causation standards would not apply.³²¹ Thus, the strict liability aspects of trespass to land and chattels could remain available for nominal damages actions to determine ownership, but the defendants would not necessarily be strictly liable for all the resulting harm, no matter how unforeseeable.

Professors Farnsworth and Grady posit three possible rationales for a single intent rule: administrative convenience, deterrence, and an

316. See Simons, *supra* note 6, at 1089 (noting that “[n]ot all intentional torts involve fault”); see also Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 931–33 (2004); Sacks, *supra* note 156, at 1078.

317. See RESTATEMENT (SECOND) OF TORTS § 158 (1965) (defining “trespass to land” as the intentional entry or refusal to leave land that is “in the possession of [another]”); *id.* § 217 (defining “trespass to chattel” as intentional dispossession, use, or intermeddling with a chattel that is “in the possession of another”).

318. See, e.g., KEETON ET AL., *supra* note 97, § 13, at 68 (“Since in the usual case the important question was the disputed title, and any technical invasion would serve as the basis of litigation to settle it, the rules as to the character of the tort itself tended to become fixed, and to remain so.” (footnote omitted)). Although it may make sense to describe the offensive battery action as one designed to *protect* personal boundaries, it does not make sense to describe the action as one designed to *resolve* disputed boundary issues, as in the actions of trespass to land and trespass to chattels.

319. See RESTATEMENT (SECOND) OF TORTS § 162 (1965) (trespass to land); *id.* § 218 (trespass to chattels). Coupled with the fact that the defendant may have reasonably believed that the land belonged to the defendant, see *supra* note 316 and accompanying text, this result seems unduly harsh.

320. Bublick, *supra* note 7, at 1349–50.

321. *Id.* at 1347–50.

intuition about fairness.³²² The administrative convenience rationale involves the difficulty of proving the subjective intent of the defendant.³²³ This concern appears to be particularly strong in cases involving sexual boors.³²⁴ Professor Dobbs and others reject this argument on the ground that juries can be expected to reject testimony that is not credible,³²⁵ which should eliminate this concern in all but a handful of cases, some of which will involve children and the mentally disabled.³²⁶ As for deterrence, Professors Farnsworth and Grady suggest that, although people who act deliberately are more likely to be deterred than those who act inadvertently, it is unlikely that most people subject to a single intent rule would be aware of the rule outside of institutional settings like hospitals.³²⁷

The intuitive fairness rationale appears to motivate most defenders of the single intent rule. In the case of the sexual boor whom the jury believes honestly did not understand that his advances would be offensive, even Professor Dobbs, who otherwise supports the dual intent rule, appears to support liability.³²⁸ For example, Professor Dobbs assumes that a defendant might be found negligent when unwanted sexual contact results in harm, but he expresses apparent dismay that this “solution would leave the victim with no redress for merely offensive touchings if the jury believed the defendant had no intent to offend.”³²⁹ He then concludes that “[t]he best solution . . .

322. See FARNSWORTH & GRADY, *TEACHERS’ MANUAL*, *supra* note 268, at 12.

323. *Id.* (noting that proving intent to touch is easier than proving intent to harm).

324. For example, Professor Glannon concludes that the defendant in a sexual boor hypothetical is likely to be held liable “even if he is too conceited to realize that this contact is offensive under the Restatement definition; the law will attribute to him an understanding of what the reasonable person finds offensive.” GLANNON, *supra* note 238, at 15. According to Professor Glannon, the reason for this is that “[o]therwise, he could avoid liability based on his testimony that he didn’t think it would be offensive,” and that “[s]uch a test would allow social boors to escape liability simply because they have poor judgment—or lie about what they understood—even though they inflict unwanted contact on others.” *Id.* at 15–16.

325. See DOBBS, HORNBOOK, *supra* note 9, § 30, at 59; King, *supra* note 3, at 649.

326. See, e.g., *J.W. v. Utah*, No. 2:05CV00968K, 2006 WL 1049112, at *1, *5 (D. Utah Apr. 19, 2006) (applying the single intent rule under *Wagner* to immunize the State against a battery claim when a six-year-old foster child committed sexual assault, even if the child was incapable of understanding the injurious or offensive nature of the contact), *aff’d*, 647 F.3d 1006 (10th Cir. 2011); see also *infra* notes 334–36 and accompanying text.

327. FARNSWORTH & GRADY, *TEACHERS’ MANUAL*, *supra* note 268, at 12.

328. Professor Dobbs first appeared to support the dual intent rule in his student treatise; that support has become clearer in the most recent edition of his practitioner treatise, in which he expressly acknowledges Professor Simons’s arguments in favor of the single intent rule and argues against them. Compare DOBBS, HORNBOOK, *supra* note 9, § 30, at 58–61, with DOBBS, PRACTITIONER TREATISE, *supra* note 21, § 35, at 90–92.

