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Restating the Intentional Torts to Persons: Seeing the Forest and the Trees

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Abstract: The five thoughtful, incisive articles by Professors Bernstein, Chamallas, Geistfeld, Moore, and Sugarman offer a breathtaking range of perspectives on the Restatement, Third of Torts: Intentional Torts to Persons (“ITR”). Some view tort law from the widest vantage point, inquiring whether this forest deserves its own appellation or should instead be assimilated to the rest of tort’s greenery. Some focus more on the trees—on the distinct doctrines that characterize the torts and defenses that ITR is restating. In this response, we engage with the participants at both levels.

Our response also addresses two fundamental questions—the role of a Restatement and the significance of the “intentional tort” category. First, ITR is a Restatement of tort law. It is not a model code of tort law, nor is it an academic article committed to a particular vision of the proper purposes and principles of tort law. We see our task, not as creating a grand theory from which all of intentional tort doctrine can be deduced, but as a bottom-up endeavor, accurately characterizing developments in the case law and then providing the most sensible and persuasive justifications for extant doctrine. At the same time, however, we strive to provide intellectual coherence to this body of law. Thus, we examine not only the holdings in narrow doctrinal categories, but also the consistency of those holdings with more general tort law principles.

Second, what is distinctive about the intentional torts to persons? How do they differ from torts of negligence or from other intentional torts? These questions have no simple answer, because most of the intentional torts to persons have very long historical roots, and because the common law process of reformulating doctrine has played a vital role in defining the scope of these torts in current American law. It is thus not at all surprising to find tensions and apparent inconsistencies between some current doctrines.

Nevertheless, we believe that the contemporary formulations of these torts are indeed justifiable in principle. First, these intentional torts sometimes reflect

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a hierarchy of fault or culpability. Purposely injuring someone is more culpable, *ceteris paribus*, than negligently causing the same injury. Second, these torts sometimes protect distinct interests, such as the interest in avoiding emotional harm or in freedom of movement, that for various policy reasons are not protected by liability rules if they are only negligently invaded. Third, the intentional torts do not *simply* identify species of conduct that reflect greater fault or culpability than negligence. Comparing intentional torts is sometimes akin to comparing apples and oranges, because these torts protect a varied set of interests or protect them in varying ways. Fourth, the intentional torts express a pluralistic set of values and principles. No single principle (such as welfare, autonomy, or freedom) fully explains all of these torts. And fifth, although these intentional torts contain some reasonableness criteria, for the most part they reject the reasonableness paradigm of negligence, and thus reject the more flexible, less structured criteria of liability that that paradigm engenders.

Keywords: intentional tort, tort, intent, battery, assault, false imprisonment, negligence, fault, consent, rape, sexual assault, restatement

1 Introduction

The intentional tort doctrines addressed by the Restatement, Third of Torts: Intentional Torts to Persons (henceforth “ITR”) have received relatively little scholarly attention, with respect either to their details or to the underlying principles that justify them. We are very grateful to the Journal of Tort Law for holding this symposium, which begins to fill that lacuna. And we are hopeful that our interchange with these five thoughtful, incisive articles by Professors Anita Bernstein, Martha Chamallas, Mark Geistfeld, Nancy Moore, and Stephen Sugarman will trigger further scholarship about these neglected topics.

One challenge of this symposium project is that these five scholars are commenting upon, and critiquing, a moving target. The most recent draft that had been completed at the time they initially drafted their commentary was Preliminary Draft No. 4.¹ Since that time, Council Draft No. 4 has been published, and we will soon complete Preliminary Draft No. 5 and Tentative Draft No. 3. For purposes of this symposium, we treat Preliminary Draft No. 4 as the most recent expression of our views. The challenge of a moving target is also a welcome opportunity, however. We will incorporate many of the very helpful suggestions from these five articles in future drafts, including those that we are currently revising.

¹ RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS (AM. LAW INST., Preliminary Draft No. 4, 2017)

We should also caution that, although we make some assertions in this response about our plans for future drafts of ITR, it is always hazardous to predict what the American Law Institute will approve. The approval process is lengthy, and surprising hurdles sometimes arise. Nevertheless, we have no doubt that the ultimate effect of this symposium will be both an improvement in the quality of ITR and a revival of academic interest in the topics that ITR addresses.

The five articles offer a breathtaking range of perspectives on the intentional torts project—hence the title of this response. Some view tort law from the widest vantage point, inquiring whether this forest deserves its own appellation or should instead be assimilated to the rest of tort’s greenery. Some focus more on the trees—that is, the distinct doctrines that characterize the torts and defenses that ITR is restating.

Before turning to the specific arguments in each article, we would like to make two introductory substantive points that have relevance to all of the articles in this symposium, about the role of a Restatement and about the significance of the “intentional tort” category.

First, ITR is a Restatement of tort law. It is not a model code of tort law, nor is it an academic article committed to a particular vision of the proper purposes and principles of tort law. But what is a Restatement? Is it a snapshot of current precedent? An extrapolation from current trends? An endorsement of the soundness of the relevant doctrine? A confirmation that a specific doctrine is consistent with other doctrines and principles in the relevant area of law? The simple answer is, “All of the above.” But the more complex and more honest answer is: reasonable people may differ about the relative weight of these considerations, even within the express guidelines of the ALI.²

We see our task, not as creating a grand theory from which all of intentional tort doctrine can be deduced, but as a bottom-up endeavor, accurately characterizing developments in the case law and then providing the most sensible and persuasive justifications for extant doctrine. We look closely at what judges are doing, and what they say about what they are doing. At the same time, however, we strive to provide intellectual coherence to this body of law. Thus, we examine not only the holdings in narrow doctrinal categories, but also the consistency of those holdings with more general tort law principles.

Second, what is distinctive about the intentional torts to persons? How do they differ from torts of negligence, or from other intentional torts? These are foundational questions posed by most of the contributors to this symposium. No

² The ALI’s most recent official statement about the nature of a Restatement gives weight to all of these questions. See ALI Revised Style Manual, approved by the ALI Council, January 2015.

simple answer to these questions is possible, for two reasons. First, most of the intentional torts encompassed by ITR have very long historical roots. Second, judicial precedent and the common law process of reformulating doctrine have played vital roles in defining the scope of these torts in current American law. The contemporary contours of these torts, and the criteria that differentiate them from each other, from other intentional torts, and from torts of negligence and of strict liability, reflect that common law history and evolution. It is thus not at all surprising that there are tensions and apparent inconsistencies between some current doctrines.³

Nevertheless, contemporary formulations of even traditional causes of action must indeed be justifiable in principle. What, then, are the most persuasive justifications for the intentional torts addressed by ITR, including both the question of whether liability is warranted and whether the distinctions between these torts and other torts are sensible? In our responses below, we explore these questions in some detail. For now, we emphasize five points.⁴ First, these intentional torts sometimes reflect a hierarchy of fault or culpability. Purposely injuring someone is more culpable, *ceteris paribus*, than negligently causing the same injury. Second, these torts sometimes protect distinct interests, such as the interest in avoiding emotional harm or in freedom of movement, that for various policy reasons are not protected by liability rules if they are only negligently invaded. Third, the intentional torts do not *simply* identify species of conduct that reflect greater fault or culpability than negligence. That is, comparing intentional torts is sometimes akin to comparing apples and oranges, because these torts protect a varied set of interests or protect them in varying ways. Fourth, the intentional torts express a pluralistic set of values and principles.⁵ No single principle (such as welfare, autonomy, or freedom) fully explains all of these torts. And fifth, although these intentional torts contain some reasonableness criteria, for the most part they reject the reasonableness paradigm of negligence, and thus reject the more flexible, less structured criterion of liability that that paradigm engenders.

³ For a recent exploration of these points, see JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS*, Chapter 8 (forthcoming 2018) (explaining the “elucidative” nature of tort adjudication).

⁴ Much of the remainder of this paragraph is drawn from Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061 (2006).

⁵ See Peter Cane, *Mens Rea in Tort Law*, 20 OXF. J. OF LEG. STUD. 533 (2000) (“[T]he normative pluralism of tort law makes the project of discovering or generating a general principle of liability for intention difficult and undesirable.”)

We now turn to an examination of the five individual contributions to this symposium.

2 Reply to Geistfeld

2.1 Introduction

In his illuminating and insightful article, “Conceptualizing the Intentional Torts,” Mark Geistfeld perceptively identifies an important and surprisingly understudied question about intentional torts: why does the presence of intent mark out a distinct category of torts?

Geistfeld observes that intentional tort doctrine cannot be fully explained and justified by (what one of the Reporters elsewhere has called⁶) a fault hierarchy. It is not the case that intentional torts invariably involve more culpable or more faulty conduct than torts of negligence or strict liability. For example—our example, not Geistfeld’s—a practical joker who intentionally sprays a stranger with a water gun may be merely negligent in exceeding the scope of another’s consent yet will be liable for battery, but a driver who intentionally exceeds the speed limit by 50 m.p.h. loses control of the car and kills a victim is liable only for negligence. Similarly, he claims, intentional tort doctrine cannot be distinguished as a tort category on the basis of the kinds of interests that are protected, including the interests in emotional and physical security, autonomy, dignity and freedom of movement. Geistfeld accurately observes that ITR frequently does rely on this type of justification, but he objects that such interest analysis is inadequately developed, because it could equally justify negligence or strict liability.

We agree with Geistfeld in part. It is indeed the case that *some* of the interests that support *some* intentional tort doctrines also justify negligence doctrines. The clearest example is the interest in bodily security against physical harm: negligence law provides general protection against unreasonably dangerous conduct that causes bodily harm, but harmful battery also provides protection against conduct that causes such harm. However, other interests protected by intentional torts to persons are not protected at all, or are protected in a much more limited way, by negligence and strict liability doctrine. False imprisonment, assault, offensive battery, and intentional infliction of emotional distress are all examples.

⁶ Simons, *supra* note 4.

Geistfeld is also concerned that (what he perceives as) a failure to provide an adequate rationale for the distinctiveness of intentional torts leaves courts and commentators unable to explain the actual doctrinal shape of intentional torts, especially the definition of intent. In his view, the guidance offered by ITR is helpful but incomplete.

Before offering a reply to this critique, it will be helpful to address Geistfeld's own account of the distinguishing characteristics of intentional torts, an account that takes up most of his paper.

2.2 Geistfeld's aggressive interaction conception of intentional torts

Geistfeld asserts that the function of a Restatement is not to endorse any particular theoretical or policy perspective, such as efficiency or fairness, in light of disagreement about this question. We largely agree: a Restatement should indeed be modest about selecting any particular theoretical or policy perspective as providing the only, or the best, justification for tort doctrine. But Geistfeld then makes a most intriguing and quite original claim: the nature of the social interaction between plaintiff and defendant is the key to identifying the conduct that is best analyzed as an intentional tort rather than a tort of negligence. Specifically, he claims that three paradigmatic forms of social interaction shaped the common law of tort, contract and criminal law: (1) aggressive interaction, in which the attacker takes something belonging to the victim; (2) mutual advantage, in which the parties voluntarily participate in an interaction for mutual benefit; and (3) accidental injury, a paradigm comprising “[i]ndividuals engaged in nonaggressive risky behaviors who are not otherwise cooperating for reasons of expected mutual benefit.” Today, he argues, intentional torts and criminal law exemplify (1), contract and some of tort law exemplify (2), and tort law distinctively exemplifies (3) through negligence doctrine.

Geistfeld's argument is novel, and it illuminates some aspects of tort doctrine. In the end, however, we believe that his tripartite interaction-based account oversimplifies intentional tort doctrine and relies heavily upon a slippery conception of “aggression” that needs further clarification. Moreover, the justification for employing the tripartite framework itself as a criterion of doctrinal categories within tort law remains elusive.

Consider, first, Geistfeld's claim that intentional tort doctrine expresses the category of “aggressive interactions.” He is careful not to treat this category as simply an instance of highly culpable conduct, conduct of the sort that would be punished as a serious crime. Instead, he emphasizes that tort law addresses the

interaction between aggressor and victim. What is critical, he says, is whether the actor intends to invade the protected interests of the victim, and how the victim would reasonably be expected to respond if aware of the actor's conduct. Geistfeld gives the example of actor A taking B's umbrella based on a mistaken belief that it is A's, conduct that is not culpable but justifies B in perceiving the conduct as aggressive and in employing self-help measures for that reason. "The manner in which we interact—created both by my nonculpable taking of the umbrella, and by your reasonable motivation to avoid that outcome by retaining your umbrella—makes the interaction aggressive."

This analysis is problematic, however, because it seems to define "aggression" in a Pickwickian, stipulative way. In what respect is mistaken actor A an "aggressor" as that term is ordinarily understood? Geistfeld's example does not even specify that A's mistake is unreasonable. Nor is it clear that B would perceive A as an aggressor, especially if B recognizes that A was mistaken. To be sure, a term might be used in a specialized sense. Perhaps Geistfeld understands "aggression" to mean something like "any unjustified invasion of the interests of another." But on that interpretation, the connection that Geistfeld seeks with the historical and psychological notions of aggressive interaction is lost. Or perhaps he believes that "aggression" is equivalent to an *intentional* and unjustified invasion. But that construction does not explain the example: mistaken actor A has no idea that he has invaded B's property interests. His act of taking the umbrella is intentional, to be sure, but it is unclear why the intentionality of that act alone should be considered sufficient, when other intentional torts require a more robust type of intentionality—such as the intention to physically contact or to confine the plaintiff.⁷

We do agree that intentional torts require that the actor intend to invade the interests of the victim in some sense. In the first Restatement of Torts, Professor Francis Bohlen emphasized the idea that the intentional invasion of interests is what distinguishes the intentional torts from torts of negligence and strict liability. Prosser, in the Second Restatement of Torts, adopted a similar general conception of intentional torts. But it is difficult to see what the concept of "aggression" adds to the analysis.

Moreover, even if "aggression" did play a useful explanatory role, the question would remain whether and why this paradigm of social interaction justifies the distinct category of intentional torts. Geistfeld suggests that corrective justice supports the focus on aggressive interactions because "[t]he injurious interactions that are corrected or reversed by the intentional torts are

⁷ We do not deny that the intention required in trespass differs from, and is less culpable than, that required in other intentional torts such as battery and false imprisonment.

normatively different from those that are redressed by the rules of negligence and strict liability.” But this begs the question of why aggression makes the right kind of normative difference. He also suggests that efficiency can support the focus on aggression because, instead of engaging in an aggressive interaction, the parties could engage in a much more efficient voluntary exchange. But it seems to us that the ability of the parties to interact and conduct a voluntary exchange, not the aggressive nature of the interaction, is what best explains why aggressive interactions are especially inefficient. (Indeed, in many cases of aggression, especially sudden outbreaks of violence in highly emotional circumstances, it is not very plausible that legal rules could effectively induce the parties to come to a voluntary agreement.)

Another difficulty raised by the tripartite paradigm approach relates to Geistfeld’s surprisingly narrow understanding of “intention” as embracing purpose but not knowledge. In explaining how the aggressive interaction paradigm differs from the accidental harm paradigm, Geistfeld relies in part upon the doctrine of double effect (DDE). Under DDE, it is much easier to justify knowingly or foreseeably causing a harm than to justify purposely causing the same harm; moreover, purposely causing harm is more culpable than knowingly doing so. Geistfeld concedes that the greater culpability of purposeful harm cannot fully explain the intentional tort category (as in the mistaken umbrella thief example). Yet he still concludes that the normative difference for the right-holder that DDE identifies explains why intentional torts differ from tort rules governing accidental, i. e., negligent, injuries. Geistfeld again invokes the mistaken umbrella thief, asserting that the victim in that example suffers the same normative harm as would exist in a case of theft, involving a direct harm.

This argument is not persuasive. First, it is not clear why a mistaken appropriation of an umbrella is a “direct” rather than “indirect” harm, since these terms are never defined. Second, DDE does not rely on such a distinction; rather, it draws a line between intentional or purposeful consequences on one hand and known or foreseen consequences on the other.⁸ Third, in relying on DDE, the analysis ignores an important doctrinal datum: for most intentional torts, either purpose *or knowledge* is sufficient to satisfy the “intent” or “intention” requirement, as Section 1 of Restatement Third, Torts: Liability for Physical and Emotional Harm provides. In battery, assault, and false imprisonment, the

⁸ Geistfeld seems to treat direct harms as equivalent to harms that the actor has the purpose to cause, and to treat indirect harms as harms the actor merely causes knowingly or foreseeably, but this conflates two distinct distinctions. For example, if D pays E to kill F, D has purposely caused the death, but the intervening agency of E might be viewed as making the death of F an indirect rather than direct consequence of D’s actions.

actor possesses the requisite intention (to contact, to cause anticipation of a contact, or to confine) if he has the purpose to cause the relevant consequence but also if he knows with substantial certainty that that consequence will occur.⁹ The same is true of the intent for trespass to land or to chattels. For example, if D locks the door of a room in order to keep X out of the room, knowing that Y is inside the room and now unable to exit, D is *prima facie* liable for false imprisonment of Y, even though D merely knows that his conduct will confine Y and does not act for that purpose. Only the tort of purposeful infliction of bodily harm is consistent with DDE in premising liability on purposely causing a consequence rather than knowingly doing so.

