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Introduction

In 2005, a draft of what was then entitled Restatement (Third) Torts: Liability for Physical Harm concluded that there was a "scarcity of judicial opinions that have seriously called into question" the intentional tort doctrines set forth in the 1965 Restatement (Second) of Torts," and that "[a]ccordingly, the Restatement (Second) remains largely authoritative in explaining the details of [those doctrines]."[1] Consequently, the American Law Institute did not intend to include an intentional torts project as part of the Restatement (Third) Torts ("Third Restatement").[2]

This view was not without its dissenters. Kenneth Simons agreed that restating intentional tort doctrine "should not be highest on the agenda of the ALI;"[3] however, he also observed that there were a number of unresolved issues in intentional tort doctrine, which he argued contained far more complexity than the ALI had previously acknowledged.[4] In a selective review of doctrinal developments in battery since the Restatement (Second) of Torts ("Second Restatement"), Professor Simons described several important debates in the case law, including the nature of the required intent (dual intent or single intent) and the difficulty of distinguishing between battery and negligence in medical treatment cases in which the patient alleges that the physician acted without the patient's consent. [5]

Ellen Bublick, on the other hand, urged that the ALI undertake an intentional torts project, not for the purpose of resolving current debates over doctrine, but rather to attempt to create "a coherent whole" [6] with other parts of the Third Restatement by "articulating a principled and useful (if imperfect and impermanent) structure."[7] She then proposed two alternative methods of reorganizing and better integrating parts of intentional tort doctrine: (1) creating a "baseline principle of liability for intentional

[1] Restatement (Third) of Torts: Liab. For Physical Harm § 5 cmt. c (Proposed Final Draft No. 1, 2005).That project was subsequently expanded to include emotional as well as physical harm. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).
[2] See Restatement (Third) of Torts: Liab. For Physical & Emotional Harm xi-xii (2010) (describing content of completed first volume and projected second and final volume), cited in Nancy J. Moore, "Intent and Consent in the Tort of Battery," 61 Amer. U. L. Rev. 1585, 1587 & n. 3 (2012).
[3] Kenneth W. Simons, "A Restatement (Third) of Intentional Torts," 48 Ariz. L. Rev. 1061, 1062 (2006).
[4] See id.
[5] See id. at 1065-1079.
[6] See Ellen M. Bublick, "A Restatement (Third) of Torts: Liability for Intentional Harm to Persons---Thoughts," 44 Wake Forest L. Rev. 1335 (2009).
[7] Id. at 1336.

physical harm"[8] and "pairing it with a rule outlining exceptions,"[9] which would require "[r]ealiging" aspects of intentional torts that protect interests other than physical harm;[10] or (2) maintaining "the historical shape of the trespassory torts"[11] but then seeking to identify "a core of culpable, entitlement-destructive torts that warrant extended liability for defendants and diminished requisites for avoidance by plaintiffs."[12]

Professor Simons had considered the possibility of reorganizing intentional tort doctrine along the lines of the first alternative proposed by Professor Bublick, that is, adopting umbrella rules for intentionally causing physical harm, for intentionally causing emotional harm, and for intentionally causing economic harm.[13] Ultimately, however, he rejected this approach as neither realistic nor justifiable in principle.[14] As for the need to at least identify a core of culpable torts reflecting extended liability, Professor Simons rejected the concept of a "hierarchy of fault,"[15] preferring to recognize intentional torts as "an alternative paradigm of tort doctrine,"[16] which adopts "multiple fault elements [even] within a single tort doctrine."[17] As for "ancillary doctrines" that sometimes "piggy-back" on the identification of a tort as an intentional tort (often simply assuming the hierarchy of fault principle), Professor Simons suggested that the key is to apply the ancillary doctrines in a more "discriminating way."[18] Thus "[t]he simple fact that the defendant has committed an 'intentional' tort should not be conclusive of whether the defendant should pay punitive damages, whether the plaintiff is precluded from obtaining insurance or workers' compensation coverage for the defendant's tort, or whether a liability judgment should be nondischargeable in bankruptcy."[19] In the end, Professor Simons concluded that a new Third Restatement of intentional torts should aim to "accurately depict[] existing doctrine, clarify its concepts, and mak[e] visible the normative commitments that the doctrine embodies."[20]

In 2013, Professor Simons was appointed as a co-reporter of the Restatement of the Law Third Torts: Intentional Torts to Persons ("Intentional Torts").[21] Shortly thereafter he assumed the role of principal reporter.[22] Not surprisingly, the overall approach the project has taken corresponds with Professor Simons's earlier views. Thus the project has maintained the historical division of the specific,

[8] Id. at 1339.
[9] Id. at 1341.
[10] Id. at 1345.
[11] Id. at 1346.
[12] Id. at 1347.
[13] See Simons, supra note 3 at Part III.B
[14] See id. at 1085.
[15] See id. at Part III.C.
[16] Id. at 1097
[17] Id. at 1090.
[18] Id. at 1096.
[19] Id.
[20] Id. at 1102.
[21] He was appointed co-reporter along with Ellen Pryor. See, Restatement (Third) of Torts: Intentional Torts to Persons v (Prelim. Draft No. 1) (Aug. 28, 2013).
[22] Professor Pryor withdrew as co-reporter (presumably when she became associate dean at North Texas Law School in Dallas) and then briefly served as an associate reporter. When she withdrew from that role as well, Jonathan Cardi became an associate reporter to the project. See Restatement (Third) of Torts: Intentional Torts to Persons v (Prelim. Draft No. 3 (Mar. 11, 2016).

individual trespassory torts to persons,[23] clarified many of the existing ambiguities, resolved various doctrinal debates, and explained why one approach is taken over another in view of the competing policy concerns.[24] Moreover, as we might have anticipated, the project purports to reject the hierarchy of fault principle,[25] although the commentary suggests from time to time that certain collateral doctrines, such as an extended scope of liability, should not apply when liability exists without substantial fault.[26] If there are any surprises, it is that the reporters have been so willing to push the boundaries of existing doctrine, recommending extensions that the ALI membership sometimes adopts, despite the almost total lack of existing case law (for example, recognizing an entirely new tort of purposeful infliction of bodily harm, without any bodily contact),[27] and sometimes rejects (for example, defining "offensive contact" to include conduct that is "highly offensive to the other's unusually sensitive sense of personal dignity [when] the actor knows that the contact will be highly offensive to the other").[28]

I agree with what I will characterize as the overall Simons approach. It would have been extraordinarily difficult to radically reorganize the contours of existing tort doctrine in the manner proposed by Professor Bublick, even if limited to attempting for each individual tort to explicitly identify when a tort's status as an intentional tort warrants extended liability. Moreover, the Intentional Torts project has been extraordinarily successful in clarifying existing doctrine in numerous instances.[29] The reporters provide exhaustive explanations of the choices made when there is a split of authority,[30]

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[23] Although the reporters did not expressly address this issue, it was clear from the beginning that they would proceed with the historical division of the intentional torts to persons---battery (harmful and offensive), assault, intentional infliction of emotional harm, and false Imprisonment. See Restatement (Third) of Torts xi (Prelim. Draft No. 1) (Aug. 28, 2013).

[24] See, e.g., infra Notes 78-79 & accompanying text (discussing reporters' resolution of the debate over single versus dual intent in the tort of battery).

[25] See infra 120-22 & accompanying text.

[26] See Restatement of the Law Third Torts: Intentional Torts to Persons, Scope Note at 4 (T.D. No. 1, Apr. 8, 2015).

[27] See Restatement of the Law Third Torts: Intentional Torts to Persons § 104 (T.D. No. 1 (Apr. 8, 2015). This section was approved by the ALI membership at its annual meeting in May 2015. [Chris, Ken says you will know how to cite this.] It has since been renumbered as Section 4. See Restatement of the Law Third Torts: Intentional Torts to Persons xvii (T.D. No. 2) (Mar. 10, 2017).

[28] See Restatement of the Law Third Torts: Intentional Torts to Persons § 3(b) (T.D. No. 2, Mar. 10, 2017). In May 2016 the ALI membership voted to limit that provision to situations where the actor has the purpose of causing such offense. . [Chris, Ken says you will know how to cite this.]

[29] For a brief discussion of the reporters' resolution of the single versus dual intent debate, see infra Part I.A.2. Other instances in which the reporters have been successful in clarifying existing doctrine include: replacing "apprehension" with "anticipation" in the definition of assault to make clear that "fear" is not required, see Restatement of the Law Third Torts: Intentional Torts to Persons §105, cmt c (T.D. No. 1, Apr. 8, 2105);confining transferred intent to battery, assault, and false imprisonment, leaving any extension to trespass to chattels, conversion, and trespass to land to judicial development, see id. at §110, cmt b at 158; and replacing "within boundaries fixed by the actor" with "within a limited area" with respect to the required nature of the confinement in false imprisonment, to clarify that it is enough if the defendant precludes the plaintiff's ability to leave a confined area even if someone or something else created the limits, see Restatement of the Law Third Torts: Intentional Torts to Persons, Reporters' Memorandum xvii (T.D. No. 2, Mar. 10, 2017).

