Does Saying "Yes" Always Make It Right? The Role of Consent in Civil Battery

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After hundreds of years of jurisprudence, one would expect that something as basic as the prima facie elements of common-law battery would be well-settled, yet nothing could be further from the truth — especially when it comes to the issue of consent. Indeed, recognizing just how unsettled the law is, the Restatement Third of Torts retreats from the position of earlier Restatements — which made non-consent an element of battery — and takes no position on whether consent should be treated in the prima facie elements or as an affirmative defense. Instead the Restatement Third charges scholars and the courts alike with the task of considering consent's proper function in battery law.

This Article takes up the charge of the Restatement Third. After examining the current state of the law in the U.S. and in other common law jurisdictions, it argues that, contrary to the position taken by the first two Restatements and many U.S. courts, consent is properly treated as an affirmative defense to battery. Arguments for non-consent to be treated as an element, the Article explains, are based on a rationale that consent "magically" transforms otherwise wrongful contacts into legally acceptable ones. Such a rationale, the Article argues, is unpersuasive because it prioritizes autonomy over dignity and bodily integrity, while ignoring many

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factors, such as unequal distribution of wealth and patriarchal gender norms, that undermine the validity of consent in general.

After explaining the limitations of the majority position, the Article then turns to the positive reasons for making consent an affirmative defense. In the process, the Article describes a fundamental misunderstanding in the reasoning of courts and commentators regarding the element of non-consent. Many courts and commentators discuss non-consent in terms of protecting plaintiff's autonomy and promoting efficiency, yet, as an element, which places the burden of proof on the plaintiff, non-consent advances neither of these goals. It is only by making consent an affirmative defense that these goals can be furthered.

The difference between the two roles — element or affirmative defense — is of enormous consequence in the era of the "#Metoo" movement, where questions of consent to sexual contacts often take center stage and the burden of proof often matters. The arguments made in this Article, however, are relevant to all civil batteries — from barroom brawls to spousal abuse. Contrary to the positions taken by the first two Restatements and many U.S. courts, the Article concludes, interests in dignity, autonomy, and efficiency are best served when consent is treated as an affirmative defense.

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INTRODUCTION

"You OK?" a boy asks me in the middle of consensual sex. His hands are firm on my hips, his breathing ragged in my ear. I turn my head to the side, twist my mouth into a grimace. He's having trouble getting off, he tells me. He'll finish soon, he promises. One quick thrust. "It hurts," I tell him.

"You want to stop?" he says without pausing. There's a slight annoyance in his voice as he continues, "I'm really close."

I don't remember the feel of this boy's hands, I don't remember his caresses or kisses, I don't remember the words he said to me before we started having sex. I do remember his heaviness pressed against me, the way he pinned me down by the very act of what we we're doing; his erratic, persistent, insistent movements, his loud pleasure and my pain. I remember speaking this quiet, muffled answer: "Kind of." But it's unclear — I will remind myself later, for days, for weeks, for years — what exactly I have said "kind of" to. It's too noncommittal, and it's too late.

"Just let me finish," he says. "It won't be much longer." He hurries and then he comes. He's slumping on top of me, and though I'm not sure why, I'm starting to cry. When he sees me, he's angry. Why didn't I tell him I was crying, and why didn't I say I wanted him to stop? He feels weird now; he feels guilty. I have ruined this for him. I am always ruining things for him.

"I tried to tell you," I say. I thought I did. Didn't I? He's pulling on his clothes and observing me with disgust. I'm naked and confused, mascara-streaked and ugly, alone on a hotel bed. He

> tells me I don't get it. Get what? I think, with desperation. I pull the covers to my chin. He's already crossed the room. *Get what?*[1]

The way the law treats consent matters. Yet, consent has proven to be a difficult concept to define legally.[2] As the above example demonstrates, this is particularly the case regarding sexual batteries.[3] Is

[1] Laura Gianino, *I Didn't Say No — But It Was Still Rape*, BUSTLE (Feb. 9, 2016), https://www.bustle.com/articles/135171-i-didnt-say-no-but-it-was-still-rape [https://perma.cc/EX56-SVQS] (emphasis in original).

[2] Case law varies in its application and definition of consent. *See* Dubbs v. Head Start, Inc., 336 F.3d 1194, 1212 (10th Cir. 2003) (holding that without explicit authorization to conduct genitalia examinations on children, it was not objectively reasonable for defendants to believe they had consent to perform such examinations); Hernandez v. K-Mart Corp., 497 So. 2d 1259, 1260 (Fla. Dist. Ct. App. 1986) (holding that the defendant failed to bear the burden of proof of consent, and that a minor could not consent on behalf of his mother when he was not authorized to do so and she was capable of providing her own consent); Noguchi v. Nakamura, 638 P.2d 1383, 1385 (Haw. Ct. App. 1982) (holding implied consent can be narrow and limited); Richard v. Mangion, 535 So. 2d 414, 417 (La. Ct. App. 1988) (showing that consent is not invalidated simply because it is given under "tremendous peer pressure"); McQuiggan v. Boy Scouts of Am., 536 A.2d 137, 141 (Md. Ct. Spec. App. 1987) (holding that apparent willingness can suffice as consent, until such willingness is clearly withdrawn); Smith v. Calvary Christian Church, 614 N.W.2d 590, 594 (Mich. 2000) (finding "no wrong is done to one who consents"); Wulf v. Kunnath, 827 N.W.2d 248, 254 (Neb. 2013) (illustrating that the presence of consent shows an actor's willingness to wave protection from offensive conduct and, as such, "ordinarily bars recovery"); Grager v. Schudar, 770 N.W.2d 692, 695 (N.D. 2009) (discussing consent as a defense to sexual conduct to a prisoner by a guard). Legal scholars also grapple with the proper role of consent. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 39 (5th ed. 2007) (pointing to jury instructions as a good way to understand a jurisdiction's use of consent); ARTHUR BEST, DAVID W. BARNES & NICHOLAS KAHN-FOGEL, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS 49-50 (5th ed. 2018) (discussing consent as a defense to assault and battery when an actor engages in a conduct that is "knowing, informed, and voluntary"); Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123 (1996) (explaining, "consent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography"); H.M. Malm, *The Ontological Status of Consent and Its Implications for the Law on Rape*, 2 LEGAL THEORY 147, 149 (1996) ("[C]onsent is best defined as the signification of a mental state, rather than as the mental state itself [by virtue of the fact that] the mental state associated with consent comes in degrees, whereas consent does not."); Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1653-54 (2012) (discussing the uncertainty of how to apply consent in cases of battery, with a specific focus on reasonable belief in medical practice).

[3] According to one study of over 16,000 Americans, 18.3% of women report having been victims of rape or attempted rape at some time in their lives. MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, THE NATIONAL INTIMATE PARTNER AND

it, for example, consent if: you ask to change sexual positions and your partner doesn't or your partner keeps asking after you refuse until you finally say "yes"?[4] Scholars have dedicated substantial time debating the issue of consent in the context of criminal law[5] and law reform efforts[6] have sparked substantial controversy.

While criminal consent standards have attracted so much of the legal community's attention, little effort has been expended to consider the role of consent in the civil law of battery.[7] It is not surprising that the

SEXUAL VIOLENCE SURVEY 2010 SUMMARY REPORT 1 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/6M2E-TFYQ].

[4] *See* Elizabeth Enochs, 7 *Things that Qualify as Rape*, BUSTLE (Feb. 12, 2016), https://www.bustle.com/articles/141289-7-things-that-can-be-rape-even-if-you-were-taught-to-think-that-they-cant [https://perma.cc/T9MH-T7CK].

[5] *See generally* Vivian Berger, *Rape Law Reform at the Millennium: Remarks on Professor Bryden's Non-Millennial Approach*, 3 BUFF. CRIM. L. REV. 513 (2000) (suggesting that the burden should fall on the man to obtain an affirmative expression of consent before proceeding to engage in sex); Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147 (2011) (proposing that models of consent fail to address the realities of rape and that instead rape law should be defined by explorations of power and control); Aya Gruber, Not *Affirmative Consent*, 47 U. PAC. L. REV. 683 (2016) (addressing affirmative consent and voicing concern that determining a defendant's culpability from a legally prescribed script, i.e. "yes," raises concerns about the government dictating private interactions). The Department of Justice defines rape as "[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim." *An Updated Definition of Rape*, U.S. DEP'T JUST. (Jan. 6, 2012), https://www.justice.gov/archives/opa/blog/updated-definition-rape [https://perma.cc/EDP6-VVEM].

Scholars also argue about the proper understanding of consent as it relates to law enforcement and the Constitution. *See generally* Steven B. Dow, *"Step Outside, Please": Warrantless Doorway Arrests and the Problem of Constructive Entry*, 45 NEW ENG. L. REV. 7 (2010) (discussing the role of consent in warrantless seizures); Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211 (2001) (arguing that police cannot actually gain voluntary consent and as such consent should be removed as an element of Fourth Amendment Searches).

[6] *See* MODEL PENAL CODE § 213.0(3)-(4) (AM. LAW INST., Tentative Draft No. 1, 2014); *id.* general cmt.; *id.* § 213.1 cmt. 4; *id.* § 213.2 cmt. 5. The American Law Institute is also currently implementing the "Student Sexual Misconduct" project, which focuses on procedural frameworks that colleges and universities should adopt when dealing with sexual assault and related misconduct. *See Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities*, AM. L. INST., https://www.ali.org/projects/show/project-sexual-and-gender-based-misconduct-campus-procedural-frameworks-and-analysis/ (last visited Jan. 9, 2021) [https://perma.cc/6HLW-WWFV]; *Student Sexual Misconduct*, AM. L. INST. ADVISOR, http://www.thealiadviser.org/campus-sexual-misconduct/ (last visited Jan. 9, 2021) [https://perma.cc/P55B-U634].

[7] There are some notable exceptions. *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 42 (5th ed. 1984); Moore, *supra* note 2, at 1653-55; Kenneth W. Simons, *A Restatement (Third)*

criminal definition of consent has been the focus of so much commentary. What is surprising is that the same cannot be said regarding civil consent; especially given the large number of "civil rape" cases that have been adjudicated,[8] and the rise of the #Metoo movement. Perhaps most surprising regarding this lack of attention, however, is that the civil law of consent is itself so unsettled, necessitating thoughtful assessment by courts and commentators alike. Indeed, while the first two *Restatements of Torts* treated non-consent as an element of battery, the forthcoming *Restatement Third* has abandoned this position and, instead, invited reconsideration of the role of consent in the tort.[9] The time is thus ripe for a thorough consideration of the role of consent in the tort of battery.

This is the charge taken up by this Article. While recognizing the complexity of battery law, the Article concludes that consent in civil battery is properly treated as an affirmative defense and not as an element of the tort. Thus, the burden of production and persuasion on the question whether the plaintiff consented should be on the defendant. To be clear, this Article does not simply argue that battery law needs to be rethought as a means of responding to social concerns regarding sexual battery. Rather, while sexual battery claims will be central to its analysis, this Article argues that consent is generally better conceived of as an affirmative defense for all batteries. Whether the battery results from a barroom brawl or a sexual contact, consent is properly understood, and advances the policy interests of tort, only when treated as an affirmative defense.

The argument for an element of non-consent, the Article explains, is based on a vision that autonomous choice makes all contacts non-wrongful. Embodied by the Roman law principle, *volenti non fit injuria* (to the willing there is no harm), courts and commentators alike suggest that, through a type of "moral magic," consent turns otherwise wrongful contacts into legally acceptable ones. Following a similar instinct, others argue that consent makes contacts inoffensive and thus consent

of Intentional Torts?, 48 ARIZ. L. REV. 1061, 1066-71 (2006); Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 214-15 (1987).

[8] Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1414 & n.6 (1999) (explaining the term "civil rape" and stating that there are hundreds of published cases that deal with the issue).

[9] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. e (AM. LAW INST., Tentative Draft No. 4, 2019). Recognizing "the uncertain state of the law and conflicting policies," the *Restatement Third* has chosen to take "no position on the question of the burden of proof for any of the categories of consent," recognizing that "the question is better left to judicial development." *Id.*

negates battery. Whether by making contacts not wrongful or inoffensive, to these courts and commentators, consent is the central component of battery law. Non-consent is what makes a contact a battery and thus is properly conceived as an element — if not the key element — of a *prima facie* case of the tort.

As this Article will show, the instinct that consent makes all contacts legally acceptable is incorrect, and claims that non-consent is needed as an element of battery unjustified. Autonomous choice does not make all contacts inoffensive nor legally acceptable. Sometimes this is because contacts for which consent is given are undignified, and other times it is because consent is based in unequal distribution of power. Simply put, some contacts are still legally wrongful even when they are consented to. It is, for example, still wrongful to grope a cocktail waitress, and such conduct should result in tort liability despite the fact that she is willing to put up with the groping (and thus is consenting as that term is defined by law) in order to make more tips. Such groping is based on gender norms that disempower and objectify women, and "uses" another person for one's own purposes, thus impacting their dignity. In the context of battery consent doesn't always work its moral magic, yet an element of non-consent obviates the role of dignity and ignores the effects of unequal power.

After discussing how consent is not necessary as a *prima facie* element, the Article then turns to positive arguments that support the role of consent as an affirmative defense. In the process, it uncovers a basic mistake made by proponents of non-consent as an element. Courts and commentators who argue that consent is properly a part of the *prima facie* case of battery generally agree that battery law is intended to protect the plaintiff's autonomy. Yet, ironically, when consent is used to define a contact's wrongfulness, it does not accomplish this task. Those who argue that consent defines battery mistakenly equate focusing on the plaintiff's choice with protecting the plaintiff's autonomy. Plaintiff's autonomy, however, is actually protected only when consent is treated as an affirmative defense. That is, when non-consent is an element, contacts with plaintiff's body are acceptable unless she proves she did not consent.

When consent is an affirmative defense, contacts with plaintiff's body are not acceptable unless the defendant proves that she did consent. Plaintiff's bodily autonomy — the right to use her body in the way she sees fit without interference from others — is only adequately protected in situations where the defendant has to prove the plaintiff gave permission. Similar concerns underlie promoting efficient exchanges. As the Article explains, ensuring that plaintiff only exchanges her

interest in situations where the benefits received outweigh the cost of the loss in autonomy is best accomplished when consent is an affirmative defense.

The Article will proceed as follows. In the next Part, it discusses the current state of the law of consent to batter; describing the basis of arguments for consent to be used as both an element and affirmative defense and explaining the current confusion regarding the treatment of consent both within the U.S. and in all common law jurisdictions.[10] A proper accounting of consent is thus likely to influence not just U.S. law, but also common law jurisdictions around the world. In Part II, the Article turns to the arguments that support the use of non-consent as an element, explains their limitations, and ultimately demonstrates the difficulty of using non-consent as an element of battery.[11] In Part IV, the Article turns to positive arguments in favor of using consent as an affirmative defense.[12] It explains how the use of consent as an affirmative defense responds to the fact that consent sometimes does make otherwise wrongful contact acceptable while also promoting autonomy and efficiency.

I. THE LAW OF BATTERY AND CONSENT

A. The Forms of Consent

Before beginning our discussion of the treatment of consent in battery law, we need a basic understanding of how tort law defines consent.

The *Restatement Third of Torts* has identified four categories of consent: (1) actual consent, (2) apparent consent, (3) presumed consent, and (4) emergency doctrine.[13] The drafters' comments discourage the use of other consent terminology or doctrines; to wit, implied or constructive consent.[14] However, a large number of cases and other sources of law continue to use such language and many commentators continue to argue that any form of "consent" other than "actual" consent is not actually consent at all.[15] I will briefly describe

[10] *See infra* Part I.

[11] *See infra* Part II.

[12] *See infra* Part IV.

[13] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 (AM. LAW INST., Tentative Draft No. 4, 2019).

[14] *See id.* § 12 cmt. d.

[15] *See* Werth v. Taylor, 475 N.W.2d 426, 428 (Mich. Ct. App. 1991); Stevens v. Comm'r of Pub. Safety, 850 N.W.2d 717, 727 (Minn. Ct. App. 2014); Harvey v. Strickland, 566 S.E.2d 529, 532-33 (S.C. 2002); Non-Marine Underwriters v. Scalera, [2000] 1 S.C.R. 551, para. 103 (Can.); Elizabeth Adjin-Tettey, *Protecting the Dignity and*

the four different forms of consent described by the *Restatement Third*, before turning to a discussion of the caselaw.

1. Actual Consent

Actual consent, defined in terms of voluntariness, requires that the person consenting (a) was willing[16] to engage in/with the conduct, (b) had an understanding of the whole scope of the act, (c) while having "the capacity to consent," and (d) not giving consent "under duress or substantial mistake."[17]

There is ongoing debate as to how to approach proof of the first element, willingness, either as being subjective to the person giving consent (not requiring actual communication)[18] or requiring an objective affirmative communication/act.[19] In addition, many jurisdictions allow that the scope of consent need only extend to the initial act,[20] while others require consent to include the possible consequences of the contact.[21] The *Restatement*'s comments provide that the "capacity to consent" is given contour by the *Model Penal Code*'s formulation of legal competency; examples that might preclude or invalidate consent include, but are not limited to, the participant's age,

Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery, 39 U.B.C. L. REV. 3, 5 (2006); Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER'S ADVISOR 197, 201-02 (2013).