329. See DOBBS, HORNBOOK, *supra* note 9, § 30, at 59. Unlike Professor Dobbs, I argue that even when sexual contact results in harm, the defendant will not

may be to recognize that the plaintiff's apparent lack of consent must be judged objectively" and "[i]f the plaintiff says, in words or deeds, 'Don't touch me,' and the defendant intentionally touches the plaintiff anyway, the defendant, not the plaintiff, must bear the cost of the defendant's foolish belief that no means yes."³³⁰ Although it is unclear why Professor Dobbs relies on the doctrine of apparent consent,³³¹ his argument has been cited as supporting an interpretation of the element of intent that "may turn on a community standard insofar as the defendant is bound by community standards about what is reasonable and in accordance with social norms."³³²

The intuitive fairness rationale is most typically cited in connection with situations involving children and the mentally disabled, who are most likely to avoid liability as defendants under the dual intent rule.³³³ For example, in *Wagner*, the Supreme Court of Utah adopted the single intent rule in a case involving a mentally ill patient who physically attacked a stranger, reasoning the result of a refusal to do so would place "victims who were subjected to a harmful or offensive

necessarily be liable in negligence, particularly when the harm is unforeseeable. See *infra* Part III.B.5.

330. DOBBS, HORNBOOK, *supra* note 9, § 30, at 59. Professor Dobbs does not explain how this approach can be squared with the dual intent rule. Under that rule, the lack of apparent consent would be irrelevant, since the defendant, if his testimony is to be believed, did not have the requisite intent to harm or offend, regardless of whether his belief was reasonable or unreasonable.

331. The answer may be that, according to Professor Dobbs, in the absence of apparent consent, the defendant would have the requisite intent to offend. See DOBBS, HORNBOOK, *supra* note 9, § 29, at 55–56. But this ignores the fact that intent is, by definition, subjective not objective. *Id.* § 29, at 49. Moreover, as previously argued, it makes more sense to separate the elements of intent and consent rather than to define one in terms of the other. See *supra* Part III.C. Under Professor Dobbs's approach, the intent to offend becomes *an example of* single intent in the case of the sexual boor. It is unclear whether his argument is limited to the case of the sexual boor, or whether it can be used in other instances as well.

332. Sacks, *supra* note 156, at 1077 n.127. Professor Sacks interprets the Dobbs treatise to incorporate a notion of "constructive intent," which according to her "is a concept that appears throughout our legal system and is based on the expectation that people in a society know or should know certain information in order to conform to legal requisites; it is no excuse if they are subjectively unaware of information of which they should be aware." *Id.* Then, like Professors Henderson and Pearson, she says that "[s]ince the Restatement defines 'offensive' conduct by reference to objective, prevailing social usages, the defendant is bound by such even if she was unaware of the social usages or incorrectly subjectively believed that her conduct comported with social usages." *Id.* But as I have posited earlier, this argument confuses the separate elements of result and intent. See *supra* note 187 (discussing the difference between result and intent).

333. In addition, governmental bodies and insurance companies will avoid liability under the single intent rule by taking advantage of the exclusion for intentional torts such as battery. See *supra* notes 273–76 and accompanying text. But this avoidance of liability seems to be directly contrary to the liability-extending rationale of many single-intent proponents. See *infra* notes 349–55 and accompanying text.

physical contact at the mercy of those who deliberately come into contact with them, and must bear the costs of injuries inflicted thereby” and that “[t]he law would serve to insulate perpetrators of deliberate contact from the consequences their contact inflicts upon their victims.”³³⁴ This would not have been the case in *Wagner* itself because the attack there resulted in foreseeable physical harm; therefore, an action in negligence should have been available, and the mentally ill patient’s conduct would have been measured by the standard of the reasonable sane person.³³⁵ The court did not acknowledge this, and so it did not attempt to explain why an action in negligence would not suffice to compensate victims in similar cases involving foreseeable physical harm.³³⁶

Admittedly, however, an action in negligence probably will not be available when physical harm was unforeseeable or when the result was limited to an offensive rather than a harmful bodily contact.³³⁷ Even so, children and the mentally disabled will not necessarily escape liability for battery in many, perhaps even most cases. All that is required is that a defendant intend either harm or offense, and both children and the mentally ill are often capable of both kinds of intent.³³⁸ Indeed, most of the published decisions involving these types of defendants present circumstances in which a jury could readily have concluded that the defendant had the requisite intent. This is particularly true when the contact is of a type that foreseeably will cause physical bodily harm, as in *Wagner* itself, where the mentally ill defendant, who had a history of violent conduct, “became violent, took [the plaintiff] by the head and hair, threw her to the ground, and otherwise acted in such a way as to cause serious bodily injury to her.”³³⁹ Given that the patient was apparently well enough at the time of the incident to participate in a public outing, a jury likely would have concluded that he intended to harm the plaintiff, although his

334. *Wagner v. Utah*, 122 P.2d 599, 608 (Utah 2005).

335. See *supra* note 8 and accompanying text (describing the Second Restatement’s adoption of an objective standard for determining whether an actor breached the requisite standard of care in a negligence action). The *Wagner* court cites relevant Restatement standards without indicating that they refer to an action in negligence, not an action in battery or any other intentional tort. *Wagner*, 122 P.2d at 608 (citing RESTATEMENT (SECOND) OF TORTS § 283B (1965)).