[30] See, e.g., Restatement of the Law Third Torts: Intentional Torts to Persons § 102, cmt b (T.D. No. 1) (Apr. 8, 2015) (extensive discussion of arguments on both sides in single versus dual intent debate); id. at Reporters' Note to § 102, cmt b (extensive discussion of Restatement Second's ambiguous provisions and case law concerning single versus dual intent debate).

thereby making it easy for courts addressing these questions to decide these issues for themselves. Although I disagree with the reporters' recommended resolution of some of these debates---most notably, the decision to adopt single intent rather than dual intent[31]---I commend the reporters for their ability to identify and fully explore a wide range of issues, including providing detailed summaries of the conflicting and often confusing case law and laying out the various policy justifications that underlie the different positions a court might take.

Rather than applaud or critique the specific choices the reporters are making as they articulate both the elements of each prima facie case and the affirmative defenses that might be asserted, what I propose to do in this essay is to discuss two broader concerns I have regarding Intentional Torts. My first concern is that the piecemeal nature of assembling the Third Restatement has made the reporters' task more difficult than it should have been and may ultimately contribute to an overall product---the assembled projects constituting the Third Restatement of Torts---that is significantly flawed in some important respects.[32] My second concern draws on Professor Bublick's fundamental insight that, as a conceptual matter, it is important to try to understand what makes intentional torts different than either negligence or the strict liability torts.[33] Although I agree that this question should not have driven the basic organization of the project, I suggest that the reporters may have too often lost sight of this distinction, thereby making doctrinal decisions that further blur, rather than clarify the boundaries between intentional torts and other torts, primarily negligence.[34]

I. The Piecemeal Process of Assembling the Third Restatement of Torts

Unlike the Second Restatement of Torts ("Second Restatement"), which was conceived as a single project,[35] the ALI always viewed the Third Restatement as a series of separate projects, each with its own reporters. The ALI has completed and published three different segments: Products Liability (1998), Apportionment of Liability (2000), and Liability for Physical and Emotional Harm (2010). The Third Restatement will also include both Intentional Torts and another ongoing project, Liability for Economic Harm.[36] At the time that the earlier projects were adopted, the ALI did not contemplate restating the law of intentional torts.[37] As a result, various sections of the earlier, completed projects, most importantly

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[31] See, e.g., Moore, supra note 2 (defending the dual intent approach).

[32] See infra Part I.

[33] See supra notes 6-12 & accompanying text.

[34] See infra Part II.

[35] See Third Restatement: Products Liability Foreword:

> The Restatement Second was conceived as a single project, with the brilliant and indefatigable William Prosser serving as the sole Reporter. It was eventually completed, after Dean Prosser's resignation, under the reporter-ship of another great torts scholar, John W. Wade. Such a comprehensive engagement with the law of torts is no longer feasible. The subject has become too broad and too intricate to be encompassed in a single project, even one as prolonged as Restatement Second, or by a single directing intelligence, even one as powerful as Bill Prosser's or John Wade's.

[36] An entirely separate project will include sections restating the property torts---trespass to land, trespass to chattels, conversion and nuisance---within a broader restatement of the law of property. See Restatement of the Law Fourth, Property, Projected Overall Table of Contents, Division One: Property Torts at https://www.ali.org/media/filer_public/ff/60/ff60711a-c4f4-4e89-b17f-1b86f1822cba/pages_from_property_pd_2_-_online.pdf.

[37] See supra notes 1-2 & accompanying text.

Liability for Physical and Emotional Harm, have already addressed certain aspects of intentional tort doctrine,[38] thereby causing the ALI to take positions that either limit what the current reporters can comfortably propose or create unfortunate contradictions and inconsistencies that may undermine the clarity and cohesion of the final product.

In addition, even with respect to a single project, Intentional Torts, portions of the project are being reviewed and approved in much smaller chunks than was apparently the case with the Second Restatement.[39] The result is that the ALI membership is voting to approve certain sections without fully understanding the extent to which as yet undrafted sections may impact the decision they are being asked to make.[40] The risks entailed in this aspect of the piecemeal process of review and adoption include not only the presence of unanticipated contradictions and inconsistencies among related sections, but also the possibility that the ALI is now locked into various decisions that it might not have made if it had more of the related sections under current consideration.

A. The Impact of the Already Completed Projects

Although there are sections of Apportionment of Liability that address some aspects of intentional torts,[41] it is Liability for Physical and Emotional Harm that has the greatest significance for Intentional Torts. Conceptually, Liability for Physical and Emotional Harm appears to endorse the view that the separation of intentional and nonintentional torts reflects a hierarchy of fault, a view clearly at odds with the Simons approach in Intentional Torts.[42] More specifically, Liability for Physical and Emotional Harms assumes the dual intent approach to battery (which Intentional Torts rejects) and takes positions that make it difficult for the ALI to consider approving liability for negligent confinement or to fully answer the question of when battery, as opposed to negligence, applies in medical treatment cases involving patient consent.

1. Hierarchy of Fault Versus "Apples and Oranges"[43]

[38] See infra Part I.A. 1-2.

[39] For example, the first draft of the Restatement Second that was presented to the ALI Council contained Sections 1-156, apparently encompassing sections covering the prima facie cases in battery, assault, false imprisonment and intentional infliction of emotional distress and the privileges of consent, self-defense, defense of others, and defense of land or chattels. See ALI Council Meeting Minutes NO. 8017-03 at p. 5 (Dec. 13-15, 1956). The first draft of Intentional Torts presented to the Council contained detailed sections on battery, assault, intentional infliction of emotional distress and transferred intent, with no draft of false imprisonment and only brief portions or sketchy outlines of the various privileges. Restatement Third Torts: Intentional Torts to Persons (C.D. No. 1).

[40] For example, the first draft of Intentional Torts presented to the membership for its approval consisted of 172 pages of detailed material on battery, purposeful infliction of bodily harm, assault, intentional infliction of emotional harm and transferred intent, followed by six pages containing brief sections and sketchy outlines of the various privileges (for discussion only, time permitting). T.D. No. 1 (Apr. 8, 2015).

[41] See Simons, supra note __ at 1064-65 (discussing sections of Apportionment of Liability that provide that: 1) intent to cause harm is one of several factors used to apportion responsibility; 2) intentional tortfeasors are jointly and severally liable for individual injuries they cause (recognizing, however, that there may be "occasional[]" cases of low culpability where joint and several liability should not be applied); and 3) declining to take a position on whether comparative fault should ever reduce recovery against an intentional tortfeasor).

[42] See infra Part I.A

[43] Simons, supra note 3 at 1080.

Although it does not purport to restate the law of intentional torts,[44] Liability for Physical and Emotional Harm maintains the Second Restatement's traditional, tripartite organization of intentional, negligence, and strict liability torts,[45] thereby reinforcing the view that this division reflects a hierarchy of fault.[46] Chapter 1 of Liability for Physical and Emotional Harm defines "intent," "recklessness," and "negligence," in that order. Then, after defining "physical harm," Chapter 2 provides umbrella sections on "Liability for Intentional Physical Harm" and "Liability for Negligence Causing Physical Harm." Chapter 3 then elaborates aspects of "The Negligence Doctrine and Negligence Liability," after which Chapter 4 contains specific provisions for the separate "Strict Liability" torts. Chapters 5 and 6 provide sections on "Factual Cause" and "Scope of Liability," issues that arise with respect to all of the intentional, negligence, and strict liability torts.

Chapter 8 addresses "Liability for Emotional Harm." Here, too, there is a division of sections that appears to reflect a hierarchy of fault. Mirroring the manner in which Chapter Two provides umbrella sections for intentional and negligent physical harm, Chapter 8 provides a single section on "Intentional or Reckless infliction of Emotional Harm," followed by sections on "Negligent Conduct Directly Inflicting Emotional Harm on Another" and "Negligent Infliction of Emotional Harm Resulting from Bodily Harm to a Third Person."

Aside from the organizational manner in which sections move from intention to recklessness to negligence to strict liability, there are other aspects of Liability for Physical and Emotional Harm that

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[44] See supra notes 1-2 & accompanying text.