[16] The requirement is "willingness." This Article will, however, sometimes refer to the requirement as "want" or "desire."

[17] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 13 (AM. LAW INST., Tentative Draft No. 4, 2019).

[18] *See* Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 165-66 (1996) (arguing that consent is a subjective mental state to forgo one's moral objection to otherwise impermissible conduct, although one need not intend the conduct).

[19] *See* Malm, *supra* note 2, at 149-50. Cases using the purely subjective formulation cite to the Restatement Second of Torts section 892(1), which reads: "Consent . . . need not be communicated to the actor." RESTATEMENT (SECOND) OF TORTS § 892(1) (AM. LAW INST. 1979); *see, e.g.*, Wulf v. Kunnath, 827 N.W.2d 248, 254 & n.12 (Neb. 2013); Reavis v. Slominksi, 551 N.W.2d 528, 537 (Neb. 1996).

[20] *See, e.g.*, Hellriegel v. Tholl, 417 P.2d 362, 367-68 (Wash. 1966) (holding that where a plaintiff actually consented to horseplay, he accepted the inherent risks and recovery was barred even when the outcome, a broken neck, was unintended).

[21] *See, e.g.*, MO. APPROVED JURY INSTR. (CIVIL) 32.08 (8th ed. 2020) (instructing that "[y]our verdict must be for defendant if you believe that plaintiff, by words or conduct, consented to the acts of defendant and the reasonable consequences thereof").

mental defect, or intoxication.[22] Finally, because consent must be voluntary, a person's submission to the tortious act does not preclude liability when there is duress[23] or substantial mistake.[24]

2. Apparent Consent

Apparent consent exists when there is a reasonable belief that consent was given to the tortious act because of the plaintiff's conduct,[25] the surrounding circumstances,[26] or both, "without regard to whether the person does actually consent."[27] A minority of jurisdictions apply a narrower formulation that requires the reasonable belief in consent to be based on an affirmative act by the plaintiff.[28] Regardless of the jurisdictional approach, the reasonableness standard demands that

[22] *See* MODEL PENAL CODE § 2.11(3) (AM. LAW INST., Proposed Official Draft 1962); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 13 reporters' note a (AM. LAW INST., Tentative Draft No. 4, 2019); *see also* Davies v. Butler, 602 P.2d 605, 612 (Nev. 1979) (holding that in order for consent to preclude liability a party must possess the capacity to consent).

[23] RESTATEMENT (SECOND) OF TORTS § 892B(3) cmt. j (AM. LAW INST. 1979) ("The cases to date in which duress has been found to render the consent ineffective have involved those forms of duress that quite drastic in their nature . . . . These include force against the person consent or the members of his immediate family or his valuable property; and also arrest, imprisonment or prosecution upon a serious criminal charge of the person consenting or a member of his family, as well as immediate threats of that force.").

[24] *See* Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 440-41 (Ariz. 2003) (holding that where a nurse intentionally misrepresented the medicine being administered the patient could not consent); Rains v. Superior Court of L.A. Cty., 198 Cal. Rptr. 249, 253-55 (Cal. Ct. App. 1984) (holding a fraudulent representation of psychotherapeutic treatment negates a patient's consent); *cf.* State v. Bolsinger, 709 N.W.2d 560, 564-65 (Iowa 2006) (holding that consent to inspect for hernias and other injuries was not vacated by the defendant's subsequent sexual touching because the mistake was made in the inducement of consent rather than in a misunderstanding of the act the defendant said he would perform).

[25] *See* O'Brien v. Cunard Steamship Co., 28 N.E. 266, 273-74 (Mass. 1891) (holding where a plaintiff subjectively did not consent to being given a vaccine but held out their arm in a manner consistent with accepting the shot, there was no liability for assault).

[26] *See* Dubbs v. Head Start, Inc., 336 F.3d 1194, 1219-20 (10th Cir. 2003) (holding that school nurses were not liable for battery where they reasonably relied on the program's representation that the children had parental consent).

[27] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16(a) (AM. LAW INST., Tentative Draft No. 4, 2019).

[28] *Id.* § 16 reporters' note b(2).

mistake is not a defense if the actor reasonably should have known that the plaintiff did not consent.[29]

3. Presumed Consent

While there is debate as to whether this portion of the *Restatement Third* reflects existing law, the document currently states that an actor, lacking actual or apparent consent, may rely on "prevailing social norms" to justify an otherwise tortious act[30] if the actor "has no reason to believe that the person would not have actually consented to the conduct."[31] Presumed consent, or "implied consent,"[32] can prevent liability in situations where there was no reasonable opportunity to gain actual consent; to wit, a football player tackling another player within the established rules of the game.[33] The drafters of the *Restatement Third* call for caution in applying this principle. First, because actors should be encouraged to seek actual consent and second, because presumed consent looks at how an objective reasonable person would perceive the specific plaintiff, it does not allow for the assumption of consent based on a "generally reliable predictive judgment."[34]

4. Emergency Doctrine

The doctrine protects actors who intentionally invade another's protected rights while attempting to help in emergency situations (serious risk to health or life) where actual consent cannot be readily granted.[35] The actor must (1) believe reasonably that need outweighs invasion and there is immediate necessity to act prior to gaining actual

[29] *See* Reavis v. Slominski, 551 N.W.2d 528, 539-40 (Neb. 1996) (holding that apparent consent is not effective where a defendant "knew, or had reason to know" that the plaintiff did not or was unable consent).

[30] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16(b)(1) (AM. LAW INST., Tentative Draft No. 4, 2019).

[31] *Id.* § 16(b)(2).

[32] Note that implied consent is an imprecise approximation of presumed consent used by some jurisdictions and is not endorsed by the *Restatement Third of Torts*. *See id.* § 12 cmt. d.

[33] *Id.* § 16 cmt. d; *see also* Griffin v. Haunted Hotel, Inc., 194 Cal. Rptr. 3d 830, 842 (Cal. Ct. App. 2015) (holding that plaintiff's consent to go into a haunted house extends presumed consent to being scared, thereby removing liability for assault).

[34] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16 cmt. d (AM. LAW INST., Tentative Draft No. 4, 2019).

[35] *Id.* § 17 cmt. b.

consent,[36] and (2) have "no reason to believe that" the person would not have consented to the aid.[37] As with other forms of consent the actor is held to the reasonable person standard.[38] Case law application includes immediately-needed, unforeseen surgeries[39] or help from Good Samaritans.[40]

B. The Existing Law

One would expect that, after hundreds of years of common law tort jurisprudence, the basic elements of battery, including the role of consent, would be well-settled. This, however, is not at all the case. In a recent article, Professor Nancy Moore provides a comprehensive overview of the uncertainty attendant to such basic issues as "intent" and "consent" in battery law and explains the historical reasons for this phenomenon.[41] As Professor Moore notes, the definition of battery has been greatly influenced by the evolution of tort law into a system structured around intent, negligence and strict liability. Moreover, the different elements of intent, consent and contact are often deeply interconnected.[42] Thus, a decision regarding the proper standard for one element will directly influence the construction of the other elements in the tort. As a result, while battery has always been conceived as protecting individuals from improper touches, the types of contacts,

[36] *See* Rogers v. Lumbermens Mut. Cas. Co., 199 So. 2d 649, 652-53 (La. Ct. App. 1960) (holding that emergency doctrine does not apply to a "precautionary measure" because there is no need for immediacy).

[37] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 17 (AM. LAW INST., Tentative Draft No. 4, 2019).

[38] *See id.* § 17 cmt. c(1).

[39] *See In re* Estate of Allen, 848 N.E.2d 202, 218 (Ill. App. Ct. 2006) (holding that where the patient was incapable of giving consent the emergency doctrine allowed the doctor to preform her job free from liability); Vitale v. Henchey, 24 S.W.3d 651, 659 (Ky. 2000) (holding that where a nonemergency surgery was done without a patient's consent the doctor was liable for battery).

[40] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 17 cmt. c (AM. LAW INST., Tentative Draft No. 4, 2019).

[41] Moore, *supra* note 2.

[42] *See id.* at 1630 ("Failure to recognize intent as an element separate from the absence of consent poses its own problems. For example, if 'intent to make an unpermitted contact' is substituted for 'intent to make a harmful or offensive contact' as some commentators have suggested, then it would still be necessary to decide whether the plaintiff must prove that the defendant *knew* that the contact was unpermitted or whether it is sufficient that the contact turned out to be unpermitted. This exercise is simply another version of the dual intent versus single intent debate." (emphasis in original)).

intent and consent needed for a battery to be legally actionable has been in constant flux over the years.

This complex evolution has led to significant uncertainty about factors such as consent, which receives different treatment depending on the court or commentator at which one looks. For example, while virtually all first-year tort case books treat consent to battery as an affirmative defense,[43] the first two *Restatement*s treat non-consent as an element.[44] As Professor Moore notes, however, consent is treated differently by the first two *Restatement*s, with the *Restatement* placing non-consent in the black-letter elements of battery, and the *Restatement Second* explaining it is an element in a comment.[45] In addition, the *Restatement Second* also refers to consent as a "privilege," before explicitly stating that non-consent is an essential element of the tort.[46] The *Restatement Third*, on the other hand, takes no position on the role of consent in the tort, recognizing instead that there is substantial uncertainty regarding the element's proper role.[47]

Nowhere is the uncertainty regarding consent more apparent than in its treatment by the world's common law jurisdictions. While Canadian

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[43] *But see id.* at 1591-92.

[44] For a full discussion of the *Restatement* and *Restatement Second*, see *infra* note 63.

[45] Moore, *supra* note 2, at 1604-05.

[46] The persistent emphasis in many cases on the plaintiff's lack of consent is puzzling given the absence of any mention of consent in the *Restatement Second*'s definition of battery in the text of sections 13 and 18. In addition, the comment to section 13 provides a cross-reference to privileges preventing liability, including consent, stating that these privileges will be defined in later sections. This comment suggests that consent, like self-defense, is an affirmative defense and not an aspect of the *prima facie* case. However, the comment contains the following very important clarification:

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

Id. at 1604 (internal citations omitted).

[47] Some courts use consent as a defense to battery or mitigating factor to resulting damages. *See, e.g.*, Hernandez v. K-Mart Corp., 497 So. 2d 1259, 1259 (Fla. Dist. Ct. App. 1986) (holding that consent was an affirmative defense to a battery resulting from a strip search); Grager v. Schudar, 770 N.W.2d 692, 698 (N.D. 2009) (holding that consent is not a complete defense but that a jury can "consider[] consent in allocating fault or determining the existence and extent of damages"); *see also* Mullins v. Parkview Hosp., Inc., 865 N.E.2d 608, 610 (Ind. 2007) (holding that consent is a complete defense).

courts find consent to be an affirmative defense,[48] courts in the United Kingdom usually consider non-consent to be an element.[49] Australia has recently found non-consent to be an element in the context of medical battery where consent has been fraudulently induced, but has specifically withheld judgment regarding other cases due in part to a recognition that Australian courts in other contexts treat consent as an affirmative defense.[50]

While less than half the courts in the U.S. have considered the issue,[51] the majority of jurisdictions in the U.S. that have done so treat non-consent as an element, while a small number treat consent as an affirmative defense.[52] However, it is difficult to say which, if any, of these courts has actually and meaningfully considered the proper role of consent in the tort.

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[48] *See, e.g.*, Non-Marine Underwriters, Lloyd's of London v. Scalera, [2000] 24 S.C.R. 551, 560 (Can.) (referring to several cases in Canada that place the burden of proving consent with the defense).

[49] *See* Freeman v. Home Office (No. 2) [1984] QB 524 at 539 (Eng.) ("'[T]he burden of providing absence of consent is on the plaintiff" is substantially in line with one hundred and forty years of authority, although some doubts have been expressed: see for example *Ashley v Chief Constable of Sussex Police* [2006] EWCA Civ 1085; [2007] 1 WLR 398 at [31].").

[50] *See White v Johnston* (2015) 87 NSWLR 779 ¶¶ 124-30 (Court of Appeal) (Austl.). For a later case specifically finding consent to be an affirmative defense and distinguishing *White* in the non-medical context, see *Tinnock v. Murrumbridgee Local Health Dist. [No. 6]* [2017] NSWSC 1003 ¶ 20 (Austl.) ("So far as the legal onus is concerned, I record that Basten JA in *Dean v Phung* (the other members of the Court agreeing) held that where consent validly given is in dispute, the defendant bears the burden of proof: 66, 350 [59]-[63]. Leeming JA took a different view in *White v Johnston* (2015) 87 NSWLR 779; [2015] NSWCA 18 at 807 [130] . . . I am prepared to assume in Mrs Tinnock's favour that the later decision of *White v Johnston* does not apply for the purpose of this case. I will apply *Dean v Phung*. I acknowledge that the Court in *White v Johnston* did not purport to expressly overrule *Dean v Phung* in this respect and that Leeming JA's observations on 'the broader question' were *obiter dictum*.").

[51] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 reporter's note f (AM. LAW INST., Tentative Draft No. 1, 2015).

[52] *See id.* For examples of courts that treat non-consent as an element, see *Barnes v. American Tobacco Co.*, 984 F. Supp. 842, 869 (E.D. Pa. 1997), *aff'd*, 161 F.3d 127 (3d. Cir. 1998); *Vitale v. Henchey*, 24 S.W.3d 651, 658 (Ky. 2000) ("Lack of consent is an essential element of battery. Therefore, the absence of consent must be proved as a necessary part of the plaintiff's case . . . ."); *Taylor v. Hesser*, 991 P.2d 35, 39 (Okla. Civ. App. 1998) ("Lack of consent is an element of a cause of action for assault and battery."). For an example of courts that treat consent as an affirmative defense, see *King v. Curtis*, No. 1:14-CV-403, 2015 U.S. Dist. LEXIS 174902, at *10 (W.D. Mich. Dec. 8, 2015); *People v. Sanchez*, 147 Cal. Rptr. 850, 851 (Cal. App. Dep't Super. Ct. 1978).

There are many doctrinal and policy concerns relevant to the question of what role consent should play in battery. For example, one would expect a court to address such basic issues as the relationship between battery, where the role of consent is uncertain, and intentional torts to property, which generally consider consent to be an affirmative defense.[53] Yet, a full review of the cases and jury instructions that find non-consent to be an element demonstrates that no jurisdiction has considered any issue of this sort in reaching its decision. Rather than individual reasoning, many cases seem to simply rely on the *Restatement Second of Torts* or the hornbook, *Prosser and Keeton on the Law of Torts*, (hereinafter "Prosser and Keeton"). This reliance occurs in two different ways. In many cases non-consent is simply listed in a statement of the basic elements of battery.[54] In other cases, courts do cite to the rationale for making non-consent an element stated in these sources but undertake no further analysis of the issue.[55] This reliance on the early *Restatement*s and *Prosser and Keeton* thus provides the basis for the vast majority of U.S. jurisprudence on the role of consent in battery.

Even in cases that do more than simply list non-consent in the elements of battery, what looks like strong supportive language quickly dissolves into nothing more than simple reliance on the *Restatement* or

[53] *See* RESTATEMENT (FOURTH) OF PROPERTY § 1.1 cmt. a, reporters' note (AM. LAW INST., Tentative Draft No. 1, 2020); RESTATEMENT (SECOND) OF TORTS § 10 cmt. c (AM. LAW INST. 1965); *see, e.g.*, Gen. Mills Rests., Inc. v. Tex. Wings, Inc., 12 S.W.3d 827, 835 (Tex. App. 2000) ("Actual or apparent consent is an affirmative defense to a cause of action for trespass."); City of Houston v. Crabb, 905 S.W.2d 669, 674 (Tex. App. 1995) (deciding a nuisance case, the court explained that, "As a general rule, it makes more sense to require a defending party to prove an affirmative act, such as consent or payment, than to require the plaintiff to prove inaction, such as the failure to pay or to give consent.").

[54] *See Barnes*, 984 F. Supp. at 869; Avila v. Citrus Cmty. College Dist., 131 P.3d 383, 395 (Cal. 2006); Costanzo v. Gray, 112 Conn. App. 614, 625 (2009); Miller v. Idaho State Patrol, 252 P.3d 1274, 1287 (Idaho 2011); Landry v. Bellanger, 851 So. 2d 943, 954 (La. 2003); Lynch v. Egbert, 271 N.E.2d 640, 642 (Mass. 1971); Ghassemieh v. Schafer, 447 A.2d 84, 88 (Md. Ct. Spec. App. 1982); *Taylor*, 991 P.2d at 39.

[55] *See, e.g.*, Smith v. Calvary Christian Church, 614 N.W.2d 590, 594 (Mich. 2000) ("[A] person who consents to another's conduct cannot bring a tort claim for the harm that follows from that conduct." (citing RESTATEMENT (SECOND) OF TORTS § 892 (AM. LAW INST. 1965))); Wulf v. Kunnath, 827 N.W.2d 248, 254 (Neb. 2013) ("Consent ordinarily bars recovery, because it 'goes to negative the existence of any tort in the first instance.'" (citing KEETON ET AL., *supra* note 7, § 18, at 112)); City of Watauga v. Gordon, 434 S.W.3d 586, 590-92 (Tex. 2014) (citing RESTATEMENT (SECOND) OF TORTS § 118 cmt. b (AM. LAW INST. 1965)) ("Consent to contact 'negatives the wrongful element of the defendant's act, and prevents the existence of a tort.'" (citing KEETON ET AL., *supra* note 7, at 112)).