Later in the article, Geistfeld does recognize that both purpose and substantially certain knowledge usually suffice to satisfy an intent requirement, and claims that his model can explain this. He argues that knowingly (but not purposely) invading a right is still an “instrumental aggression”: D’s goal is not to invade the right, but achieving the goal necessarily invades the right. This is less culpable than having a goal of invading the right, but a plaintiff will still reasonably perceive the interaction to be aggressive.

The argument is stated abstractly, but a consideration of concrete examples demonstrates its inadequacy. Geistfeld’s argument makes sense when the knowing invasion of the right is a *means* to the actor’s goal. If a deranged scientist punches a stranger in the head in order to study the physics of imposing that type of force on a human head, he clearly has the requisite intent for battery—though this is better characterized as purposely causing a physical contact, and not merely knowingly doing so. One can purposely bring about a consequence as a means (and this fits the “instrumental” label that Geistfeld attaches), and not as a final or ultimate end.

⁹ Geistfeld cites Arthur Ripstein’s account of corrective justice in his recent book in support of his argument. ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2016). However, insofar as that account relies upon the wrongfulness of dominating or using another person, Ripstein’s view is subject to the criticism that it cannot explain why intentionally touching a person does not always suffice for battery, as where an actor touches another on the shoulder to request attention or slightly bumps against others in order to exit a crowded location. See Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 949–952 (2017). Moreover, on Ripstein’s theory, it would seem that purposely contacting a person would be an impermissible battery while knowingly contacting the person ordinarily would not, since a knowing interference with a person’s rights that is a mere side effect of the actor’s purposes is not readily conceptualized as an impermissible *using*. Yet either circumstance supports battery liability. For example, suppose a police officer jumps onto a bank robber’s car in order to prevent his escape. The robber intentionally makes a sharp turn in order to throw the police officer off the car and facilitate his escape, but not in order to cause physical harm to the officer. Nevertheless, the robber’s substantially certain knowledge that his conduct will cause the officer to contact the ground (and to suffer harm) suffices for battery liability.

The hit man's ultimate purpose is to make money, but in choosing to kill as a means, he kills with purpose, not merely knowledge. However, Geistfeld's argument does not make sense of the more typical case in which substantially certain knowledge is invoked in tort law—namely, a case in which the consequence is a side effect of the defendant's chosen conduct, not a means or end. The locked room example above is an illustration. Here, the notion of "instrumental aggression" does not apply: D does not use Y as an instrument of his purposes. Rather, he knowingly invades Y's interest in freedom from confinement. That is, and should be, sufficient for liability, yet Geistfeld's model does not explain this result.

Another difficulty with Geistfeld's tripartite paradigm is its weak fit with the intentional torts covered by ITR. Medical batteries, for example, involve patients and medical practitioners who seek a mutually beneficial interaction, yet tort law ordinarily considers medical treatments beyond the scope of the patient's consent as intentional torts, which, for Geistfeld, reflect the paradigm of aggressive interaction, not mutual benefit. Similarly, when defendant plays a practical joke on plaintiff, defendant is often operating on the assumption that the plaintiff will enjoy the joke, but if defendant's conduct is beyond the scope of the plaintiff's consent, and if defendant should so realize, then this, too, is treated as an intentional tort, even though mutual benefit again seems to be the most pertinent paradigm.

2.3 Two doctrinal problems

Notwithstanding our criticisms of the tripartite paradigm structure, it is worth examining more closely two doctrinal implications that Geistfeld draws from his analysis. As we shall see, Geistfeld identifies some genuinely difficult doctrinal problems that any approach to intentional torts must address. But we are not convinced that the tripartite model provides a persuasive solution.

2.3.1 Statistical knowledge

First, Geistfeld addresses the problem of statistical knowledge. A soda manufacturer sends its beverages to millions of consumers. Even with reasonable care, it knows that some of its bottles will have flaws that result in explosions and injuries to consumers. The Restatement, Third: Liability for Physical and Emotional Harm § 1, comment e suggests that this is insufficient for intentional tort liability, because the substantial-certainty test must be limited to cases

where the defendant's knowledge is more individualized.¹⁰ But Geistfeld offers a persuasive counterexample.¹¹ Suppose a manufacturer (M1) identifies a particular bottle that contains a defect that the manufacturer knows will result in explosion when opened by a consumer yet sends the bottle into the marketplace. The manufacturer should be liable for a battery, notwithstanding its lack of knowledge of which particular consumer will be harmed, just as a person who shoots a bullet into a small crowd is liable for a battery, despite not knowing who will be harmed.

We agree with this basic analysis. Indeed, it would also be plausible to conclude that any manufacturer that sends such a seriously flawed product into the stream of commerce rather than destroying it is very likely to have the *purpose* to cause harm. The Restatement Third comment is inadequate in not accounting for this type of counterexample.¹²

However, we do not believe that Geistfeld's model explains this result. Geistfeld's explanation is as follows: an "aggressive interaction" occurs when a manufacturer sends out a particular flawed bottle, knowing that in an individual interaction with that bottle, a consumer will suffer harm; but no "aggression" occurs when a manufacturer (M2) sends out a large number of bottles, all of which have a very small chance of exploding. Unfortunately, this explanation is inadequate: it does not reveal why M1's conduct is more "aggressive" than M2's. Both M1 and M2 are sending out a product knowing that it will result in injury. Why does knowledge of which particular bottle will cause the injury make M1's conduct more aggressive? A more plausible explanation, we believe, is that M1 has no socially acceptable reason for distributing (rather than

10 The comment suggests that the substantially certain knowledge test should be "limited to situations in which 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 within a localized area."

11 For two similar but more extreme counterexamples in which intentional tort liability should unquestionably exist despite lack of individualized knowledge, see Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. REV. 1, 10, 54 (2012):

Time Bomb

A terrorist plants a bomb in a central train station. He knows that the bomb is constructed in such a way that it will explode at an indeterminate time in the near future, indiscriminately wounding or killing many individuals who happen to pass by.

...

Atmospheric Poison

A terrorist sends into the atmosphere a specially-designed chemical that he knows is virtually certain to randomly kill a hundred people somewhere on Earth sometime in the next hundred years.

12 See *also id.* at 46–59 (reaching a similar conclusion).

discarding) the flawed bottle.¹³ By contrast, M2 may act entirely without fault in distributing carbonated beverages to consumers, because each consumer receives a reasonable package of benefit and risk—namely, the benefit of carbonation coupled with an inevitable, very small risk of injury from explosion, a risk that cannot be prevented by reasonable-cost inspections.¹⁴

2.3.2 Single intent

Second, Geistfeld raises some provocative and important questions about ITR's endorsement of single intent (intent to contact) over dual intent (intent to contact plus intent to harm or offend) as the requisite intent for battery. He points out that when a doctor fails to obtain the informed consent of a patient to a medical treatment, by not disclosing the material risks and benefits of that treatment, courts typically analyze the failure within the rubric of negligence, not battery. (Indeed, the duty to obtain informed consent may require the disclosure of even low-level risks of 1% or less.). But, Geistfeld claims, inadequate disclosure of risks and benefits also amounts to a failure to obtain consent to the treatment. This is true, he continues, even if that inadequacy is inadvertent rather than knowing. And under single intent (requiring only intent to contact, not intent to harm or offend), the doctor should logically be liable for a battery as well.¹⁵ Insofar as the law does not follow this logical implication of the single intent approach, Geistfeld concludes, the approach is subject to question.

One response to Geistfeld's argument is to deny that failure to disclose the material risks and benefits of medical treatment is sufficient to count as lack of consent to the treatment for purposes of battery. After all, if the patient is not

13 If M1 somehow knows that one of its million bottles has a flaw but does not know which one, then its epistemic position and ability to prevent the harm are no greater than M2. (Suppose M1 receives a credible text from a disgruntled employee that he created a flaw in one bottle but has no way to determine the employee's location.) In this case, M1 should be treated like M2, i. e., it should not be treated as an intentional tortfeasor if it ships the million bottles.

14 Even if M2 was negligent in not inspecting carefully enough for flaws, M2 should not be considered an intentional tortfeasor just because inadequate inspections will predictably result in a certain number of injuries.

Of course, strict liability for a manufacturing defect is a widely accepted basis for imposing liability on M2 for exploding soda bottles, but the question before us is whether battery liability is appropriate.

15 The point that failure to obtain informed consent might logically be treated as a battery, under single intent, is noted in RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 15, Reporters' Note, cmt f (AM. LAW INST., Council Draft No. 4, 2017).

misled about the physical nature of the treatment, the patient's right to control access to his body has not been directly violated. Compare the following non-medical case in which the material risks and benefits of a physical contact are not disclosed. Suppose X suggests to Y an arm-wrestling match, not disclosing that X is the world champion at the event who has occasionally injured his opponents in the process of wrestling according to the understood rules. Although it would be material to Y (and to just about anyone else in Y's position) to know these facts, X does not have a duty to obtain Y's informed consent to the risks, on pain of battery liability. Informed consent is a distinct doctrine attaching to the professional obligations of medical practitioners, not a general duty that obtains between all individuals who intentionally touch another.

To be sure, when the risks of physical injury are especially significant, a failure to disclose them might indeed vitiate consent, both within and outside the medical treatment context. If A knows that he has an STD and fails to disclose this to a sexual partner, the partner may sue for battery if he or she contracts the STD. But actors do not have a general duty, in all cases, to disclose relatively small risks of physical injury of which the other is unaware. In this regard, the obligation of medical practitioners is especially stringent. More generally, outside of specialized contexts, individuals do not invariably expose themselves to battery liability by failing to disclose information that they know is highly material to another. Suppose P asks Q if Q is married, or if Q loves P, and Q lies in response in order to sleep with P; Q's behavior may be deplorable but almost all courts would find it insufficient for battery.¹⁶

Geistfeld would nevertheless recognize battery liability in some medical treatment cases—when the doctor knows that he or she is violating the patient's right to make an informed decision about the treatment. But it is unclear what this proposal embraces. If it includes cases where the doctor merely knows that he has not provided sufficient information about the material risks of the treatment, then this test recognizes battery liability much more broadly than current law and ITR. If it only includes cases where the doctor knows that he has exceeded the physical scope of the consent that the patient has given, then it would *narrow* battery liability relative to ITR's single intent approach.

Geistfeld also objects that the single intent rule inappropriately results in liability for interactions that are not "aggressive." Once again, this objection is difficult to assess, in light of the indistinct contours of that category. Consider, for example, the sexual boor who unreasonably assumes that a stranger will welcome his sudden, unilateral, forceful kiss. In the ordinary sense of the term, such

¹⁶ But not all courts. See *Neal v. Neal*, 873 P.2d 871 (Idaho 1994), upholding battery liability in this circumstance. No cases have been found that agree with *Neal*.

conduct is “aggressive.” Note, too, that the dual intent approach cannot readily explain liability in such a case: the boor does not intend to offend or cause harm.

A further problem that Geistfeld believes the single intent approach raises arises in the product liability context. Here, Geistfeld astutely identifies a potentially serious difficulty. When a manufacturer distributes a product, Geistfeld argues, it intends that the consumer use it, an intent that satisfies single intent. If the manufacturer provides an inadequate warning, however, then under the single intent approach, we must conclude that all cases in which the user of a product is harmed because of a defective warning are batteries! If correct, this argument would dramatically widen the scope of battery liability.

Fortunately, the argument is not correct, both for the reasons stated above regarding product defects and for an additional reason.¹⁷ Inadequate warnings about product dangers are quite analogous to inadequate information about risks of medical treatment: they are much better analyzed under the more flexible and capacious standards of negligence (or under products liability standards that are themselves similar to negligence in these respects) than under the more inflexible, categorical rules of intentional tort doctrine, which are designed to apply in a more straightforward, more mechanical way.

Geistfeld’s own thoughtful answer to the puzzles that he has so nicely formulated is not to insist on dual intent in all cases. Rather, he largely endorses single intent but also relies upon the objective definition of offensive contact as a contact that offends a reasonable sense of dignity. Thus, he avoids some unpalatable consequences that would flow from the dual intent approach—for example, allowing a doctor to subject a patient to unwanted treatment simply because the doctor honestly believes the treatment is in the patient’s best interests. Such treatment offends a reasonable sense of dignity, Geistfeld notes, even if the physician does not subjectively intend to offend the patient.¹⁸ So far, so good. However, Geistfeld’s reliance on an objective criterion of “offense” only addresses part of the problem. Even if a nonconsensual contact is not offensive, it might cause bodily harm, and indeed this will very often occur in medical treatment cases. Courts must then still determine whether the single intent to contact is sufficient for liability. In our view, the answer is yes. A

¹⁷ Geistfeld seems to agree that the argument fails: “A manufacturer that intentionally violates the consumer’s right to make an informed decision about product use only creates a risk of physical harm, and so the occurrence of such harm is accidental and not subject to battery liability” (footnote 100). But it is not clear why, despite this reasoning, Geistfeld reaches a different conclusion and supports battery liability when a doctor intentionally violates a patient’s right to make an informed decision.

¹⁸ Geistfeld also asserts that the plaintiff in such a case would reasonably perceive the interaction to be “aggressive”—an assertion that once again seems *ipse dixit*.

negative answer would make it extremely difficult to explain many of the medical treatment cases in which a court upholds liability for battery because a doctor or nurse exceeded the scope of consent.

2.4 Conclusion

In conclusion, we return to Geistfeld's critique that ITR does not adequately explain the definition of intent contained in the different intentional torts. We demur. These definitions take their shape from the specific principles, policies, and history of each intentional tort, as well as the administrative concerns that each tort engenders. As we note in the introduction to this response, these doctrinal criteria cannot be explained by a simple deduction from abstract principles. Moreover, "intentional" torts embrace a wide range of specific tort doctrines. ITR addresses only battery, assault, and false imprisonment.¹⁹ Other intentional torts include defamation and invasion of privacy, many torts for economic harm, malicious prosecution and abuse of process, trespass to land and chattels, and conversion.

Finally, we must not lose sight of the complexity of intent as a criterion of liability. Intent can mean purpose, or knowledge, or both; it might even extend to recklessness.²⁰ Moreover, the object of intent can be specified in multiple ways. Prosser famously defined intent as "an intent to bring about a result which will invade the interests of another in a way that the law will not sanction," a definition that is vacuous and close to circular.²¹ Each intentional tort particularizes the relevant object of the intent, and the resulting diversity reflects the distinctive interests protected by the tort, the distinctive type and degree of culpability or fault that the tort requires, and also the tort's peculiar history.

3 Reply to Sugarman

3.1 Introduction

In his strikingly original article, "Restating the Tort of Battery," Professor Sugarman proposes doing away with the intentional tort of battery and

¹⁹ ITR also recognizes a new tort, purposeful infliction of bodily harm, and is expected to cover fraud causing bodily harm.

²⁰ For example, the tort of intentional infliction of severe emotional harm extends to reckless infliction of such harm. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 46 (AM. LAW INST., 2010).

²¹ See Keith N. Hylton, *Intent in Tort Law*, 44 VAL. U. L. REV. 1217, 1217 (2010).

absorbing it within a broader tort of wrongfully causing physical harm. Although not nearly as far-reaching as his earlier proposal to do away with tort law altogether,²² this new proposal would dramatically reshape tort doctrine. Sugarman concedes that he does not expect the ALI to adopt his proposal, since it cannot reasonably be characterized as a “restatement” of the law. But he does express hope that judges will find his approach attractive and will “over time begin to move in my direction.”

Sugarman’s article is full of thoughtful observations about current doctrine, and many of his criticisms of that doctrine have bite. However, we believe that he understates the value of the current distinction between negligence and intentional torts. Employing his suggested wrongfulness test to replace the more differentiated intentional tort doctrines would obscure important features of the tort landscape—indeed, it would flatten that landscape into a simple, and unfortunately simplistic, test of wrongfulness or unreasonableness. A global test of this sort might initially seem attractive.²³ Who could object to a criterion of legal liability that merely asks whether the actor’s conduct was unreasonable? And, to a significant extent, negligence law employs such a test. But this is not an appropriate test for intentional torts, as our arguments below explain.²⁴

We agree with one of Sugarman’s arguments, that eliminating the distinction between negligence and battery causing physical harm would simplify tort doctrine. Obviously enough, eliminating a doctrinal distinction creates one less headache for legal actors who need to draw that distinction. But simplicity is not always a decisive consideration in articulating the rules of tort law, as we shall see.