336. It is ironic that labeling the patient’s conduct a battery in that case resulted in the inability of the victim to be compensated because the victim had sued the State, not the patient (who presumably had no assets), and the State was immune from liability based on an action arising in battery. *Id.* at 610.

337. See *supra* notes 298–301 and accompanying text.

338. See, e.g., *McGuire v. Almy*, 8 N.E.2d 760, 763 (Mass. 1937) (holding that a patient had the required intent despite her mental illness).

339. *Wagner*, 122 P.2d at 601.

reasons for doing so were likely irrational.³⁴⁰

Nevertheless, it must be conceded that there are some situations when adopting the dual intent rule will result in a defendant “escaping” liability. In these cases, Professor Reynolds appears to adopt an intuitive fairness approach, arguing that although “the intent of the person causing unpermitted contact may not be so antisocial as to justify criminal liability, the contact surely violates the rule of society and of modern tort law that a person must keep his hands to himself.”³⁴¹ He then concludes that “[t]he injured victim of violations of this rule deserves compensation.”³⁴² Or, as the *Wagner* court concluded, “[t]he policy behind the [single intent rule] is to allow plaintiffs to recover from individuals who have caused them legal harm or injury, and to lay at the feet of the perpetrators the expense of their own conduct.”³⁴³ But the mere fact that the defendant “caused” the plaintiff’s harm has never been accepted as the sole or even primary basis for imposing what amounts to strict liability against a defendant, even though the result will be that some innocent victims will bear the cost of accidental injury.³⁴⁴ For example, because battery requires a voluntary act, a defendant who suffers an epileptic seizure and involuntarily strikes the plaintiff, causing foreseeably severe physical injuries, will not be liable either in negligence or in battery.³⁴⁵ The question then is on what basis a plaintiff “deserves” to be compensated when the defendant

340. *Id.*; see also, e.g., *Miele ex rel. Miele v. United States*, 800 F.2d 50, 51–53 (2d Cir. 1986) (upholding immunity for the federal government under the Federal Torts Claim Act in a decision apparently adopting the single intent rule, but, noting that evidence that the mentally ill soldier had previously indicated hostility toward the plaintiff boy and his family could easily have resulted in jury finding that defendant intended harmful bodily contact); *McGuire*, 8 N.E.2d at 761, 763 (concluding that there was sufficient evidence for a jury to find that the defendant, who was insane and threatened to kill the plaintiff if she came into her room, intended to strike and injure the plaintiff). In cases like *Miele* and *Wagner*, the significance of adopting the single intent rule is that the government is more likely to obtain a directed verdict, whereas adoption of the dual intent rule would make it more likely that the case would go to the jury, which might prefer to reject battery in order to provide the plaintiff with a remedy against the government. As with other ancillary doctrines, the question of governmental immunity should not drive the court’s adoption of basic rules for an action in battery. See *supra* notes 266–71 and accompanying text.

341. Reynolds, *supra* note 8, at 731.

342. *Id.*

343. *Wagner*, 122 P.3d at 610. As previously noted, however, the use of the single intent rule in *Wagner* resulted in a finding of *no* liability because of the government’s immunity for conduct amounting to a battery. See *supra* note 336.

344. Strict liability for defective products and abnormally dangerous activities requires facts other than mere causation and are justified by policy concerns specific to those particular situations. See *infra* notes 345–48 and accompanying text.

345. See RESTATEMENT (SECOND) OF TORTS §2 cmt. a (1965) (explaining that an act must be voluntary); *id.* § 13 (noting that battery requires that the defendant act with the requisite intent).

deliberately touches the plaintiff, but intends neither harm nor offense.³⁴⁶ To permit the plaintiff to shift the cost of such accidents to the defendant is to elevate the plaintiff's interest in "bodily integrity" and "bodily autonomy" to a higher level than perhaps it deserves in the twenty-first century.³⁴⁷

C. *Questioning the Modern Need for a Single Intent Rule*

Arguably, the tort of offensive battery is itself merely a vestige of the historical inability to distinguish between the levels of violence that might prompt retaliation and therefore a breach of the king's peace.³⁴⁸ Modern commentators now rationalize offensive battery by recognizing the desire to protect the victim's autonomy—that is, the right to decide whether and on what conditions to permit deliberate bodily touchings.³⁴⁹ But given that modern tort law now recognizes actions for intentional infliction of severe emotional distress,³⁵⁰ for negligent infliction of emotional distress,³⁵¹ and for sexual harassment in the workplace,³⁵² how far should courts be willing to go to protect either "bodily integrity" or "bodily autonomy"? Countervailing concerns include not only the defendant's autonomy—that is, the freedom to engage in conduct, including deliberate touchings—that are not intended to harm or offend³⁵³—

346. See *supra* notes 328–36 and accompanying text (stating the rationale behind intuitive fairness).

347. See *infra* notes 349–54 and accompanying text (noting numerous sources of liability for violations of "bodily integrity" and "bodily autonomy").