Prosser and Keeton. In *Miller v. Idaho State Patrol*,[56] for example, plaintiff brought a battery suit for what he described as a forced catheterization at a hospital to obtain a urine sample. In considering the issue of consent, the court states simply: "Civil battery consists of an intentional contact with another person that is either unlawful, harmful, or offensive. *Neal v. Neal*, 873 P.2d 871, 876 (Idaho 1994). Lack of consent is a critical element of battery. *Id.*"

Neal v. Neal thus becomes the source of the court's finding on consent. Yet, *Neal v. Neal* dealt with the issue of fraudulently induced consent where the issue of whether consent should be an element of the case was not in front of the court at all.[57] The court's only consideration of the role of consent was a simple cite to *Prosser and Keeton* in the middle of a basic exposition of the tort of battery.[58]

What initially looks like two cases that strongly support the notion that "consent is a critical element of battery," is, in this case, actually a "magnification" of *Prosser and Keeton* by two courts that did not have the issue of consent as an element briefed or otherwise directly in front of them.

Of course, both the early *Restatement*s and *Prosser and Keeton* are very respected sources that have had significant influence on the development of tort law and should thus not be discounted in considering the issue.[59] The rationale given by these sources treats

[56] 252 P.3d 1274 (Idaho 2011).

[57] Neal v. Neal, 873 P.2d 871, 876-77 (Idaho 1994) (noting that "[h]er battery claim is founded on her assertion that . . . had she known of his sexual involvement with another woman, she would not have consented").

[58] *Id.* at 876. Civil battery consists of an intentional, unpermitted contact upon the person of another which is either unlawful, harmful, or offensive. *See* White v. Univ. of Idaho, 797 P.2d 108, 109 (Idaho 1990). The intent necessary for battery is the intent to commit the act, not the intent to cause harm. *Id.* Further, lack of consent is also an essential element of battery. *See* KEETON ET AL., *supra* note 7, § 9, at 41, § 18, at 112. Consent obtained by fraud or misrepresentation vitiates the consent and can render the offending party liable for a battery. Bowman v. Home Life Ins. Co. of Am., 243 F.2d 331, 333 (3d Cir. 1957); KEETON ET AL., *supra* note 7, § 18, at 119.

[59] *See* Michael D. Green & Olivier Moréteau, *Restating Tort Law: The American and European Styles*, 3 J. EUR. TORT L. 281, 285 (2012) ("In terms of reliance, for example, the Third Torts Restatement on Physical and Emotional harm has been cited by courts over 200 times in the two years since the first of its two volumes was published. The three torts Restatements (the most popular and influential of all of the Restatements that the ALI has published) have been cited an estimated 70,000 times since the first one was published in 1934, and the citation count for all Restatements is now pushing 200,000."); Courtney G. Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, 79 BROOK. L. REV. 621, 623 (2014) ("And the *Restatement of Torts* is an example of a non-Model Code publication that has heavily influenced the development of state law."); Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 932 (2009) ("The classic

consent as neither a defense nor privilege, but instead suggest that the concept "negatives the existence of any tort in the first instance."[60] In other words, they suggest that there is nothing wrongful about acts that are consented to by the plaintiff. In this sense, these cases and commentators suggest, one should not be held responsible for an act, no matter how vile, as long as another person has agreed to it.

Prosser and Keeton explain:

> Consent ordinarily bars recovery for intentional interference with person or property. It is not, strictly speaking, a privilege, or even a defense, but goes to negative the existence of any tort in the first instance. It is a fundamental principle of the common law that *volenti non fit injuria* — to one who is willing,[61] no wrong is done. The attitude of the courts has not, in general, been one of paternalism. Where no public interest is contravened, they have left the individual to work out his own destiny, and are not concerned with protecting him from his own folly in permitting others to do him harm. As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. "the absence of lawful consent," said Mr. Justice Holmes, "is part of the definition of an assault."[62]

A similar rationale is given by the *Restatement*s.[63]

example of an ALI process for improving state law is the Restatement (Second) of Torts, which sets out Prosser's privacy torts and heavily influences state law."); *see also* Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27, 28 (2013).

[60] *See, e.g.*, United States v. Johnson, 54 M.J. 67, 69 (C.A.A.F. 2000) (noting battery requires an act done without "lawful consent"); Brzoska v. Olson, 668 A.2d 1355, 1360-61 (Del. 1995) ("Lack of consent is thus an essential element of battery." (citing KEETON ET AL., *supra* note 7, at §§ 9, 18)).

[61] While we will discuss the distinction between different forms of consent *supra*, it is worth noting at this point that these rationales seem particularly relevant to cases of actual consent, where willingness is a part of the legal inquiry and potentially inapposite when other forms of consent, which do not inquire into the plaintiff's actual state of mind, are at issue.

[62] KEETON ET AL., *supra* note 7, § 18, at 112.

[63] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 13 cmt. d (AM. LAW INST. 1965) ("The defendant's act must be a legal cause of the contact with the plaintiff's person, and the liability is defeated by any privilege available to the defendant under §§ 49-156. In particular, the plaintiff's consent to the contact with his person will prevent the liability. The absence of such consent is inherent in the very idea of those invasions of interests of personality which, at common law, were the subject of an action of trespass for battery, assault, or false imprisonment. Therefore, the absence of consent is a matter essential to the cause of action . . . ."). The *Restatement Third* also notes this reasoning.

Prosser and Keeton and, potentially the early *Restatement*s,[64] rely on two cases as support for the claim that non-consent somehow negatives the wrongfulness of a contact in battery. In *Ford v. Ford*,[65] Justice Holmes was confronted with the question of whether a woman had "deserted" her husband within that term's meaning in a Massachusetts divorce statute. The woman denied the claim because, she alleged, her husband had consented to her leaving. Analyzing the statutory term, Justice Holmes stated:

> The act of 1838, c. 126, § 1, required that the desertion should be "without the consent of the party deserted," and, although these words have been omitted from the later statutes, the requirement is unchanged in cases like the present, being imported by the word "desertion," without more. A desertion consented to is not a desertion. St.1857, c. 228, § 2; Gen.St. c. 107, § 7; St.1870, c. 404, § 2; St.1873, c. 371, §§ 2, 3; Pub.St. c. 146, § 1; *Lea v. Lea*, 8 Allen, 418. On like principles, the absence of lawful consent is part of the definition of an assault, and a license cannot be pleaded specially at common law, but must be proved under the general issue. *Christopherson v. Bare*, 11 Q.B. 473 . . . .[66]

This one sentence of dictum provides the totality of that court's analysis of consent in the context of battery. Holmes, in turn, relies on the decision of the Queen's Bench in *Christopherson v. Bare*[67] as the basis of his assertion. The *Christopherson* court specifically considered the issue of whether consent should be an element. While the issue was briefed and argued by counsel, the Court ultimately held that non-consent was an element of battery with little elaboration.[68]

It is through the mechanism of the early *Restatement*s and *Prosser and Keeton* that the principle of *volenti non-fit injuria*, loosely derived from a single statement in dictum of Justice Holmes and one English case,

See RESTATEMENT (THIRD) OF TORTS § 12 cmt. c (AM. LAW INST., Tentative Draft No. 4, 2019).

[64] To find the cases relied upon, I searched the library of the ALI at Hein Online, which contains all the *Restatement* drafts, appendices and supporting documents. My search uncovered no cases. This is no surprise, because "in early Restatements Reporter's Notes were often minimal, if they were present at all." E-mail from Karen Van Gorder, Editor & Publ'n Manager, Am. Law Inst. (June 20, 2018, 08:37 AM) (on file with author).

[65] 10 N.E. 474 (Mass. 1887).

[66] *Id.* at 475.

[67] 116 Eng. Rep. 554 (1848).

[68] *See id.* at 556.

has found its way into the majority of U.S. courts. Interestingly, both Canadian and Australian courts have been much less willing to adopt the *volenti* concept wholesale[69] and, as we have noted, the *Restatement Third* has abandoned the position taken by the first two *Restatement*s, explicitly stating that it takes no position on the issue of consent. While the *volenti* concept is long-standing, its persuasiveness regarding whether non-consent should be an element of battery has not been equally influential in all jurisdictions.

Determination of a "majority rule in the U.S." is also attenuated by the form of consent that the courts have considered. As the drafters of the *Restatement Third* note, except for the emergency doctrine, there is little caselaw considering the proper treatment of any of the forms of consent other than actual consent.[70] For the emergency doctrine, most courts do not stipulate who has the burden of proof and instead leave the question to juries to untangle.[71] However, a few cases suggest that the emergency doctrine should be used as a defense to the *prima facie* case[72] and that the defendant bears burden of proof.[73] All forms of consent other than actual consent are similar to the emergency doctrine to the extent that they do not consider the plaintiff's subjective knowledge or willingness to engage a risk. This distinction is extremely significant in that the *volenti* principle is premised on a plaintiff's knowing and willing consent.[74] It is thus unlikely the *volenti* principle would be applied to situations other than actual consent.

Of course, a number of courts have rejected the *volenti* principle.[75] While the majority of American courts have found non-consent to be

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[69] *See supra* note 61 and accompanying text.

[70] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 1 reporters' note, cmt. f (AM. LAW INST., Tentative Draft No. 4, 2019).

[71] *Id.* § 17 reporters' note, cmt. i.

[72] *See, e.g.*, Shine v. Vega, 709 N.E.2d 58, 63-64 (Mass. 1999) (holding a doctor may establish the elements of emergency to defeat a medical battery claim); *In re* Spring, 405 N.E.2d 115, 121 (Mass. 1980) (holding a defense of emergency may prohibit a claim of battery).

[73] *See* Tinius v. Carroll Cty. Sheriff Dep't, 321 F. Supp. 2d 1064, 1087 (N.D. Iowa 2004) (reasoning the burden of proving an emergency exception to consent lies with the defendant hospital in a medical battery case); Rogers v. Sells, 61 P.2d 1018, 1020 (Okla. 1936) (holding the defendant doctor has to show that the amputation of a child's leg was proper under the emergency doctrine).

[74] For a full discussion, see *infra* Part II.B.

[75] A note of distinction is needed here. Some may consider the *volenti* principle to be synonymous with consent, in which case, every court recognizes the principle and the question simply becomes one of burden of proof. As we will discuss *infra*, this Article conceives of the *volenti* principle differently; not as synonymous with consent,

an element, a smaller number of jurisdictions make consent an affirmative defense.[76] As with the cases finding non-consent to be an element, these cases provide little to no reasoning for their holding. The Australian courts, however, have described the main rationales for consent to be an affirmative defense by identifying the core purpose of battery as protecting bodily integrity and thus treating consent as "license" (allowing plaintiff to waive the protection by giving someone consent to contact his or her body).[77] In *Dean v. Phung*, the New South Wales Court of Appeal turned to the rationale of Judge McHugh in an earlier decision to explain its holding:

> Notwithstanding the English view, I think that the onus is on the defendant to prove consent. Consent is a claim of "leave and licence." Such a claim must be pleaded and proved by the defendant in an action for trespass to land. . . . It must be pleaded in a defamation action when the defendant claims that the plaintiff consented to the publication. . . . The essential element of the tort is an intentional or reckless, direct act of the defendant which makes or has the effect of causing contact with the body of the plaintiff. Consent may make the act lawful, but, if there is no evidence on the issue, the tort is made out. The contrary view is inconsistent with a person's right of bodily integrity. Other persons do not have the right to interfere with an individual's body unless he or she proves lack of consent to the interference.[78]

As the court notes, if the goal of battery is to protect a person's body, while the role of consent is to ensure that she "licenses" her right to

which is generally treated as privilege, but as a means of not making a behavior tortious in the first place. For a full discussion, see *infra* Part II.B.

[76] *See, e.g.*, Hernandez v. K-Mart Corp., 497 So. 2d 1259, 1260 (Fla. Dist. Ct. App. 1986) (holding that consent was an affirmative defense to a battery resulting from a strip search); Grager v. Schudar, 770 N.W.2d 692, 698 (N.D. 2009) (referring to consent as a defense but not explicitly addressing the burden of proof); COLO. JURY INSTR. – CIV. 20:11 (4th ed. 2017); *see also* JUD. COUNCIL OF CAL. JURY INSTR. – CIV. 1306 (2020) (dictating that plaintiffs show they "did not consent to the touching" in cases of sexual battery). A number of other jurisdictions are unclear about the role of consent in battery. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 1 cmt. f (AM. LAW INST., Tentative Draft No. 4, 2019) (stating that "[m]ost jurisdictions have not clearly resolved the issue of which party has the burden of persuasion in a battery lawsuit to demonstrate that a person did or did not actually consent to the otherwise tortious conduct of the actor.").

[77] *See Dean v Phung* [2012] NSWCA 223 ¶ 58 (Austl.).

[78] *Id.* ¶ 59 (internal citation omitted).

bodily integrity only in situations where such licensing is actually desired, consent should be an affirmative defense.[79]

Canadian courts also emphasize protecting bodily integrity and autonomous choice in their reasoning.[80] Relying substantially on the claim that battery derives from the writ of Trespass, the Supreme Court of Canada in *Non-Marine Underwriters v. Scalera*, emphasizes the directness of the contact to a plaintiff and the interference with the plaintiff's right to autonomy as the basis of the *prima facie* case, suggesting that once the interference is pled the burden to exonerate him or herself switches to defendant. According to the Court:

> [B]asing the law of battery on protecting the plaintiff's physical autonomy helps explain why the plaintiff in an action for battery need prove only a direct interference, at which point the onus shifts to the person who is alleged to have violated the right to justify the intrusion, excuse it or raise some other defence.[81]

The focus on bodily autonomy underlies the Court's reasoning. It states: "[C]ompensation stems from violation of the right to autonomy, not fault. When a person interferes with the body of another, a *prima facie* case of violation of the plaintiff's autonomy is made out."[82]

In addition to protecting autonomy, the *Non-Marine* Court provides additional reasons for making consent a defense. The first is again derived from the treatment of battery as a direct harm and focuses on the burden of adducing evidence. While the *Restatement Third* recognizes arguments on both sides of the issue,[83] the *Non-Marine* Court finds it fair to place the obligation on the defendant. It states:

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[79] For a full discussion, see *infra* Part IV.

[80] *See, e.g.*, Non-Marine Underwriters, Lloyd's of London v. Scalera, [2000] 1 S.C.R. 551, 563-64 (Can. B.C.) ("In my view the law of battery is based on protecting individuals' right to personal autonomy. To base the law of battery purely on the principle of fault is to subordinate the plaintiff's right to protection from invasions of her physical integrity to the defendant's freedom to act.").

[81] *Id.*

[82] *Id.* at 565-66.

[83] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. e (AM. LAW INST., Tentative Draft No. 4, 2019) (stating first: "plaintiff ordinarily has greater access to the facts relevant to actual consent and will typically be called upon to testify regardless of which party carries the burden of production. Thus, it is arguably both fair and efficient to require plaintiff to demonstrate absence of actual consent . . . ." But also stating: "First, it is often difficult to prove a negative. Second, some facets of actual consent . . . only rarely arise. It might therefore be more economical to expect defendants to raise these issues").

> In cases of direct interference, the defendant is likely to know how and why the interference occurred. I agree . . . that "if the defendant is in a position to say what happened, it is both sensible and just to give him an incentive to do so by putting the burden of explanation on him."[84]

It is not clear how relevant this reasoning is to U.S. battery jurisprudence. On the one hand, it is derived from a premise that the *prima facie* case is based solely on a direct interference with the plaintiff, which, of course differs from U.S. treatment; on the other, it seems to recognize that consent is often "communicated" by circumstances and not by spoken word. Thus, consent will be based on the factors considered by the defendant.

The Canadian Court's final reason for making consent an affirmative defense is perhaps its most interesting. It recognizes the social interest in protecting the plaintiff's autonomy. Specifically, the *Non-Marine* Court discusses what it describes as "demoralization costs": costs to society that would result from not protecting a plaintiff's autonomy that justify placing the burden of proof of consent on defendant. The Court explains:

> Victims and those who identify with them tend to feel resentment and insecurity if the wrong is not compensated. The close causal relationship between the defendant's conduct and the violation of the plaintiff's bodily integrity, the identification of the loss with the plaintiff's personality and freedom, the infliction of the loss in isolated (as opposed to systemic) circumstances, and the perception of the defendant's conduct as anti-social, all support the legal position that once the direct interference with the plaintiff's person is shown, the defendant may fairly be called upon to explain his behaviour if indeed it was innocent.[85]

In sum, the proper role of consent in the tort of battery is uncertain. To the extent U.S. courts have considered the issue, most simply rely on the early *Restatement*s and *Prosser and Keeton*, which apply the principle of *volenti non fit injuria*, as the basis of requiring non-consent to be an element. Further, the lack of a jurisprudence on all forms of consent other than actual consent further attenuates any claim that there is a majority rule, given that the *volenti* principle is not likely relevant to these other forms of consent. Some courts, on the other hand, including

[84] *Scalera*, [2000] 1 S.C.R. at 565 (internal citations omitted).