In some cases, Sugarman’s approach would likely achieve different results than the current approach. In others, although his approach might well achieve the same legal result, it gives a less persuasive rationale for the result. So the ultimate question is whether, in a sufficient number of cases, his approach either achieves better results or explains the results more persuasively than the current approach. After carefully examining his arguments and examples, we conclude that the answer is negative.

22 Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985).

23 See George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949 (1985) (critiquing the American legal tradition for emphasizing “the reasonable” to the exclusion of “the right”).

24 A recent, illuminating review of Sugarman’s article notes that German law provides some support for his proposal to treat both negligence and intentional conduct that causes physical harm within the single rubric of “Wrongfulness,” but also expresses concern that his proposal neglects tort law’s ambition to protect rights. Anthony Sebok, *Doing Away With Battery Law*, JOTWELL (20 December 2017), <https://torts.jotwell.com/doing-away-with-battery-law/>.

3.2 The claim that a single principle explains harmful battery and negligence law

In support of his general claim that harmful battery should be treated as a mere subcategory of a single tort, Sugarman makes a number of distinct points deserving a response. First, Sugarman concedes that batteries in which the actor intends a physical harm often involve conduct that is morally more wrongful than negligent conduct that causes physical harm. His retort is, “So what?” After all, the same legal remedy of compensatory damages will be awarded in both cases. And as he notes, the availability of punitive damages does not turn on the presence or absence of an intent sufficient for battery liability. He is quite right that judges and academics should not overstate the significance of the classification of conduct as intentional or negligent. However, there are other ways in which the classification matters, as we shall explain below.

Second, Sugarman emphasizes that satisfying the intent requirement for battery is insufficient for legal liability. Liability also depends on the absence of consent and on the absence of a justifying privilege such as self-defense. Moreover, when the law articulates the scope of privileges, it often rejects liability even if the actor is mistaken about the justifying facts (for example, about whether plaintiff was actually threatening force), so long as that mistake is reasonable. From these valid points, Sugarman draws the apparently innocuous conclusion that fault—in the sense of wrongful conduct, or socially unacceptable behavior, or unreasonable behavior, or conduct that violates community standards—is the foundational criterion of battery liability.

But the conclusion is not innocuous, and it does not follow from the premises. The fact that “reasonableness” is one part of a legal criterion does not demonstrate that it is the only criterion. Self-defense law, for example, does not simply permit the use of “reasonable” force to prevent the aggressor from harming the actor. Instead, it specifies rules of proportionality and necessity. Offensive battery contains, as part of its definition, the requirement that a physical touching be “offensive to a reasonable sense of dignity.” But the tort contains other requirements, including the requirement of an intentional touching. Reasonableness criteria are plentiful in tort law, but it hardly follows that every tort standard *reduces* to whether the actor (or the victim) acted reasonably.

Third, one instance where the reductive approach fails is a battery in the course of medical treatment. Sugarman does note, correctly, that some medical batteries are also viable claims of medical malpractice for which negligence recovery might be obtained, such as when the doctor carelessly removes the wrong leg during a surgery. But other medical batteries are not. If Dr B

substitutes for the original Dr A even though the patient insisted that A should conduct the surgery, and if there is no evidence that the patient gave advance consent to a replacement of surgeons, the patient has a valid claim of battery for such so-called “ghost” surgery, even though many jurisdictions would not characterize this as a case of medical malpractice by B, especially if B was unaware of A’s contrary desires. Similarly, if a patient insists that her doctor not use a particular medication or technique that is well within customary and reasonable medical practice, or even that is clearly the best option from a medical perspective, the doctor must respect the patient’s wishes either by omitting the medication or technique or by refusing to conform to the patient’s conditions and thus declining to treat the patient at all on that basis.

Fourth, Sugarman believes that the necessity doctrine is best explained by his simple wrongfulness criterion. He produces a memorable example: a tiger is chasing a bicycle rider who is carrying a child; both will die unless the rider pushes the child off the bicycle, expecting the child to be eaten but thereby facilitating the rider’s escape.²⁵ This is a difficult case that might or might not be deemed a battery, Sugarman notes, depending on how the jurisdiction interprets the necessity defense. Yet, he claims, that interpretation will ultimately turn on wrongfulness.

We disagree with this analysis. To be sure, necessity criteria are somewhat vague.²⁶ Nevertheless, necessity criteria do not boil down to a simple question of

25 The example is somewhat comparable to the following famous example from Boorse and Sorenson, which has entered popular culture:

A ferocious and hungry grizzly bear charges out of the woods towards both of us, although I am closer to him. I jump into my running shoes. You shout at me, “fool, you can’t outrun a grizzly.” I shout back as I take off, “I only have to outrun you.”

Michael Moore, *Patrolling the Borders of Consequentialist Justifications*, 27 *LAW & PHILOS.* 35, 73 (2007).

26 See *RESTATEMENT (SECOND) OF TORTS* § 197(1) (AM. LAW INST., 1965):

One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to

- (a) the actor, or his land or chattels, or
- (b) the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action.

The following provision would most likely apply to Sugarman’s tiger hypothetical:

The intentional infliction upon another of substantial bodily harm, or of a confinement involving substantial pecuniary loss, for the purpose of protecting the actor from a threat of

whether (in Sugarman's words) the conduct was "socially unacceptable under the circumstances." Notice that Sugarman's example is a difficult one only because intentionally causing serious harm to another is presumptively extremely difficult to justify, even if a life would be saved by doing so—in other words, even if the behavior might be justified as reasonable. Thus, the characterization of the tort as an intentional wrong is crucial to the conclusion that a justification for committing the tort must be especially compelling.

To underscore the point, compare two cases. In the first, a passenger in A's car suddenly suffers a heart attack, and A drives at high speed to the hospital, endangering pedestrians on the sidewalk. In the second, driver B confronts the same emergency, and is faced with several pedestrians crossing in front of him; he chooses to drive through the group of pedestrians in order to arrive at the hospital more quickly. The second driver will have a much more difficult time justifying his conduct because he is committing an intentional tort, by knowingly contacting and injuring the pedestrians.²⁷

Fifth, Sugarman discusses the question whether consent to criminal activity such as a brawl should preclude liability. He prefers the minority rule, that such consent is not legally effective, because the defendant's conduct, insofar as it violates the criminal law, is "wrongful." Once again, this analysis ignores relevant distinctions—in this case, between conduct that is morally wrongful, that is criminal, or that is tortious. Conduct is often considered "wrongful" for purposes of the criminal law but not for purposes of tort law. Prostitution is illegal, but if the prostitute genuinely consents to sex with D in exchange for money,²⁸ most courts would preclude tort liability, even if P suffered minor, foreseeable physical harm from the intercourse. Indeed, Sugarman's argument, if taken literally, would drastically expand tort liability. In most instances, intentional batteries are crimes as well as torts. This argument suggests the

harm or confinement not caused by the conduct of the other, is not privileged when the harm threatened to the actor is not disproportionately greater than the harm to the other.

Id. at § 73.

²⁷ Sugarman also addresses a case of duress in which X threatens D with death unless he kills an innocent person. In this case, too, he would simply ask whether submitting to the coercion is socially unacceptable. A more careful, structured analysis would ask whether, in such a case, D is excused from committing a wrong that clearly does not satisfy the necessity criterion of bringing about a lesser harm or evil. The analysis would undoubtedly answer in the negative, because tort law, although it recognizes such justifications as self-defense and necessity, generally does not recognize excuses. See John C.P. Goldberg, *Inexcusable Wrongs*, 103 CAL. L. REV. 467 (2015).

²⁸ Assume that the prostitute is neither underage nor the victim of coercion by the customer or by others.

implausible conclusion that because the defendant has committed a crime, consent to the battery is vitiated for tort purposes, permitting tort liability.

Sugarman also observes that the Restatement rule precluding liability in “consent to crime” cases recognizes an exception when the purpose of the law was to protect a class of people including the victim. An example is statutory rape, forbidding adults from having sex with underage individuals. Sugarman reasons that this exception supports his general principle imposing liability for socially unacceptable conduct. But we believe that the exception expresses a much narrower principle: if the legislature determines that a class of people lacks adequate capacity to consent, a person within the class should not be precluded from a tort recovery.

Sixth, Sugarman says that his general principle would reach the same result in defense of property cases as the existing rules would reach. However, there is little basis for confidence in that conclusion. He simply asserts that the current details of battery doctrine, including defense of self and property, come down to whether under the facts, the force that defendant used was wrongful.

Consider how a jury, instructed to apply Sugarman’s general principle, would resolve concrete questions. Would we have any assurance that they would share his view that force likely to cause serious injury cannot be used to prevent a trespass? Sugarman briefly concedes that “there can be some dispute as to whether certain conduct is wrongful or not.” Indeed there can be. To put the point more bluntly, disputes about that question will be far more numerous, and answers to that question will be far less consistent and far more dependent on the whims of the particular decision-maker, under an unstructured “wrongfulness” or “socially unacceptable” criterion than under the existing legal criteria for the *prima facie* cases and for the various distinct defenses. For example, in our current draft of defense of property, a defendant must establish that the use of nondeadly force was the only means available to protect the property, and the draft forbids the use of force to retake real property and, under most circumstances, personal property. Were courts to adopt Sugarman’s general wrongfulness principle, juries would be free to reach decisions inconsistent with such rules.

As a partial response, Sugarman explains that he is willing to permit a shift in the burden of proof as one way of capturing the distinctive privilege doctrines such as defense of property and self-defense. But merely requiring the defendant to disprove “wrongfulness” in particular categories of cases does not adequately address the problems of vagueness, unpredictability and inconsistency, unless there are clear criteria for when burden-shifting should occur. Yet once specific criteria are articulated, the supposed advantages of a simple wrongfulness criterion would seem to evaporate.

3.3 Special rules internal to tort law

Some genuine doctrinal consequences flow from the classification of conduct as intentional tort or negligence. In other instances, the classification appears to have such a consequence, but in practice often does not. We agree with Sugarman that courts too readily attribute greater significance to the classification than is warranted, but we do not agree that the classification has no legitimate bearing on other tort doctrines.

1. *Punitive damages.* We agree with Sugarman that the intentional tort/negligence distinction does not closely track the distinction between cases that are and are not eligible for punitive damages. Thus, we share his conclusion that the award of such damages should be (and are in fact) based on distinct criteria, such as recklessness or wanton conduct or the inadequacy of compensatory damages to adequately deter the conduct in question.

2. *Comparative fault principles.* Sugarman also believes that the distinction between intentional torts and negligence should be ignored for purposes of applying comparative fault principles. We believe that a more nuanced approach is called for.

Most jurisdictions appear to reject comparative fault and permit the negligent or otherwise “faulty” plaintiff a full recovery when the defendant commits a battery, assault, or false imprisonment, except in extremely rare and distinguishable circumstances, such as where the plaintiff provokes defendant to use force or where plaintiff initially uses unjustifiable force and then defendant overreacts and employs disproportionate force in self-defense. Moreover, under Restatement of Torts, Second, § 71, comment b, an actor who uses excessive force in self-defense is liable for all of the harm inflicted by the use of such force where it is not feasible to separate the proportion of the harm caused by the actor.

Sugarman objects to the current rule that sometimes requires ignoring P’s initial provoking or threatening behavior when D responds with excessive force. Here is an instance where his approach would sometimes reach a different result than existing law, because he would have the fact-finder compare the actors’ fault in this scenario. Perhaps he is right to suggest that the fault of P and of D in such cases should usually be compared. But we do not agree that it should always be compared.

For example, Sugarman argues that if P attacks D, then D uses reasonable self-defense and disarms P, but then harms the helpless P with excessive force, comparative fault should be used. Taken to its logical extreme, this argument would permit a surprisingly broad application of comparative fault principles. Suppose P unjustifiably shoves D, and D gives a proportional shove in self-

defense. A month later, D sees P and, unprovoked but still angry about the incident, kicks P in the head. On Sugarman's view, it seems that P's initial wrongful act must be compared to D's later purely retaliatory act, potentially resulting in a substantial reduction in P's damages.

Now consider the far more common situation in which P is merely negligent but D has committed an intentional battery. Here, current law will typically ignore P's fault. Sugarman finds this stance puzzling. He points out that even when both parties are negligent, courts sometimes adopt per se rules permitting full recovery.²⁹ So why not apply special rules such as this when they are called for, instead of treating every harmful battery case as triggering a full-recovery rule?

This is a fair question. And we agree that whatever general rule is adopted about whether to compare plaintiff's negligence to defendant's harmful battery, special rules will justify a different treatment in special circumstances.³⁰ Nevertheless, we do endorse a presumption that the general rule should be as follows: when D intends to harm P, while P is merely careless with respect to P's own safety, reasons of fairness, optimal deterrence, and consistency justify awarding a full recovery to P.³¹ Moreover, we are not persuaded by Sugarman's claim that his wrongfulness criterion actually explains special rules such as the rule that a schoolchild's negligence in dashing across a street is not compared to a bus driver's negligence in dropping the child on the wrong side of the street. Sugarman says that a judge can make a case by case judgment about wrongful misconduct in order to rationalize a full-recovery rule in this situation; but what really explains the sensible full-recovery rule is the point that recognizing a very stringent duty towards children's safety is preferable to permitting case by case inquiry into the relative fault of children and bus drivers.

²⁹ Actually, courts also sometimes adopt per se rules precluding all recovery even when both P and D have been negligent. See Kenneth W. Simons, *Victim Fault and Victim Strict Responsibility in Anglo-American Tort Law*, 8 J. TORT LAW 29 (2016).

³⁰ For a recent suggestion that comparative fault principles should be applied in some contexts now treated as raising all-or-nothing issues of consent, see Aaron Twerski & Nina Farber, *Extending Comparative Fault to Apparent and Implied Consent Cases*, 82 BROOK. L. REV. 217 (2016).

³¹ The presumption might also apply when P creates risks to others in addition to himself. At the same time, the presumption arguably should not apply when D intends only to contact P, as a result of which P suffers physical harm, which is the situation in almost all medical battery cases. It might also not apply when P is reckless or intentionally provokes D, and is not merely careless.

3. *Scope of liability (proximate cause)*. One clear doctrinal consequence of the battery/negligence distinction is that the scope of liability (or the breadth of proximate cause) for battery is broader than for negligence. Yet Sugarman asserts that scope of liability does not significantly vary according to whether the underlying tort was an intentional tort or a tort of negligence. In support, he correctly notes that the eggshell skull rule permits very broad liability even for negligence torts. However, he neglects the fact that in the many situations not covered by that rule, the scope of liability for intentional torts is wider than for negligence, and indeed Sugarman does not question the examples in ITR that evidence this difference.³² Also, he concedes that transferred intent doctrine might permit liability when D intentionally shoots at X but the bullet strikes an unforeseeable person Y, yet no similar doctrine permits liability in the analogous case when D carelessly shoots a gun in the direction of X and the bullet strikes unforeseeable victim Y. Sugarman admits that fairness supports different results in these two scenarios; we agree, and we take this as evidence that the categorical difference between battery and negligence matters for purposes of proximate cause.³³

4. *No duty and limited duty rules*. We do agree with Sugarman that “no duty” and “limited duty” rules sometimes draw a doctrinal line, not between

32 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 cmt i (AM. LAW INST., Tentative Draft No. 1, 2015):

[T]he scope of liability for intentional torts is not unlimited. A doctor who commits a battery based on an honest but unreasonable and mistaken belief that the patient consents to a particular type of medical treatment is much less culpable than an actor who purposely or knowingly causes physical harm to another, and the scope of liability for the former actor should be restricted accordingly. For example, suppose the doctor’s patient becomes distressed after the mistaken extension of medical treatment causes the loss of a limb; the patient commits suicide. Such a consequence might be considered beyond the scope of liability. But if an actor maliciously cuts off a person’s limb, causing the distressed victim to commit suicide, the consequence might be considered within the scope of liability.