[45] Divisions One, Two, and Three of the Second Restatement cover, respectively, "Intentional Harms to Persons, Land and Chattels," "Negligence," and "Strict Liability." [R2d TOC]

[46] See, e.g., Alan Calnan, "The Fault(s) in Negligence Law," 25 Quinnipiac L. Rev. 695, 695-696, 747, (2007) (criticizing ALI's refusal in Third Restatement's non-intentional harms projects to review earlier restatements' "tripartite structure," in which "negligence sits at the conceptual midpoint of the liability continuum, separating the subjective fault of intentional torts from the no-fault of strict liability," and arguing against what author describes as the "modern paradigm" of tort law's "continuum of fault"). For other commentators' assumption that modern tort law's distinction between intentional and nonintentional torts reflects a hierarchy of fault, see, e.g., Prosser and Keaton on Torts 37-38 (5th ed. 1984) (explaining transferred intent on the ground that "[b]roader liability in the case of an intentional invasion of another's rights illustrates the general attitude of courts to imposition of greater responsibility upon an intentional wrongdoer"); Philip Halpern, "Intentional Torts and the Restatement," 7 Buffalo L. Rev. 7, 15 (1957-58) (arguing for a prima facie tort of intentionally causing harm without justification on the ground that it should not be necessary to invoke negligence because "[t]he defendant's wrong is much more serious than mere negligence"); Peter Cane, "Justice and Justifications for Tort Liability," 2 Oxford J. legal Stud. 30, 38 (1982) (describing courts' resistance to treating intentional harms as if they were merely negligent, reflecting unwillingness to allow intentional tortfeasors "to get away with being liable only for foreseen or foreseeable consequences and wish to impose liability for all causally direct consequences"); Jake Dear and Steven E. Zipperstein, "Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Consideration," 24 Santa Clara L. Rev. 1, 2 (1984) (rejecting the concept that intentional conduct is "different in kind" from negligence and instead viewing intentional wrongdoing as merely "different in degree" and predicting that the "different levels of culpability inherent in each type of conduct will merely be reflected in the jury's apportionment of fault"); Ellen M. Bublick, "The End Game of Tort Reform: Comparative Apportionment and Intentional Torts," 78 Notre Dame L. Rev. 355, 400 (2003) ("an intentional tortfeasor is, all other things being equal, more blameworthy than a negligent actor"); Richard Epstein, "Intentional Harms," 4. J. Legal Stud. 391 (1975) ("With the intentional infliction of harms, it is not necessary to decide which of two innocent persons should be required to bear the loss in question. The element of intention makes the case an easy one, by allowing the loss to be placed upon the person who willed it, upon the person who is 'bad' in the strongest sense of the word.").

appear to endorse a hierarchy of fault in the division between intentional and nonintentional torts. Consider, for example, the following introductory comment to Section 1 on Intent:

> For a variety of reasons, tort law must distinguish between intentional and nonintentional consequences and harms (including harms that may be negligent, reckless, or without fault). Harms that are tortious if caused intentionally may not be tortious if caused unintentionally; affirmative defenses available in negligence cases may not be available when the underlying tort is intentional; [and] the limitation period may vary depending on whether the tort is one of intent or instead of negligence….[47]

Another comment suggests that the beneficial aspects of characterizing conduct as intentional rather than negligent are not surprising "given that intentional torts are generally deemed considerably more serious than torts of mere negligence."[48]

A hierarchical fault view is also reflected in Liability for Physical and Emotional Harm's dual definition of intent, an extended scope of liability for intentional torts, and the division between physical and emotional harm.[49]

Section 1 defines Intent to include both purposefully and knowingly causing harm, and the separation of the two into different subsections is designed to permit courts to limit liability to the former in some instances, particularly those involving what is elsewhere referred to as "statistical knowledge."[50] The comment explains that "[t]here are obvious differences between the actor who acts with the desire to cause harm and the actor who engages in conduct knowing that harm is substantially certain to follow," and that "[t]here is a clear element of wrongfulness in conduct whose very purpose is to cause harm" that may be lacking in the statistical knowledge cases.[51]

Under Section 33, entitled "Scope of Liability for Intentional and Reckless Tortfeasors,"[a]n actor who intentionally causes harm is subject to liability for that harm even if it was unlikely to occur."[52] That section further provides that "[a]n actor who intentionally or recklessly cause harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently" and that the moral culpability of the actor "as reflected in the reasons for and intent in committing the tortious acts" is one of several factors to consider in determining the scope of liability.[53] By contrast, the section on the scope of liability for negligent conduct makes no provision for

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[47] Liability for Physical and Emotional Harm, §1, cmt a.

[48] Liability for Physical and Emotional Harm, §5, cmt a. The quoted language is being used to explain why it is ironic that "in certain circumstances the plaintiff is worse off if the tort committed against the plaintiff is classified as intentional rather than negligent," including shorter statutes of limitations and greater difficulty in demonstrating that an employee acted within the scope of employment. Id.

[49] After first defining "emotional harm," Chapter 8 provides a section on the intentional or reckless infliction of emotional harm, followed by two sections on the negligent infliction of emotional harm. Id. at §§ 45-48.

[50] The comment refers to cases in which employees attempt to avoid the exclusivity of workers' compensation by characterizing as an intentional tort situations where "the employer has created a very dangerous job-site condition that the employer knows will eventually bring about an employee injury." § 1, cmt a. These cases are often referred to as involving "statistical knowledge." See, e.g., Simons, supra note 3 at 1063 & n. 3.

[51] Liab. For Phys. and Emot. Harm, §1, cmt a.

[52] Id. at §33(a).

[53] Id. at § 33(b).

considering of the degree of moral culpability of an actor in determining the scope of harms for which the negligent actor will be liable.[54]

The division between physical and emotional harm did not originate from a view that one was more serious than the other. Rather, the ALI had initially decided to limit the project to liability for physical harm and only subsequently decided to extend that project to include liability for emotional harm.[55] With respect to the nonintentional torts, the division between physical and emotional harm was almost certainly inevitable, as was the decision to begin with physical harm, which was historically the focus of the torts of both negligence and strict liability. With respect to intentional torts, however, the division in Liability for Physical and Emotional Harm not only reinforces the hierarchy of fault view rejected by much of Intentional Torts,[56] but also creates confusion concerning the nature of the interests being protected by the specific individual torts, which often protect interests other than either physical or emotional harm.[57]

Section 5 on "Liability for Intentional Physical Harm is "[a]n umbrella rule"[58] providing that "[a]n actor who intentionally causes physical harm is subject to liability for that harm."[59] The comment states that this rule of liability "does not replace the doctrines for specific intentional torts, such as battery, assault, false imprisonment, and others," but rather "provides a framework that encompasses many specific torts for intentionally caused physical harm."[60] The comment further provides:

> The general statement of liability in this Section highlights the point that tort law treats the intentional infliction of physical harm differently than it treats the intentional causation of economic loss or the intentional infliction of emotional harm. In cases involving physical harm, proof of intent provides a basic case for liability, although various affirmative defenses may be available. However, as the focus shifts from physical harm to other forms of harm, the intent to cause harm may be an important but not a sufficient condition for liability.

Both the Section 5 text and the quoted commentary are confusing. As Professor Bublick previously observed, there is presently no individual tort addressing the intentional infliction of physical harm, as such.[61] Battery provides liability for the intentional infliction of harmful (or offensive) bodily contact, but in the absence of bodily contact, intentionally causing physical harm to either person or property will result in liability only in negligence, as a form of the unreasonable creation of the risk of physical harm.[62] The ALI has approved the reporters' recommendation that the Third Restatement recognize a new intentional tort for physical harm without bodily contact, although unlike the other (mostly historical) intentional torts, liability will exist only for purposefully causing such harm, not for

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[54] Id. at §29.
[55] See supra note 1.
[56] Although rejected by the reporters in the single versus dual intent debate, hierarchy of fault principles appear in other parts of the Intentional Torts project. See infra Notes 123-126 & accompanying text.
[57] See infra note 210 & accompanying text..
[58] §5, cmt a.
[59] §5.
[60] §5, cmt a.
[61] See Bublick, supra note 6 at 1342-44. The Intentional Torts reporters implicitly acknowledge the lack of an existing tort of purposeful infliction of physical harm, relying on Restatement Second, Torts § 870's "prima facie" tort as a possible predecessor of the new section. See Intentional Torts, T.D. No. 1 at §104, Reporters' Note at a.
[62] See, e.g., Restatement Third Torts: Intentional Torts to Persons, § 104, cmt c (T.D. No. 1)

merely knowing conduct.[63] In this respect, there is ironically *less* liability for the intentional infliction of physical harm (without bodily contact) then there is for the other specific intentional torts such as battery, assault, false imprisonment, and even the intentional infliction of emotional distress.[64]

Because Section 5 is limited to the intentional infliction of physical harm, neither that section nor its comment addresses the wide range of other interests protected by the historic intentional torts. As a result, Section 5 is wildly underinclusive of the common law intentional torts, completely ignoring the common law's traditional protection of such interests as freedom from merely offensive bodily contact, freedom from apprehension of either harmful or offensive bodily contacts, and freedom from physical confinement.[65] Indeed, the Section 5 comment may be affirmatively misleading in its implicit suggestion that the intentional torts protect primarily (or perhaps even exclusively) against either physical, emotional, or economic harm.[66] To the contrary, of the specific torts included in the Intentional Torts project, only harmful battery and the intentional infliction of emotional harm fall within that grouping, whereas the other intentional torts only incidentally secure the interest in avoiding those harms.[67] As a result, it is difficult to see how the Intentional Torts project can fit conceptually within the overall divisions of tort liability announced in Liability for Physical and Emotional Harm.