348. See, e.g., King, *supra* note 3, at 649 ("I believe that the mere intent to contact rule is an atavism of an outdated historical rationale for battery The preservation of the peace rationale—whatever its original validity—has been obviated by criminal law and more developed social constraints."); see also *supra* Part II (describing the historical evolution of the tort of battery).

349. See, e.g., DOBBS, HORNBOOK, *supra* note 9, § 28, at 54 ("Battery today vindicates the plaintiff's rights of autonomy and self-determination, her right to decide for herself how her body will be treated by others, and to exclude these invasions as a matter of personal preference, whether physical harm is done or not.").

350. See RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) (including liability for either intentionally or recklessly causing severe emotional distress by "extreme and outrageous conduct").

351. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 46–48 (Tentative Draft No. 5, 2007); DOBBS, HORNBOOK, *supra* note 9, § 308, at 835–36.

352. See 42 U.S.C. § 2000e-2 (2006) (unlawful employment practices); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (holding that sexual harassment creating a hostile or offensive work environment is a form of sex discrimination under Title VII).

353. See, e.g., King, *supra* note 3, at 649 ("A broader battery liability rule—one requiring only intent to cause a contact—could reciprocally impair the autonomy of not only potential defendants but of the broader society to engage in activities, without an equivalent enhancement of the autonomy of potential recipients of contacts.").

but also the societal resources necessary to adjudicate these claims.³⁵⁴ Given the existence of alternative forms of action that address the most egregious of the offensive battery cases, it may no longer be necessary or desirable to permit recovery for merely offensive bodily contacts, particularly when the defendant intends neither harm nor offense.³⁵⁵ In any event, it is questionable whether there is any continuing justification for subjecting such a defendant to liability for substantial physical harm in the absence of any wrongful intent.

V. THE ROLE OF CONSENT IN MEDICAL BATTERIES

A. *The Majority Approach*

In most jurisdictions, a patient who did not consent to medical treatment has an action in battery against the physician, whereas a patient who consented, but whose consent was obtained without adequate information concerning the risks and benefits of the proposed treatment, is limited to an action in negligence.³⁵⁶ This distinction is important because in the battery action, the patient can recover for any harm caused by the treatment, whereas in the negligence action, the patient can recover only when the harm results from the undisclosed risk.³⁵⁷ It is unclear, however, whether the action in battery requires that the physician or other medical personnel know that there was no consent, or whether it is sufficient either that the patient did nothing to manifest consent or that the physician was unreasonable in believing that the patient consented.³⁵⁸

354. It is probably true that most battery cases involve physical harm, even when the defendant intended merely an offensive touching, but there are a number of cases, including recent cases, in which the plaintiff sues for a merely offensive battery, sometimes in settings in which a court might conclude that the offense to the plaintiff is insufficient to warrant the resources necessary to adjudicate the claim. *See, e.g.,* *Wishnatsky v. Huey*, 584 N.W.2d 859, 862 (N.D. Ct. App. 1988) (concluding that defendant's "rude and abrupt" conduct in pushing an office door closed, thereby pushing the plaintiff back into the hallway, did not rise to the level of battery because it was not "offensive to a reasonable sense of personal dignity").

355. *See supra* notes 353–54 and accompanying text.

356. *See* DOBBS, HORNBOOK, *supra* note 9, § 103, at 242–43 (outlining the difference between actions in negligence and battery in medical cases).

357. *See, e.g.,* *Howard v. Univ. of Med. & Dentistry of N.J.*, 800 A.2d 73, 79 (N.J. 2002) (noting that in an informed consent case, the plaintiff must prove "that a reasonably prudent patient in the plaintiff's position would have declined to undergo the treatment if informed of the risks that the defendant failed to disclose"). Further, nominal damages, as well as damages for mental anguish, are available in an action in battery. *See, e.g.,* *Mink v. Univ. of Chi.*, 460 F. Supp. 713, 717 (N.D. Ill. 1978). Finally, as with cases outside the medical context, there are ancillary questions involving insurance coverage, statutes of limitations, and governmental immunity that will often turn on the distinction between the two actions. *See supra* notes 272–77 and accompanying text.

358. *See infra* notes 383–89 and accompanying text (describing the need to clarify

The issue comes up in a variety of situations,³⁵⁹ including those in which the patient consented to the proposed treatment, but only on some condition.³⁶⁰ It also arises in situations involving a patient who consented to treatment, but the physician deviated from the scope of the express authorization because the physician thought it was in the patient's best interests to do so.³⁶¹ The issue also comes up in situations in which the patient consented to the proposed treatment, but the physician mistakenly performed a different treatment, such as inadvertently operating on the wrong leg, or mistakenly treated the wrong patient.³⁶²

A majority of courts appear to require that physician must have deliberately deviated from the patient's wishes before the physician will be held liable in battery.³⁶³ Others hold that a physician will be liable in battery whenever the patient has not, in fact, given either express or implied consent.³⁶⁴ Still others hold that, in at least some situations, medical personnel may reasonably rely on others in a position of authority who inform them that the patient has consented

the intent rule). It is uniformly agreed that physicians are entitled to act in emergency, life-threatening situations, where there is either a form of presumed consent or a privilege to act in the patient's best interests. *See, e.g.*, DOBBS, HORNBOOK, *supra* note 9, § 106, at 247–48. However, this exception will not apply where there is strong evidence that the patient would reject the proposed treatment, such as when a patient has given explicit instructions in a living will. *E.g.*, *Allore v. Flower Hosp.*, 699 N.E.2d 560, 565 (Ohio Ct. App. 1997) (finding no battery where the treating physician and hospital were unaware of a living will directing that no life-sustaining treatment be administered).