[85] *Id.*

a minority of courts in the U.S. and courts in other common law jurisdictions, do not ascribe to the *volenti* reasoning. They would require consent to be an affirmative defense in order to protect a plaintiff's autonomy and promote efficiency. The *Restatement Third*, by pointing out the lack of clarity, has opened the door for courts and litigants alike to fully consider the role of consent in common law battery.

II. SHOULD NON-CONSENT BE AN ELEMENT OF THE PRIMA FACIE CASE OF BATTERY?

To this point we have simply described the limited consideration courts have given to the role of consent in the tort of battery. In this Part, we will begin the discussion of what role consent should play in the law of civil battery. For purposes of the analysis, we will assume that actual consent has been given. We will consider other forms of consent such as apparent consent, later in the Article. Courts and commentators suggest that consent is an element because it somehow "negatives the existence of the tort."[86] We need to be precise here; this is not a question about whether, when plaintiff consents, they should be able to recover for a battery. No one denies that consent can be a full, affirmative defense. Rather, the more specific question we are considering is why some courts suggest that non-consent should be considered in the *prima facie* case, where the plaintiff bears the burden of proof on the issue. In the context of battery, there are two ways this can happen. Either consent can negate an existing element of the *prima facie* tort or its absence is required to make out the tort.

Courts have relied on both mechanisms when they make non-consent an element. This first mechanism, it has been suggested, may result from the fact that consent always negates the offensiveness of a contact.[87] No court has claimed that consent makes a contact not harmful and thus, we will focus in this Part on the relation of consent to offensiveness. This is the notion behind statements such as: "any

[86] *See, e.g.*, United States v. Johnson, 54 M.J. 67, 69 (C.A.A.F. 2000) (noting battery requires an act done without "lawful consent"); Brzoska v. Olson, 668 A.2d 1355, 1360 (Del. 1995) ("Lack of consent is thus an essential element of battery." (citing KEETON ET AL., *supra* note 7, at §§ 9, 18)).

[87] *See* United States v. Dill, No. ARMY 20011104, 2005 CCA LEXIS 457, at *9 (A. Ct. Crim. App. Sept. 21, 2005); *Johnson*, 54 M.J. at 69 ("Consent 'can convert what might otherwise be offensive touching into nonoffensive touching . . . .'" (quoting United States v. Greaves, 40 M.J. 432, 433 (C.A.A.F. 1994))).

unconsented touching is offensive."[88] One can understand this reasoning in the abstract; if plaintiff invites defendant to hit him hard in the stomach, how can we consider defendant's acting on this invitation to be offensive?[89]

Second, there is a notion that consent is needed as an element of battery because when the plaintiff has invited the harm upon himself or herself, the plaintiff has no basis upon which to claim that the defendant had any responsibility to her. The logic here is similar to that of the *volenti* principle, which holds that inviting the contact makes the contact not wrongful.[90] Commentators have suggested that this is akin to the type of "no duty rule" contained in the negligence-based doctrine of primary assumption of the risk.[91] Because it is akin to a question of duty, plaintiff would have to prove non-consent as a means of establishing the defendant's duty.[92] We will start our analysis with the

[88] *See* Cooper *ex rel.* Cooper v. Lankenau Hosp., 51 A.3d 183, 191 (Pa. 2012) (citing C.C.H. v. Philadelphia Phillies, Inc., 940 A.2d 336, 340 n.4 (Pa. 2008)).

[89] We focus here on offensiveness and not harmfulness because whether consent is or is not given has no impact on whether a contact is harmful.

[90] While the early *Restatement*s and *Prosser and Keeton* suggest that consent is neither justification nor defense, it is treated as such in this Part of the Article because, ultimately, the logic of these sources supports a claim that non-consent be a stand-alone element.

[91] *See, e.g.*, Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 519 (2002) ("A more careful examination of the analogy between consent (IT) and AR will reveal two basic points. First, in both the intentional tort and negligence contexts, a genuine consensual rationale underlies, or is at least an important part of, certain no-duty rules. Second, in both contexts, we can identify cases in which the injurer breached a duty to someone, but in which the victim consented to that wrong. Thus, we can indeed find a consent (IT) analogy to AR of a breach of duty. As an empirical matter, however, only rarely does a victim consent to conduct by a defendant that remains a (nonconsensual) intentional tort as to others. Accordingly, the question that seems so pivotal in the AR debate — should a victim be barred for consenting to the injurer's wrong? — simply does not arise very often in intentional torts cases. Nevertheless, when it does arise, the question should be answered the same way in both contexts. (The answer, as we will see, is affirmative, so long as 'consent' is given an appropriately narrow interpretation.)" (emphases omitted)).

[92] *See* Alan Calnan, *Strict Liability and the Liberal-Justice Theory of Torts*, 38 N.M. L. REV. 95, 114 (2008) ("Liberal-justice tort theory departs from this approach in several material respects. First, it requires that the consent issue always be litigated first. Why? Because in determining the justice of a private encounter, consent always trumps reasonableness. Acts are unreasonable and personally wrongful only if they (1) are governed by a freedom-limiting duty owed to a specific person and (2) violate the standard of care required by that duty. Consent affects the first prong of this analysis. If the duty-beneficiary consents to a known act, risk, or consequence, she not only eliminates the risk-creator's duty to protect against that hazard, but also bestows upon the risk-creator a right of action or omission. Without a duty, there can be no tort, even if every other element of the claimant's cause of action is satisfied.").

first mechanism — that consent makes all touches inoffensive before turning to the claim that consent negates wrongfulness.

A. The Conflict Between Consent (Autonomy) and Offensiveness (Dignity)

Some courts have found that consent should be an element because it negates the offensiveness of a contact.[93] Consider the example of consenting to a hard hit to the stomach.[94] Pursuant to this example, one can understand the instinct of these courts to connect consent to a contact's offensiveness.[95] An invited hit to the stomach seems, after all, blameless. But does consent "negative the existence of battery" because, whenever consent is given, the *prima facie* element of offensiveness is not satisfied? On closer examination, the answer to this question is clearly no. There are contacts for which consent has been given that would likely be considered offensive and contacts for which consent has not been given that would likely be considered inoffensive.

First, let's quickly consider how consent and offensiveness are not coextensive. One main point of differentiation is that actual consent is subjectively determined, and offensiveness is objectively determined. Proving actual consent requires a showing that plaintiff subjectively understood the risks of a contact or activity and willingly encountered the risk.[96] On the other hand, a contact is deemed offensive when it offends a reasonable sense of personal dignity.[97] Under this standard,

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[93] *See supra* note 87; *see, e.g.*, United States v. Greaves, 40 M.J. 432, 433 (C.A.A.F. 1994) ("Consent, of course, can convert what might otherwise be offensive touching into non-offensive touching . . . ."); *see also* United States v. Dill, No. ARMY 20011104, 2005 CCA LEXIS 457, at *9 (A. Ct. Crim. App. Sept. 21, 2005); United States v. Johnson, 54 M.J. 67, 69 (C.A.A.F. 2000).

[94] A hard hit to the stomach is one of the favored illustrations in the *Restatement Third*. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 13 cmt. d, illus. 4 (AM. LAW INST., Tentative Draft No. 4, 2019).

[95] No claim has been made that consent somehow negates physical harm. We thus focus solely on offensiveness.

[96] "The requisite state of mind for actual consent is willingness (i) that the actor engage in the otherwise tortious conduct and (ii) that the otherwise tortious invasion to the person's interests occur. To be willing is to assent or acquiesce to the actor's conduct or invasion . . . . On the other hand, a person who is not subjectively willing to permit the actor's conduct cannot be said to actually consent to that conduct." RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 13 cmt. b (AM. LAW INST., Tentative Draft No. 4, 2019); see *supra* Part I.A, for a detailed discussion of consent.

[97] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 103(a) (AM. LAW INST., Tentative Draft No. 1, 2015).

the jury or fact-finder determines whether the contact is one that a reasonable person would find undignified.

Consent and offensiveness are also not coextensive because autonomy and dignity — while related — are separate concerns. Thus, there are likely many types of contacts to which a plaintiff consents that are likely still not dignified. Let's consider some potential examples, starting with one that is perhaps a bit more extreme than the others: A poor person consents[98] to being urinated upon in public for a payment of $1000.[99] In this case it seems the contact is likely offensive to a reasonable sense of personal dignity despite the fact that consent was given.[100] One may balk at this example, thinking that it would never happen. However, even more extreme examples have occurred.

In one well-known case, Armin Meiwes ate Bernd Juergen Brandes with Brandes's consent. Meiwes, a forty-two-year-old German man posted a message in an internet chat room devoted to cannibalism, seeking a "well-built man, 18-30 years old, for slaughter."[101] Brandes responded enthusiastically, "I offer myself to you and will let you dine from my live body. Not butchery, dining!!"[102] On March 9, 2001 Brandes

> swallowed twenty sleeping tablets and half a bottle of schnapps. Then Meiwes cut off part of Brandes's body and fried it as a snack for them both. Brandes was bleeding to death, but still not dead, when Meiwes butchered him and froze the flesh.

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[98] We must assume that the person has consented to demonstrate the conflict between consent and offensiveness in the *prima facie* case of battery. In cases where the consent is clear, of course, there would be no recovery even if consent were an affirmative defense.

[99] We are assuming here that consent is freely given and that the individual is willing to experience the contact in exchange for the $1,000. Of course, the fact that the plaintiff is poor suggests that consent is not being freely given. This, however, is not the case under the current definition of consent. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 cmt. f (AM. LAW INST., Tentative Draft No. 1, 2015).

[100] For a discussion, see *id.* (noting a person "is properly treated as legally consenting to the result . . . because the risk of that result is inherent and socially acceptable risk of the activity to which [he/she] actually consented").

[101] Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 166 (2007) (citing Peter Finn, *Cannibal Case Grips Germany; Suspect Says Internet Correspondent Volun-teered to Die*, WASH. POST (Dec. 4, 2003), http://www.washingtonpost.com/archive/politics/2003/12/04/cannibal-case-grips-germany/aec9e5b4-db54-4b4b-8188-f7d157c95e09/ [http://perma.cc/MSY6-WANS]).

[102] *Id.* (citing Finn, *supra* note 101).

> Eventually he ate about twenty kilograms, washing it down with a South African red.[103]

Extreme cases can isolate the point in great relief but plenty of less extreme and more common examples also exist. Consider sorority and fraternity "hazing": a sorority pledge is forced to remove most of her clothing and have the sorority sisters mark every place of fat on her body with indelible marker or a fraternity pledge is publicly "paddled" by fraternity brothers. In such cases, the rituals are actually designed to be degrading despite the legally valid consent to the contact given by the pledges. Finally, one may consider a cocktail waitress who fully understands that she will be groped by drunken men nightly, but who is willing to undergo the degrading behavior for the money. In all these cases, individual consent may not negate the offensiveness of a behavior.

Perhaps the reader will object to my examples and argue that contacts such as being groped in a cocktail bar consensually are not degrading because the reasonable person will find the waitress' free choice to receive such contacts in order to receive more money makes the contact dignified. It is highly unlikely that a free choice to receive extra money will make all contacts inoffensive. Many pornographic websites, for example, are regularly portrayed as degrading women, despite the fact that the women are paid for their services.[104]

While the above discussion explains that non-consent and offensiveness are not coextensive, it should not be taken to suggest that the element of offensiveness completely ignores whether or not a contact was consented to. Certainly, consent is a particularly significant factor to be considered in determining whether a contact is offensive.[105] Indeed, consent may be a major, or even, at times, the only factor, that makes a behavior inoffensive.[106] Put simply, consent is a component of the determination of offensiveness but the two are not coextensive.

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[103] *Id.* (internal citation omitted).

[104] *See, e.g.*, Kayla Louis, *Pornography and Gender Inequality — Using Copyright Law as a Step Forward*, 24 WM. & MARY J. WOMEN & L. 267, 269 (2018) ("Pornography is harmful to gender equality since it normalizes the degradation and subordination of women to men. It places women in an inferior status based on their gender."); Renae Regehr, *3 Reasons Mainstream Pornography is not Empowering to Women*, ROLE REBOOT (Jan. 8, 2015), http://www.rolereboot.org/sex-and-relationships/details/2015-01-3-reasons-mainstream-pornography-empowering-women/ [http://perma.cc/NS89-5C7M] ("However, I do not believe the way women are currently depicted in pornography is empowering. It is the opposite: degrading.").

[105] *See infra* Part IV.B.

[106] *See* Mink v. Univ. of Chi., 460 F. Supp. 713, 718 (N.D. Ill. 1978) (finding that administration of a drug without plaintiff's consent was offensive).

There are times when consent does not negate the offensiveness of contact.

This basic conflict of elements may also be conceived more broadly by considering the interests underlying them. Consent, as an element, is generally built on interests of autonomy and efficiency.[107] While subject to a variety of definitions, "[i]ndividual autonomy is an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces."[108] Efficiency is generally served when an individual has an opportunity to exchange an existing right for benefits that exceed that right's value. For example, one may give away her right to exclude others from her property to have a dinner party or her right to bodily integrity for a welcomed kiss.

The element of offensiveness, on the other hand, reflects the nature of battery as a dignitary tort.[109] The concept of dignity is subject to a variety of often antagonistic views.[110] Dictionaries define dignity as the

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[107] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. c (AM. LAW INST., Tentative Draft No. 4, 2019) ("The power to consent enlarges personal freedom, autonomy, and agency, while also facilitating mutually beneficial relationships and transactions between people.").

[108] John Christman, *Autonomy in Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Jan. 9, 2015), http://plato.stanford.edu/archives/spr2018/entries/autonomy-moral/ [http://perma.cc/M5YF-84EB].

[109] *See* E. Haavi Morreim, *Medical Research Litigation and Malpractice Tort Doctrines: Courts on a Learning Curve*, 4 HOUS. J. HEALTH L. & POL'Y 1, 78 (2003) ("Battery, discussed above, is perhaps the leading example of a dignitary tort."); Grant H. Morris, *Dissing Disclosure: Just What the Doctor Ordered*, 44 ARIZ. L. REV. 313, 319 (2002) ("[B]attery is a dignitary tort, protecting individuals from offensive as well as harmful contact."); Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 HARV. L. REV. 942, 958 (2017) (reviewing ARTHUR RIPSTEIN, PRIVATE WRONGS (2016)) ("Indeed, it is no accident that battery is often called a dignitary tort. But battery's protection extends beyond our dignitary interests too. It also protects our interest in bodily security. Because battery prohibits harmful touchings, you can't punch, push, or poison me, without my permission.").

[110] *See* Stephen Riley & Gerhard Bos, *Human Dignity*, INTERNET ENCYCLOPEDIA PHIL., https://www.iep.utm.edu/hum-dign/ (last visited Dec. 19, 2020) [https://perma.cc/U22C-VDJ5] ("There are a number of competing conceptions of human dignity taking their meaning from the cosmological, anthropological, or political context in which human dignity is used. Human dignity can denote the special elevation of the human species, the special potentiality associated with rational humanity, or the basic entitlements of each individual. There are, by extension, dramatically different normative uses to which the concept can be put. It is connected, variously, to ideas of sanctity, autonomy, personhood, flourishing, and self-respect, and human dignity produces, at different times, strict prohibitions and empowerment of the individual. It can also, potentially, be used to express the core commitments of liberal political

quality or state of being worthy, honored or esteemed.[111] In law, dignity is often conceived as "the prohibition of degradation and objectification [of a person]."[112] The law of battery reflects this general idea of dignity through its definition of offensiveness as something that "offends a reasonable sense of personal dignity."[113] This, of course, is a community standard; dignity as a state of being worthy of honor and not being degraded is defined socially and not individually.

The fact that dignity is socially defined is of significant consequence to my analysis and it is important to distinguish between the private use of dignity in battery law from the discussion of dignity that often occurs in the criminal context. When discussing whether the criminal law should protect dignity, commentators often distinguish between cases where there is a public welfare interest in protecting a person's interest (in which case the criminal law is relevant) and cases where there is no public interest in protecting dignity (in which case protecting dignity should be left to the private individuals involved in the contact).[114] Battery, of course, provides the basis for a private party to exonerate his or her dignity as a matter of tort. Put simply, while the criminal law deals with protecting the public welfare generally, tort law is narrower — analyzing the rightfulness of conduct between particular parties.[115] Offensive contacts have long been the basis for battery liability,[116] and battery is generally conceived as protecting dignity.[117] To define the wrongfulness of a behavior by deferring to the actions of two people

philosophy as well as precisely those duty-based obligations to self and others that communitarian philosophers consider to be systematically neglected by liberal political philosophy."); *see also* Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 317 (2019) (discussing how the dignitary torts, including battery, have been undertheorized).

111 *Dignity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/dignity (last visited Dec. 19, 2020) [https://perma.cc/5AFM-UZP7].

112 Riley & Bos, *supra* note 110.

113 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 103(a) (AM. LAW INST., Tentative Draft No. 1, 2015).

114 *See, e.g.*, Bergelson, *supra* note 101, at 222.