If Liability for Physical and Emotional Harm had been limited to restating the law of negligence and strict liability, then the Intentional Torts reporters would have been free to recommend an entirely different approach to describing the relationship between the nonintentional and the intentional torts. Here, we would anticipate that Professor Simons would have emphasized what he has previously characterized as the "'apples and oranges'"[68] approach, whereby the intentional torts function in an entirely different manner than the nonintentional torts. According to this approach, "[t]he intentional torts protect distinct and sometimes incommensurable interests, and often protect them in different ways that a single overarching umbrella tort could not possibly express."[69] Intent sometimes plays a necessary but relatively minor role,[70] and the hierarchy of fault may be completely irrelevant.[71] Indeed,

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[63] Id. at § 104.

[64] For a discussion of the ALI's decision to confine the new tort to purposefully causing physical harm, see id. at cmt c.

[65] See, e.g., Simons, supra note 3 at 1085 ("[t]he distinct intentional torts protect distinct and sometimes incommensurable interests").

[66] The comment to this section refers only to the intentional infliction of physical, emotional, and economic harm, thereby completely ignoring the other interests protected by the intentional torts of offensive battery, assault, and false imprisonment. § 5, cmt a ("The general statement of liability in this Section highlights the point that tort law treats the intentional infliction of physical harm differently than it treats the intentional causation of economic loss or the intentional infliction of emotional harm.").

[67] See, e.g., Simons, supra note 3 at 1082 ("false imprisonment is a tort that most directly safeguards the interest in freedom from physical confinement, and only incidentally secures the more general interest in avoiding physical and emotional harm").

[68] Simons, supra note 3 at 1080.

[69] Id. at 1085.

[70] Under the single intent view of battery, an actor need only intend a bodily contact that the actor deems to be neither harmful nor offensive; moreover, the actor may sincerely believe that the victim consented. See Id. at 1081 (even under dual intent, actor may merely intend to mildly offend, but will be liable if unexpected physical harm results).

[71] Id. at 1088.

some intentional torts involve no fault whatsoever.[72] And if there is a general principle underlying this motley collection of specific torts, it is the recognition that they provide an alternative to the "reasonableness paradigm," establishing relatively clear, bright line rules and rejecting any assumption that plaintiffs must act reasonably in demanding that their interests be protected against deliberate intrusion.[73] This general principle is clearly at work throughout much of the commentary in Intentional Torts, but nowhere do the reporters note or discuss the extent to which this principle appears to be at odds with the overall conceptual vision of Liability for Physical and Emotional Harm.

It is difficult to understand how Section 5 was adopted, given that its effort to characterize both the nature of the intentional torts and the relationship between intentional and nonintentional torts---even with respect to physical and emotional harm---is so misguided. Unfortunately, because Section 5 has been both adopted and published, it will likely remain in its present form until a Fourth Restatement project is undertaken,[74] potentially confusing and confounding judges, practicing lawyers, and scholars alike.

2. Single versus Dual Intent in Battery

Section 13 of the Second Restatement provides that a defendant has the requisite intent for harmful battery if the defendant "acts intending to cause a harmful or offensive [bodily] contact" with the plaintiff.[75] Recent cases and commentary have surfaced a debate in interpreting this section.[76] Under the single intent view, it is sufficient that the defendant intends to cause a bodily contact; under

[72] Id. at 1089 (referring to trespass to land or chattels). Professor Simons also characterizes as a form of strict liability the situation where the defendant honestly but mistakenly believes that there are facts that would justify a privilege, such as the common law rule that a merchant could not detain a suspected shoplifter, even if the mistake was reasonable. Id. at 1081. I would not characterize this as strict liability, given that the merchant intentionally confined the shoplifter, which under common law, the merchant had no right to do. As for trespass to land, it is true that this is more appropriately characterized as a strict liability tort, because all that is required is an intentional entry onto land, and the actor's reasonable but mistaken belief that the land belongs to the actor is irrelevant. [cite to R2d). Elsewhere I have argued that this feature of trespass to land is justified by the origin of the tort in providing a method for testing rights of ownership. See Moore, supra note 2 at 1640. The fact that the property torts will now be included in a new restatement of property, rather than in the Third Restatement of Torts, is support for my view that the property torts are qualitatively different from the torts affecting persons. See supra note 36.

[73] See Simons, supra note 3 at 1097-1101.

[74] My understanding is that will there be no effort to amend provisions of Liability for Physical and Emotional Harm that conflict with Intentional Torts, and, even further, that there will be no integration of the separate projects into a single integrated product, thereby making it difficult for judges, lawyers, and academics to access all of the related provisions. See email from Kenneth Simons to Nancy Moore, June 26, 2017 (referring to lack of any current plan to integrate the separate tort projects) (email on file with the author).

[75] Second Restatement §13, In fact, intent is defined there to include not only acting with intent to cause a harmful or offensive contact, but also acting with intent to cause "an imminent apprehension of such a contact." This is but one aspect of the concept of transferred intent, whereby the intent to commit an assault will be sufficient to satisfy the intent requirement in battery, and vice versa. See also Second Restatement §§ 18 (offensive battery), 21 (assault). Intentional Torts combines harmful and offensive battery into a single section and provides a separate section on transferred intent. See § 110 (T.D. No. 1), renumbered as § 10.

[76] See,e.g., Intentional Torts § 102, cmt b & Reporters Note to cmt b. See also, e.g., Moore, supra note 2 at 1597-1604, 1632-1646; Simons, supra note 3 at 1066-1070.

the dual intent view, however, it is also necessary that the defendant intend that the contact cause harm or offense.[77]

For reasons they explain at length in the comment and the reporter's notes,[78] the reporters chose and the ALI membership approved the single intent approach.[79] However, Section 5, as well as other provisions in Liability for Physical and Emotional Harm, almost certainly assume the dual intent approach. Take, for example, the text of Section 5: "An actor who intentionally causes physical harm is subject to liability for that harm."[80] If physical harm includes harmful bodily contact (and the reporters who drafted that section must have thought that it did)[81] then it is impossible to reconcile this text with the single intent view of battery, in which no intent to cause harm of any kind is required.[82]

In addition, the illustrations of harmful battery in Section 1, which defines intent, also reflect the dual intent approach. In Illustration 1, for example, a defendant who discharges his gun unaware that any person is in the vicinity "has not intentionally caused the harm" when the bullet unexpectedly strikes the nearby plaintiff.[83] In illustration 2, the defendant throws a rock at the plaintiff, wanting to hit him, which she does; she has the requisite intent because she "purposely, and hence intentionally, caused this harm."[84] And in Illustration 5, a physician who confuses a dangerous medication with a safe medication has not "intentionally harmed" the patient, who is physically harmed by ingesting the dangerous medication.[85] Given that each of these examples will now be addressed under the single intent approach of Intentional Torts, it is both unfortunate and potentially misleading that the

[77] See Intentional Torts, §203, cmt b at 49 (T.D. No. 1).
[78] See Intentional Torts § 102, cmt b & Reporters Note to cmt b.
[79] See id. at §102 ("The intent required for battery is the intent to cause a contact with the person of another. The actor need not intend to cause harm or offense to the other.").
[80] See supra note 59 & accompanying text.
[81] See, e.g., Michael D. Green and William C. Powers, Jr. "The Restatement Third of Torts: Liability for Physical and Emotional Harm," in ALI, A Concise Restatement of Torts 5 (3d ed. 2013) (reporters for Liability for Physical and Emotional Harm describing the project: "It provides rules for liability to intentional, negligence, and strict liability torts *that result in physical injury*." (Emphasis added.) At time of the drafting and adoption of Section 5, battery was the only intentional tort that expressly addressed physical injury to persons. See supra notes 61-64 and accompanying text.
[82] Not surprisingly, the intent to cause harm is emphasized throughout the Section 5 comment.
[83] Liability for Physical and Emotional Harm, §1, Illustration 1. Of course, there would be no liability here under either dual or single intent because the defendant did not intend any bodily contact at all; nevertheless, the illustration is noteworthy because the assumption appears to be that what is required is *both* an intent to contact and an intent to harm.
[84] Id. at Illustration 2. Again, there would be liability under either dual or single intent here, but the drafters appear to assume that what is required is *both* intent to contact and intent to harm.
[85] Id. at illustration 5. Here the result with respect to the prima facie case in battery would be different under single intent because there was intent to make bodily contact. The Intentional Torts reporters would argue that the patient gave actual consent to such contact, and that consent is abrogated only when the actor knows (but the victim does not) that the substance ingested will be harmful or offensive. See Intentional Torts § 15(c) (providing that actual consent is not "legally effective" when "[t]he person is induced to give consent by a substantial mistake concerning the nature of the invasion of the person's interests or concerning the extent of the expected harm and the mistake is known to the actor or is induced by the actor's affirmative misrepresentation or fraud.") Although the result is the same under either single or dual intent, Illustration 5 clearly presupposes a dual intent view of the intent necessary to establish a prima facie case in battery.

intentional torts sections of Liability for Physical and Emotional Harm so clearly assume a dual intent requirement.