359. For an extensive discussion of the many contexts in which this question arises, see generally Allan H. McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381 (1957).

360. *See, e.g.*, *Ashcraft v. King*, 278 Cal. Rptr. 900, 904 (Ct. App. 1991) (involving a plaintiff who requested that any blood transfusion come from a family member); *Vitale v. Henchey*, 24 S.W.3d 651, 653 (Ky. 2000); *Perna v. Pirozzi*, 457 A.2d 431, 433 (N.J. 1983) (involving a plaintiff who requested that only a certain doctor be allowed to operate on her).

361. *See, e.g.*, *Pizzalotto v. Wilson*, 437 So. 2d 859, 861–62 (La. 1983) (involving a patient who consented to an exploratory operation and a surgeon who removed her reproductive organs).

362. *See, e.g.*, *Moos v. United States*, 225 F.2d 705, 706 (8th Cir. 1955) (wrong leg and hip); *Lane v. United States*, 225 F. Supp. 850, 851 (E.D. Va. 1964) (wrong knee); *see also Gill v. Selling*, 267 P. 812, 813 (involving a doctor who operated on the wrong Mrs. Stone), *aff'd en banc*, 270 P. 411 (Or. 1928).

363. *See* FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE § 1.01[D], at 1-16 to -17 nn.18–19 (4th ed. Supp. 2012) (citing numerous cases in which the court came to this conclusion); *see also* AM. COLL. OF LEGAL MED., LEGAL MEDICINE 256 (S. Sandy Sanbar et al. eds., 7th ed. 2007) (same).

364. *See, e.g.*, *Perna*, 457 A.2d at 440 (involving a surgeon who performed an operation while unaware that the consent form named only a different surgeon); *see also Vitale*, 24 S.W.3d at 658 (involving a surgeon who believed he was authorized to perform the surgery, but who did not obtain that authorization from someone with the capacity to give consent on behalf of the patient).

to treatment by the defendant.³⁶⁵

Many of these decisions do not give a reasoned explanation for their rulings, but merely rely on precedent regarding unauthorized medical treatment.³⁶⁶ Some of the decisions that require a deliberate deviation from the patient's wishes in order for liability to attach apparently rest on the assumption that, in the absence of such a deviation, a physician lacks the requisite intent for battery. This is described as either an intent to commit a "harmful or offensive" contact³⁶⁷ or as an "intentional unauthorized touching."³⁶⁸ Although these courts do not directly address the single versus dual intent debate, they appear to adopt a form of dual intent requirement, in which the court views the known absence of consent as inextricably linked to the intent to make a contact known to be offensive.³⁶⁹ Still other decisions reflect a policy perspective unique to the medical context, citing concerns that: (1) intentional torts might not be covered by the physician's malpractice insurance; (2) punitive damages are more readily available in battery; and (3) absent an intentional deviation, the physician's conduct essentially consists of an inadvertent deviation from the standard of conduct required of physicians and therefore should be addressed in a negligence action requiring expert testimony.³⁷⁰

365. See, e.g., *Mullins v. Parkview Hosp., Inc.*, 865 N.E.2d 608, 611 (Ind. 2007) (finding no battery because an emergency medical technician (EMT) student who performed an intubation was entitled to rely on her supervisor and anesthesiologist, who informed her that she had permission to perform an intubation on the unconscious patient); *Allore v. Flower Hosp.*, 699 N.E.2d 560, 565 (Ohio Ct. App. 1997) (finding no battery where the treating physician and hospital were unaware of the existence of a living will directing no life-sustaining treatment be administered and where the patient's general physician had entered an order in the patient's chart directing immediate administration of resuscitation measures when necessary).

366. See, e.g., *Moser v. Stallings*, 387 N.W.2d 599, 604 (Iowa 1986).

367. See, e.g., *Hogan v. Morgan*, 960 So. 2d 1024, 1028 (La. Ct. App. 2007) (finding that because the physician was unaware of a court order limiting his examination of the patient, there was no evidence that he intended his examination to be either harmful or offensive).

368. See, e.g., *Hulver v. United States*, 393 F. Supp. 749, 752 (W.D. Mo. 1975) ("In order to have committed a battery, the defendant must have done some positive or affirmative act and that act must not only have caused but *must have been intended to cause* an unpermitted contact." (emphasis added)), *rev'd on other grounds*, 562 F.2d 1132 (8th Cir. 1977); *Gaskin v. Goldwasser*, 520 N.E.2d 1085, 1094-95 (Ill. App. Ct. 1988).