115 KEETON ET AL., *supra* note 7, § 18, at 112.

116 *See* Moore, *supra* note 2, at 1607 ("[A]t some point early on it became clear that the writ of trespass covered many of what we would now view as offensive bodily contacts, such as 'spitting upon a person; pushing another against him; throwing a squib or any missile or water upon him.'" (citation omitted)).

117 *See* Abraham & White, *supra* note 110, at 335; Erin Sheley, *Rethinking Injury: The Case of Informed Consent*, 2015 BYU L. REV. 63, 102 ("[A]ctual physical harm [is] not relevant as battery is a dignitary tort . . . ."); Stephen D. Sugarman, *Restating the Tort of Battery*, 10 J. TORT L. 1, 2 (2017) ("One is (only) a dignitary tort — an 'offensive' touching. If I spit in your face, I probably have committed an offensive battery.").

would simply negate this fact. Certainly, as between two parties, consent can provide a full defense and negate liability based on one person having licensed certain rights to the other. However, it cannot be said that all consented-to contacts are dignified without referring to community standards of what types of behaviors are esteemed. That is, the wrongfulness of contacts protected by battery law is determined in part by a jury, applying a social standard, not by the agreement of the individual plaintiff and defendant.

For now, it is enough to show that, contrary to the suggestions of courts that have held consent to always make a contact inoffensive, dignity cannot be easily reduced to a simple question of autonomy. For this reason, claims that non-consent should be an element of battery because consent negates offensiveness are unfounded. The two elements may be related, but they are not coextensive. Indeed, if they were coextensive, non-consent would not be necessary to the *prima facie* case of battery because lack of consent would always make a contact offensive.

B. Does Consent Make All Contacts Acceptable and Extinguish the Defendant's Duty?

So far, we have discussed how non-consent and offensiveness concern two competing and sometimes irreconcilable interests in autonomy and dignity. The two concepts, however, are not coextensive and thus the argument that non-consent is a necessary element of battery because lack of consent always negates offensiveness fails. However, there may be a separate reason for including non-consent as an element of battery. Indeed, as many have argued, non-consent may be necessary as an element because an autonomously-made decision to allow a contact negates that contact's legal wrongfulness. A number of courts have referred to batteries as "unwanted" touchings,[118] while others, adopting the reasoning of *Prosser and Keeton* or early *Restatement*s, describe consent as negating the wrongfulness of a contact.[119]

[118] *E.g.*, Wilkerson v. Duke Univ., 748 S.E.2d 154, 159 (N.C. Ct. App. 2013) (ruling that "[a] battery is made out when the person of the plaintiff is offensively touched against his will" (quoting Ormond v. Crampton, 191 S.E.2d 405, 410 (N.C. Ct. App. 1972))); Proffitt v. Ricci, 463 A.2d 514, 517 (R.I. 1983) (holding that an "unconsented touching" can be shown as part as a plaintiff's battery suit); Koffman v. Garnett, 574 S.E.2d 258, 261 (Va. 2003) ("The tort of battery is an unwanted touching which is neither consented to, excused, nor justified.").

[119] *See, e.g.*, Taylor v. Johnston, 985 P.2d 460, 464 (Alaska 1999) (writing that "[a] battery claim turns not on the motive of the actor but on the consent of the victim"); Hoofnel v. Segal, 199 S.W.3d 147, 150 (Ky. 2006) (granting summary judgment because

As we have noted,[120] and will discuss in further detail,[121] making non-consent an element generally does not serve the concerns of autonomy and efficiency traditionally associated with it. The traditional role of consent is to promote autonomy and to ensure that individuals can engage in mutually-beneficial exchanges that increase the well-being of both parties.[122] These traditional roles, however, are best served by an affirmative defense which will ensure that the plaintiff's autonomy is protected and that exchanges of protected interests will maximize total welfare.[123] The use of non-consent as an element of the tort is different. As suggested by *Prosser and Keeton* and the early *Restatement*s, the principle of *volenti non-fit injuria* uses autonomy as a means of defining when an individual has committed a "wrong"; nothing can be a wrong if a person consents to it. On this view, consent works a type of "moral magic" that makes otherwise wrongful behavior no longer wrongful.[124]

How does consent accomplish this task? A number of scholars have suggested that consent may act in this manner by extinguishing the defendant's duty toward the plaintiff.[125] In her article "The Moral Magic of Consent," widely cited as the basis for this connection, Professor Heidi Hurd explains:

> [C]onsent derives its normative power from the fact that it alters the obligations and permissions that collectively determine the rightness of others' actions. By consenting to another's touch, one puts that person at liberty to do what [] was antecedently obligatory of her not to do . . . .

the plaintiff's consent to a surgery negated the battery claim and holding that "[a] plaintiff must prove lack of consent as an essential element of battery"); Landry v. Bellanger, 851 So. 2d 943, 954-56 (La. 2003) (stating that failure of plaintiff to show lack of consent bars recovery for a battery, even where the act is otherwise harmful and offensive).

120 *See supra* Part II.A.

121 *See infra* Part IV.

122 *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. c (AM. LAW INST., Tentative Draft No. 4, 2019).

123 For a discussion, see *infra* Part IV.

124 *See* Hurd, *supra* note 2, at 123.

125 *See, e.g.*, Michelle Madden Dempsey, *Victimless Conduct and the* Volenti *Maxim: How Consent Works*, 7 CRIM. L. & PHIL. 11, 12-13 (2013) ("[O]ne's consent transforms the moral quality of another's conduct."); Richard Healey, *Consent, Rights, and Reasons for Action*, 13 CRIM. L. & PHIL. 499, 500-01 (2019) ("[V]alid consent cancels a directed duty that is grounded in a claim-right of the consenter."); Alan Wertheimer, *What is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 566-67 (2000) ("[C]onsent can 'magically' transform the rights and duties of others . . . ."); *see also* Aditi Bagchi, *Managing Moral Risk: The Case of Contract*, 111 COLUM. L. REV. 1878, 1901 (2011).

> To have the ability to create and dispel rights and duties is what it means to be an autonomous moral agent. To respect persons as autonomous is to recognize them as the givers and takers of rights and duties. It is to conceive of them as very powerful moral magicians.[126]

Pursuant to this reasoning, consent negates the defendant's prior obligation to refrain from contacting the plaintiff. The defendant's act is no longer wrongful because the plaintiff's autonomous choice has removed the wrongfulness from it. The notion here is that, by autonomous choice, the plaintiff removes the defendant's duty not to contact him or her — even in ways that are undignified or harmful. In this sense the plaintiff's autonomy is determinative of what amounts to a wrongful contact regardless of whether a jury would find a contact offensive or harmful.[127] We will consider the equation of consent with duty in this next section before turning to the general claim that consent negates wrongfulness generally.

1. Equating Consent to Batter with No Duty Rules in Negligence

The relationship between non-consent and duty has found its way into the *Restatement Third* where the Reporters equate consent with the "no duty" rule of primary assumption of the risk found in negligence.[128] According to the reporters:

> [A]ssumption of risk is a cognate doctrine to consent. However, there is an important distinction between consent and assumption of risk. In assumption-of-risk cases (other than primary assumption of risk), plaintiff has usually already proved that defendant has breached a duty; and courts treat assumption of risk as a defense to a breach of duty, not as undermining the claim that defendant was negligent in the first instance. Thus, it makes considerable sense to require defendant to prove the elements of traditional assumption of risk. (By contrast, jurisdictions that recognize *primary*

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126 Hurd, *supra* note 2, at 124.

127 For a discussion of the relationship between consent and offensiveness, see *supra* Part II.A.

128 *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. g (AM. LAW INST., Tentative Draft No. 4, 2019) (discussing how different jurisdictions treat primary assumption of the risk). For a discussion of primary assumption of the risk, see *infra* note 133 and accompanying text.

> assumption of risk treat it as a no-duty or limited-duty doctrine, on which plaintiff bears the burden of persuasion.).[129]

The Restatement thus suggests that consent might be analogized to the "no duty" rule of primary assumption of the risk in negligence as a basis for including it as a *prima facie* element of battery.[130]

The California case of *Knight v. Jewett*, a watershed case for the doctrine, is often cited for the basic rationale behind no duty rules in primary assumption of the risk.[131] In that case, the California Supreme Court found that a plaintiff who plays a sport relieves the other players of a duty in certain conditions. As the Court explained:

> By voluntarily entering into a relationship with the defendant, and being fully aware that the defendant will not be responsible for protecting him or her from known future risks, the plaintiff may be found to have impliedly relieved the defendant of any duty towards him or her with respect to such risks.[132]

By finding a defendant to have no duty, the doctrine provides a full defense,[133] whereas secondary assumption of the risk is often merged with comparative negligence schemes.[134] It is this rationale that commentators suggest may underlie the role of consent in the *prima facie* case of battery.

To fully address the characterization of consent as a "no duty" rule we need to deal with two different but interrelated claims: a general claim about consent negating duty in all batteries and a specific claim

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[129] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. e (AM. LAW INST., Tentative Draft No. 4, 2019).

[130] *Id.*; *see also* Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 484 (2002) ("[T]he consensual rationale underlying traditional assumption of risk may continue to carry weight even in abolitionist jurisdictions, especially in certain no-duty, limited-duty, or no-breach categories, although its weight and shape will vary in important respects depending on the doctrinal category.").

[131] *See* Knight v. Jewett, 834 P.2d 696, 707-08 (Cal. 1992).

[132] 1 COMPARATIVE NEGLIGENCE MANUAL § 1:38 (3d ed. 2020).

[133] *See Knight*, 834 P.2d at 707 ("In cases involving 'primary assumption of risk' — where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury — the doctrine continues to operate as a complete bar to the plaintiff's recovery.").

[134] *See id.* at 707-08 ("In cases involving 'secondary assumption of risk' — where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty — the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties.").

that consent in battery may act like primary assumption of the risk in negligence.

Arguments that consent in battery should operate like the "no duty" rule in primary assumption of the risk run up against a truly daunting number of objections. However, even before considering whether consent acts as a "no duty" rule in battery, we should confront the relatively unstable ground that "no duty" rules stand on, even in negligence.[135] As noted by Michael Green and Jonathan Cardi:

> The concept of duty in tort law remains in turmoil. Courts say and do things that seem wildly inconsistent, sometimes proclaiming the existence of a general duty of reasonable care and then, often in the same case, engaging in a full-scale inquiry into whether the defendant owed the plaintiff a duty. Duty is often said to be categorical, and yet duty decisions sometimes appear to be narrowly dependent on the specific facts of the case at hand — although so far the duty inquiry has not turned on the color of the parties' eyes. Academics also continue to battle over the proper role for duty in contemporary tort law.[136]

Simply put, duty, even in the context of negligence law, is not bedrock; it is uncertain and contentious, leading commentators to recommend caution in its application.[137]

It is against this backdrop of caution that we can begin to consider the assertion that consent operates as a "no duty" rule. Even in its most basic form, the argument that consent acts like a no duty rule

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[135] *See* W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 671 (2008); John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 329-31 (2006) [hereinafter *Shielding Duty*]; John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1771-72 (1998).

[136] Cardi & Green, *supra* note 135.

[137] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 cmt. a (AM. LAW INST., Proposed Final Draft No. 1, 2005) (discussing modifications and other considerations to take into account when imposing duty); *see also* Goldberg & Zipursky, *Shielding Duty*, *supra* note 135, at 333 ("Although courts tend to invoke the concept of duty in several different senses, in its primary sense it specifies as a condition of negligence liability that the defendant was under an obligation to persons such as the plaintiff to conduct herself with reasonable care so as to avoid causing the kind of injury suffered by the plaintiff." (citing John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 664-87, 698-709 (2001))); Goldberg & Zipursky, *supra* at 736 ("The Restatement (Third) of Torts: General Principles has studiously avoided the concept of duty and language expressing it.").

encounters serious limitations. Intentional torts, after all, have no duty element[138] and no courts who find non-consent to be an element have referenced duty in their analyses. Any general claim that consent influences duty would have to first overcome this difficult hurdle.

Even if there were some claim that consent negated duty in battery, however, one would need to explain its disparate treatment within the different intentional torts. Consent is generally treated as an affirmative defense to intentional property torts,[139] and to some privacy torts.[140] It is also an affirmative defense in other contexts.[141] The basic rationale for treating consent as a no duty rule in battery would apply equally to all these torts.[142] For example, if consent negates the wrongfulness of an entry onto property,[143] then non-consent should be an element of trespass to land.[144] Professor Moore and the Reporters for the

[138] Despite the lack of a duty element, commentators do use duty nomenclature to discuss the defendant's obligations in intentional torts. *See, e.g.*, Simons, *Assumption of Risk and Consent*, *supra* note 7, at 250-52 (stating we generally conceive of intentional torts as having an absolute duty to not interfere with the protected interests of the plaintiff).

[139] *See supra* note 16.

[140] 62A AM. JUR. 2D *Privacy* § 207 (2020) ("Because consent is an affirmative defense to an action for public disclosure, it is the defendant who bears the burden of establishing the plaintiff's consent." (citing McCabe v. Vill. Voice, Inc., 550 F. Supp. 525 (E.D. Pa. 1982); Hawkins v. Multimedia, Inc., 344 S.E.2d 145 (S.C. 1986))); *see also* McCabe v. Vill. Voice, Inc., 550 F. Supp. 525, 530 (E.D. Pa. 1982) ("The defendant bears the burden of establishing consent of the plaintiff."); Sanchez-Scott v. Alza Pharm., 103 Cal. Rptr. 2d 410, 420 (Cal. Ct. App. 2001); Hawkins v. Multimedia, Inc., 344 S.E.2d 145, 146 (S.C. 1986) ("Since consent is a matter to be raised by the defendant, it has the burden of proof on that issue.").

[141] *See, e.g.*, TEX. WATER CODE ANN. § 7.252 (1997) (describing consent as an affirmative defense to endangerment offenses); United States v. Wright, 340 F.3d 724, 731 (8th Cir. 2003) (stating how 18 U.S.C. § 1201 establishes lack of consent as an element of kidnapping such that consent is a valid defense); *see also* Festa v. Jordan, 803 F. Supp. 2d 319, 327 (M.D. Pa. 2011) (holding that consent is an affirmative defense to false imprisonment); American Master Lease L.L.C. v. Idanta Partners, Ltd., 171 Cal. Rptr. 3d 548, 563 (Cal. Ct. App. 2014) (treating consent as an affirmative defense to a breach of fiduciary duty).

[142] There are, however, a small number of courts that have suggested that non-consent should be an element of property torts. *See, e.g.*, Chase Inv. Servs. Corp. v. Law Offices of Jon Divens & Assocs., 748 F. Supp. 2d 1145, 1178 (C.D. Cal. 2010), *aff'd*, 2012 U.S. App. LEXIS 16316 (9th Cir. 2012) ("The elements of a conversion claim are . . . that the plaintiff did not consent . . . ."); Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 457 S.W.3d 414, 424 (Tex. 2015) ("Given these parameters, it makes sense to treat consent, or lack thereof, as an element of the trespass cause of action rather than as an affirmative defense.").

[143] *See* Hurd, *supra* note 2, at 123.

[144] *See id.* at 124.

Restatement Third suggest that the difference between property and privacy torts on the one hand and torts to the person may lie in the fact that property torts have traditionally been more readily treated as subject to strict liability.[145] First, of course, this explanation falls short simply because it is an attempt to explain the use of consent in property torts only and not in privacy or other torts where consent is an affirmative defense.[146] However the distinction, even as to property torts, fails for a more basic reason; put simply, strict liability torts still have a duty component that would be negated by consent.[147] One cannot hypothesize a duty for battery and ignore duty in strict liability.

[145] *See* Moore, *supra* note 2, at 1640-41; RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. e (AM. LAW INST., Tentative Draft No. 4, 2019).

[146] Professor Moore has argued that property torts may be different to the extent they are used to litigate ownership of property thus allowing for an intent element that operates more like strict liability. *See* Moore, *supra* note 2, at 1640.