3. Negligent Confinement

Section 35 of the Second Restatement, which provides for liability for intentional confinement, also provides that "[a]n act which is not done with [intent to confine] does not make the actor liable for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm."[86] A Caveat further provides that "The Institute expresses no opinion as to whether the actor may not be subject to liability for conduct which involves an unreasonable risk of causing a conferment *of such duration or character as to make the other's loss of freedom a matter of material value.*"[87] Paralleling Section 35, Section 7 of Intentional Torts similarly provides for liability for intentional confinement;[88] however, instead of a formal Caveat, the comment merely states, with respect to the Second Restatement's approach to nonintentional confinement, that "[g]iven the dearth of caselaw on point, this Restatement also leaves open the question whether tort liability should exist in the absence of either the intent required for wrongful-confinement liability or the bodily harm ordinarily required for negligence liability."[89]

A dearth of case law has not prevented the Intentional Torts reporters from proposing to extend liability in other instances.[90] Moreover, as the Reporters' Notes explain in detail, there are a fair number of cases recognizing liability for negligent confinement resulting in "actual damages" in circumstances where the harm suffered was apparently insufficient for liability under traditional negligence principles.[91] These cases typically involve negligent conduct that results in the plaintiff being confined in jail on erroneous charges.[92] At least one court clearly stated that "[n]egligent conduct which results in a confinement of sufficient consequence to constitute the actual damage required to maintain a negligence action is a sufficient basis for imposing liability….Incarceration of even brief duration has been found sufficient to fulfill the requirement of actual damage."[93] Surely these cases could have been the basis for recommending that the Third Restatement expressly approve liability for conduct falling within the Second Restatement's Caveat.

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[86] Second Restatement, § 35(2). The bracketed reference is to an earlier section that requires that the actor intend to "confine the other or a third person within boundaries fixed by the actor." Id. at § 35(1)(a).
[87] Id. at § 35 Caveat (emphasis added).
[88] Intentional Torts § 7 (T.D. No. 2).
[89] Id. at § 7, cmt e (also noting that "an actor is subject to negligence liability if the actor engages in conduct that creates an unreasonable risk of causing a confinement that results in bodily harm or in other damages of the sort that suffice for a negligence claim."
[90] See, e.g., supra notes 27-28 & accompanying text (recognition of entirely new tort for purposeful infliction of emotional harm and extension of offensive battery liability to contacts that do not offend a reasonable sense of personal dignity).
[91] Intentional Torts § 7, Reporters' Note to cmt e.
[92] See id.
[93] Green v. Donroe, 440 A.2d 973, 975-976 (Conn. 1982) (statement is dictum as court concluded that plaintiff failed to please a negligence claim), discussed in Intentional Torts, § 7,, Reporters' Note, to cmt. e (T.D. No. 2 at p. 45).

Why did the Intentional Torts reporters decline to take a position on these cases involving the negligent infliction of "a confinement of such duration or character as to make the other's loss of freedom a matter of material value"?[94] Perhaps the most obvious answer is that it would have been exceedingly difficult to propose a section creating liability for merely negligent conduct in a restatement project limited to restating the intentional torts. And perhaps the reporters felt comfortable about this decision in the belief that the negligent infliction of a material confinement could be recognized (or rejected) as an aspect of the negligent infliction of emotional harm. But wouldn't it have been useful to courts if the Third Restatement, in at least one of its projects, took a clear position on the Second Restatement's Caveat? And does it makes sense conceptually to subsume a harm such as a material confinement to the realm of emotional harm, when the interest protected under at least the intentional confinement tort is not emotional harm, but rather "[t]he deprivation of the person's freedom of movement, as aspect of a person's fundamental interest in autonomy or freedom of choice"?[95] In any event, the issue was apparently not considered by the reporters for Liability for Physical and Emotional Harm, and the emotional harm sections of that project are not necessarily conducive to recognizing liability for negligent material confinement. If that project were not already concluded and published, then perhaps the Liability for Physical and Emotional Harm reporters would have considered a clearer statement on the continuing relevance of the Second Restatement's Caveat, as well as the possibility of approving liability for negligently causing other harms associated with the historic intentional torts.

4. A Physician's Mistaken Belief that Patient Consented: Is the Potential Liability in Negligence or Battery?

As Professor Simons has previously observed, it is often difficult to distinguish between battery and negligence in medical treatment cases in which a patient alleges that a physician acted without the patient's consent.[96] This is the case when a physician mistakenly believes that the patient consented or when there is an unintentional deviation from the scope of a patient's actual consent.[97] Under the Second Restatement, any substantial deviation from the scope of a patient's actual consent is treated as a battery,[98] although an affirmative defense may be available when the patient's conduct leads the physician to reasonably believe that the patient consents.[99] The Intentional Torts reporters have endorsed this position,[100] except that the draft section on apparent consent does not limit the

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[94] See supra note 87 & accompanying text (quoting Caveat to Second Restatement §35).

[95] Intentional Torts, § 7,, cmt b (T.D. No. 2 at 27). See also supra note 67 & accompanying text (Professor Simons's description of interest protected under false imprisonment).

[96] See Simons, supra note ___ at 1071-1076.

[97] See infra notes 216-220 & accompanying text.

[98] See Second Restatement §892A(2) ("In order to be effective, the consent must be to the particular conduct of the actor, or to substantially the same conduct.") The Intentional Torts reporters propose to continue this position in the Third Restatement. See infra note 100 & accompanying text.

[99] See Second Restatement § 892 (2) ("If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact."); id. at 892(a)(2)(a) "in order to be effective, consent must be "by one who has the capacity to consent or by a person empowered to consent for him.) Not all courts agree that apparent consent must be based on the words or conduct of the plaintiff himself or herself. See Intentional Torts §16, Reporters' Note to cmt c.

[100] See Intentional Torts § 14(a) ("A person's actual consent does not extend to conduct of the actor that is substantially different in nature from the conduct that the person is subjectively willing to permit"). Intentional Torts P.D. No. 4.

affirmative defense to reasonable belief based on a patient's actions, but also includes other circumstances resulting in such apparent consent.[101]

I have previously written in support of jurisdictions that take a different approach, under which a medical practitioner is not liable for battery unless he or she intentionally deviates from the scope of consent given by the patient.[102] This would preclude battery liability in two important contexts: first, where the physician unintentionally operates on a different body part; and second, where the physician mistakenly believes that the patient has given consent for the physician in question to perform a particular procedure. It would not preclude any liability; rather, liability would be in negligence when physical harm results from a physician's unreasonable mistake.[103]

There is much to say about the policy considerations implicated in the choices made by the Intentional Torts reporters in this area, and I will address some of these considerations later in this essay.[104] For now, however, I will limit myself to pointing out that the reporters have been constrained in their ability to fully address the distinction between negligence and battery by the failure of Liability for Physical and Emotional Harm to address professional malpractice, including the role of custom and the typical requirement in medical malpractice negligence cases that the plaintiff establish breach of duty through expert testimony on the standard of care.[105]

The significance of the distinction can be seen by considering an illustration that appears in the comments to several section.[106] In this illustration, a qualified surgeon asks an equally qualified surgeon to perform an operation that the first surgeon is unable perform due to illness.[107] The first surgeon's medical notes reveal that the patient had insisted that only the first surgeon perform that operation, but the second surgeon did not read those notes.[108] Under the reporters' current draft, if failure to read the notes was unreasonable, then there is no apparent consent, and the second surgeon is liable for battery, even if the operation is properly performed.[109] But how is reasonableness to be determined? Is a jury free to decide for itself whether the second surgeon should have read the notes to determine whether he or she was permitted to operate? Or would it be bound, as in a negligence case, by uncontradicted expert testimony that when surgeons are asked to perform such a substitution, they customarily assume