369. See, e.g., *Hulver*, 393 F. Supp. at 752 (suggesting two required intents, one to do an act and another to intend harm).

370. See *Cobbs v. Grant*, 502 P.2d 1, 8 (Cal. 1972); cf. *Woolley v. Henderson*, 418 A.2d 1123, 1133 (Me. 1980) (limiting battery to "conscious disregard of the patient's interest in his physical integrity" because such a rule "best accords with modern principles of medical malpractice favoring a single basis of liability predicated on fault and with the realities of the physician-patient relationship"); *Ponholzer v. Simmons*, 910 N.Y.S.2d 609, 610 (App. Div. 2010) ("[T]he [physician] is not one who acts antisocially as one who commits assault and battery, but is an actor who in good

Several commentators agree with the majority position that in medical cases, only the physician who deliberately deviates from the patient's wishes should be held liable for battery. Professor Lawson proposes that the prima facie case in *all* forms of battery, including medical cases, should be reformulated as the "intent to cause unauthorized bodily contact," including an explicit requirement that the defendant know that the contact is unpermitted.³⁷¹ In a slight variation of this position, Professor King proposes an elaborate test in which the defendant must intend harm or offense or, alternatively, know that consent is required and be "aware and contemporaneously cognizant of the absence of or deviation from the reasonably evident consent of the contemplated recipient [or that the defendant] did not honestly believe he had valid consent."³⁷² This alternative formulation—which is too convoluted to be useful—appears to apply primarily in medical and other "helpful intent" cases.³⁷³

B. The Majority View as Inconsistent with the Second Restatement's Approach to Consent

Although the majority position is almost certainly justifiable from a public policy point of view in cases involving physicians and other medical personnel,³⁷⁴ it is apparently inconsistent with battery doctrine as it generally applies outside the medical context. For example, courts in other types of cases have not stated explicitly that the defendant must be aware of the plaintiff's lack of consent.³⁷⁵

faith intends to confer a benefit on the patient." (second alteration in original) (quoting *Dries v. Gregor*, 424 N.Y.S.2d 561, 564 (App. Div. 1980))). For actions brought under the Federal Tort Claims Act, courts have also found that while a physician who mistakenly operates on the wrong body part might have committed a "technical battery," Congress did not mean to immunize the Government except when the defendant committed an "intentional wrongful act," such as intentional deviation from the patient's consent. *See, e.g., Lane v. United States*, 225 F. Supp. 850, 853 (E.D. Va. 1964).

371. *See* Lawson, *supra* note 8, at 368–81, 384.

372. *See* King, *supra* note 3, at 644 (footnote omitted).

373. *Id.* at 647 (applying the alternative formulation to a case involving a dental surgeon). Medical cases are the ones in which potential defendants are most likely to be conscious of the need to obtain explicit consent before performing invasive examinations or treatments. This formulation might also be used in cases involving sexual boors. *See supra* notes 328–32 and accompanying text.

374. *See supra* note 370 and accompanying text. One early commentator recommended an even more radical departure from the standard applied in non-medical cases, arguing that assault and battery should be limited to cases in which the physician has engaged in "an intentional deviation from practice which does not tend to be beneficial to the patient." McCoid, *supra* note 359, at 434. In all other cases, liability would be based on "deviation from the standard of conduct of a reasonably prudent doctor." *Id.* Under this proposal, battery would presumably be limited to egregious cases such as those involving sexual touchings of an unconscious or sedated patient.

375. *See supra* notes 221–25 and accompanying text (detailing cases in which single

Indeed, this position is inconsistent with the single intent rule, which requires only that the defendant intend a bodily contact that turns out to be either harmful or offensive. Perhaps more importantly, this position appears to be contradicted by Section 892 of the Second Restatement, which provides that consent can be either actual or apparent and that apparent consent consists of “words or conduct [that] are reasonably understood . . . to be intended as consent.”³⁷⁶ In other words, a battery is committed if the defendant has the requisite intent *and* the patient does or says nothing that the reasonable physician would interpret as consent.³⁷⁷ So, for example, under the Second Restatement provisions, if a physician mistakenly operates on a patient’s left knee when the patient consents to an operation on the right knee, the physician would be liable for a battery because there was intent to make a harmful bodily contact and it is hard to imagine circumstances in which a jury would be permitted to find even apparent consent to an operation on the wrong knee.³⁷⁸ Under the majority approach, however, the physician will *not* be liable, so long as she sincerely believes that she is operating on the correct knee and does not knowingly deviate from the patient’s wishes.

The majority rule is inconsistent with Section 892 of the Second Restatement because the majority rule does not acknowledge liability for battery when a physician *unreasonably* believes that the patient has consented to the particular contact. However, the Second Restatement position may itself be problematic because under section 892A the consent must be “by one who has the capacity to consent or by a person empowered to consent for him.”³⁷⁹ As a result, the Restatement apparently does not allow for a treating physician to reasonably rely on other physicians to determine

intent rule was used without reference to lack of consent).

376. RESTATEMENT (SECOND) OF TORTS § 892(2) (1979). Actors such as physicians are also privileged in emergency circumstances in which the actor has no reason to believe that the other person would, if asked, refuse to consent. *Id.* § 892D.