[147] *See* Oster v. Dep't of Transp. & Dev., 582 So. 2d 1285, 1288 (La. 1991) ("Under the negligence theory, it is the defendant's *awareness* of the dangerous condition of the property that gives rise to a **duty** to act. Under a **strict liability** theory, it is the defendant's *legal relationship* with the property containing a defect that gives rise to the **duty**." (emphasis added) (citation omitted)); Rylands v. Fletcher, L.R. 3 H.L. 330 (1868) (applying strict liability for contaminating water against a duty to the public); Alani Golanski, *Paradigm Shifts in Products Liability and Negligence*, 71 U. PITT. L. REV. 673, 676, 684-85 (discussing a wide variety of duty issues in products liability cases such as: disputes over privity and chain of product distribution, adequacy of warnings, and whether the distributor of toxic materials owes a duty to family members exposed to those toxins on the worker's clothing, ultimately concluding, "issues have . . . run the gamut, depending on the circumstances of the product-related injury" (internal citations omitted)); *see also* Cox v. City of Dallas, 256 F.3d 281, 290 n.16 (5th Cir. 2001) (noting in strict liability nuisance law the breach of a duty can be an element considered); Lucey v. Saint-Gobain Performance Plastics Corp., No. 1:17-CV-1054, 2018 U.S. Dist. LEXIS 97400, at *22 (N.D.N.Y. June 11, 2018) ("To state a *prima facie* case of liability on the basis of a defendant's failure to warn, the plaintiff must establish that '(1) the manufacturer had a duty to warn; (2) the manufacturer breached the duty to warn in a manner that rendered the product defective, i.e., reasonably certain to be dangerous; (3) the defect was the proximate cause of the plaintiff's injury; and (4) the plaintiff suffered loss or damage.'" (quoting Amos v. Biogen Idec Inc., 28 F. Supp. 3d 164, 169-70 (W.D.N.Y. 2014))); Bee v. Novartis Pharm. Corp., 18 F. Supp. 3d 268, 282-83 (E.D.N.Y. 2014)); Chavez v. S. Pac. Transp. Co., 413 F. Supp. 1203, 1214 (E.D. Cal. 1976) (holding that a reason for applying strict liability to a railroad carrying ultra-hazardous material is because of a duty to the public); Franken v. Sioux Ctr., 272 N.W.2d 422, 424 (Iowa 1978) (discussing the application of strict liability to wild animals because of their "dangerous propensities" but recognizing the possessor's duty to confine the animal or prevent it from doing harm); Spano v. Perini Corp., 250 N.E.2d 31, 35 (N.Y. 1969) (holding that while use of dynamite is a lawful act it also creates a duty for resulting damages).

It is also worth noting that intentional torts to persons — particularly battery — might also be conceived of in terms akin to strict liability.[148] The majority of courts and the *Restatement*s do not require an intent to harm but simply an intent to contact.[149] In other words, attempts to distinguish intentional property torts because they are conceived more readily than torts to persons in terms of strict liability simply ignores both the fact that battery too can be conceived of in terms of strict liability as well as the fact that strict liability torts still require a duty to the plaintiff. Given these limitations, as well as the significant hurdles posed by the fact that intentional torts do not contain a duty element, efforts to explain the existence of non-consent as an element of battery through a generalized relationship to a no duty rule in negligence are quite tenuous.

Suggestions that consent acts like a "no duty" rule in all cases of battery would also have to explain the much narrower treatment of the concept as it is currently applied in negligence. Courts have demonstrated serious concern about broadly applying the no duty concept to negligence cases. Consider the very specific limitations put on the use of primary assumption of the risk. Many jurisdictions limit

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[148] *See* Alan Calnan, *The Fault(s) in Negligence Law*, 25 QUINNIPIAC L. REV. 695, 748 (2007) ("First, intentional torts and strict liability do not fall on opposite ends of the liability spectrum. Rather, they are on the same side. In an intentional tort action, the plaintiff does not have to prove the defendant's fault. Fault is presumed from the element of intent. To rebut this presumption, the defendant must come forward with an excuse or justification. If she fails to do so, she may be held liable even though she committed no wrong. In this sense, every intentional tortfeasor is like her strict liability counterpart: if she acts and injures, she does so at her own peril."); Moore, *supra* note 2, at 1640-41 ("On what basis, then, is it fair to subject defendants to liability in battery absent any intent to offend or harm, in circumstances under which a defendant would not be liable in a negligence action? In partial response to this question, Professor Simons and other commentators note that there are other intentional torts, including trespass to land and trespass to chattels, that entail a form of strict liability (and not even negligence)." (internal citations omitted)); Deana Pollard Sacks, *Intentional Sex Torts*, 77 FORDHAM L. REV. 1051, 1078 (2008).

[149] *See* Brenneman v. Famous Dave's of Am., Inc., 410 F. Supp. 2d 828, 846-47 (S.D. Iowa 2006), *aff'd*, 507 F.3d 1139 (8th Cir. 2007) (applying a dual intent standard to a sexual harassment case, holding the defendant intended the contact and a reasonable person would find an unsolicited slap on the butt to be offensive); White v. Muniz, 999 P.2d 814, 818-19 (Colo. 2000) (finding an Alzheimer's patient could lack the capacity to commit a battery if she was incapable of intending the requisite harm or offense); Labadie v. Semler, 585 N.E.2d 862, 863 (Ohio Ct. App. 1990) (using the *Restatement Second of Torts*'s formulation of intent); State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374, 378 (Tex. 1993) (holding that in a sexually transmitted disease case the actor must intend the harm or reasonably know it will result). *But see* Moore, *supra* note 2, at 1646 (advocating for a dual intent standard).

its application to plaintiffs who participate in sporting events.[150] Still, others limit its application further, noting it only applies to "active" or "potentially dangerous" sporting activities.[151] Sometimes the doctrine is only available if the defendant is a co-participant in the sport and not connected to the sporting activity in some other fashion.[152] Indeed, to the extent the doctrine of primary assumption of the risk is a means to avoid placing defendants in sporting events into a scheme of comparative fault,[153] this concern is not relevant to battery. Whether consent is an element or affirmative defense in battery, it acts as a full defense. Thus, there may be even less compelling need to apply a no duty rule broadly in battery than in the context of negligence.

We have, so far, identified the many ways in which a suggestion that consent generally acts like a no duty rule in battery cannot be justified. This is the danger that comes from wholesale reliance on broad concepts like "consent makes all contacts not wrongful." Taken out of context and without reflection upon its application, the California Supreme Court's general statement that by "voluntarily entering into a relationship with the defendant, and being fully aware that the defendant will not be responsible for protecting him or her from . . . known future risks, the plaintiff may be found to have impliedly relieved the defendant of any duty towards him or her"[154] seems to suggest a particularly broad role for consent in tort. Context, however, demonstrates how this broad statement does not explain the role of

[150] *See* N.Y. PATTERN JURY INSTRUCTIONS — CIVIL 2:55 (2020) ("As a general rule, application of primary assumption of risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreational activities, or athletic and recreational pursuits that take place at designated venues."); 30 AM. JUR. 3D *Proof of Facts* § 161 (2020); *see also* Custodi v. Amherst, 980 N.E.2d 933, 935 (N.Y. 2012); Trupia *ex rel.* Trupia v. Lake George Cent. Sch. Dist., 927 N.E.2d 547, 548 (N.Y. 2010); Filer v. Adams, 966 N.Y.S.2d 553, 555 (N.Y. App. Div. 2013).

[151] 30 AM. JUR. 3D *Proof of Facts* § 161 (2020); *see also* 4 MINN. PRACTICE, JURY INSTRUCTION GUIDES — CIVIL CIVJIG 28.30 (6th ed. 2020).

[152] 30 AM. JUR. 3D *Proof of Facts* § 161 (2020).

[153] *See* Knight v. Jewett, 834 P.2d 696, 704 (Cal. 1992) (ruling on an injury resulting from a consensual touch football game the court held: "[i]n 'primary assumption of risk' cases, it is consistent with comparative fault principles totally to bar a plaintiff from pursuing a cause of action, because when the defendant has not breached a legal duty of care to the plaintiff, the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever, and thus there is no occasion at all for invoking comparative fault principles"). *But see* Turcotte v. Fell, 502 N.E.2d 964, 967 (N.Y. 1986) (holding that assumption of the risk is not a complete defense because of issues of comparative negligence).

[154] 1 COMPARATIVE NEGLIGENCE MANUAL § 1:38 (3d ed. 2020).

non-consent in battery, nor how its very limited use in negligence can be expanded to support broad use of the concept to cover all batteries.

The use of consent as a "no duty" rule must also deal with the *Jewett* court and later efforts to distinguish primary assumption of the risk from consent.[155] For example, while ostensibly a rule that impliedly relieves the defendant of any duty regarding risks intrinsic to sporting activities, the *Jewett* court specifically rejects claims that the no duty rule it develops is based in consent.[156] The court explains:

> The dissenting opinion suggests, however, that, even when a defendant has breached its duty of care to the plaintiff, a plaintiff who reasonably has chosen to encounter a known risk of harm imposed by such a breach may be totally precluded from recovering any damages, without doing violence to comparative fault principles, on the theory that the plaintiff, by proceeding in the face of a known risk, has "impliedly consented" to any harm. (See dis. opn. by Kennard, J., *post,* p. 25–26 of 11 Cal.Rptr.2d, p. 719–720 of 834 P.2d.) For a number of reasons, we conclude this contention does not withstand analysis . . . .
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> Second, the implied consent rationale rests on a legal fiction that is untenable, at least as applied to conduct that represents a breach of the defendant's duty of care to the plaintiff. It may be accurate to suggest that an individual who voluntarily engages in a potentially dangerous activity or sport "consents to" or "agrees to assume" the risks inherent in the activity or sport itself, such as the risks posed to a snow skier by moguls on a ski slope or the risks posed to a water skier by wind-whipped waves on a lake. But it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the possibility that such misconduct may occur.
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> A familiar example may help demonstrate this point. Although every driver of an automobile is aware that driving is a

[155] *See* Russ VerSteeg, *Consent in Sports & Recreational Activities: Using Contract Law Terminology to Clarify Tort Principles*, 12 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 14 (2016) ("'[C]onsent' is a term used in the context of intentional torts, such as assault and battery, whereas 'assumption of risk' is a term used in connection with negligence. It is best not to confuse or conflate the two terms.").

[156] *See Knight*, 834 P.2d at 705-06.

> potentially hazardous activity and that inherent in the act of driving is the risk that he or she will be injured by the negligent driving of another, a person who voluntarily chooses to drive does not thereby "impliedly consent" to being injured by the negligence of another, nor has such a person "impliedly excused" others from performing their duty to use due care for the driver's safety.[157]

Pursuant to this analysis, consent to engage in the activity does not relieve others of their duty to not act unreasonably. The Court, of course, is not directly addressing consent as to non-negligent behaviors, but to parse consent in this way seems non-sensical; first a court would have to determine if an act is negligent and then, if it isn't, the court would conclude there was no duty. It would be simpler and more doctrinally honest in such cases to say that something other than consent is behind the "no duty" rule. Given these substantial limitations, the analogy of consent to a "no duty" rule for purposes of suggesting that non-consent should be an element of battery, is very difficult to support.

2. Consent as Determinative of a Contact's "Wrongfulness"

As we have just seen, it is very difficult to equate consent with the "no duty" rule of primary assumption of the risk. However, regardless of the difficulty of analogizing it to "no duty" rules, if consent actually does work moral magic and make all otherwise wrongful contacts acceptable, it should be a *prima facie* element of battery. As this section will show, consent does not have this magical quality in the context of battery.

Let's step back and look at the role of consent within the tort of battery. The types of intentional contacts that battery law general finds wrongful, and thus protected, are ones that are either physically harmful, undignified or unconsented to. As we have seen regarding offensiveness already, when treated as an element, non-consent is placed into apposition of privilege vis-à-vis offensiveness and harmfulness. That is, as a free-standing element, non-consent negates the wrongfulness of contacts that are otherwise harmful or offensive. The notion is that, regardless of how harmful or offensive a contact is, consent to the contact removes its legal wrongfulness. But does consent magically remove the wrongfulness of these contacts?

Again, it is worthwhile to highlight the specific issue here. We are not asking whether defendant will be liable for an act that is consented to;

[157] *Id.* at 705.

he or she will not. We are simply asking *whether consent negates a contact's legal wrongfulness or instead acts as privilege*. In the former case, consent would be an element to be proven by the plaintiff. In the latter case, it would be an affirmative defense proven by the defendant.

Given the current structure of battery, consent trumps the harmfulness and offensiveness of a contact to make the contact legally acceptable. We have already discussed the conflict between consent and offensiveness. A poor person may give legally valid consent to being urinated upon for a payment of $1,000 but does that consent negate the undignified nature of the contact? As we have already noted an autonomous choice does not always make a contact dignified. Let's return to our earlier example from Bergelson's "The Right to Be Hurt";[158] Armin Meiwes' cutting and cooking Bernd Juergen Brandes. If a plaintiff consents to being killed, cut apart, fried, and eaten by another the consent of the plaintiff seems to make little difference regarding the "wrongness" of defendant's acts. It is undignified to cut someone into pieces and the defendant intended just that, regardless of the plaintiff's consent.

Dignity, in part, derives from whether one is being objectified by another. As Bergelson elaborates regarding the criminal law in her discussion of the Brandes case, the defendant's behavior is not made "rightful" as a matter of simple consent. Rather, it continues to be wrongful, partly[159] because Meiwes "used Brandes as an object, a means of obtaining a desired experience, and thus disregarded his dignity."[160] The same can be said for the patron who gropes a cocktail waitress or a sorority sister who fat-shames a pledge. Indeed, to the extent objectification becomes a basis for loss of dignity in general, sexual contacts may often be considered undignified.

Battery already treats undignified contacts as wrongful and worthy of tort recovery. Indeed, battery has long been considered a dignitary tort.[161] Consent does not somehow magically transform undignified contacts into dignified ones. The current structure of battery law,

158 Bergelson, *supra* note 101.

159 Bergelson notes that there also must be a setback to interests. *See id.* at 219 ("If we include violation of dignity in the concept of 'wrong,' then harm can continue to be defined as a wrongful setback to an interest where 'wrongful' means either that which violates a right (i.e., autonomy) or that which violates the victim's dignity. The two kinds of harm would include the same evil — objectification of another human being — which may happen through a rights violation (e.g., murder) or, alternatively through a setback to interests combined with the disregard of the victim's dignity (e.g., consensual deadly torture).").

160 *Id.* at 221.

161 *See supra* notes 112–13 and accompanying text.

however, where non-consent is an element, negates the wrongfulness attendant to undignified contacts.

A similar conflict exists between consented to and harmful contacts. Again, to be precise, we are now considering conflict only between consent and harmfulness. Some harmful contacts, such as the cutting and killing of Brandes, will also impact the plaintiff's dignity, however, there are plenty of contacts that are dignified but cause harm — a legal tackle on a football field breaks a bone, a surgeon removes a diseased organ from a body. The instinct in these cases is to turn to consent as the measure of these contacts' wrongfulness. That is, *assuming* we want to define such contacts as not wrongful, and given that the contact is not offensive but causes harm, the only means currently in battery law for holding such contacts to not be wrongful is the element of consent. The problem of dignified but harmful touching leads some to argue for a dual intent standard in battery.[162]

Perhaps the more direct response to the problem, however, is to simply recognize that harmful touches are still wrongful regardless of consent. Put simply, "[c]ausing death, injury or pain is *prima facie* bad and should be avoided."[163] Surgery, after all, is a "violent assault, not a mere pleasantry,"[164] and the *Restatement Second* definition of harm includes the creation of pain or illness.[165] Once again, the issue is not whether consent creates liability; it is the more nuanced concern of whether consent negates the wrongfulness of the contact.

A different way of getting at the issue is to ask what role consent actually does play in situations where a contact causes harm and pain. A simple thought experiment might serve to highlight the role played by consent in these circumstances. Assume I ask a surgeon to take a scalpel and use it to cut into me when I am healthy. The doctor has my absolute consent and I actually and truly desire the pain I will experience as a result of the cut. Can we say that the doctor's action has not caused me pain and harm? Does my consent change that fact? I would suggest that consent negates the wrongfulness here not because the cut isn't painful but because I have given away my right to not suffer pain for something else. Consent doesn't somehow make the cutting not painful, it justifies the otherwise wrongful cutting as it relates to me because I have freely "licensed" the contact in exchange for the benefit

[162] *But see* Moore, *supra* note 2, at 1637 (arguing a single intent standard would address this concern).

[163] Vera Bergelson, *The Meaning of Consent*, 12 OHIO ST. J. CRIM. L. 171, 177 (2014).

[164] Mohr v. Williams, 95 Minn. 261, 271 (1905); *see also* Moore, *supra* note 2, at 1619-20.

[165] RESTATEMENT (SECOND) OF TORTS § 15 (AM. LAW INST. 1965).

of the surgery.[166] Consent will, of course, alleviate the doctor of all responsibility in both cases. The point, however, is simply that consent does not somehow make painful or harmful contacts not painful or not harmful.

Battery is meant to protect against harmful and undignified contacts. Non-consent as an element negates its ability to do so. But consent does not do so by making contacts dignified or painless. Consent does not magically remove the hurt or the loss of dignity. Yet, giving it a role as an element that makes harmful or undignified contacts not wrongful simply because they were consented to has exactly this effect. If only the existing black-letter relation between consent, harm and offense were at issue, the discussion of non-consent might stop here.[167]

One might also argue that non-consent on its own always makes a contact wrongful regardless of its harmfulness or offensiveness. This argument, however, begs the question of how consent is defined and, as I will discuss in the next Part, consent is not currently defined in a way that supports its inclusion as an element of battery. However, in addition to the problems created by how consent is defined, there are many factors that make consent itself imperfect and thus limit its ability to actually accomplish its moral magic. The arguments made and examples used in this Article generally assume that consent is properly given. Legal scholars, however, recognize that, even when consent is properly given, there are many limits to individual decision-making that make individual choice imperfect.[168]

People, for example, don't have perfect information,[169] act irrationally in myriad ways[170] and have bounded willpower.[171] More importantly, consent can be grudging due to power imbalances resulting from social norms, social pressure or uneven wealth distribution. Professor Aya Gruber, in an effort to demystify the structure of consent in the context

166 This helps explain some cases where a person consents to contacts.

167 One might also argue that non-consent should be a free-standing basis for determining wrongfulness. In other words, rather than requiring non-consent and either harmful or offensive contact, the black-letter could require non-consent, or harmful or offensive contact. On this reasoning, all unconsented to contacts — whether a tap on the shoulder or a punch in the face — are wrongful simply because they were not consented to. This, of course, begs the question of how consent is defined. As I will discuss in the following Part, the existence of apparent consent negates many of the basic arguments for why consent should be an element. *See infra* Part III.