33 Elsewhere in the article, Sugarman takes a different view of transferred intent, dismissing it as a gratuitous “fancy legal move” that tort law could do without. We demur: transferred intent is an historically recognized doctrinal crystallization of the general point that courts will recognize a broader scope of liability for intentional torts. Consider Illustration 6 from RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 cmt b (AM. LAW INST., Tentative Draft No. 1, 2015):

John, a security guard at a nightclub, is angry that Rudy, an intoxicated patron, refuses to leave. John fires a gun at Rudy in order to injure him. The bullet misses Rudy, ricochets across the street, and strikes the bicycle of Nancy a block away. As a result, Nancy falls off her bicycle, suffering a concussion. John is subject to liability to Nancy for battery.

battery and negligence, but between aggravated forms of negligence and ordinary negligence. This is often the case with respect to injuries arising from recreational and sporting activities, for example, where courts frequently preclude liability unless the defendant's conduct was reckless, and not merely negligent. In endorsing the significance of the battery/negligence distinction, we certainly do not mean to suggest that this is the only legitimate basis for doctrinal differentiation within tort law. Similarly, as Sugarman observes, courts have occasionally applied no-duty or limited-duty rules to claims of battery as well as negligence claims, either explicitly or implicitly. He aptly cites *Gregory v. Cott*³⁴ in support, a case in which the California Supreme Court determined that an Alzheimer's patient was not liable for injuries she intentionally caused to her professional home health care aide who was paid to care for her.

5. *Other rules.* Despite our disagreement with many of Professor Sugarman's specific arguments, his challenge to the battery/negligence distinction is an important one. And we do find appealing some of his suggested doctrinal changes. For example, should the liability of children for their torts vary so dramatically depending on whether the alleged tort is battery rather than negligence? It is actually easier to prove that a young child committed a battery (recall the famous case of *Garrett v. Dailey*,³⁵ involving a five-year old child) than to prove that he engaged in a negligent act, because negligence is judged according to the standard of a reasonable child of the actor's age and experience. This is a doctrine ripe for rethinking and might well be addressed in the Restatement of the Law of Children, currently in progress.

3.4 Collateral rules outside tort law

With respect to collateral legal rules outside tort law, such as liability insurance coverage, vicarious liability, and worker's compensation, Sugarman points out that the intentional nature of defendant's conduct is often given weight in determining whether the rule applies: "expected or intended" conduct is frequently excluded from insurance policies, vicarious liability often does not extend to intentional conduct by an employee (either by rule of law or, more commonly, by a jury finding that the conduct was outside the scope of employment), and the exclusive remedy provisions of state worker's compensation laws often do not extend to intentional conduct by an employer. And yet, he correctly

³⁴ 331 P.3d 179 (Cal. 2014).

³⁵ 279 P.2d 1091 (Wash. 1955).

observes, the battery/negligence distinction is not always precisely where the joints of these outside rules are carved, because some nonintentional conduct is treated in the same way as intentional conduct for these purposes, and not all intentional conduct is treated alike.

We agree with these observations, and with Sugarman's suggestion that courts should employ a more refined distinction than battery/negligence in applying these external doctrines. Some courts do employ the simple battery/negligence distinction in these contexts.³⁶ If they do so unthinkingly or mechanically, they might well bring about consequences that are inconsistent with the rationale underlying these rules. For example, it makes little sense to treat a battery by a psychotic person as "expected or intended" under an insurance policy and thus excluded from coverage, because (as Sugarman agrees) denying coverage does not further insurance law's concern about avoiding moral hazard. But if a court were to mechanically apply insurance law principles to deny coverage here, the real problem is the overly crude application of these external legal doctrines, not the battery/negligence distinction itself. Many courts have indeed shown their ability to sensitively apply these external legal doctrines according to the goals they serve. Thus, there is no reason to believe that employing the battery/negligence doctrine for other purposes necessarily creates problematic distortions in the application of these legal doctrines.

3.5 Sugarman's problematic unitary standard

Sugarman's ultimate proposal is to adopt the following unitary standard, adapted from Restatement, Third of Torts: Liability for Physical and Emotional Harm § 6: "An actor whose wrongful conduct is a factual cause of physical harm is subject to liability for any such harm within the scope of liability."³⁷ This standard would replace three torts now addressed in the Restatement, Third of Torts: negligence causing physical harm; battery causing physical harm; and the new tort of purposeful infliction of bodily harm.

Sugarman then concedes: "Wrongful conduct would then have to be defined." That is quite an understatement! He would define it as:

³⁶ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 1, Scope Note (AM. LAW INST., 2010).

³⁷ It is not clear whether Sugarman would include the last phrase of § 6: "unless the court determines that the ordinary duty of reasonable care is inapplicable."

unreasonable conduct and unreasonable failure to act where there is a duty to act. Unreasonableness would be failing to behave as a reasonable person in the actor's situation would have behaved. This would be clearly stated to include despicable, deliberately wrongful, wanton, reckless, grossly negligent, and ordinary negligent acts.

However, this proposal continues to raise the serious problems of vagueness, unpredictability, and inconsistency in application noted above. For example, Sugarman expresses confidence that his proposal will “readily” lead to liability in such varied circumstances as a prison guard who turns down the heat for the purpose of causing an inmate to become ill; an emergency doctor who refuses to aid a patient out of jealousy, resulting in the patient's avoidable death; and a person who pulls out a chair as plaintiff is sitting down, intending the contact but not the resulting physical harm. Yet the article never explains exactly why these are clear cases. For example, is the omission/action distinction now irrelevant in all physical harm cases, as the emergency doctor example might suggest? The quoted language suggests that a duty to act would be required; yet in the context of the tort of purposeful infliction of bodily harm, there is no such requirement.³⁸

The proposal also raises serious questions about its scope. Sugarman would apparently eliminate all of consent doctrine, for he endorses “folding in the ‘consent’ feature of the current draft of the Intentional Torts Restatement into my newly proposed general principle.” He suggests that seven full sections of that draft could be eliminated, by analogy to how negligence law has, in most jurisdictions, eliminating the distinct defense of assumption of risk. Whatever the merit of the abolition of assumption of risk,³⁹ abolishing consent to an intentional tort as a distinct doctrine could have the radical implication of drastically increasing tort liability for physical harm caused by various types of consensual conduct. Sugarman would no doubt resist this conclusion, for he asserts at several points that the “wrongfulness” criterion suffices to capture

38 See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS, § 104, cmt b (AM. LAW INST., Tentative Draft No. 1, 2015). Consider Illustration 9:

D, a friend of elderly E, has agreed to take care of E's medical and other needs and is compensated for doing so. D knows that E has left him a small inheritance in his will. One evening, as D is conversing with E, E has a heart attack. Deciding that this is his chance to obtain the inheritance promptly, D fails to perform his duty to call 911, and watches E die. D is not liable for battery, but D is subject to liability under this Section.

39 Compare Stephen D. Sugarman, *The Monsanto Lecture: Assumption of Risk*, 31 VAL. U. L. REV. 833 (1997); (endorsing the abolition of assumption of risk), with Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481 (2002) (endorsing a limited version of assumption of risk).

legitimate consent doctrines. For example, he discusses an emergency doctrine case in which D tackles P in order to prevent P from being hit by a car, and he concludes that this is a “clear example of conduct that is not wrongful.” But this conclusion is much too easy. How can we be sure how different factfinders would apply a vague “wrongfulness” test to the wide variety of cases that the emergency doctrine currently embraces, ranging from this example to medical treatment cases in which a doctor performs emergency surgery? How would we include in the simple “wrongfulness” criterion the rule that the emergency doctrine does not apply when D knows that P (such as a Jehovah’s Witness) holds a very unusual belief rejecting emergency medical treatment (such as a blood transfusion)?

The problematic scope of the proposal is an equally serious issue with respect to the privileges, such as self-defense and defense of property, discussed above. Sugarman asserts that the privileges can simply be included as comments to the basic wrongfulness provision. But the privileges are not that simple to describe. It would be unrealistic, and indeed dangerous, to delegate to individual factfinders the raw power to determine the permissible use of force. Under the Restatement Second and current tort law, the proportionality and necessity standards for use of force are now spelled out with much more specific criteria. This is, we believe, the proper approach, which we plan to implement in future drafts of the Restatement Third. Individual juries should not be authorized to decide, for example, that the use of proportional force purely in retaliation for a prior attack is not wrongful, or that a person facing a minor (or no) threat of force is permitted to use deadly force in response.

Moreover, Sugarman’s approach ignores a critical difference between negligence and intentional torts. For the tort of negligence, unjustifiability of the conduct is part of the plaintiff’s prima facie case. By contrast, for intentional torts, the burden is on defendant to prove a privilege. Furthermore, the privileges themselves are relatively narrow in scope. They do not embrace the wide range of considerations that are properly weighed in judging whether a negligent actor imposed an unjustifiable risk of harm on others.⁴⁰

Finally, Sugarman tentatively suggests that the distinct torts of assault, offensive battery, false imprisonment, and intentional infliction of emotional distress should be combined into a single tort of intentional dignitary harm to the person. This suggestion encounters similar problems to those that we have identified with respect to his physical harm proposal. These different torts protect very different interests, ranging from fear of physical harm to humiliation or offense from a physical touching to freedom of movement. Much would

40 See Simons, *supra* note 4, at 1099–1100.

be lost, and little gained, by submerging these differences within a single vaguely defined intentional tort.

3.6 Conclusion

In the end, the desirability of Sugarman's proposal turns on the importance of history and precedent in tort law; on the relative merits of standards and rules, a perennial issue for legal actors who articulate legal doctrine; and on whether more specific criteria of intentional tort liability are both feasible and valuable. With respect to the first point, reasonable minds differ about the extent to which tort doctrine should be continuous with the past or instead should be modified, even radically, in order to better serve consequentialist goals or to better reflect corrective justice, fairness, or rights-based principles. However, insofar as the Restatements of Torts are addressed to judges and not legislators, considerable deference is owed to history and precedent. Moreover, caution and modesty are warranted with respect to the appropriate limits of the judicial role in furthering policy goals and expressing socially desirable principles.

With respect to the second point, Sugarman's proposal for a standard rather than a set of rules to govern tortious causation of physical harm indeed has some merit.⁴¹ First, there is the obvious value of simplicity when the law employs a single overarching standard, thus avoiding line-drawing difficulties in identifying the boundaries of different torts. Second, the generality of his standard-based proposal does, in some cases, better further the underlying purposes of tort law than current law's rule-based approach, as we have seen. At the same time, however, a rule-based approach can evolve over time. A good example of such doctrinal progress is ITR's new tort of purposeful infliction of bodily harm. This tort fills a lacuna created by battery doctrine's requirement of a physical contact.

The third point is, we believe, a fatal objection to Sugarman's approach. Specific criteria of intentional tort liability are quite feasible to articulate, as the three Restatement projects to date demonstrate. And as we have tried to show throughout this response, these more detailed criteria have a much greater

⁴¹ Near the end of his article, Sugarman briefly asserts that rules are not precluded by his proposal. As an example, he states that it might be unreasonable as a matter of law to use deadly force in the defense of property. This concession, if taken seriously, would create exceptions that would swallow his proposal. In this reply, we assume that he is serious about his proposal and does not endorse elaborate exceptions that would simply replicate existing tort doctrine.

capacity to accurately and fully express the relevant features of intentional tort liability than is possible through the use of a reductive “wrongfulness” test.

4 Reply to Moore

In her paper for this symposium, “Restating Intentional Torts: Problems of Process and Substance in the ALI’s Third Restatement of Torts,” Professor Moore carefully elucidates a number of concerns about ITR, which we shall address in the following order: (A) the piecemeal process of the Restatement, Third of Torts is highly problematic; (B) ITR imposes excessively broad liability for omissions to release a person from a confinement and omissions to prevent a primary actor from committing an intentional tort; (C) in other respects as well, ITR is too willing to push the boundaries of existing doctrine; (D) ITR has blurred rather than clarified the boundaries between the intentional torts and other torts, primarily negligence; and (E) ITR should take account of collateral legal doctrines.

We wish to acknowledge at the outset the meticulous, thorough, and insightful analysis that Moore offers. In this reply, we are unable to respond to each of her thoughtful arguments, but we will consider them all as we continue work on ITR.

4.1 The piecemeal development of the Restatement Third of Torts

One concern emphasized by Moore is the piecemeal nature of the process of assembling the Restatement, Third of Torts in general and the Intentional Torts Restatement in particular. With respect to the first point, we agree that the sequential development of the various Restatement Third projects over a lengthy period of time has been unfortunate in some respects. For example, the Reporters for the Restatement of Products Liability were required to address issues of causation that were later addressed more thoroughly, but in a somewhat different manner, by the Liability for Physical and Emotional Harm project.⁴² In addition, broadly-applicable principles such as participation

⁴² Compare RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 15 (AM. LAW INST. 1998) (using “substantial factor” language) with RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26, cmt j (AM. LAW INST. 2010) (disapproving “substantial factor” language).

liability have been drafted in piecemeal fashion by Reporters for different projects, and will likely not be restated at all as applied to negligence. In retrospect, the coordination between different Restatement Third projects would have been improved by beginning most or all of the projects at the same time, with the Reporters for the different projects harmonizing their efforts and ensuring that common issues were treated consistently. At the same time, we do not believe that serious issues of inconsistency have arisen in the Restatement Third project.

With respect to the second point, similarly, we believe that Moore overstates the problem. She is correct, of course, that the various parts of our Restatement project are interconnected, and yet the approval process requires sequencing the parts. The project began with individual torts and transferred intent, is now turning to consent and participation, and will soon turn to the defenses, such as self-defense and defense of property. However, every Restatement project faces this problem. Given the number of projects that the ALI is now undertaking, and the limited time available at Council and Annual Meetings for each project, it is a practical necessity to sequence the different sections of a project over a period of years, rather than present all or most of the sections at once to the Council or Annual Meeting for a very extended discussion.

Moreover, as Reporters, we have been sensitive to Moore's concern—thus, we have not yet requested approval of the black letter sections and comments relating to consent for the individual torts of battery, assault, and purposeful infliction of bodily harm, even though the other sections of those torts have already been approved (with the exception of offensive battery). And we are confident that there will be adequate opportunity to return to earlier sections and make necessary changes in light of unanticipated issues that arise in later sections. Even if the Council and membership have approved a section that, upon later reflection, requires modification, the entire project will eventually be submitted for final approval as a Proposed Final Draft, and the modification can readily be made at that point. As Reporters, we are quite committed to producing the best possible product, even if this requires changes to sections that we initially believed were in final shape. (One example is our agreement with a criticism that Moore offers in her article, concerning the scope of liability for the omission to release a person from confinement, discussed below.) Thus, we do not share Moore's concern that the ALI "is now locked into various decisions that it might not have made" if it had seen the newer material now under consideration.

We do agree, however, with some of Moore's criticisms arising from the sequential process for restating tort law. Moore notes that the Restatement, Third of Torts: Liability for Physical and Emotional Harm endorsed an "umbrella"

intentional tort in the black letter of Section 5: “An actor who intentionally causes physical harm is subject to liability for that harm,” and she observes that this provision is inconsistent with the approach to intentional torts in ITR in several respects: it does not accurately map onto intentional tort doctrines, for it is both underinclusive⁴³ and overinclusive⁴⁴ of those doctrines. Moreover, it relies on a somewhat crude hierarchy of fault. Although the comment to Section 5 significantly qualifies the black letter language,⁴⁵ she contends that this qualification is in serious tension with the black letter. Furthermore, Section 5 and the comments appear to endorse the dual intent test for battery⁴⁶ (requiring an intent to harm or offend, as well as an intent to contact), which ITR has rejected in favor of a single intent test. As a result, Section 5 remains misleading and risks causing significant confusion.

We largely agree with these criticisms. The explanation for Section 5 is that the ALI was not then contemplating a comprehensive restatement of most of tort law in the Restatement Third of Torts but rather expected the project to serve as a statement of “general principles.” It was thus thought desirable to treat the issue of intentional torts in this abbreviated way. But in retrospect, it is unfortunate that Section 5 was approved, because its simple distillation of intentional tort doctrine is regrettably simplistic. The ALI should, we believe, consider including language in the electronic database versions of Section 5 that cross-reference ITR and warn readers that Section 5 itself should not be employed as a

43 Battery liability is not limited to contacts that are intended to cause physical harm; under single intent, it embraces intentional contacts that cause harm but were not intended to have that effect. And, of course, offensive batteries, assault, and false imprisonment are recognized intentional torts to persons that are not embraced by Section 5.

44 In the rare case where an actor intentionally causes harm but not by way of physical contact, battery doctrine does not permit recovery, yet Section 5 suggests that recovery is warranted. In ITR, the tort of purposeful infliction of bodily harm does permit liability in some cases in which Section 5 would extend liability beyond battery, but not in all such cases. As Moore observes, the purposeful bodily harm tort does not impose liability when an actor merely *knows* that his conduct will cause physical harm, while the language of Section 5 seems§ broad enough to recognize liability in such cases.

45 Comment a explains that the Section “does not replace the doctrines for specific intentional torts, such as battery, assault, false imprisonment, and others,” but rather “provides a framework that encompasses many specific torts for intentionally caused physical harm.”