377. Section 892 also makes it clear that it is the patient or the patient’s authorized representative who must give either actual or apparent consent. *Id.* § 892D(a). For a discussion of whether this restricted concept of apparent consent makes sense, particularly in the medical context, see *infra* notes 379–82 and accompanying text.

378. See RESTATEMENT (SECOND) OF TORTS § 892A cmt. d (1979) (using these precise facts as illustration for the need to adhere to the terms of the consent given). There are, however, cases in which courts permit juries to determine the appropriate scope of the consent given by the patient. See, e.g., *Kaplan v. Mamelak*, 75 Cal. Rptr. 3d 861, 868 (Ct. App. 2008) (holding that a jury must determine “whether operating on the wrong disk within inches of the correct disk is a ‘substantially different procedure’” than the one authorized by the patient).

379. RESTATEMENT (SECOND) OF TORTS § 892A(2)(a) (1979).

whether the patient has consented to the proposed treatment. Some medical battery cases have allowed patients to recover, despite the fact that the defendants may have reasonably relied on another physician's advice that the patient consented, because the other physician was not empowered to consent on the patient's behalf.³⁸⁰ These defendants would have prevailed under the majority rule—which requires deliberate deviation from a patient's wishes—as well as in jurisdictions that allow physicians and other medical personnel to reasonably rely on others.³⁸¹

As a matter of policy, it may not be feasible or sensible to require each and every member of a medical treatment team to personally investigate and determine whether consent has been given whenever a team member touches the patient in a way that would be either harmful or offensive in the absence of effective consent.³⁸² The question then arises whether an exception to the Second Restatement provisions on consent should be limited to medical batteries or extended to other cases.

C. The Rationale for Deviating from the Second Restatement's Approach to Consent

The majority rule excluding battery in medical cases unless the physician deliberately departs from the patient's wishes may be justified for public policy reasons unique to the medical context, including the necessity of permitting physicians to reasonably rely on other medical personnel in determining whether or not the patient has consented to a particular procedure. Outside of the medical context, however, it may be unduly harsh to exclude from battery those cases in which a defendant believes that the plaintiff has consented, but that belief is unreasonable.³⁸³ As a result, it would be preferable for courts to not only separate the intent and consent

380. See, e.g., cases cited *supra* note 365.

381. See King, *supra* note 3, at 644; Lawson, *supra* note 8, at 368–69.

382. I am not talking about the types of touching that are impliedly consented to when a patient consents to be admitted to a hospital or to be examined by a physician. Rather, I am focused on other contexts—for example, major operations—for which additional and specific consent is typically required. In these situations, there are frequently many members of the treatment team (including other doctors, medical students, and nurses) who will intentionally contact the patient in ways that are invasive and therefore would be offensive in the absence of consent. I doubt that each member of these teams routinely examines the patient's written informed consent before participating in the operation.

383. For example, in the sexual context, a defendant may sincerely believe that when the plaintiff says “no” she really means “yes”; nevertheless, the jury should be permitted to conclude that the defendant's belief was unreasonable and that the plaintiff should therefore recover in battery. See DOBBS, HORNBOOK, *supra* note 9, § 30, at 59.

elements,³⁸⁴ but also to clarify that requiring knowing departure from the patient's wishes is a special rule invoked in cases involving consent in the context of medical care.

There is, however, at least one apparent departure from Sections 892 and 892A that might warrant extension to non-medical cases, and that is the defendant's ability to rely on circumstances other than the words or conduct of the plaintiff herself in order to invoke the privilege of consent. It is not clear that defendants should be required, in all cases, to determine consent solely on the basis of the plaintiff's own words or conduct. Perhaps defendants should be permitted to act when, under all of the circumstances, they reasonably believe that a plaintiff with the capacity to do so has consented to the contact.³⁸⁵ For example, in recreational sports cases, a defendant might believe that a written consent purportedly executed by the plaintiff (or by someone authorized to act on the plaintiff's behalf) is legitimate, but it might turn out to be a forgery. So long as the defendant's reliance is reasonable under the circumstances, there is no reason why the defendant should be liable in battery. The same logic would apply in cases involving mistaken identity.³⁸⁶ It may be that mistaken identity cases in a medical context will almost always involve negligence on the part of a physician,³⁸⁷ but the same is not necessarily true of other, less formal contacts, such as a man who comes up behind a woman he reasonably believes to be his wife and gives her a hug, only to find out that she is a stranger wearing the same coat that his wife was wearing that morning. If a defendant may act reasonably in self-defense, taking into account all

384. *Supra* Part III.C.

385. According to Professor Dobbs, the defendant's reasonable belief that the plaintiff has the capacity to consent is already acknowledged as an appropriate basis to involve the consent doctrine. *See* DOBBS, HORNBOOK, *supra* note 9, § 24, at 49. He does not discuss statutory rape; however, I presume he would acknowledge that courts will invoke statutory rape legislation as creating an exception to the apparent consent doctrine, thereby rendering a minor's consent ineffective regardless of whether the defendant reasonably believed she was of age.