168 *See* Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV 1471, 1508-10 (1998).

169 *See id.* at 1518-20.

170 *See id.* at 1477.

171 *Id.* at 1479.

of the criminal law, has recently described the complexity of the concept's underlying considerations.[172] One of the main underlying considerations is the recognition that consent does not always happen on a level playing field.[173] This notion reflects the reality of sexual relations in a patriarchal society that condones male aggression; where, for example, a woman may feel pressured to have sex and "give in grudgingly." Power imbalances exist for other reasons as well, such as wealth. It is not the purpose of this Article to consider the proper structure of consent. However, to treat consent as making a contact legally valid in all of these circumstances would ignore the basic issues of fairness raised by uneven wealth and power.

In the context of sexual harassment, the Supreme Court has recently recognized the limitations of consent as the basis for judging the wrongfulness of behavior. According to the Court, the crux of a sexual harassment claim[174] is *not voluntariness* but whether the harassing behavior was actually *welcomed*.[175] Implicit in this analysis is the Court's recognition that consent is not monolithic, and that certain forms of willful sex — perhaps consent that is grudgingly given — may still be wrongful. It is equally applicable when other imbalances of power resulting from uneven distribution of wealth, norms of race, gender and the like, lead us to question the ability to give valid consent generally or whether valid consent was given in any particular situation.

The language of consent in civil battery, however, does not allow for the distinction between consent given in situations of equal or unequal power. While there is concern regarding the influence of fraud and duress, actual consent is defined in terms of voluntariness.[176] Pursuant to this definition, concerns regarding structural power imbalances and gender norms that may make the willingness to receive a contact "unwelcomed" are irrelevant in the discussion of actual consent. Put simply, the sorority pledges' willingness to be "fat shamed" is still willingness. Of even greater concern, however, is the applicability of apparent consent. As we will discuss in the next Part, apparent consent is defined in terms that do not reflect the plaintiff's actions or

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172 Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 417 (2016) (describing the debate over whether consent is a mental state or external performance).

173 *See id.* at 421 ("[I]n a world rife with male hierarchy, women rarely freely choose sex." (internal citations omitted)).

174 Like sexual harassment law, civil battery deals with many more touches than just sexual penetration.

175 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986).

176 *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 13 cmt. g (AM. LAW INST., Tentative Draft No. 4, 2019).

willingness at all,[177] focusing instead solely on the reasonable perceptions of the defendant.[178] By defining apparent consent to include what a reasonable person believes about the communications of another, tort law completely removes any notion of the plaintiff's state of mind from the analysis of consent. That is, the plaintiff's autonomous choice, whether the plaintiff was either willing to engage in sex or welcomed the sexual contact, is simply irrelevant to consideration of apparent consent. In such cases, any suggestion that consent is a measure of the wrongfulness of the underlying act is simply misplaced.

In sum, there are many reasons that the analogy of consent to the no duty rule of primary assumption of the risk fails. In addition, there are a variety of reasons why consent alone does not work its moral magic in the context of battery. If consent were given, even enthusiastically,[179] to some behaviors it would not magically transform undignified or harmful contacts into dignified and non-harmful ones. Separately, as a stand-alone element, consent runs into problems due to the fact that it is defined to include cases where the autonomous choice of the plaintiff is not even considered. Any argument that autonomous choice defines a behavior's wrongness is simply misplaced in such situations. Even if autonomous choice were always relevant, a number of other factors make consent imperfect further negating its use as a tool for determining the rightfulness of any contact.

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[177] It should be noted that, while the first two Restatements emphasize plaintiff's behavior as the source of a reasonable inference of consent, the Restatement Third has explicitly abandoned this requirement. *See* RESTATEMENT (FIRST) OF TORTS § 50 cmt. e (AM. LAW INST. 1934) ("*Apparent assent*. If *the other's* words or conduct are such that a reasonable man would interpret them as expressing a willingness to submit to a particular invasion of any of his interests of personality and the actor so understands them, there is an apparent assent which is as effectual a bar to liability as an actual assent."); *see also* RESTATEMENT (SECOND) OF TORTS § 892 cmt. c (AM. LAW INST. 1979) ("*Apparent consent*. Even when the person concerned does not in fact agree to the conduct of the other, *his words or acts or even his inaction* may manifest a consent that will justify the other in acting in reliance upon them. This is true when the words or acts or silence and inaction, would be understood by a reasonable person as intended to indicate consent and they are in fact so understood by the other."); *see also* RESTATEMENT (THIRD) OF TORTS § 16 note c (AM. LAW INST. 2019) (rejecting the requirement that consent must be based on the words or conduct of the plaintiff).

[178] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16 cmt. b (AM. LAW INST., Tentative Draft No. 4, 2019).

[179] *See supra* notes 102–04 and accompanying text.

III. CONSIDERING OTHER FORMS OF CONSENT

So far, we have focused on the issue of actual consent. As we have discussed, the *Restatement Third* recognizes a number of other forms of consent, including apparent consent, presumed consent[180] and the emergency doctrine.[181]

These various forms of consent are different from actual consent in important ways. Of most relevance to this analysis is the fact that these forms of consent are not based on plaintiff's autonomous choice. Rather, they represent situations where a defendant is found not to be liable because of a reasonable belief that certain contacts are acceptable to the plaintiff.[182] Because these forms of consent do not require plaintiff's autonomous choice, any claim that they somehow work moral magic would be misplaced. The drafters of the *Restatement Third* recognize that almost no caselaw exists regarding consent as an element or affirmative defense when forms other than actual consent are at issue.[183] As the *Restatement Third* states: "There is little case law concerning the burden of proof on forms of consent other than actual consent — apparent consent, presumed consent, substitute consent and the emergency doctrine."[184] There are, however, some jury instructions regarding the emergency doctrine that put the burden of proof on the defendant.[185] This holding implicitly recognizes the limitations to these other forms of consent.

The subjective willingness to accept a contact underlies all arguments made in support of actual non-consent as an element yet, as the *Restatement Third* suggests, these other forms of consent are more focused on the lack of blameworthiness of the defendant than on any true consent of the plaintiff. For example, the main policy rationales supporting apparent consent are described by the *Restatement Third* as fairness and promoting socially beneficial interactions. It states: "As a matter of fairness, actors should ordinarily be permitted to rely upon reasonable appearances. Also, a general practice of recognizing apparent consent facilitates the substantial social benefits of consensual

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[180] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16 (AM. LAW INST., Tentative Draft No. 4, 2019); *see also* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101 reporters' note f (AM. LAW INST., Tentative Draft No. 1, 2015).

[181] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 17 (AM. LAW INST., Tentative Draft No. 4, 2019).

[182] *Id.*

[183] *Id.* § 12 cmt. e.

[184] *Id.* § 1 cmt. f.

[185] *Id.*

interactions."[186] Indeed, the *Restatement Third* has removed any reference to the plaintiff from its definition of apparent consent. Where previous *Restatement*s had required that the defendant's belief be based on the words or conduct of the plaintiff, this requirement has been deleted from the *Restatement Third*.[187] Failure to consider the plaintiff's actual willingness to accept negates the applicability of arguments that support making actual non-consent an element.

First, any reference to non-consent as a "no duty" rule or as the basis for a claim a contact is morally acceptable in this context would be misplaced. That is, even if a broad rule like that announced in *Jewett* could be expansively applied, that rule depends on a plaintiff's "voluntarily entering into a relationship with the defendant . . . being fully aware that the defendant will not be responsible for protecting him or her from known future risks."[188] Similarly, the *volenti* principle — which states "to the willing there is no harm" — becomes irrelevant when the inquiry is no longer about willingness. To the extent these alternatives to actual consent are not conditioned on plaintiff's knowledge and voluntary willingness to accept, they do not provide a basis for a claim of "no duty" or that the contact is morally acceptable.

Claims that these forms of "consent" would be coextensive with the concept of offensiveness would be similarly misplaced. We have described how consent and offensiveness are actually not coextensive.[189] However, even if they were, these other forms of "consent" do not reflect a willingness to accept a contact. In other words, even if the subjective willingness to accept a contact somehow negated that contact's offensiveness in every situation, these other forms of "consent" do not require a subjective willingness to accept a contact. The inquiry changes from one focused on the plaintiff to the beliefs of the defendant; from a discussion of "the plaintiff consented to it" to "I thought the plaintiff agreed to it". This is justification, plain and simple.

When one changes the analysis from what the plaintiff actually wants to what a defendant reasonably thinks she can do, arguments that non-consent be made an element simply become irrelevant. Because consent is based on the plaintiff's autonomous decisions and not the perceptions of others, there is no argument that a contact is morally acceptable because the plaintiff has agreed to it and there is no argument that because the plaintiff agreed to a contact, the contact is not offensive.

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[186] *Id.* § 16 cmt. b.

[187] *Id.* § 12 cmt. a.

[188] 3 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 14:14 (3d ed. 1997).

[189] *See supra* Part II.A.

The fact that other forms of consent are not properly treated as a part of the *prima facie* case of battery, does not directly impact arguments that actual non-consent should be an element. As we have seen, however, arguments that actual non-consent should be an element because it negates the offensiveness of contact or otherwise makes contact not *prima facie* wrongful also fail. In short, the standard arguments that non-consent should be an element of battery are simply misplaced.

IV. ARGUMENTS IN SUPPORT OF CONSENT AS AN AFFIRMATIVE DEFENSE

So far, we have discussed how traditional claims that non-consent — either actual or apparent — should be a part of the *prima facie* case of battery fail. The notion that consent makes acts wrongful is intuitively appealing but, on close analysis, claims that non-consent is determinative of wrongfulness for all contacts, yet alone the majority of contacts that comprise battery, are not supportable. The fact that existing arguments for non-consent as an element fail does not, however, tell the full story. In this Part, the Article provides some of the positive arguments that support the role of consent as an affirmative defense.

A. Doctrinal Complexity and the Role of Offensiveness and Consent

One can imagine the confusion that will be created at trial if consent is treated differently in different situations. While we have discussed already that there is no basis for making actual consent an element for most types of contacts and there is no basis for treating other forms of consent as an element, let's assume, for example, that a court is interested in treating actual consent as an element but all other forms of consent as an affirmative defense. We know that actual consent can be proven either through language or circumstances.[190] Thus, the proof of consent will likely be similar regardless of whether actual or some other form of consent is relevant. In either case a defendant will be able to focus on what the circumstances communicate. The main differences will be in the question being considered; in the case of actual consent the focus will be on the plaintiff's subjective willingness to accept the contact, while in the other cases the focus will be on the defendant's beliefs regarding the plaintiff's willingness to accept a contact. As the *Restatement Third* notes "[i]n many cases strong evidence that a reasonable person in the actor's position would believe that the plaintiff actually consented will also be convincing evidence that the plaintiff did

[190] *See supra* Part I.A.1.

actually consent."[191] Put simply, circumstantial evidence may create a "reasonable belief" regarding the plaintiff's consent, even if it is not strong enough to prove actual willingness.

There is, in essence, a continuum between the reasonable belief of the defendant and the plaintiff's actual consent but the evidence given will remain the same. In such circumstances, any effort to distinguish between the different forms of consent for purposes of instructing the jury would create confusion. The court would have to explain to the jury that, if attempting to determine from the evidence that the plaintiff actually consented, the burden would be on the plaintiff and if the evidence on actual consent was at equipoise, the plaintiff should lose. However, if attempting to consider whether the defendant reasonably believed he or she had plaintiff's consent, the burden is on the defendant and if the evidence is at equipoise the defendant should lose. This type of complexity would undoubtedly create jury confusion. Assuming this to be the case, consent needs to play just one role in the tort of battery. As the *Restatement* summarizes:

> Simplicity would favor treating the burden of proof in the same fashion for all categories of consent. It might be difficult for jurors to apply a test requiring plaintiffs to shoulder the burden with respect to actual consent but requiring defendants to shoulder the burden with respect to apparent consent and other types of consent.[192]

B. Balancing Consent, Offensiveness and Harmfulness

This Article defers to existing caselaw for purposes of defining what types of intentional contacts the law should protect. Battery law has variously been found to protect interests in dignity, autonomy, and physical well-being. In previous Parts we have discussed how autonomy is not best conceived of as an element of battery because of its potential to undermine the wrongfulness of offensive or harmful contacts. We have also discussed the limits of consent as a measure of wrongfulness when power imbalances and other factors that limit individual choice are present.

Of particular concern in our analysis has been the impact of autonomy on battery law's ability to protect dignity. We have seen that,

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[191] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16 cmt. b (AM. LAW INST., Tentative Draft No. 4, 2019).

[192] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. e (AM. LAW INST., Tentative Draft No. 1, 2015).

when the two conflict, autonomy is given a position of privilege in the tort. In our oft-repeated examples, neither a cocktail waitress nor Brandes would recover in tort for the grope or dismemberment they received assuming they have consented to them. Autonomy is given privilege over dignity and harm when non-consent is an element. In this Part we advance the discussion between autonomy and dignity by noting that the proper balance between the two can be achieved simply by making consent an affirmative defense.

The relationship between autonomy and dignity is greatly contested. Some philosophers completely equate dignity with autonomy while others argue autonomy has nothing to do with dignity and, of course, still others suggest that autonomy is a component, but not fully determinative, of dignity.[193] Wading into such murky waters is not the purpose of this Article. For our purposes, we have defined dignity as being worthy of respect as determined by a community standard[194] and we have noted a variety of ways in which dignity and autonomy may diverge. In particular, we have noted that an autonomous choice still may not be dignified when the defendant is using a person for his or her own purposes[195] and where power imbalances exist.[196] While a significant component of dignity is that one has made an autonomous

[193] The concept of dignity in the law is slippery. *See* Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CAL. L. REV. CIRCUIT 107, 109 (2015) (internal citations omitted). While there may be a relationship between autonomy and dignity that relationship is also unclear. *See generally* Mark Piper, *Autonomy: Normative*, INTERNET ENCYCLOPEDIA PHIL., https://www.iep.utm.edu/aut-norm/ (last visited Jan. 9, 2021) [https://perma.cc/5XM9-PD5H] (describing the most common objections leveled against Kantian notions that autonomy underlies dignity. For example, most would argue that the mentally handicapped are owed basic moral respect, even if they do not possess (the capacity for) autonomy. And if human dignity is indexed to the presence of autonomy, it is argued, this would entail, counter-intuitively, that those who are more autonomous have more dignity, and are more worthy of respect. It may also be argued that the capacity for autonomy is a poor ground for human dignity (and respect for persons) for other reasons — for example, because autonomy has no essential connection to morality, or because better grounds are available). While dignity is determined socially, based on the above definitions, one can understand how choices made with perfect autonomy reflect an individual generally not being reduced to mere means, unless the autonomous choice is made subject to a power imbalance or other mechanism that makes one person subject to the will of another.

[194] *See supra* notes 111–18 and accompanying text; *see also* JACOB WEINRIB, HUMAN DIGNITY AND AUTONOMY 9 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3336984 [https://perma.cc/BEL5-S8LL] (noting that a significant difference between autonomy and dignity is that the latter is defined by a community standard).

[195] *See supra* notes 159–61 and accompanying text.

[196] *See supra* notes 174–79 and accompanying text.

choice, if these other factors are relevant, autonomy alone does not negate the dignity interest battery law is supposed to protect.

However, by making consent an affirmative defense, courts can strike the proper balance between autonomy and dignity. That is, when no other factors impacting dignity are relevant, consent alone will be determinative of offensiveness. In this case, plaintiff will not be able to carry the burden of proving the contact is offensive and, assuming no harmfulness, the contact will not be wrongful. In other circumstances, when consent is not dispositive of offensiveness, it can serve as an affirmative defense. In those cases, consent properly is treated as "license;"[197] that is, it abrogates the defendant's responsibility because the plaintiff has waived a right to recover.

Let's consider a few examples that help make this point clear:

Example 1 (other factors impact wrongfulness): Armin, a fraternity brother, requires Berndt, a fraternity pledge, to bend over and be slapped on his buttocks in front of a crowd at a school sporting event. Berndt gives his consent and Armin slaps him, not harming him. Despite the consent, the contact is likely offensive because it is undignified and, perhaps, because it is based in unequal bargaining power. This contact would not be wrongful if non-consent were an element. However, it would be wrongful if consent were an affirmative defense. However, as an affirmative defense, consent denies recovery because Berndt "exchanged" his right not to be contacted wrongly for the benefit of becoming a fraternity brother.

Example 2 (only autonomy/consent impacts wrongfulness): Armin, a college wrestler, grabs Berndt, another wrestler. Berndt yells "stop," but Armin lifts Berndt up and throws him to the wrestling mat. Berndt is not hurt. Assuming no other factors, such as unequal bargaining power, consent alone determines the wrongfulness. Because consent is a significant component of dignity, lack of consent makes the contact offensive and thus wrongful. Non-consent is not necessary as an element to ensure that the behavior is determined to be wrongful.