46 Moore might be correct about this, for all of the examples in the comments to Section 5 are indeed of intent to cause harm. On the other hand, Section 5 and its comments do not mention the controversy about whether battery requires single intent or dual intent; moreover, they provide that intent to cause physical harm is sufficient for tort liability; they do not provide that it is necessary. By contrast, the dual intent version of battery does provide that intent to harm (or offend) is necessary for liability.

stand-alone tort nor invoked in a jury instruction. Instead, readers should consult the much more specific criteria provided by ITR for the separate intentional torts restated in ITR.⁴⁷

Moore also is concerned about other provisions of ITR that she believes are in tension with other portions of the Restatement Third of Torts. Consider two of her examples. First, she notes that ITR declines to take a position on whether negligent conduct that results in a confinement but does not cause bodily harm should result in tort liability. In practical effect, ITR's agnosticism on this point is equivalent to the Restatement Second's Caveat addressing the same issue.⁴⁸ As Moore observes, some states have endorsed tort liability in these circumstances—for example, when an actor's negligence results in the plaintiff being confined in jail on erroneous charges. She surmises that ITR does not take a firm position on the question because "it would have been exceedingly difficult to propose a section creating liability for merely negligent conduct in a Restatement project limited to restating the intentional torts." It would have been much better, she suggests, if the Reporters for the project on Liability for Physical and Emotional Harm had addressed this topic. We agree with her analysis and conclusion here. Indeed her critique applies beyond this particular doctrine: the Restatement Third's treatment of negligence leaves a number of holes that will not be filled until a fourth Restatement of the topic. Some of these holes might not exist had the entire subject been restated simultaneously. However, we suspect that others would still remain, because comprehensive treatment of such a broad area of the law is bound to overlook some issues.

Second, Moore raises the question of how ITR addresses cases in which a physician provides treatment because of a negligently mistaken belief that a patient consents. She points to an ITR Illustration in which a surgeon fails to read the medical notes in which the patient insists on a different surgeon performing a procedure. The illustration states that if it was unreasonable of the surgeon not to read the notes, then the surgeon cannot rely on apparent consent to preclude liability. Moore asks an important question about the illustration: how is reasonableness to be determined? Will it be judged by a reasonable person test, or instead by the test of medical custom that typically applies in medical malpractice cases? We believe that courts are likely to apply a

⁴⁷ Our research of cases that cite Section 5 suggests that no court has been misled by the current language of Section 5 to misapply the traditional requirements of battery doctrine.

⁴⁸ Moore seems critical of ITR's decision to state in a comment that this issue remains open, rather than to formally issue a Caveat to this effect. However, it is no longer customary for the Restatement Third of Torts to employ Caveats. There is no significant difference between a Caveat and a statement in a comment that the ALI takes no position on a question.

reasonable person test, because the situation is comparable to the question of the proper standard for a medical practitioner's duty to disclose the material risks of a medical treatment. In the latter situation, the duty to obtain the patient's informed consent is usually governed by a reasonable person test, not by medical custom, because the duty to disclose depends on the informational needs of the patient, not the medical expertise of the doctor. Similarly, whether medical practitioners have used reasonable care to investigate and communicate accurately the scope and nature of the treatment to which a patient has (or has not) consented would seem to depend on the need to respect the patient's right to consent, not on medical expertise.⁴⁹ But Moore is correct that the issue underscores a deeper problem: the Restatement Third of Torts has not heretofore addressed the topic of professional malpractice. This lacuna makes it more difficult to reach a firm conclusion about how ITR should resolve these issues.⁵⁰

A further example offered by Moore is ITR's endorsement of single intent as the intent requirement for battery. Moore believes that members of the ALI who supported this position in preference to the alternative dual intent view did not realize that single intent would create the following problems that dual intent does not: (1) adopting single intent necessitates a vague and controversial implied-in-law category of consent, and (2) it makes the question of comparative fault much more difficult, because plaintiff's fault is plausibly viewed as irrelevant if the actor had the (dual) intent to harm or offend but not if the actor merely had the (single) intent to contact. With respect to (1), ALI members were well aware that the Reporters contemplated coupling the single intent requirement with a category of implied-in-law consent: § 2, comment b discusses the latter category, and Illustration 7 is an exemplar. With respect to (2), Moore is correct that courts and legislatures are more likely to apply comparative fault principles to cases in which the defendant acts *merely* with single intent, such as a doctor making a negligent mistake about the scope of a patient's consent or a practical joker forming a good faith but foolish belief that the victim would consent. However, if a court concludes that comparative fault principles should apply in such cases but not in dual intent cases where the actor has the intent to

⁴⁹ To the extent that ITR leaves this matter unaddressed, we will certainly amend the relevant comment with an appropriate discussion.

⁵⁰ A similar issue arises with ITR's consent § 18, which explains the distinction between medical treatment inadequate consent cases that are properly treated as batteries and those that are properly treated as negligent failure to obtain informed consent. This Section would be more useful and authoritative if earlier Restatement Third of Torts projects had specifically addressed the standards governing the negligent failure to obtain informed consent.

harm or offend, it may readily craft a comparative fault rule to that effect.⁵¹ Moreover, a recent paper presents an intriguing argument that comparative fault principles should apply in any intentional tort case in which both plaintiff and defendant contributed to a misunderstanding about the scope of consent.⁵²

4.2 Does ITR impose excessively broad liability for omissions?

One issue that Moore discusses in some detail is intentional tort liability for omissions. She expresses concern about the different manner in which the Restatement Third addresses liability for omissions for different intentional torts. As she notes, the Restatement declines to recognize omission liability for battery or assault, but does endorse such liability for false imprisonment, for the new tort of purposeful infliction of bodily harm, and for participation in or instigation of another's intentional tort. Moore objects that the Restatement does not offer principled reasons for these distinctions.

In reply, we note that the Restatement does offer reasons for the distinctions, resting on history, principle, and concerns about unduly wide liability. One example is § 1, comment c:

Under ... a rule [permitting battery liability for an omission], a teacher who omits to take steps to prevent one student from attacking and injuring another student could be subject to battery liability so long as a jury finds that the teacher knew (with substantial certainty) that the attack would occur and that the teacher could have prevented the attack. An employer who fails to prevent an employee from being harmed (or merely offensively contacted) by a dangerous environmental pollutant not of the employer's creation might also be liable for battery.

Moore also specifically criticizes the treatment of omissions in the false imprisonment and participation provisions. With respect to false imprisonment, she objects to the scope of the duty to rescue a person from confinement and is skeptical about the comment's suggestions about the source of such a duty. Thus, she objects that the duty should be limited to instances in which the defendant "refuses" to help a person escape from confinement, as the Restatement Second § 45 provides, and should not extend to all instances in which the defendant breaches a duty to help the person escape, as the Restatement Third § 7 provides. It is difficult properly to assess Moore's concern,

⁵¹ Notably, even when the basis of a plaintiff's lawsuit is defendant's negligence, courts recognize several categories of "no liability" or "full liability" rules that displace the background rule of comparative negligence. See Simons, *supra* note 29.).

⁵² See Twerski & Farber, *supra* note 30.

because it is not clear what amounts to “refusing” to help as opposed to breaching a duty not to help.⁵³ After all, a separate requirement of false imprisonment is that the actor knows that the person is or will be confined, or intends such a confinement. One might therefore say that any failure of an actor to use reasonable care to extricate a person from confinement even though the actor has such knowledge or such an intention simply *constitutes* a “refusal” to save the person.

However, perhaps “refusing” has a narrower connotation, of making no effort at all, as opposed to trying but incompetently failing to successfully aid another.⁵⁴ If a security guard is unable to find the right key to unlock a person from confinement because he has carelessly lost the key, perhaps he has not “refused” to release the person and should not be liable for false imprisonment. But if he decides to delay releasing a person from the locked store while he gets a cup of coffee, his choice not to make any effort to facilitate the release until he has completed his personal errand arguably should be treated as a “refusal” to release the person.

There is no question that a refusal to release another, in this sense, should qualify as a false imprisonment, while it is a much closer question whether unreasonable, inadequate efforts to release a person from confinement when one has a duty to do so should so qualify. To be sure, a number of cases recognize false imprisonment liability of actors who have custody over a person and who knowingly or merely negligently fail to release the person as required by law.⁵⁵ But almost all of these cases involve the scope of a privilege to detain (as a defense to an intentional false imprisonment). Perhaps liability for an inadequate effort to satisfy the requirements of such a privilege is (as Moore argues) less troublesome than liability for an inadequate effort to comply with a duty to extricate a person from a confinement in a case that does not involve such a privilege.

⁵³ Although the Restatement Second § 45 employs the language of “refusal,” and most of its illustrations include that language, one of its illustrations does not. Moreover, comment b, quoted in a footnote below, presupposes that one can be liable for making an unsuccessful and unreasonable effort to help another escape from confinement. Thus, in the last sentence, comment b states: “The actor is not required to do more than is reasonable under the circumstances,” implying that if he does less, he is liable. Thus, it is not entirely clear that the term “refusal” in the black letter of § 45 is actually intended to establish a standard that is any narrower than “unreasonable breach of duty to release.”

⁵⁴ Moore does not hazard a definition. She does approve of liability “for a deliberate, purposeful refusal” to release someone from confinement. But it is not clear what this language adds to the separate requirement under both the Restatement Second and the Restatement Third that the defendant must knowingly or purposely confine the plaintiff.

⁵⁵ See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 7, cmt f, Reporters’ Note (AM. LAW INST., Tentative Draft No. 2, 2017).

Moore also raises the legitimate question why a sharp distinction should be drawn between failure to use reasonable care to prevent a confinement from occurring in the first instance, which all agree is not an intentional false imprisonment, and failure to use reasonable care to release someone from a confinement that one realizes has already occurred. One answer is that liability for the first type of failure might dramatically expand the scope of false imprisonment (e.g. imposing liability on airlines that do not take sufficient care to prevent flight delays or on security guards who do not adequately inspect the entire property they are charged with securing), while the second type is much less likely to do so. Another answer⁵⁶ is that false imprisonment creates liability even in the absence of physical harm, and it would be unduly onerous to impose a general duty to use reasonable care not to unjustifiably confine another (as opposed to the much narrower duty not to *intentionally* and unjustifiably confine another). Still, there is reason to hesitate before recognizing liability whenever a defendant with a duty to release a plaintiff from confinement attempts to facilitate a release yet is incompetent or negligent in those rescue efforts. Moreover, there is very little case law bearing on this question.

Accordingly, Professor Moore has persuaded us to modify our prior position on this point: we will use the language “refusal to release” (or similar language) recognized in the Restatement Second. We will also clarify that this standard is only met if the actor breaches a duty to facilitate the release of the plaintiff by making *no effort* to do so. But we will also underscore that a more demanding standard governs the issue of the scope of a privilege to confine a person. Thus, if prison officials unreasonably fail to execute a judge’s order to release a person in custody immediately, they are subject to liability for false imprisonment, even if their omission cannot be characterized as a “refusal” to release the person.

As to the second issue, the source of the duty to aid a confined person, the Restatement Third attempts to give greater guidance than the Restatement Second provides.⁵⁷ That is why the Restatement Third states that the affirmative duties specified in Restatement Third, Torts: Liability for Physical and Emotional Harm § 38–44 presumptively apply. It is surprising that Moore finds ITR’s

⁵⁶ Suggested by Professor Benjamin Zipursky. Email from Benjamin Zipursky to Kenneth W. Simons, (27 June 2016) (on file with author).

⁵⁷ The Restatement Second, § 45, comment b, merely says: It is not within the scope of this Restatement to state when the duty to aid another in release from confinement may arise. Factors to be taken into account are the degree of inconvenience, effort, and expense necessary to make such aid effective, and the extent to which the actor has already made a reasonable but unsuccessful effort, as well as the availability of other sources of help. The actor is not required to do more than is reasonable under the circumstances.

treatment of duty problematic, a treatment that most likely recognizes a significantly *narrower* scope of duty than the vague, multi-factor, potentially expansive test that the Restatement Second suggests.⁵⁸

Moore also criticizes our position with respect to omission liability for participation. She characterizes our approach as an expansion of the Restatement Second's provisions and questions our interpretation of the cases cited in our supporting Reporters' Note, suggesting that the cases do not represent instances of omission liability. We do not believe that we are innovating in recognizing that participation liability often rests on what are essentially arguments of omission, and we stand by our interpretation of both the Restatement Second and the cases we cite. Implicit in Moore's critique is the assumption that if a defendant took any action whatsoever with respect to a third-party wrongdoer's act, the defendant's liability necessarily involves misfeasance rather than nonfeasance. This is, in our view, an inaccurate description of the law.

Thus, suppose a police officer A participates in an arrest and does nothing to stop his partner B's subsequent beating of the arrestee but does not actively instigate, encourage, or contribute any force to that beating. A is liable for battery only by omission or nonfeasance.⁵⁹ This is likely true even pursuant to the extraordinarily broad definition of misfeasance prescribed by Section 7 of the Restatement Third of Torts: Liability for Physical and Emotional Harm. *Comment o* to that section explains that a case involves misfeasance if the "actor's conduct or course of conduct results in a greater risk to another." Accordingly, if the officer B would have made the initial arrest even without A's assistance, then the participation claim against A for the beating is based on pure nonfeasance. Furthermore, even if A's conduct was a factor causally contributing to the arrest, the plaintiff's battery claim remains one of omission. It cannot be said that the duty to interrupt a partner's subsequent beating of a recent arrestee is part of the duty of reasonable care owed in conducting the arrest itself.⁶⁰ Rather, if the

⁵⁸ See prior footnote.

⁵⁹ See *Schiller v. Strangis*, 540 F. Supp. 605 (D. Mass. 1982) (cited in our Reporters' Notes and by Professor Moore).

⁶⁰ A defendant's prior creation of a risk creates a subsequent, affirmative duty to warn, protect, or rescue a plaintiff from that risk. See *Maldonado v. Southern Pac. Transp. Co.*, 629 P.2d 1001 (Ariz. Ct. App. 1981). However, risk-creation does not give rise to a duty to protect from all subsequently-developing risks, but only those risks foreseeably resulting from the original conduct. For example, suppose that pedestrian A non-negligently runs into B during rush-hour on a sidewalk, knocking B down into the road. A would certainly owe an affirmative duty to use reasonable care to rescue B from oncoming traffic. But suppose that B falling into the road catches the attention of B's ex-husband who happens to be walking nearby, and he

defendant owes an affirmative duty in this scenario, it is likely due to the custodial relationship between the plaintiff and defendant, the defendant's relationship with the batterer, or the defendant's official duties as a police officer. Similar reasoning explains each of the cases cited by Moore and ITR.

As this brief discussion highlights, at the heart of this issue are two related matters: (1) the relationship of participation liability to factual causation and (2) whether risk-creating conduct is required for participation liability. As we explain in the comments to Section 10, our interpretation of the Restatement Second and the case law is that neither causation nor risk-creating conduct is required so long as the elements of Section 10 are satisfied. Indeed, this is a major reason for recognizing so-called “concerted action” liability. Consider, as one final example, the first Illustration in Section 10, borrowed from the Second Restatement: “A, B, C, and D decide to commit a robbery at E’s house. A breaks down E’s front door, B ties E up, C beats E, and D steals and carries away E’s jewelry. A, B, C, and D are all subject to liability for trespass to land, false imprisonment, battery, and conversion.” In this hypothetical, without the participation of D (for instance), A, B, and C might still have committed the robbery, and C might nonetheless have beaten E. In such a case, D neither was a factual cause of E’s beating nor acted in any way that increased the risk of that beating. Nonetheless, D is liable as a participant in E’s lawsuit for physical harm. Although D acted or “misfeas[ed]” in *stealing E’s jewelry*, the fact remains that E’s participation claim *for battery* against D is based on D’s omission.

4.3 Does ITR inappropriately extend existing doctrine?

Another concern and surprise, according to Moore, is how willing the Reporters have been to push the boundaries of existing doctrine. She offers two examples—recognition of a tort of purposeful infliction of bodily harm (which was approved at the 2015 annual meeting) and our proposal to define offensive battery as extending to cases in which the actor knows that the plaintiff will be highly

begins to beat B. A arguably owes no affirmative duty to stop the beating because it was not one of the risks foreseeably created by knocking B into the street. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 36 & cmt c (AM. LAW INST. 2010) (duty to minimize risks that actor’s conduct created applies only to “a continuing risk of physical harm of a type characteristic of the conduct”).

offended by the intentional touching.⁶¹ The Restatement also includes some other changes in doctrinal formulations, most of them quite modest.⁶² Whether the Intentional Torts Restatement has inappropriately extended existing doctrine is a matter upon which reasonable people may disagree. But it is important, we think, to place this question in perspective.