[101] Id. at §16 & cmt c.
[102] See Moore, supra note 2 at Part V.
[103] See id. at 1649 "absent an intentional deviation, the physician's conduct essentially consists of an inadvertent deviation from the standard of conduct required of physicians and therefore should be addressed in a negligence action").
[104] See infra notes 216-220 & accompanying text.
[105] See email from Ken Simons to Nancy J. Moore, Feb. 20, 2017 ("One tricky problem of drafting is that R3 of torts has not covered professional malpractice, so there are limits to how detailed we can be in this restatement in describing the negligent causation of physical harm doctrine.")
[106] The illustration first appears in the comment to the section on the scope of actual consent. See Intentional Torts § 14, Illustration 4. It is then referenced in the comment to the section on apparent consent. See id. at § 16, cmt. d.
[107] Intentional Torts, §14, Illustration 4.
[108] Id.
[109] Battery, like most other intentional torts, does not require any harm, and the plaintiff is always entitled to at least nominal damages. In addition, the patient would be entitled to recover damages for any bad side-effects, even if the surgery is performed properly. See email from ken Simons to Nancy J. Moore, Feb. 20, 2017.

the patient's consent to the substitution.[110] In the absence of Liability for Physical and Emotional Harm addressing the use of expert testimony in medical malpractice cases, it is obviously difficult for the Intentional Torts reporters to answer this question, even though it has important ramifications for liability for battery, as well as for negligence.

B The Impact of Piecemeal Review and Approval of Related Sections of Intentional Torts

The process of producing a restatement is as follows:[111] The reporters draft individual sections; those sections are then reviewed by project Advisers, who are members who have been selected to serve in that advisory role, and by the Members Consultative Group, which consists of all members who request to serve in that capacity. Based on these discussions, the reporters make selected revisions and either bring the sections back to these two groups the following year or submit them to the ALI Council. The reporters then make any revisions suggested or directed by the Council, at which point the drafts may be revised and either brought back to the Advisers and Members Consultative Group for further discussion or submitted to the ALI membership for discussion only or for discussion and approval. When sections are submitted for its approval, the ALI membership discusses each section and then votes it up or down, along with any amendments submitted by individual members. If the vote on a section was close, the reporters may bring it back to the membership, with or without revisions. And based on the discussion, the reporters may agree at the meeting to make minor revisions to individual sections, typically to the comments. When all of the proposed sections of a project have been approved by the membership, the reporters submit a Proposed Final Draft that consists of all prior approved drafts, and this draft is then submitted to the Council and the membership. Although it is possible for minor revisions at this late stage of the process, it is highly unlikely that there will be any substantial amendments to either the text or the comments.

The Intentional Torts project began in 2013. In the spring of 2014, sections on battery, purposeful infliction of bodily harm, assault, intentional (or reckless) infliction of emotional harm and transferred intent were submitted to the membership for discussion only.[112] The draft of these sections was revised and brought back to the ALI membership in the spring of 2015,[113] at which time they were approved. The vote on one section was close, and the reporters revised and submitted it once again at the spring 2017 meeting.[114] The sections on false imprisonment were also submitted for approval, but time constraints prevented their consideration at that meeting. Detailed sections on consent were not submitted to the

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[110] See, e.g., Dan B. Dobbs, The Law of Torts §242 (2000) (professionals bound not by reasonable person standard but by professional customs and standards in the relevant community).

[111] See generally ALI, "How the Institute Works," at https://www.ali.org/about-ali/how-institute-works/.

[112] Intentional Torts, Discussion Draft (Apr. 4, 2014). The document contained no draft of false imprisonment and only tentative and preliminary sections on consent, as well as a very brief mention of privileges other than consent.

[113] Intentional Torts, T.D. No. 1.(Apr. 8, 2015). Certain black-letter provisions and comments referenced consent were submitted for discussion only. Those provisions were directed primarily to the question of which party bears the burden of production and proof on consent.

[114] See Intentional Torts, T.D. No. 2 xix-xx (Reporters' Memorandum addressing § 103(b), now renumbered as § 3(b), on liability for offensive contacts that do not offend a reasonable sense of dignity). The Reporters redrafted that section prior to the annual meeting, and the section was approved as amended. See infra 28 & accompanying text.

advisory groups until March 2017, along with tentative provisions on privileges such as defense of land or personal property.[115]

As this brief overview of the review process reveals, neither the advisory groups nor the ALI membership has had an opportunity to engage in a detailed review of all of the relevant project sections at the time they are asked to comment on or approve individual sections. As a result, it may not be apparent at the time individual sections are being reviewed what the impact might be of later, as-yet-undrafted sections. The risks of this piecemeal process of consideration are that: 1) the ALI takes a position on an issue that it might not have taken if it had fully understood the imspact of later sections; and 2) the ALL adopts provisions that contain unanticipated contradictions or inconsistencies among related sections, which could diminish the coherency of the project as a whole. To illustrate the former, I suggest that the decision to adopt single rather than dual intent might have been different if the ALI had fully understood the extent to which subsequent provisions undermine some of the arguments in favor of the single intent approach. To illustrate the latter, I suggest that the positions being taken on intentional tort liability for omissions, rather than actions, are inconsistent and reflect the lack of a clear, consistent and coherent vision of the difference between the intentional torts and the tort of negligence.

1. Single Versus Dual Intent: Revisited

Under the single intent view, a battery is committed if an actor intends to cause a bodily contact and that contact is either harmful or offensive, whereas under the dual intent view, the actor must intend both the bodily contact and that the contact be harmful or offensive.[116] One of the arguments in favor of dual intent is that intentional tort liability should be reserved for actors who are generally more culpable than merely negligent actors.[117] An actor who intends to harm or offend is more culpable than an actor who has no such intent. Indeed, an actor who intends a bodily contact without either desiring or knowing that such contact will harm or offend is barely culpable, given that intent is subjective, unlike negligence, where actors are held to the standard of the objective, reasonable person in similar circumstances.[118]

As the reporters recognize, the circumstance that presents the greatest test for the single intent view is when an intended contact that is neither offensive nor likely to result in bodily harm unexpectedly results in serious bodily injury.[119] Given the extremely low risk of such harm, the actor would not be liable in negligence,[120] but because she intended a bodily contact, she may now be liable for the intentional tort of battery, with potentially substantial damage, as well as the practical effects of characterizing a tort as intentional, including an extended scope of liability and the inability to raise a comparative negligence defense.[121] The reporters defend this result by noting that "insofar as the single-

[115] See Intentional Torts Preliminary Draft No. 4 (Mar. 6, 2017).
[116] See supra Note 75 & accompanying text.
[117] See, e.g., Intentional Torts, §102 cmt b at 50 (T.D. No. 1); Moore, supra note 2 at 1632.
[118] The reporters describe the single-intent approach as "imposing a modest degree of strict liability." Intentional Torts §102 cmt b at 50 (T.D. No. 1).
[119] Id. at 57-58.
[120] Id.at 58.
[121] See infra note 196 & accompanying text.

intent rule is meant to afford very strong protection to a person's right of bodily autonomy, liability even in this class of cases is justifiable."[122]

This response is, of course, a rejection of the hierarchy of fault principle in favor of the "apples and oranges" approach. But what may not have been fully apparent when this section was being considered was the extent to which the reporters draw on hierarchy of fault principles elsewhere in Intentional Torts. A prominent example is in Section 7, the basic provision on false imprisonment. Section 7 generally requires that the plaintiff be aware that he or she is being confined, but does not require such awareness if the plaintiff "suffers bodily harm as a result of the confinement."[123] In Comment h, the reporters recognize that when the plaintiff suffers bodily harm, liability under false imprisonment might not be necessary "because negligence liability is arguably a satisfactory alternative."[124] They nevertheless justify the provision on the ground that "intentional-tort liability, rather than negligence liability, is proper in such cases because an actor who intentionally confines another and thus causes bodily harm is typically more culpable than an actor who merely negligently causes bodily harm."[125] More specifically, the reporters conclude that "by classifying conduct as an intentional tort, a jurisdiction may wish to trigger certain doctrinal consequences, such as ignoring the plaintiff's own fault or expanding the scope of liability" and that "[f]alse imprisonment, like battery and assault, is an intentional tort for which such consequences are ordinarily appropriate."[126]

Another argument in favor of single intent is that it better explains the result in medical treatment cases where a physician mistakenly believes that the patient has consented to the treatment. Courts routinely find the intent element satisfied in such cases, and the reporters argue that dual intent does not adequately explain such cases because the physician intends to benefit rather than harm the patient, and if the physician believes the patient has consented, then the physician does not intend to offend.[127] Dual intent proponents, such as myself, argue in response that most medical treatment cases do involve an intent to harm because the physician (typically a surgeon) understands that surgical treatment necessarily requires bodily harm, even if the ultimate result is intended to be beneficial.[128] In the alternative, we argue that courts should analyze the prima facie element of intent separately from the privilege of apparent consent. In doing so, they should find that the treating physician understands that surgery and other invasive treatments without the patient's consent will constitute an offensive contact. They can then separately address whether the physician is nevertheless privileged to act because he or she reasonably believes that the patient consents to the treatment.[129] The reporters'

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[122] Id.