Example 3 (same as above but consent is given): Armin, a college wrestler, grabs Berndt, another wrestler, during a match to which both have consented. Armin lifts Berndt and throws him to the mat. Berndt is not hurt. This behavior is not wrongful because no other factor is relevant to the determination of offensiveness other than consent. Non-consent is not necessary as an element.[198]

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[197] *See supra* notes 51, 69, 77 and accompanying text.

[198] We need not consider the role of non-consent regarding harmfulness because, as we have discussed, consent does not remove the pain or injury of a harmful contact. *See supra* Part II.B.2.

As these examples show, in situations (examples 2 and 3) where consent alone is determinative of wrongfulness, it is not necessary as an element of battery because it will determine wrongfulness through the element of offensiveness. That is, despite not being an element, consent will influence the analysis of wrongfulness because it is a component of dignity. In cases where lack of consent is the only factor relevant to wrongfulness, lack of consent will make a contact undignified or offensive. However, in situations when consent is not the only factor that makes a contact wrongful, an element of non-consent interferes with the battery analysis (example 1). Thus, as an affirmative defense, consent will work to make behaviors wrongful when it is the only factor to influence wrongfulness and will work as privilege when the contact is otherwise wrongful. Ultimately, the result of a finding of consent will be the same. The difference is in the role played by consent and who bears the burden of proof.

It is rare to say that one solution is doctrinally superior to another. Yet by moving consent to the role of affirmative defense, we allow consent to be exactly what it is — sometimes something that makes a contact acceptable and sometimes not. In cases where it is dispositive, consent will inform wrongfulness not as a separate element of battery (non-consent) but as a central component of offensiveness. In situations where other factors such as dignity, unequal bargaining power and the like make a contact wrongful, consent will still be available as an affirmative defense where the defendant carries the burden of proving the plaintiff has waived his or her right and given the defendant license to contact her.

C. Protecting the Plaintiff's Autonomy

There are two different uses of autonomy that lead to two very different conclusions regarding the role of consent in battery law. The first use, we have already discussed, uses autonomy to determine whether a contact is a legal "wrong." This is the rationale described by *Prosser and Keeton* and the early *Restatement*s for making non-consent an element of the tort. We have already discussed the limitations of that idea; according to this use of autonomy, no matter how heinous a particular contact is, if plaintiff can't show she did not agree to it, it isn't a legal wrong. This use of consent, of course, does not protect plaintiff's autonomy.

The other use of autonomy focuses not on the effect of the plaintiff's autonomous decision regarding the act of a third party but on the protection of the autonomy of the plaintiff. To protect autonomy the law would have to create disincentives to the defendant acting in a way

that impedes plaintiff's autonomy in conditions of uncertainty. Placing the burden of proof of non-consent on the plaintiff does not accomplish this goal.

Before discussing how autonomy works in battery law specifically, let's first consider the autonomy interest and how law generally protects it. Autonomy is generally derived from one's ownership of one's body or property.[199] "Modern cases tend to reflect the view that one's bodily integrity is . . . the core of autonomy and thus will be protected by preventative remedies."[200] The main way in which law protects autonomy is by providing remedies that *deter* third parties from acting in a way that impinges upon one's bodily integrity.[201] In other words, in situations where third parties seek to interfere with one's bodily integrity, the law will act as a deterrent by creating sanctions for interferences that are not consented to.

This is a different vision of autonomy than that advanced by the current inclusion of non-consent as an element. In this vision the law acts as an external cost that deters incursions into autonomy instead of using autonomy to define the wrongfulness of a behavior.

To understand how the autonomy interest will be impacted by battery law, let's take a moment to consider how the different forms of consent to batter will be proven. We have already discussed the fact that there are a number of standards of non-consent that focus on what a reasonable person infers from the facts of any particular situation. Consider a simple example of a sexual contact to a female plaintiff after a night out dancing.[202] Situational factors that will be considered in analyzing consent might include: how close she danced to her partner, the way she danced with her partner and any other number of factors that may "communicate" her willingness to engage in sexual contacts.

Although the standard becomes one of "actual willingness to engage in the contact," the same types of proof can be used in the context of

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[199] JOHN RAWLS, A THEORY OF JUSTICE 358 (Belknap Press of Harv. Univ. Press 1971). These two components can be derived from John Rawls's conception of society as individuals seeking to carry out a "rational plan of life."

[200] *Id.* at 369.

[201] *Id.* at 375.

[202] As we have already discussed, the concept of sexual assault is itself incredibly complex. While women do indeed sexually assault men, the vast majority of such assaults are from men to women. *See* Gerald Walton, *What Rape Culture Says About Masculinity*, CONVERSATION (Oct. 16, 2017, 6:01 PM), https://theconversation.com/what-rape-culture-says-about-masculinity-85513 [https://perma.cc/ZDZ5-WXZB]. For purposes of this discussion, we will thus assume a female plaintiff and male assailant.

apparent consent. Remember from our previous discussion[203] that, no matter what form of consent is sought to be proven, circumstances are relevant. In one situation the circumstances are used to determine whether plaintiff actually consented to the contact, in the other situation, the circumstances inform whether a person reasonably believes the plaintiff consented to the contact.

The use of circumstantial evidence raises similar concerns whether the issue is one of actual consent or apparent consent.

The burden of proof may be dispositive in either situation where there are two, equally plausible readings of the circumstances. Consider the simple act of unbuttoning one button on a shirt: she may have unbuttoned the next button on her shirt because it was hot on the dance floor; he, however, may see her unbuttoning as an "invitation."[204] This is especially the case when the meanings of certain actions are normatively "contested." For example, what does it mean for a woman to agree to come up to a man's apartment; is she agreeing to have sex or is she just interested in talking more? One could easily think of a jury saying both readings of the situation, as well as both meanings are "valid." In such cases, the burden of proof will play a significant role in the disposition of the matter. That is, when non-consent is an element and a behavior carries two "valid" meanings, the plaintiff will find it difficult to prove she did not consent. In these cases, the law does not create the external sanction necessary to protect the plaintiff's autonomy.

There is a broad understanding that the tort of battery should protect autonomy generally.[205] In the case of sexual contact, the drafters of the *Restatement Third* specifically recognize that the law has been moving toward protecting a woman's autonomy.[206] Placing the burden on a plaintiff to prove non-consent in either actual or inferred consent cases

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[203] *See generally* Bergelson, *supra* note 101 (asserting that, even in cases where consent is given, the circumstances matter).

[204] For a non-sexual-contact case, consider a situation where, after cajoling from friends, a child shows up to a pre-determined location for a fight, but his body-language and actual words suggest he is not interested in fighting. *See* Richard v. Mangion, 535 So. 2d 414, 415 (La. Ct. App. 1988).

[205] *See* Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1645 (2012) ("Modern commentators now rationalize offensive battery by recognizing the desire to protect the victim's autonomy . . . ."); Melissa Mortazavi, *Tainted: Food, Identity, and the Search for Dignitary Redress*, 81 BROOK. L. REV. 1463, 1489 (2016) ("[B]attery grounded in offensive touching protects an individual's dignitary right to his or her own physical autonomy.").

[206] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 18 cmt. b (AM. LAW INST., Tentative Draft No. 4, 2019).

stands against this interest. Simply put, the baseline created by non-consent being an element is that "my body is available to you until and unless I can show that I specifically didn't want the contact and that it was unreasonable for you to think so." To protect autonomy the baseline should be: "my body is not available to you unless you can show that I did want the contact or that it was reasonable for you to think so."

In the case of sexual battery, background gender norms exacerbate the situation. Consider how gender roles are constructed in patriarchal society:

> A core dynamic of patriarchal sexuality . . . is the normalizing and sexualizing of male (or masculine) control and dominance over females (or the feminine). This dynamic finds expression in a number of beliefs about what is natural, acceptable, and even desirable in male-female sexual interaction: that the male will be persistent and aggressive, the female often reluctant and passive; that the male is invulnerable, powerful, hard, and commanding, and that women desire such behavior from men; that "real men" are able to get sexual access to women when, where, and how they want it; that sexual intercourse is an act of male conquest; that women are men's sexual objects or possessions; and that men "need" and are entitled to sex.[207]

Ambiguous information will frequently resonate within this construct.

Examples of how ambiguous consent issues can be in the context of sex, are prevalent. Many of these stories specifically reflect the norms of patriarchy. Men treat women as prey, pursuing them until they give in,[208] come up with ways to insinuate women into bed,[209] and gain

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[207] Rebecca Whisnant, *Feminist Perspectives on Rape*, STAN. ENCYCLOPEDIA PHIL. (June 21, 2017), https://plato.stanford.edu/entries/feminism-rape/ [https://perma.cc/CJ2N-A9UM].

[208] *See, e.g.*, Lauren Von Bernuth, *In the Aziz Ansari Story She Said No, but She Didn't Have to. It's Time to Talk About Consent.*, MEDIUM (Jan. 18, 2018), https://medium.com/@LaurenvonB/in-the-aziz-ansari-story-she-said-no-but-she-didnt-have-to-it-s-time-to-talk-about-consent-be2410fe44e6 [https://perma.cc/U37E-46FK].

[209] *See, e.g.*, Catherine Reid, *Sexual Consent Is Not as Simple as Saying 'Yes' – It's Time Young People Understood That*, INDEPENDENT (May 29, 2016), https://www.independent.co.uk/voices/sexual-consent-is-not-as-simple-as-saying-yes-a7052811.html [https://perma.cc/8EBP-TTEY] ("I was on a first date with this guy and we got really really drunk," says Jenny. "He just 'happened' to miss his train, and I didn't feel very comfortable because I felt like it was a deliberate thing. He asked if he could come back to mine. I wasn't very happy about it but I agreed, being only 19 at the time, and we were in the middle of having sex when I sobered up and it just hit me. I'd been that drunk, and it was just happening. I remember

status from their conquests.[210] In such cases the conception of gender roles may lead a jury to conclude that a man reasonably "read" a behavior such as the unbuttoning of a button or willingness to come in and talk as a statement of consent. Similarly, juries may "excuse" men's efforts at manipulation simply as "men being men." Placing the burden on the plaintiff in a context where women are already considered objects of sexual conquest further diminishes a woman's ability to protect her autonomy.

Battery law already balances autonomy with concerns of promoting socially beneficial interactions and protecting "innocent" defendants. One would expect the tap on the shoulder to ask the time, or the random bumping against someone on a subway train to not be actionable because they are neither offensive nor harmful. Thus, battery law already protects defendants when the intentional contacts are generally accepted in society and do not cause physical harm. Consent thus becomes relevant only regarding contacts that cause harm or offense. In these circumstances, the balancing of interests favors placing the burden of proving consent on the defendant who interferes with plaintiff's autonomy.

D. Facilitating Welfare Enhancing Exchanges

Another major role played by consent in the action of battery is to promote welfare-enhancing exchanges by allowing a plaintiff to "waive" his or her legally-protected rights in situations where it would be beneficial to do so.[211] One may waive his or her right to bodily-autonomy in order to have mutually beneficial sexual relations, to receive medical treatment or to play sports. In these cases, consent works when the owner of the right has knowledge of the potential risks

nearly crying and him asking if I was OK, but for some reason I said I was and he continued.").

[210] *See, e.g.*, Peggy Orenstein, *She Didn't Say No. But She Didn't Say Yes.*, CAL. SUNDAY MAG. (Nov. 30, 2017), https://story.californiasunday.com/orenstein-consent [https://perma.cc/N8QJ-382Z] ("There's a hierarchy among guys," he explained, "and it is completely based on sports, looks, who you're friends with, and your sex life — and on those things alone. Personality? Not really. Maybe if you're a funny guy, then you're 'the funny guy,' whatever. So bragging about how many girls I'd hooked up with, joking about it, was definitely a way to gain status.").

[211] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. f (AM. LAW INST. 2000) ("Any agreement by words or conduct that would constitute consent to an intentional tort constitutes a defense . . . .").

associated with his or her waiver[212] and is subjectively willing[213] to encounter those risks in order to receive a benefit of higher value. Of course, the person receiving the waiver must also benefit from it.[214] In some circumstances, liability will not be a deterrent to the defendant acting to receive the benefit because the benefit of the contact outweighs the potential cost. However, uncertainty about liability will make the potential cost of the contact higher than if there were certainty the contact was consented to.

In this situation, the goal of the law should be to ensure that exchanges occur only when the subjective value of the benefits received will outweigh the potential risks to each party. In such a case there are two ways in which the law can ensure the optimal exchange. First, it can create incentives that each party have certainty regarding the desire to enter into an exchange. In this sense, clear communication of consent with great certainty would be the law's goal. When consent is clear, the contact will only happen when both the person being contacted and the person doing the contacting both value the benefits derived from the contact more than the negative consequences of the contact. Second, in situations where there is uncertainty, the default can be set to protect the most valued interest.

The *Restatement* does little to promote certainty. One could attempt to create certainty through a substantive standard. For example, the law could require an explicit statement of consent (the "only 'yes' means 'yes' approach") for consent to be valid. This is not the approach taken by the *Restatement* or the courts. Rather they allow for apparent, as well as actual consent, and both actual and apparent consent can be based on inferences gleaned from the circumstances. One can easily summon a variety of examples where consent is uncertain; unbuttoning an additional button, inviting him up to your apartment. Indeed, as we have discussed, even actual consent can be inferred from circumstances when the meaning of particular behaviors is disputed.[215] Put simply, where proof of consent is circumstantial, and circumstances are often ambiguous, the law does little to promote certainty.

If the law will not promote certainty through the creation of a substantive standard, a second-best alternative would be to ensure that, in conditions of uncertainty, the default position created by the burden

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[212] *See* Simons, *Assumption of Risk and Consent*, *supra* note 7, at 228-30.

[213] The value must be subjectively determined from the "owner" of the right's point of view due to the fact that preferences among individuals vary.

[214] An exchange is pareto superior only in conditions where one party is made better while the other party is, at least, not made worse off.

[215] *See generally* Bergelson, *supra* note 203.

of proof protects the most valued option, and incentivizes the creation of certainty in the least costly manner. In this regard, let us remember that consent is only relevant in situations where a contact is either offensive or harmful. That is, minor, socially acceptable contacts, are not batteries because they are neither harmful nor offensive. Assuming that the majority of individuals tend not to desire offensive or harmful contacts, placing the burden on the defendant to prove consent would promote the most welfare.

Consider a situation where Harry Houdini's consent to a hard punch in the stomach is uncertain.[216] Assume Harry has previously stated that he is willing to be hit in the stomach at any time. In this case, however, Harry is walking through a park looking a bit tired and wan, and a reasonable person might wonder if he is recuperating from an illness. Assuming a general desire not to be hit hard in the stomach among the general populace, should the default be set to protect individuals from such hits when consent is uncertain or to allow for consent? Of course, if the majority of people do not desire hard hits to the stomach, in conditions of uncertainty setting the standard to protect against such contacts promotes the most welfare. That is, when consent is uncertain, placing the burden on defendant will deter behavior that is generally welfare-diminishing.

Of course, as we have noted, this is a default rule. The potential hitter can simply ask Harry if he can hit him to create the certainty needed to overcome the burden of proving consent. Placing the burden of creating certainty with the potential defendant makes sense in the case of intentional torts. The actor, after all, has to intend or be substantially certain a contact will occur. The actor thus has a high degree of certainty of whose autonomy with whom he or she will be interfering. In situations like our Harry example, where there is one potential hittee and any number of potential hitters, placing the burden on Harry will require Harry to communicate to all parties his lack of consent to their potential offensive or harmful contact. Even in a situation where there is only one potential actor — such as a situation where one individual seeks sexual contact with another — it is effective to place the cost on the person who intends the contact. Moreover, social mores[217] support requiring the person seeking to invade the interests of the other to ask

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[216] *See generally* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 13 reporters' note cmt. d (AM. LAW INST., Tentative Draft No. 4, 2019) (noting that some jury instructions require consent only as to the acts or conduct of the defendant while others require consent as to that conduct *and* as to the possible consequences).

[217] Claims that it is "better to ask forgiveness than permission" still recognize that an individual is acting in a way that is harmful or socially unacceptable to the recipient.

for permission. Placing the burden on defendant in such circumstances thus will be the most effective means of creating certainty.

CONCLUSION

One can understand the first-blush intuition behind claims that consent makes all contacts — no matter how harmful or undignified — legally acceptable. As this Article shows, however, the intuition is wrong. Consent may serve to limit the liability of a particular defendant to a particular plaintiff, but it does not necessarily negate the wrongfulness of the defendant's contact. In most cases consent is better thought of as license, where a plaintiff has given away the right to seek compensation for a specific wrongful contact. The difference is of consequence. In the case of consent, burdens of proof matter. But this treatment of consent as an affirmative defense is not instrumental. Rather, it serves to promote the policy concerns underlying battery law while also simplifying complex doctrine. As an affirmative defense, consent in battery law protects plaintiff's autonomy and promotes plaintiff's ability to make exchanges that promote his or her well-being while avoiding potentially confusing doctrinal complexity.