A first perspective is historical. When Francis Bohlen began work on the First Restatement of Torts in 1923, he was writing, to a considerable extent, on a *tabula rasa*. His own formulations of the intentional torts were very often not taken from existing case law or jury instructions. They were largely inventions—brilliant distillations and reformulations of the cases and academic commentary, but inventions nevertheless. By contrast, when William Prosser took on the role of producing the Second Restatement, he made very few changes to the substance of the First Restatement intentional tort provisions.⁶³ His conservative approach can partly be explained by the fact that the first Restatement's doctrinal formulations were widely accepted by courts, at least insofar as they were widely quoted.

However, “widely quoted” does not mean “widely applied.” And this brings us to a second perspective, specific to the context of intentional torts: the problem of scarce authority. There is not an abundance of case law addressing the doctrinal criteria of the torts addressed in this Restatement. A number of reasons might explain this dearth of authority: the potential damage award is often too small to justify the costs of litigation; insurance policies often do not cover intentional torts; other collateral legal rules such as limits on vicarious liability discourage the assertion of intentional tort claims; and many defendants might have an especially strong incentive to settle intentional tort claims in order to avoid reputational harm.

The historical perspective suggests that somewhat less deference might be owed to the intentional tort formulations presented in the prior two restatements, since these formulations reflect the novel criteria created for the first

⁶¹ At the 2017 meeting, the membership rejected the offensive battery proposal in its original form but endorsed an extension of offensive battery to contacts by which the actor had the *purpose* to highly offend the plaintiff.

⁶² For example, ITR employs the language of anticipation rather than apprehension in the definition of assault; endorses a single intent rather than dual intent test for battery, a matter about which courts are divided; and proposes change to false imprisonment's definitions of confinement and of submission to legal authority.

⁶³ However, Prosser did make significant organizational changes, and a very few substantive changes, including broadening false imprisonment liability in two ways: consciousness of the confinement is not required if the plaintiff is “harmed” by the confinement; and forms of duress other than threats of physical force can suffice for a confinement.

Restatement, which were then adopted with very little change in the second. Moreover, the scarce authority problem suggests that, in drafting the Third Restatement, it is both necessary and desirable to consider, not merely what a handful of reported cases have said on a topic, but how well the treatment of the topic coheres with other doctrines within intentional tort law. And that broader lens sometimes supports a broadening of the doctrinal formulations. These considerations help explain the choice of ITR to recognize liability for purposeful infliction of bodily harm in § 4 and to recommend recognition of offensive battery liability when the actor contacts a plaintiff knowing, or acting with the purpose, that this will cause a plaintiff to be highly offended. On the other hand, ITR also identifies many instances (for example, omission liability for battery or assault) in which we recognize that plausible arguments exist for extending existing doctrine, but we conclude that the absence of case law support militates against such an extension.

4.4 Does ITR blur the boundaries between intentional torts and other torts?

Moore offers a thoughtful, birds-eye overview of the place of intentional torts to persons within tort law generally, relying in part on prior analyses of this topic by Professor Ellen Bublick⁶⁴ and by one of the present authors.⁶⁵ She largely accepts the view that ITR should not always express a simple hierarchy of fault, under which intentional torts invariably express a more serious degree of culpability than negligence. Thus, she agrees with Simons that intentional torts and negligence, and indeed different intentional torts, are sometimes “apples and oranges.”⁶⁶ Nevertheless, Moore believes that ITR unduly blurs the lines between intentional torts and negligence-based torts.

One of her general concerns is what she perceives as inconsistent explanations of doctrine. For example, she notes that ITR supports both the general requirement for false imprisonment liability that the plaintiff was contemporaneously aware of the confinement, and also an exception where an unaware plaintiff suffers bodily harm as a result of the confinement. And Section 7, cmt h supports this result based on the hierarchy of fault principle: although negligence liability would frequently permit liability in such cases, intentional tort

⁶⁴ Ellen M. Bublick, *A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts*, 44 WAKE FOREST L. REV. 1335 (2009).

⁶⁵ Simons, *supra* note 4.

⁶⁶ See *id.* at 1080–1083.

liability might be viewed as more appropriate insofar as the intentional actor is typically more culpable than a merely negligent actor. But Moore finds this reliance on the fault hierarchy problematic, since ITR sometimes rejects that principle—for example, in recognizing battery liability for single rather than dual intent.

We concur with Moore's observation that the same argument (such as the fault hierarchy) is given more weight in explaining or justifying some doctrines within ITR than in explaining others. But we do not believe that this approach to explanation and justification should be viewed as troubling. As explained earlier, the task of a contemporary judge formulating tort doctrine is not to derive that doctrine from general principles of justice, fairness, liberty, social welfare, or efficiency. Rather, the judge's (and hence the Reporter's) role is to articulate realistic and justifiable criteria for judges and juries to apply to the ongoing project of identifying when an actor violated the legal right of another, and when the other is entitled to a legal remedy from the actor. In explaining and justifying these criteria, judges should of course avoid irrational or incoherent rationales, but they need not undertake the Herculean effort of deducing doctrine from abstract principles. Indeed, if the principles underlying tort law are pluralistic, as many believe,⁶⁷ then even the adoption of a deductive, ahistorical approach is no simple solution to the challenges of coherence and consistency.

A more specific concern noted by Moore is that ITR employs reasonableness criteria with some frequency. She invokes this fact as undermining the claim that intentional torts are distinctive insofar as they employ more rule-like criteria than the standard-like reasonableness tests of negligence law. Here, she echoes a criticism that Professor Sugarman makes even more forcefully in this volume—that the inclusion of reasonableness standards in ITR amounts to the stealth introduction of negligence principles.

But if one examines more carefully the situations in which the Restatement employs reasonableness criteria, it becomes clear that ITR has not surreptitiously diluted or transmuted intentional tort law into negligence law. Rather, reasonableness criteria are employed in the interstices of the edifice of intentional torts. And they are typically so employed in order to avoid recognizing a form of liability that is either too wide or too narrow. For example, consider apparent consent, which does employ a test of whether the actor reasonably believes that the plaintiff actually consents. This test focuses not on the reasonableness of the defendant's conduct, full stop, but on the reasonableness of his beliefs about the other person's consent. Similarly, reasonable mistakes about

⁶⁷ See GOLDBERG & ZIPURSKY, *supra* note 3; Hershovitz, *supra* note 9, at 962 (“there are lots of torts because there are lots of ways of wronging people”); Simons, *id.*

the facts that would justify an actor in defending his person or property preclude liability—but again, not because the jury is entitled to make an all-things-considered judgment that the actor’s conduct was reasonable. Rather, the jury’s role is much more limited; the question is only whether the actor made a reasonable factual mistake about the specific proportionality and necessity criteria that the law establishes for the privileges of self-defense and defense of property.⁶⁸

Another concern identified by Moore is how the boundary line between battery and negligence is drawn in the field of medical treatment. She reiterates her support for a requirement that a doctor “intentionally deviate” from the consent given by the patient, which she understands as meaning that the doctor must intentionally contact the patient in a manner that the doctor *knows* is beyond the scope of the patient’s consent; a negligent mistake about the patient’s consent would be insufficient. In the recent C.D. 4, we respond to this argument for an unusually deferential standard by suggesting that the case law support for her interpretation is uncertain and by endorsing the application of the usual test of apparent consent in this context, which asks whether the doctor reasonably believed that his intentional contact was of a type to which the patient actually consented.⁶⁹ However, we also suggest that if courts are concerned that applying the usual test would unduly burden medical practitioners, they might establish appropriate per se or presumptive rules that under specified circumstances, a doctor’s mistake about the scope of consent is reasonable.⁷⁰

Moore also expresses concern about cases in which the doctor *inadvertently* and unreasonably treats a part of the patient’s body that is not within the scope of actual consent, such as operating on the wrong limb: she would treat such a case under the rubric of negligence, applying medical malpractice criteria, not the rubric of battery. In reply, we would first distinguish two kinds of inadvertent treatment. If a surgeon’s hand slips, causing her to make an incision in the wrong location, battery liability is unavailable, because the surgeon did not

68 Moore is concerned about the vague standards that govern implied-in-law consent. This is a legitimate concern, and going forward, we will make every effort to make those standards as precise as possible, lest this category of consent balloon so large that it swallows all of the specific tort privileges. We do not, however, share her view that this category is “entirely new”; although it was not explicitly formulated in the prior Restatements, courts and scholars have long recognized or presupposed such a category.

69 See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16, cmt e (AM. LAW INST., Council Draft No. 4, 2017). This draft was not available to Professor Moore when she wrote her article.

70 *Id.* “For example, a court might determine that a surgeon is ordinarily entitled to assume that the hospital’s standard consent forms have been properly signed prior to surgery.”

intentionally contact the patient at that location.⁷¹ The patient's only recourse is negligence. But if a surgeon intentionally operates on the left leg rather than the right leg, not realizing that this is contrary to the patient's consent, we believe that the patient is entitled to sue either for harmful battery (because the contact will undoubtedly cause physical harm) or for negligence. Since this fact pattern potentially satisfies the criteria of both torts, the patient should have the choice of remedy. Moore resists this conclusion, believing that the only remedy should be in negligence. In most cases, her approach will be satisfactory to plaintiffs. (Note that one possible detriment of a negligence lawsuit, the usual need to offer expert evidence about the standard of care, might not exist in this fact pattern, insofar as some jurisdictions will treat a "wrong limb" case as satisfying *res ipsa loquitur*.) However, if a battery cause of action provides certain procedural, proof, remedial, or other practical advantages in some of these cases, we see no compelling reason to limit the plaintiff to a negligence theory.

4.5 Collateral legal rules for intentional harms or torts

A final issue that Moore helpfully raises is the important question of whether ITR should, in formulating doctrine, take account of collateral legal rules, such as the contractual exclusion of insurance coverage for harms that are "expected or intended." Courts sometimes treat the characterization of an actor's conduct as an intentional tort as automatically triggering such a collateral rule. ITR's view is that courts and legislatures should carefully consider whether a collateral rule should be triggered and should be sensitive to the concern that an automatic trigger of this sort will not always serve the public policy underlying the rule. As just one example, "courts have noted that, even if a person with a mental disability is liable for an intentional tort, it does not follow that the person intentionally caused injury within the meaning of the insurance exclusion."⁷² Moore originally shared ITR's view on the matter. However, after observing that a more sensitive application of collateral rules is unlikely to occur, she now takes the position that ITR should take account of these collateral effects in determining the criteria and scope of the doctrines within ITR.

There is considerable force to Moore's position. Restatement Reporters should not be blind to the practical effects of their work. And it is understandable and predictable that courts and legislators often take the simple approach

⁷¹ See *id.* at § 18, cmt b.

⁷² RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS Scope Note (AM. LAW INST., Tentative Draft No. 1, 2015).

of treating the intentional tort category as automatically triggering a collateral rule. On the other hand, if we were to give significant weight to all the predictable legal effects of ITR, the doctrines that we propose would be unstable. Restatements are meant to last for a considerable period of time, and any predictions about the effect on collateral legal rules would be uncertain. Moreover, it is of course beyond the jurisdiction of ALI Restatement projects to attempt to settle the content of collateral legal rules such as the effect of our definitions of intentional torts on worker's compensation recovery, insurance coverage, or vicarious liability. Finally, in some collateral contexts, especially worker's compensation cases, courts have in fact developed specific rules that define "intentional torts" in a manner that is appropriately sensitive to that context.⁷³ Thus, we believe that the better course in ITR is to highlight any problematic effects of collateral legal rules of which we are aware, thus encouraging those legal actors responsible for the rules to modify or refine them.

5 Reply to Chamallas

In her article, "The Elephant in the Room: Sidestepping the Affirmative Consent Debate in the Restatement (Third) of Intentional Torts," Professor Martha Chamallas critiques ITR's treatment of consent as it applies to sexual battery cases. Chamallas presents a thoughtful, measured, historically informed, and powerful argument in favor of the adoption in the Restatement of an affirmative consent standard. In this response, we hope to show that the positions we have taken in this Restatement, and that we plan to take in future drafts, on the crucial question of the proper criteria for consent to sexual conduct are not as far from her views as she may suppose. At the same time, however, we do not share her view that the Restatement should unequivocally endorse the affirmative consent approach that she espouses. In arriving at this position, we are cognizant of the fact that it is a Restatement, not a Model Code of Tort Law, that we are drafting. That fact is what prompts our hesitation about fully endorsing her approach.

5.1 "No means no" and "Only yes means yes"

Before we turn to the substance of Chamallas's argument, it is worth underscoring the ways in which the current Restatement draft departs from traditional

⁷³ See *id.*, Reporters' Note.

criminal law standards that, as Chamallas persuasively recites, placed enormous and unjustifiable obstacles in the path of victims of nonconsensual sexual assault.⁷⁴ The criminal law historically required proof of force extrinsic to the act of intercourse as a predicate for a sexual assault crime; required proof of utmost physical resistance or, more recently, “reasonable” resistance; and insisted on special evidentiary requirements that applied only to rape or sexual assault cases. This Restatement abjures all of these requirements, and simply requires proof of nonconsent as a predicate for the tort of battery.

Moreover, our draft firmly endorses the position that “no means no.” Consider the following hypothetical:

A and B are lying on a couch in A’s apartment after a mutually enjoyable first date. A kisses B and expresses his desire to have sex. B says, “No, I don’t want to” but does not physically resist intercourse, lying passively on the couch as A removes B’s clothes and initiates intercourse.

According to our draft, A has committed a battery. This approach is arguably a departure from that of the Second Restatement, which can be read to allow a jury the freedom to infer actual consent or find apparent consent under such circumstances. Although courts have thus far remained surprisingly silent in civil cases as to whether “no means no” as a matter of law, we are proposing that the ALI adopt the bright-line rule because it clearly tracks current cultural and legal norms and is consistent with general tort principles governing consent. Furthermore, in light of the ALI’s adoption of “no means no” in the context of the Model Penal Code’s sexual assault provisions, we are hopeful that the ALI will endorse our approach.

Although Chamallas lauds the adoption of a bright-line “no means no” rule, her article urges us to propose an even more plaintiff-protective approach—“only yes means yes,” commonly known as affirmative consent. The difference between Chamallas’s desired approach and that taken by our draft is most salient in scenarios in which the nonconsent of the plaintiff is less clear than in the facts of the hypothetical above. Consider the following variations:

Variation 1: Same facts as the hypothetical above, but when A states his desire to have sex, B is silent (rather than saying no).

Variation 2: Same facts as the hypothetical, but B passionately returns A’s kisses. When A states his desire to have sex, B is silent, continues to return

⁷⁴ As Chamallas notes, “there is now a growing appreciation for the grievous injury lack-of-consent intercourse may cause, even absent inflictions of additional external injuries.”

his kisses, but then lies passively on the couch when he initiates intercourse.

Variation 3: A and B have had a relationship for months in which they regularly engage in mutually-consensual sex. On one particular night, A kisses B and expresses his desire to have sex. B is silent in response and is passive when A initiates intercourse. B does not desire to engage in sex because she is feeling ill, but she is reluctantly willing to do so (albeit silently and passively) because she feels that satisfying the sexual desires of her partner under these circumstances is part of a healthy relationship.

Variation 4: A and B have had a relationship for months in which they regularly engage in mutually-consensual sex, including several instances in which B awoke in the middle of the night to find that A had initiated intercourse while she was asleep—a practice to which she had always responded with behavior indicating affirmative consent.⁷⁵ One night, A and B have a heated political debate at dinner. Later that night, B awakens to find that A has initiated intercourse. B is not subjectively willing to have intercourse after their disagreement, but lies silent and passive throughout.

The current Restatement draft would allow a jury to decide in each of these variations whether the plaintiff had actually consented and whether there was apparent consent. By contrast, an affirmative consent requirement would require liability in each variation—regardless of whether the plaintiff actually consented, i. e., was willing to permit the actor's conduct, and regardless of additional context that might lead one to conclude that the defendant had acted reasonably based on a reasonable belief that plaintiff had actually consented. The default rule is thus often determinative in such cases.

At the heart of Chamallas's argument lie three concerns, each of which we share: (1) such cases often turn solely on evidence of the plaintiff's word versus the defendant's; (2) much of society has to date been predisposed to believe the male's (typically the defendant's) version of the story; and (3) unwelcome sexual conduct is a common occurrence with damaging consequences to the victim and largely without legal consequence to the perpetrator. Chamallas suggests that sexual assault presents a problem closely analogous to that of employment discrimination; therefore, she believes, the sexual battery plaintiff should benefit from procedural and substantive protections analogous to those provided by

⁷⁵ We do not endorse the idea of retroactive consent, *see* § 14(d) and comment e, but the practice of A and B might qualify as presumed consent, at least after the first instance when B greeted A's conduct with approval.

civil rights statutes such as Title VII and Title IX. She further reasons that requiring each person to obtain the affirmative consent of the other before proceeding with sexual conduct is a small burden in light of the justice and clarity it would bring not only in sexual battery cases, but in common day-to-day sexual interactions.