[123] Intentional Torts § 7(c).

[124] Id. at § 7, cmt h, at 34.

[125] Id.

[126] Id. Section 7 was not before the ALI membership in the spring of 2015 when it approved the reporters' recommendation to endorse single rather than dual intent; however, Section 104---creating an entirely new tort for the purposeful infliction of physical harm (absent bodily contact) was approved by the membership at that time. See Intentional Torts §§102, 110 (T.D. No. 1, Apr. 8, 2015). The comment to Section 104 also invoked hierarchy of fault reasoning to justify creating a new intentional tort rather than relying on the negligence action to cover such harm. See id. at §104, cmt. c. Arguably this comment should have alerted the membership to the inconsistency in rejecting hierarchy of fault principles in order to endorse single over dual intent, although it may have been unclear to what extent other parts of the Intentional Torts project would rely on such principles.

[127] See Intentional Torts, §102 cmt b at 53-54 (T.D. No. 1); see also Simons, supra note 2 at 1067-1070..

[128] See Moore, supra note ___, at 1619-1620.

[129] Id. at 1620, n. 209.

response to this argument is to reject it as being what they elsewhere refer to as "counterfactual."[130] Thus they argue that "this conditional conception of intent seems artificial. If such an actor actually believes (even unreasonably) that the other consents to a particular contact, then it seems a fiction to say that the actor nevertheless actually knows or believes that the other will be offended by the contact."[131]

Having rejected "counterfactual" intent for purposes of choosing single over dual intent, the reporters nevertheless subsequently endorsed a similar concept of "counterfactual consent" in a newly crafted privilege entitled "Implied-in-Law Consent."[132] Section 17 provides that an actor is privileged to engage in what would otherwise be tortious intentional conduct if "most individuals…in the person's circumstances would actually consent to the actor's conduct" and, in addition, the invasion is "de minimis" or "the actor reasonably believes that his or her conduct is necessary to further public policies or private interests that substantially outweigh the gravity of the invasion."[133] The reporters explain that this section requires that most persons would consent to such a contact because "[t]his feature helps assure that §17(a) rests on a consensual rationale, *albeit a counterfactual one*."[134] They go on to note that "[c]ourts regularly employ an analogous counterfactual rationale" in other contexts, such as "determining the contours of a medical practitioner's duty to obtain informed consent."[135] The embrace of "counterfactual" consent in this context is clearly at odds with its rejection in the context of dual intent in medical treatment cases.[136]

If Section 17 had been drafted and reviewed at the same time as the initial battery sections, the advisory groups might also have considered another implication of the decision to choose single over dual intent. Section 17 has no counterpart in the Second Restatement, nor is anything like it clearly articulated in case law.[137] Nevertheless, the reporters deemed the new "implied-in-law" privilege necessary to preclude intentional-tort liability in a small number of cases involving "socially justifiable minor contacts, such as pushing against pedestrians or bus or subway passengers in crowded conditions, or requiring people evacuating a building during a fire alarm to move with such haste that they must touch other while exiting."[138] Such a provision would not have been necessary if the reporters had endorsed dual intent, because in situations involving "justifiable minor contacts," the actor typically does not intend to either harm or offend.[139] At the time the single-versus-dual intent was before them,

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[130] See infra notes 132-36 & accompanying text.

[131] Section 102, Reporter's Note at 67.

[132] Intentional Torts §17 (Prelim. Draft No. 4 (Mar. 6, 2017). The existence of such a privilege was noted in earlier drafts, see, e.g., infra note 141 & accompanying text), but this is the first draft to provide a detailed account of how the privilege is established.

[133] Id.

[134] Id. at cmt b, p. 150 (emphasis added).

[135] Id.

[136] The reporters and I agree that there is case law supporting both single and dual intent debate. Thus the primary basis for resolving the dispute should be a combination of policy rationales and determining which approach best coheres with the rest of tort law. I will not explain here why I believe dual intent better satisfies both of these concerns, but will leave that for another time.

[137] See Intentional Torts § 17, cmt a

[138] Id. at cmt b.

[139] Exception where plaintiff has expressly refused consent, as when he or she shouts "Keep your distance! Do not touch me" when standing in a crowded bus. Under the Second Restatement, the actor would not have intended offense even then, because "offense" was defined as offending a "reasonable sense of personal dignity" and did

the advisory groups were informed that such cases would be addressed by an implied-in-law privilege; however, they were not informed that this was an entirely new privilege[140] nor were they confronted with the difficulties created in interpreting and applying the actual requirements of such a privilege.[141] For example, what constitutes a "de minimus" invasion of the plaintiff's interests? And when does an actor "reasonably believe that his or her conduct is necessary to further public policies or private interests that substantially outweigh the gravity of the invasion"? Are these questions for the court or for juries to decide?[142] Such vague standards seem antithetical to the use of bright-line rules that typically distinguish the intentional torts from negligence,[143] and it is questionable whether the ALI would have approved the adoption of this section when there would be no need for it if the dual intent standard had been adopted.

Finally, neither the advisory groups nor the ALI membership were clearly confronted with the possible use of comparative negligence in at least some battery cases. Historically, neither contributory nor comparative negligence was a recognized defense to an intentional tort. The Apportionment of Liability project did not take a position on the use of comparative negligence in intentional torts cases, although it did suggest that, unlike the "image of a mugger who claims that the victim was negligent for being out too late at night or for wearing too much jewelry," it might be justified to permit a comparative negligence defense when "a defendant who otherwise batters a plaintiff honestly but unreasonably believes the conduct was privileged or that it was not harmful or offensive."[144]

At the time of the single-versus-dual intent debate, the possibility of such a limited use of the comparative negligence defense was briefly mentioned in the Reporter's Scope Note, but it appeared only at the end of a lengthy discussion of whether negligence and intentional-tort claims are mutually exclusive.[145] The possible use of a comparative negligence defense does not reappear in the discussion of single versus dual intent,[146] and it is unlikely that the implications of a section on a defense of comparative negligence were considered in the debate over the issue. The reporters have not drafted a

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not include such ultrasensitive feelings. The ALI membership recently approved a new provision of the Third Restatement that defines "offense" to include ultrasensitive plaintiffs, if the actor made the contact with the very purpose of causing offense, thereby incorporating an element of dual intent in battery. It is unclear whether an actor who purposefully offends an ultrasensitive plaintiff can take advantage of the "implied-in-law" consent provision.

[140] See supra note 141 & accompanying text.

[141] See, e.g., Intentional Torts T.D. No. 1 at 176 (Section 117, entitled "Implied-in-Law Consent [or 'Constructive' Consent] described as follows: "[This category includes socially justifiable contacts, such as pushing against pedestrians or bus or subway passengers in crowded conditions, or requiring people evacuating a building during a fire alarm to move with such haste that they touch each other while existing.'")

[142] Juries routinely determine the reasonableness of an actor's conduct in negligence cases and in assessing such privileges as self-defense and defense of property; however, in neither of these instances are juries asked to assess when conduct is justified as a matter of public policy or to determine when an actor's private (undefined) interests are substantially outweighed by the gravity of invasions of personal dignity. Cf. Intentional Torts §3 T.D. No. 2 (liability for contact that offends a plaintiff with an unusually sensitive sense of personal dignity will not be imposed if the court determines that imposing liability would be unduly burdensome or violate public policy).

[143] See infra notes 213-15 & accompanying text.

[144] Restatement Third of Torts: Apportionment of Liability, §1, cmt. c, Reporter's Note at 13 (1999)..

[145] See Intentional Torts Scope Note too Persons Project at 6 (T.D. No. 1).

[146] See id. at §102, cmt. b.

section on comparative negligence,[147] although they are contemplating doing so.[148] Given the low culpability of a single intent actor,[149] the adoption of such a provision may be compelling, but the difficulties entailed in its adoption have yet to be considered. These difficulties—primarily how to determine when a victim's fault should be taken into account[150]---would be significantly lessened under a dual intent requirement, as there would be less of a perceived need to ameliorate the potentially harsh consequences for an actor who intends to harm or offend.