386. Under section 892 of the Second Restatement, a defendant may be justified in believing that the intended recipient of an otherwise offensive touching has consented through a pattern of past practices. RESTATEMENT (SECOND) OF TORTS § 892 (1979). Under section 892A, however, if the defendant is mistaken as to the identity of the actual recipient, the defendant could not invoke the apparent consent doctrine. *Id.* § 892A. Under my proposed rule, however, a defendant may invoke the doctrine of apparent consent so long as the defendant acted reasonably under the circumstances.

387. *See, e.g.,* Gill v. Selling, 267 P. 812, 813 (involving a physician who performed a spinal test on the wrong patient, who had been mistakenly called in from the waiting room by nurse who did not even inquire as to the patient's identity), *aff'd en banc*, 270 P. 411 (Or. 1928).

of the attendant circumstances,³⁸⁸ then it is far from clear why consent should be limited to conduct manifested only by the words or conduct of the plaintiff.³⁸⁹ This question ought to be given serious consideration in any attempt to clarify and rationalize the law of consent in battery and other intentional tort actions, which I believe the ALI ought to do in the Third Restatement.

CONCLUSION

Close examination of applicable case law reveals considerable confusion and controversy concerning the law of battery, which is the most prominent of all the intentional torts. Commentators and courts have not yet recognized the full extent of this confusion, which encompasses not only the debate between single and dual intent, but also the relationship between intent and the absence of consent. The relationship between intent and consent is of particular concern in medical battery cases, in which the majority of courts are applying rules that may make sense, but that may be unique to that context. Further, there has been little examination of the precise contours of the doctrine of consent, particularly the ability of a defendant to reasonably rely on circumstances other than the words or conduct of the plaintiff or someone authorized to give consent on the plaintiff's behalf. Again, this is a particular concern involving physicians and other medical personnel, where it may not be feasible for each member of a treating team to personally investigate the existence and scope of the patient's consent.

The ALI is clearly mistaken in concluding that intentional tort doctrine is clear and that the Second Restatement's intentional tort provisions have been widely adopted. As a result, the ALI should reconsider its decision not to extend the Third Restatement to the intentional torts. It has not been my intention to propose detailed language for any such Third Restatement provisions, including those concerning battery. Indeed, before addressing those provisions, the ALI would need to give serious consideration to the suggestion there should be a radical reformulation of the intentional tort doctrine

388. See RESTATEMENT (SECOND) OF TORTS §§ 63–65 (1965) (the two primary provisions on the use of self-defense).

389. Treating consent as different from other defenses, such as the affirmative defense of self-defense, may derive from the “ancient legal maxim, *volenti non fit injuria*, meaning that no wrong is done to one who consents.” RESTATEMENT (SECOND) OF TORTS § 892A cmt. a (1979). This may explain why lack of consent is typically viewed as an element of the plaintiff's prima facie case and why actual consent, even when not manifested to the defendant, operates as a complete defense.

along the lines suggested by Professor Bublick and others.³⁹⁰

If, however, the ALI considers and rejects any such radical reformulation, then I suggest the following with respect to the provisions relating to the tort of battery: First, the prima facie case in battery should be maintained in its present formulation—what is required is an act, done with intent to cause a harmful or offensive bodily contact (or imminent apprehension of such contact), that in fact causes either harmful or offensive bodily contact. Second, the comment should clarify that, with respect to the intent to cause a harmful or offensive bodily contact, both intent to cause bodily contact and intent to cause harm or offense thereby are required. Third, the comment and illustrations should clarify that with respect to medical and other “helpful intent” situations, operations constitute harmful bodily contacts (even if they are ultimately beneficial) and that invasive bodily procedures and similar non-trivial bodily touchings are typically offensive when done without the patient’s consent. As a result, physicians and other medical personnel will almost certainly know that, in the absence of consent, medical treatment commonly involves either harmful or offensive contact. Therefore, these cases will typically turn on the presence or absence of actual or apparent consent. Fourth, the ALI should decide whether to include absence of consent as an element of the plaintiff’s prima facie case, or alternatively, to specify that consent (either actual or apparent) is an affirmative privilege or defense.³⁹¹ Fifth, the provisions should expressly provide that, in cases involving medical treatment, medical personnel are not liable in battery unless they intentionally deviate from the patient’s wishes. And finally, the ALI should also consider whether, in cases outside the medical arena, defendants should be able to establish consent based on their reasonable belief, under all of the circumstances, that the plaintiff is consenting.

Confronting the issues raised in this Article will require the ALI (and others) to address very basic questions concerning the underlying nature of intentional torts, including the extent to which those torts should reflect the fault principle that underlies most of modern tort law. I look forward to participating in the debate.

390. *Supra* notes 306–21 (discussion of Bublick’s and Sugarman’s proposals).

391. I believe the better position is to make consent an affirmative defense, just like self-defense, defense of others, and defense of property. It is unclear to me why consent functions differently, given that it is not limited to actual consent but includes apparent consent, which is very much like the reasonableness tests of other, clearly affirmative defenses.