As academics, parents, and members of society, we agree with each of the propositions of the preceding paragraph, and we support the adoption of some form of affirmative consent by courts or legislatures (one of us perhaps more strongly than the other). Adopting this position in the Restatement is another matter entirely, however. Our reasons for thus far declining to endorse affirmative consent as an express commitment of the ALI may be summarized as follows.

Chamallas is correct in pointing out that there are few reported judicial opinions addressing the tort standards for sexual consent, with none either expressly rejecting or expressly adopting affirmative consent. There is, however, fairly broad judicial consensus embracing the general principles of actual and apparent consent, as well as the plaintiff's burden in proving actual consent. In our view, departing from these general principles in the Restatement—even for a specific, underdeveloped category like sexual battery—should be justified by sufficiently weighty countervailing norms, policies, and/or principles. Although we personally are convinced by the normative arguments for affirmative consent, at least in cases involving sexual intercourse,⁷⁶ a significant proportion of ALI members and of the general public are not. Reasonable people differ sharply about the variations described above—even people with similar values and political alignment.⁷⁷ We believe that our approach honestly recognizes such differences by leaving fact-sensitive, contextual consent⁷⁸ decisions largely to the jury—with the bright-line exception of “no means no”—while also encouraging courts to consider adopting the alternative that Chamallas urges. This approach protects plaintiffs in cases where nonconsent is quite clear, while expressly recognizing that in more ambiguous cases, juries and courts must consider where to draw the line in light of developing norms. To adopt

⁷⁶ Chamallas mainly focuses on affirmative consent with respect to sexual intercourse, but some of the sources she cites in support of her position, such as many recent student disciplinary codes, require affirmative consent with respect to any sexual contact, including a kiss. In our view, the case for an affirmative consent requirement that extends this broadly is considerably weaker.

⁷⁷ The recent debate over allegations of sexual misconduct by comedian Aziz Ansari is instructive on this point. See https://www.huffingtonpost.com/entry/aziz-ansari-sex-violating-but-not-criminal_us_5a5e445de4b0106b7f65b346.

⁷⁸ As Chamallas notes, the approach we support is similar to the contextual consent approach that the Model Penal Code: Sexual Assault project now endorses.

affirmative consent outright would be to take fact-sensitive consent questions away from juries, potentially requiring plaintiff verdicts in cases in which the norms governing intimate sexual behavior not only are unaddressed in the case law but are deeply and reasonably contested in society.

5.2 Consent and sexual battery under ITR

The current Restatement draft⁷⁹ embraces the following propositions:

- (1) Actual consent consists of the mental state of willingness to permit another's conduct, but does not require that the consenting person *desire* that the conduct take place.
- (2) Actual consent may ordinarily be inferred from the circumstances.
- (3) The burden of proof is on the plaintiff to establish the absence of actual consent.
- (4) Despite these general propositions, the draft suggests that courts might reasonably decide to limit the factfinder's ability to infer actual consent by imposing an affirmative consent requirement for sexual intercourse.
- (5) Even when actual consent is lacking, the doctrine of *apparent* consent precludes liability if the defendant's belief that the plaintiff actually consented was reasonable.
- (6) The defendant's belief need not be traced to any affirmative words or actions by the plaintiff, but may be inferred from the overall circumstances. However, if a plaintiff expresses an objection to any sexual act, the defendant cannot rely upon apparent consent.
- (7) The burden of proof regarding apparent consent remains unaddressed by the courts and, because there are viable arguments for opposing positions, the draft leaves the matter for further judicial development.
- (8) Nevertheless, the draft suggests that a jury might reasonably determine that a defendant's belief that the plaintiff actually consented is not reasonable absent an expression of affirmative consent. Moreover, a court might wish to adopt a bright-line rule of law to this effect.

Chamallas presents a detailed critique of these propositions, and we offer our response below. We address, in turn, her critiques of the Restatement's analysis of actual consent and of apparent consent.

⁷⁹ By "current draft," we refer to Preliminary Draft 4. Council Draft No.4 (which was not available to participants in this symposium) contains revised consent provisions. Because these provisions are still undergoing changes, we do not discuss the latter draft here.

5.3 Chamallas' critique of ITR's position on actual consent

1. *Mental state versus communicative notion of consent.* Chamallas first criticizes our reliance on the plaintiff's subjective "mental state" as the basis for actual consent, rather than looking solely to the plaintiff's communications to the defendant. In the Reporters' Note to § 13, we acknowledge the philosophical debate on this question. A full treatment of this subject is outside the scope of this paper.⁸⁰ However, the case law does not clearly support a "communicative" or "performative" notion of consent.⁸¹ Courts regularly quote the Restatement Second of Torts language that clearly provides that the plaintiff's willingness to permit defendant's conduct need not be communicated to the defendant.⁸² Moreover, the apparent consent provisions of the Restatement Second also presuppose a noncommunicative conception of actual consent, for the following reason. Apparent consent precludes liability when the defendant reasonably but mistakenly believes that the plaintiff actually consented. Several of the Restatement Second's examples of such reasonable mistakes involve a plaintiff who privately objects to the defendant's conduct yet makes no effort to communicate that objection to the defendant.⁸³ But if actual consent required that the defendant relied upon a communication from the plaintiff, there would be little need for an additional apparent consent doctrine; courts could instead simply deny liability because of the absence of *actual* consent, i. e., the absence of a communication of willingness to the defendant. At the same time, we concede that we have found no cases whose resolution depends on the precise question whether private, uncommunicated consent precludes tort liability.

Nevertheless, the difference between the Restatement's mental state approach and a communicative approach might not be as great as Chamallas

80 One of the authors has discussed aspects of this issue in Kenneth W. Simons, *Consent and Assumption of Risk in Tort and Criminal Law*, in UNRAVELLING TORT AND CRIME 336–344 (Matthew Dyson, ed., 2014).

81 Although the later portion of Chamallas's article criticizes our reliance on the mental state conception of consent because of its supposed tension with affirmative consent, the earlier portion takes a different view, arguing that "affirmative consent standards ... can ... be interpreted consistently with a mental state account of consent." We agree with the latter view.

82 See RESTATEMENT (SECOND) OF TORTS § 892(1) (AM. LAW INST. 1965) ("Consent ... may be manifested by action or inaction and need not be communicated to the actor.").

83 See *id.* § 50, cmt. a, Illus. 1 (A is unwilling to be vaccinated but stands in line and holds up her arm to B, the ship's surgeon; B is not liable to A); and § 892, cmt. c, Illus. 3 (A proposes to kiss B; although inwardly objecting, B says nothing and does not resist or protest by word or gesture; A is not liable for the kiss).

supposes. The mental state approach leaves room for a jury to find insufficient proof of subjective consent in many cases that lack affirmative consent. And a communicative definition of consent would still require evidence of the various ways a plaintiff might communicate consent—verbally or through conduct. Thus, as we discuss further below, juries in many cases would struggle with similar questions regardless of whether consent is defined as subjective or communicative. If that is so, then the two approaches will differ in result only in unusual cases, such as a case in which the plaintiff showed both signs of nonconsent during the encounter with the defendant and also signs (not communicated to the defendant) that she might nevertheless have been subjectively willing. For example, suppose the facts of Variation 1 above: The plaintiff is silent and physically passive during intercourse. Suppose the following facts are also present: (1) the plaintiff had messaged her best friend immediately before the encounter expressing her excitement about having sex with the defendant; (2) plaintiff messaged her friend immediately after the encounter expressing her happiness about having just had sex with defendant; and (3) plaintiff wrote the same in her diary the next day and again two weeks later; and (4) plaintiff first expressed the view that the conduct had not been consensual only after the defendant ended their relationship two months later. In such a case, a communicative notion of consent might result in a finding of battery, because the plaintiff never communicated consent to the defendant. Our draft, by contrast, would allow a jury to infer that the plaintiff had actually consented.⁸⁴

2. *Inferring actual consent.* The choice between a subjective or communicative conception of consent is intertwined with another aspect of our draft with which Chamallas takes issue: she urges us to forbid juries from inferring actual consent in situations where affirmative consent is lacking. Chamallas very properly points out the serious problems with permitting a jury to infer actual consent from evidence such as a plaintiff's allegedly provocative dress or sexual history, a plaintiff's choice to visit the defendant's apartment, or the mere fact that the plaintiff had consented to sexual acts with the defendant at some point in the past. It is indeed troubling that society has historically taken an unrealistic view of such encounters, unjustly blaming the victim and often refusing to

⁸⁴ For a somewhat similar example, see Larry Alexander, Heidi Hurd, & Peter Westen, *Consent does not require communication: A reply to Dougherty*, 35 LAW & PHILOS. 655 (2016).

Chamallas critiques one of our illustrations in which a person confides to a friend a desire to be kissed and then is suddenly kissed by the object of his/her desire. See § 13, Illus. 4. We agree that the example is problematic; we will replace it with a better example of uncommunicated consent in future drafts.

credit the victim's credible evidence that she did not consent to the sexual acts in question based solely on evidence that she consented to much less intimate interactions. Misogynistic assumptions about the prevalence of false claims by female victims have contributed to these problems. Moreover, even if a person sends communications to a friend indicating pleasure with the encounter, Chamallas is surely correct that that is not always a reliable basis for inferring consent.

It is also true, however, that social pressures might, in some cases, lead a plaintiff subsequently to allege sexual battery even though she or he had been subjectively willing at the time of the act. Even if Chamallas is right that a jury is more likely to draw the inaccurate inference that plaintiff actually consented than the inaccurate inference that plaintiff did not actually consent, her proposal to forbid circumstantial evidence of actual consent would result in injustice in certain cases.

Furthermore, even were courts to require affirmative consent, inferential judgments would sometimes still be required. As Chamallas points out, affirmative consent may be conveyed via words or conduct. Although some criminal statutes define conduct to exclude actions extrinsic to the immediate interaction between the plaintiff and defendant—thus narrowing the types of facts from which an inference might be drawn—even a careful definition would not supply perfect guidance in every case. Consider, for example, the facts of Variation 2 above—when A states his desire to have sex, B is silent, continues to return his kisses, but then lies passively on the couch when he initiates intercourse. Whether affirmative consent was thereby communicated might properly be a question for the jury.

Nevertheless, Chamallas is right that we should more carefully point out in our draft that some types of circumstantial evidence are much more fraught than others and ought to be viewed with greater skepticism by juries. We will address this issue in subsequent drafts.

3. *Willingness versus desire.* Chamallas further critiques our definition of the requisite mental state as “willingness,” rather than “desire.”⁸⁵ In our view, between the extremes of repugnant refusal and eager desire, there lies a vast continuum. Some points on the continuum are easily characterized as nonconsent—for example, assent under gunpoint—and other points may, without controversy, be characterized as consent—for example, the accession of a tired, but happily-married husband to the playful teasing of his wife that without sex she will not explain to him how to use the remote control. Our understanding of the

⁸⁵ This critique seems in tension with Chamallas's concession that a person can give consent to sex even though desire is lacking.

law and of the applicable policy considerations is that the point at which consent becomes nonconsent, although highly contextual, is closer to willingness than to desire.

Men and women regularly have sex without the unconditional or enthusiastic “desire” to do so, but under conditions they would vehemently assert constitute heartfelt consent. The facts of Variation 3 above, illustrate such an example: Because she is feeling ill, B does not desire to have sex, but she is willing to do so because she feels that satisfying the sexual desires of her partner is part of a healthy relationship.

Chamallas’s primary concern seems to be the prospect of the factfinder improperly concluding that a plaintiff consented in cases in which “willingness” is the result of some form of duress. For example, she suggests that a plaintiff has not consented where she finally gives in after having been “worn down by defendant’s persistent attempts to convince her to have sex.” As the recent debate over allegations of assault against comedian Aziz Ansari illustrate, the specific facts and context are everything. Were the persistent attempts flowers and smooth talk? Mere vocal urging? Vocal urging while standing imposingly in front of the only egress from the room? Stalking and thinly-veiled threats? Section 15 of our draft clearly provides that consent given under duress is not actual consent. Although Comment d to § 15 states that what constitutes duress is a highly factual inquiry, the comment is careful to point out: “Relatively mild threats of physical, economic, or emotional harm may negate consent to sexual conduct when such threats would not suffice to undermine consent to other types of conduct. Tort law protects the right to decide whether to engage in sexual conduct without fear of serious social humiliation if the person chooses to decline.” Thus, our draft provides that subtle forms of pressure might be determined by a jury to constitute duress even where the pressure would not constitute duress in another context.

4. *The Title VII standard of unwelcomeness.* As part of her argument against our applying common tort notions of consent to sexual battery cases, Chamallas urges us to consider instead the concept of “unwelcomeness” that is utilized in quid pro quo Title VII sexual harassment cases.⁸⁶ In determining whether sexual conduct amounts to harassment, a key factor is whether the plaintiff “found particular advances unwelcome.”⁸⁷ Chamallas’s invitation to adopt

⁸⁶ This factor was first recognized by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

⁸⁷ *Id.* At 69.

“unwelcomeness” as the standard for consent is parallel to her argument that “desire” is a better standard for consent than “willingness.”⁸⁸ She urges that “unwelcomeness” ought to replace the concept of willingness, thereby placing the victim’s perspective at the forefront in determining whether the defendant’s otherwise tortious conduct was wrongful.

We find this analogy to be somewhat misplaced. In *Vinson*, the Court was considering whether the plaintiff’s sexual encounter with her supervisor had been coerced by the implicit threat that she would lose her job were she to decline. The issue in *Vinson* is thus squarely analogous to an inquiry into whether consent was vitiated by duress, not whether the plaintiff was, in some superficial or minimal sense, “willing” to engage in sexual conduct with the defendant. We concur that the perspective of the plaintiff is an important factor in determining whether duress existed—in fact, a number of the factors described as relevant to duress in § 15, Comment d focus on the plaintiff’s perspective. The concept of unwelcomeness is worth including in the Comment and corresponding Reporters’ Note expressly, however, and our next draft will do so. Still, it is worth emphasizing that the Supreme Court has never adopted “unwelcomeness” as sufficient to establish liability in Title VII harassment cases; rather, it treats unwelcomeness merely as one factor to be considered. Indeed, as Chamallas points out, the Court in *Vinson* took into account many other contextual factors that, just twenty years later, seem problematic at best—for example, the plaintiff’s “provocative speech or dress.”⁸⁹ In our view, the Court’s approach in such cases is not a model for emulation.

However, we do acknowledge Chamallas’s larger point: evolving standards for consent to sexual conduct properly place significant emphasis on the victim’s perspective, an emphasis that is much greater than was the case with traditional rape and sexual assault offenses. At the same time, we believe that the Restatement Third’s recognition that “No means no,” and the flexibility of the reasonable person component of the apparent consent doctrine, are quite consistent with this more balanced approach, which carefully considers the rights and interests of both parties to a sexual encounter.

5. *Burden of proof.* Chamallas asserts that our placing the burden of proof regarding actual consent on the plaintiff represents a departure from the Second Restatement. This is not accurate. As § 12, Comment e of our draft explain, both the First and Second Restatements expressly placed the burden to prove lack of

⁸⁸ In fact, Microsoft Word’s first-listed synonym for “unwelcome” is “undesirable.”

⁸⁹ *Vinson*, 477 U.S. at 69.

consent on the plaintiff.⁹⁰ In the face of a clear majority of cases placing the burden to prove lack of consent on the plaintiff, and in the absence of any holding to the contrary in the context of sexual battery, it is appropriate to report this position as the law. Moreover, the principle that a plaintiff has the burden to prove that the defendant has violated a protected interest and has wronged the plaintiff is ubiquitous in tort law. Since a consented-to sexual contact does not violate a protected interest, placing the burden on the plaintiff to prove a lack of consent is a natural application of the general principle.

Nevertheless, in the comments to § 12, we explain that particularly in light of evidence “of the widespread incidence of sexual assault that does not result in criminal or tort liability,” courts might reasonably consider shifting the burden of proof to the defendant in sexual battery cases. Chamallas criticizes us for not offering a more full-throated endorsement of this alternative, and perhaps rightly so. On the other hand, we have received a number of comments from other ALI members urging us instead not only to retain our more neutral tone, but also to relegate our comments to the Reporters’ Notes. This issue squarely presents the fundamental and difficult question of the proper role of a Restatement (as does much of our response to Chamallas’s article). Reasonable people may differ about the extent to which a Restatement should capture current precedent, should extrapolate from current trends, should endorse existing doctrine as sound, or should assure that a specific doctrine is consistent with other tort doctrines and principles. And the reasonable people who comprise the membership of the ALI will undoubtedly ponder these questions about a Restatement’s role when they discuss the burden of proof in sexual battery cases as this project proceeds through the ALI’s democratic process.

6. *The role of a Restatement in changing social norms.* Another dividing line between Chamallas’s argument for affirmative consent and the position of the Restatement draft concerns how to understand tort law’s purposes and its role in maintaining or changing social norms. There is much debate in the scholarly literature about whether tort law is a forward-looking instrument of deterrence or a retrospective practice of corrective justice or civil recourse. But there is also a debate about the norms that tort law should induce compliance with and about the norms whose violation tort law should correct. Should courts take a more conservative role of fostering existing norms, or should they attempt to change behavioral norms? It is not the proper role of a Restatement, most would agree, to attempt a dramatic shift in social norms. Although achieving desirable

⁹⁰ Comment e cites RESTATEMENT (SECOND) OF TORTS § 10, cmt. c and § 13, cmt. d (AM. LAW INST. 1965), and RESTATEMENT OF TORTS § 13(b) (AM. LAW INST. 1939).

social policy is certainly a factor to be considered in restating the law, it cannot be the driving force.

7. *The theft analogy.* One of Chamallas's arguments in favor of affirmative consent is that the law should afford a woman's right to avoid sex the same protection that it affords interests in property and other forms of personal injury. She cites Susan Estrich in noting that "the law does not regard a victim as consenting to robbery when the assailant pins her down, strides atop her, and steals her wallet, even if the victim fails to yell 'stop.'" There is a considerable practical difference, however, in the frequency with which a person consensually, as opposed to nonconsensually, gives up sexual rights and the frequency with which a person similarly gives up the right to his or her wallet or the right not to be punched in the nose. No matter the prevalence of sexual assault, consensual sex is surely the norm. By contrast, it is exceedingly rare that one gives away one's wallet or is willing to be punched in the nose. The difference in default interactions does not, of course, justify a presumption of consent in one situation and not the other—and the Restatement's approach does not create such a presumption. Rather, except for cases in which the plaintiff communicated nonconsent, our draft leaves such questions to the jury.

5.4 Chamallas' critique of ITR's position on apparent consent

Section 15 of our draft states that even in the absence of actual consent, the doctrine of "apparent consent" precludes liability where the defendant's belief that the plaintiff actually consented was reasonable. The defendant's belief need not be traced to any affirmative words or actions by the plaintiff but may be inferred from the overall circumstances. If a plaintiff expresses an objection to any sexual act, however, the defendant cannot rely upon apparent consent: our draft recognizes a bright-line rule by which a "no means no" as a matter of law. Chamallas objects to our treatment of apparent consent in several respects. We address each in turn.

1. *Plaintiff's versus defendant's perspective.* Chamallas urges us to abandon altogether the principle of apparent consent in the context of sexual battery. She argues that because apparent consent turns on a defendant's reasonable belief regarding the plaintiff's consent, the plaintiff's perspective is necessarily excluded altogether. To focus on the defendant's reasonableness, Chamallas asserts, is thus to negate the plaintiff's experience of violation. Furthermore, because society's norms have long been dominated by a male perspective that

privileges a man's access to sex, judges and juries often inaccurately interpret a woman's actions as inviting or acceding to a man's sexual advances.

We agree with Chamallas's point that applying apparent consent criteria without any qualification is problematic in the sexual context. Our draft thus suggests that a court might plausibly create the following bright-line rule: the belief held by an actor that the plaintiff consents does not count as reasonable unless the plaintiff has affirmatively expressed willingness to the actor. We can certainly do a better job in explaining the various reasons for this suggestion, and Chamallas's draft will prove useful in that regard.

Once again, however, reasonable minds may differ regarding the meaning and application of apparent consent in sexual battery cases. Many ALI members and members of the general public believe that some form of apparent consent ought to shield a defendant from liability in sexual battery cases. The argument is as follows:

In an apparent consent scenario, the defendant has made a mistake in believing that the defendant has actually consented.⁹¹ A decision to allow a defendant to avoid liability in such circumstances rests on the following propositions: (1) a consented-to battery is not a battery at all, because the plaintiff's interest has not been violated and the plaintiff has not been wronged; (2) if a defendant reasonably believes that a plaintiff has consented, the defendant is not sufficiently culpable to be liable for battery. An affirmative expression of *unwillingness* by the plaintiff should, of course, suffice to establish that the defendant did not reasonably believe that plaintiff consented, just as an affirmative expression of willingness ordinarily suffices to establish that defendant's belief was reasonable. Even absent an affirmative expression of willingness, however, circumstances might lead a defendant reasonably to believe that a plaintiff had consented to the defendant's actions. This is particularly so in light of the common occurrence of consensual sexual interactions in which neither party affirmatively expresses consent. Any bright-line affirmative consent requirement would thus fail to reflect existing community standards. Moreover, were such a requirement internalized over time, romance and spontaneity would be seriously undermined, especially if affirmative consent is required at each stage of every sexual interaction.

We disagree with the more dire predictions by opponents of an affirmative consent requirement regarding the deleterious effect of such a requirement on daily behavior. However, the arguments of affirmative consent's opponents are

⁹¹ "Apparent consent" is a potentially misleading term for what is really a mistake doctrine. In fact, we are considering changing the Title of § 16 to "Reasonable Mistake About Consent" in the next draft.

strong enough that without any support in the case law, we do not feel that a stronger endorsement by the ALI is defensible.

2. *Proof difficulties.* At the center of Chamallas's argument against apparent consent and in favor of affirmative consent are issues of proof and policy. She points out that typically the only available evidence in such cases is the plaintiff's word against the defendant's. Paired with society's inherent skepticism regarding a woman's assertions of sexual assault, this fact makes it easy to see why the typical sexual assault—even against a wealthy defendant—might not even result in a tort claim. In addition, she points to considerable evidence that sexual assault is rampant in our society, particularly on college campuses. Chamallas suggests that abrogating apparent consent and adopting an affirmative consent rule are necessary to overcome the crippling obstacles facing plaintiffs in this context. In a case of ambiguity with regard to what happened or whether what happened crossed the line into nonconsent, Chamallas urges that tort doctrine ought to err on the side of protecting the non-initiator, most commonly a woman.

As an additional protection—and regardless of whether the Restatement were to adopt her other suggestions—Chamallas urges us to place the burden of proof regarding apparent consent on the defendant. It is our personal view that the burden should indeed fall on the defendant, for three reasons. First, particularly when the plaintiff testifies that there was not actual consent, apparent consent is most analogous to an affirmative defense, the burden of which is typically carried by the defendant. Second, apparent consent is an argument asserting a mistake on the part of the defendant, and the defendant has the best access to evidence relevant to its proof. Third, as a policy matter, if the plaintiff testifies that she or he did not actually consent, this should present a hurdle for the defendant to overcome. Thus, if a jury can't decide whether the defendant's belief was reasonable, the plaintiff should succeed in collecting damages.

Our draft sets out some of these arguments, but takes no official position on the question for two familiar reasons—the cases do not address the question one way or the other, and there are reasonable arguments pointing the other way (including the virtue of simplicity in treating the burden of proof for all consent issues in the same manner). Chamallas's arguments provide good reason to rethink this issue, however.

3. *The relevance of the criminal law.* Chamallas makes much of the fact that at several points in our draft, we point out similarities between our approach and that of the criminal law in a majority of states. She urges us that the approach in criminal cases should not dictate the analysis of civil claims. In short, we agree. As Chamallas explains, employing a pro-victim conception of consent in the criminal law raises distinctive concerns about

overcriminalization, including triggering lifelong sex offender status for those convicted of sexual assault crimes, and about imposing harsh legal sanctions disproportionately on poor and minority defendants. Moreover, she persuasively argues that because many states still impose force and physical resistance requirements for a criminal conviction, a civil court should not feel bound to follow the approach to consent adopted in the state's criminal sexual assault cases.

At the same time, however, the approach taken in criminal cases is not irrelevant, either to a court deciding a civil sexual battery claim or to the Restatement project. How courts decide analogous criminal cases is some indication of society's cultural norms on the question—much as the evidence Chamallas cites regarding the widespread adoption of affirmative consent in university conduct codes is indeed some evidence of these norms. This is the spirit in which our draft cites criminal statutes and case law, and we will endeavor to make that clearer in our Reporters' Notes. We will also make greater reference to the content of university conduct codes. For example, as Chamallas emphasizes, many of these codes require that consent be ongoing during a sexual interaction and that the parties should have the power to revoke consent at any time. These requirements are implicit in the Restatement draft, but it might well be helpful to make them explicit.

5.5 Conclusion

In this reply, we have focused on areas of potential disagreement with Professor Chamallas, especially the question whether the Restatement Third should unequivocally endorse an affirmative consent standard. But we have also noted the many points of agreement that we share. Beyond the points already described above, we concur in Chamallas' view that tort law can play an important function in empowering victims of sexual assault, by permitting the victim to decide whether or not to pursue a tort claim. We also agree that tort law has an advantage over criminal law insofar as tort remedies are individualized to the harm suffered by the plaintiff. By contrast, criminal law has to make difficult decisions in determining whether to classify different instances of nonconsensual sexual conduct as misdemeanors, or as felonies of one or another grade, based on such factors as the use of extrinsic force or whether the conduct involved penetration.

We plan to incorporate many of these and other important points of agreement in future drafts.

6 Reply to Bernstein

Anita Bernstein, in her eloquent and provocative article, “Rape as Trespass,” provides a creative and original framework for considering the harms and evils that women suffer because of the persistent threat of rape. Women’s awareness of the background risk of rape has enormous consequences for their lives, she persuasively argues, ranging from direct medical and economic costs to the disincentive to participate fully in the work force (whether the work is agricultural, military, or journalistic). Moreover, there are equally pervasive but more subtle disruptions and costs, such as the difficulty of developing healthy relationships when women must be constantly vigilant about potential threats. “In sum,” Bernstein explains, “even when individuals are not themselves experiencing unwanted sexual penetration, rape pervades ordinary life in the contemporary United States. It breaches the peace even when none of the elements of this crime occur.”

In the portions of her article most relevant to the Intentional Torts Restatement, Bernstein carefully traces the conceptual roots of assault, battery, and false imprisonment in the ancient writ of trespass. She argues that these torts, like their property analogues, involve an unlicensed “possession” of one’s person and therefore should be accorded similar protections. Professor Bernstein asserts that this understanding is particularly important in the context of rape, for it ensures that the law both guarantees victims the right to deadly means of self-defense and accords them proper recognition of the invasive nature of such violations.

In one sense, we do not have a substantial reply to Professor Bernstein. We agree with her historical description, while recognizing also that the law has long abandoned both the writ of trespass and all usage of the language of trespass in the context of invasions to one’s person. In fact, Professor Bernstein admits that her purposes are not to influence any significant change in our draft. She states that rape “falls uncontroversially under the current blackletter prohibition of ‘contact [that] is offensive to a reasonable sense of personal dignity.’” (We would add that many rapes would also constitute battery resulting in physical injury and some would constitute false imprisonment as well, if the defendant physically holds down the victim and prevents her or him from escaping.) With regard to our draft, Professor Bernstein suggests merely that we add in the Reporters’ Notes some acknowledgement of the pedigree of the torts we restate and also their common ancestry with the torts of trespass to land and trespass to chattels. We will happily do so.

Bernstein also makes the important point that tort law recognize a person’s absolute dominion over the body, with a corresponding absolute right to

“exclude” another for any reason. As Bernstein explains: “As a self-possessor, she may refuse access to her body ... for good reason, for no reason, and out of a motive of which she might be or ought to be ashamed: snobbery, prejudice, distraction, laziness, meanness, baseless resentment.” Contemporary tort law recognizes, in the tort of battery, a person’s right to exclude another from making physical contact with the person’s body unless the person has granted consent (or has a privilege such as self-defense). And that consent may be granted or denied for any reason, idiosyncratic or otherwise. A doctor may not even act to save a patient’s life if the patient refuses consent to the treatment. The law thus elevates the autonomy of the individual over otherwise compelling social interests, except in extremely limited circumstances.

We would like to address a few points in Professor Bernstein’s piece insofar as they relate to our work on self-defense and defense of property, the subject of our upcoming Restatement draft. First, we offer a response to Professor Bernstein’s assertion that one ought to enjoy the same privilege to use deadly force as a means to defend against rape that a property owner enjoys to defend her personal or real property. Our draft does indeed provide parallel protection, although not in quite the manner described in Professor Bernstein’s article.

Professor Bernstein first asserts that a person in her or his home may kill an intruder even in the absence of any threat of serious bodily injury. This does not accurately state the law in most jurisdictions, and it is neither the position of the Second Restatement nor of our current draft. Rather, a person’s privilege to use deadly force in defense of property is coextensive with the privilege of self-defense: if and only if the intruder poses a threat of death or serious bodily harm to someone on the property, the landowner may use deadly force in response.⁹² The Restatement Second makes only one distinction in this regard: in the context of self-defense, the danger to the defendant must be immediate,⁹³ but immediacy is not required if one is acting in defense of property. We find neither support for this distinction in the case law nor any sufficiently compelling policy reason for maintaining it; thus, our future drafts will abrogate the distinction, requiring proof of immediate danger even in defense of property scenarios.

Professor Bernstein also asserts that the Second Restatement does not require a threatened person to flee before using deadly force in self-defense, regardless of whether one is in one’s home. This statement is accurate with regard to a person’s dwelling: one may kill an intruder into one’s dwelling who threatens death, serious bodily harm, or “ravishment” even where safe retreat is

⁹² RESTATEMENT (SECOND) TORTS § 79 (AM. LAW INST. 1965).

⁹³ *Id.* at § 65.

available.⁹⁴ The statement is not accurate, however, outside of one's dwelling: there, an actor may not use deadly force if the actor can "with complete safety avoid the necessity of so defending himself by retreating."⁹⁵ To be sure, several states have adopted "stand-your-ground" statutes, broadly protecting a right to use deadly force without retreat. Only about a third of these statutes apply to tort actions, however, and only four of those extend the right beyond the defense of one's home.⁹⁶

Finally, Professor Bernstein's interpretation of rape as a form of trespass has an intriguing implication: it might militate against the application of apparent consent to sexual battery, contrary to the position of the Third Restatement, for the following reason. In a case involving trespass to land, she points out, a defendant would be subject to liability even if the defendant had a mistaken belief that the landowner had granted access to the property. Similarly, one might think, a defendant should be subject to liability for sexual battery even if the defendant had a mistaken belief that the plaintiff had granted permission for sexual intimacy.

Bernstein is correct about trespass to land not permitting a defense of (even reasonable) mistake about consent to use the property, but we should also remember that this doctrine contains a rather important exception: if the mistake is traceable to actions by the landowner, then the alleged trespasser is not liable. This exception is largely consistent with how our current draft treats apparent consent. When a defendant asserts apparent consent, the defendant typically claims that some actions by the plaintiff led defendant to believe that the plaintiff actually consented to the battery, assault, or false imprisonment. Thus, even if it is generally true that mistake about consent should receive the same treatment in sexual battery as in trespass to land, it does not follow that all instances of such a mistake should result in liability. To be sure, the current Third Restatement draft takes the position that an actor's reasonable belief that the plaintiff actually consents need not be traced to the plaintiff's actions. Accordingly, the exception noted above is not consistent with the draft's treatment of apparent consent in all cases.

This analysis does raise the question whether the draft's position should be reconsidered as applied to sexual battery, as opposed to other intentional torts to persons. In this specific context, perhaps an actor should be precluded from relying on reasonable mistake with respect to a plaintiff's actual consent unless

94 *Id.*

95 *Id.*

96 The four states are Alabama, North Carolina, South Carolina and Utah. *See, e.g., Skinner v. Bevans*, 116 So.3d 1147, 1152 (Ala. Civ. App., 2012).

the source of the mistake is the plaintiff's own words or conduct. Generalizations about what is customarily expected in the way of sexual consent should arguably not be a sufficient basis for judging a mistake about actual consent to be reasonable, absent specific words or conduct by the plaintiff that are the basis of the mistake. This is an issue that we will carefully consider as we move forward with the project.

A last question remains: is Bernstein's analogy between trespass and rape valid? At the level of doctrine, the analogy remains problematic. Trespass is a different kind of intentional tort than battery: although the plaintiff must prove that the defendant intended to enter the property in question, the defendant is liable without regard to whether the defendant knew or should have known that the land was owned by the plaintiff. In this sense, trespass contains an element of strict liability. By contrast, battery does not contain an analogous strict liability element. (At the same time, however, the single intent version of battery endorsed by ITR requires a less culpable type of intent than the dual intent version, which requires intent to harm or offend as well as an intent to contact.) Some might not approve of the fact that property rights command more protection in this sense than rights to physical inviolability (and we agree that this distinction might be questioned), but this indeed is the law.