2. Liability for Omissions

Sections 1 and 5 provide that for the intentional torts of battery and assault, an actor must engage in "affirmative conduct."[151] Section 7, however, provides that for the intentional tort of false imprisonment, an actor must either engage in "affirmative conduct" or "breach[] a duty to release the other from such a confinement."[152] Section 10 provides that "[a]n actor who purposefully or knowingly instigates, or participates substantially in, the commission of an intentional tort of battery,…assault…or false imprisonment is subject to liability for that tort, even if the actor's personal conduct is not independently tortious."[153] Comment b to Section 10 addresses omissions, stating that "[i]n addition to affirmative acts, nonfeasance may also constitute participation, where the defendant had a duty to warn, protect, or rescue the plaintiff."[154]

Comment c to Section 1 explains the requirement of an affirmative act for liability in both assault and battery. After conceding that it is possible to "imagine cases in which battery or assault liability for an omission to rescue or protect another seems defensible"---as when a prison guard out of hostility toward one inmate deliberately fails to intervene to prevent that inmate from being severely beaten by another inmate---the comment nevertheless rejects such liability on the grounds that "judicial support for such liability is sparse" and that "allowing battery or assault liability for an omission whenever a person has duty to act and has the requisite intent for the tort would raise concerns about unduly broad liability."[155] The comment acknowledges that the draft section on false imprisonment subjects an actor to liability if the "actor intentionally breaches a duty to rescue a person from confinement," but provides no explanation for recognizing omissions liability in the case of false

[147] Indeed, none of the drafts signal an intention to draft such a provision. The most recent draft considered by the advisory groups sets forth detailed consent provisions and indicates several other "privileges" to be drafted, such as defense of land or personal property. See Prelim. Draft No. 4. Comparative negligence would operate as an affirmative defense that would reduce but not necessarily eliminate the plaintiff's recovery, unlike the privileges, which if satisfied, defeat the plaintiff's claim.

[148] See email from Jonathan Cardi to Nancy J. Moore dated Apr. 11, 2017 (on file with author)..

[149] See supra note 75 & accompanying text.

[150] See generally, e.g., Ellen M. Bublick, The End Game of Tort Reform: Comparative Apportionment and Intentional Torts, 78 Notre Dame L. Rev. 355 (2003); Gail D. Hollister, Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault, 46 Vand. L. Rev. 121 (1993); Dear & Zipperstein, supra note 46; William J. McNichols, Should Comparative Responsibility Ever Apply to Intentional Torts, a37 Okla. L. Rev. 641 (1984).

[151] Intentional Torts § 1(b) (battery); § 5(b) T.D. No. 2, Appendix C

[152] Intentional torts § 7(b) T.D. No. 2.

[153] Intentional Torts § 10 Prelim. Draft No. 4. (This section has not been approved by the Council for presentation to the membership; therefore, it may be substantially revised before it is presented for adoption.)

[154] Id. at cmt b.

[155] Intentional Torts T.D. No. 1 § 101 cmt c.

imprisonment but not battery or assault.[156] Moreover, the comment makes no mention of the presumably-not-yet-drafted Section 10,[157] including the fact that under that section an actor can be found liable for participation in a battery or assault based on nonfeasance as well as misfeasance, even though the actor could not be found liable under Section 1, because of the lack of an affirmative act.[158]

Sparse case law support has not proved to be a consistent obstacle to recognizing liability elsewhere in Intentional Torts. Most prominently, despite the lack of significant case law support, the ALI is recognizing an entirely new intentional tort for purposeful infliction of bodily harm (absent bodily contact)[159] and is extending liability for offensive battery to include some bodily contacts that would not offend a reasonable sense of personal dignity.[160] Thus, further explanation is required for the failure to harmonize the battery and assault treatment of omissions with the treatment of omissions liability under false imprisonment and participation.

As noted above, the alternative explanation is a concern for "unduly broad liability," a concern rejected with respect to other liability-expanding provisions, including the recognition of single intent.[161] Moreover, in rejecting omissions liability for battery and assault, the reporters rely on yet another justification that they elsewhere reject---that "liability for negligence or for intentional infliction of emotional harm is ordinarily adequate to address instances in which an actor's omission reflects sufficient fault to warrant tort liability."[162]

The reporters could easily have reached the same conclusion in considering omissions liability for both false imprisonment and participation. Liability in negligence typically requires physical harm, thus limiting the scope of an actor's liability; however, this limitation could have been justified as necessary to avoid precisely the "unduly broad liability" that was a primary reason for rejecting omissions liability in battery and assault.[163] Moreover, liability in negligence is also limited by the requirement that for omissions liability, the actor must be subject to an affirmative duty to act, which exists primarily as a result of voluntary undertakings, special relationships, and situations where the actor's affirmative conduct created the risk to the plaintiff.[164] Indeed, this is precisely what the reporters recommend for omissions liability in false imprisonment, where the duty to act affirmatively is to be

[156] See id. See also id. at Reporters' Note to cmt c (providing extensive discussion of cases without any effort to explain why omissions are sufficient for liability in false imprisonment but not battery).
[157] Section 10 first appeared in Preliminary Draft No. 4, dated March 6, 2017.
[158] See supra note 151 & accompanying text.
[159] See supra note 27 & accompanying text.
[160] See supra note 28 & accompanying text.
[161] As the reporters explain, in most instances the result will not differ depending on whether single or dual intent is adopted; however, they acknowledge that single intent broadens liability in some cases involving young children and adults with mental disabilities, as well as situations involving nonconsensual contacts that cause bodily harm but not offense. See T.D. No. 1 at 56-58. The reporters and I disagree on the impact of the debate on such cases as medical batteries and practical jokes and horseplay . Compare id. at 53-55 with Moore, supra note 2, at 1619-1626.
[162] TD 1 at 18. The reporters reject the adequacy of an action in negligence in their discussion of the need to recognize a new intentional tort of purposeful infliction of bodily harm rather than rely on liability in negligence. See supra note 126.
[163] See supra note 161 & accompanying text.
[164] See Liability for Physical and Emotional Harm, Ch. 11 (Affirmative Duties).

found not in Intentional Torts, but rather in other sources of law, including case law recognizing such a duty in negligence law.[165]

The reporters might respond that they were simply following similar positions taken by the ALI in the Second Restatement. Aside from the fact that the reporters have rejected Second Restatement provisions in other instances,[166] it is noteworthy that the Intentional Torts sections on false imprisonment and participation do not simply mirror equivalent positions in the Second Restatement but rather expand an actor's liability for omissions in ways that more closely resemble liability for negligence rather than liability for an intentional tort.

Consider, for example, Section 45 of the Second Restatement, which provides with respect to false imprisonment that "[i]f an actor is under a duty to release the other from confinement, or to aid in such release by providing a means of escape, his *refusal* to do so with the intention of confining the other is a sufficient act of confinement to make him subject to liability."[167] Section 7 of Intentional Torts differs from Section 45 in several important respects. First, it does not expressly limit the actor's liability to a "refusal" to release, but rather provides for liability whenever an actor "breaches a duty" to release with the requisite intent.[168] Second, unlike Section 45, which takes no position on when a duty to release a person from confinement will be found,[169] Comment f to Section 7 provides that such a duty can be found in "general tort-law principles" and that the sections providing for omissions liability in negligence presumptively apply, [170] thereby creating a "duty to take reasonable steps to release a person from confinement" whenever negligence law recognizes a duty "to use reasonable care to protect a person from physical injury."[171]

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[165] See, e.g. T.D. No 2 at §7, cmt f (false imprisonment); The reporters do not discuss the legal source of a duty to "warn, protect, or rescue the plaintiff" as the basis for participation liability, see P.D. NO. 4 at §10, cmt b; however, presumably they mean to refer to the same sources of a legal duty as in false imprisonment..

[166] For example, with respect to false imprisonment by submission to an assertion of legal authority, the reporters recommend a change to the Second Restatement's requirement that the plaintiff either believe that the authority is valid "or is in doubt as to its validity," whereby it will now be sufficient if "the plaintiff submits to custody because the other believers that he or she might have a duty to comply with the assertion of authority *or might face adverse legal consequences for failure to comply*." P.D. No. 4 at §9, Reporters' Note to cmt a (emphasis added).

[167] Restatement Second §45 (emphasis added).

[168] Intentional Torts, T.D. No. 2, § 7. The reporters acknowledge that some courts limit omission liability to a refusal or knowing failure to perform the legal duty to release. See id. at 51. TD #1 at 51 (discussing "Colorado's narrower duty to release from confinement than this Section recognizes"). The reporters suggest that there is actually no substantial difference between the two positions, citing a Pennsylvania jury instruction; however, that Pennsylvania instruction limits liability to one who "'*refuses* to do what is reasonable under the circumstances to do.'" Id. at 47 (emphasis added). Section 7 is not so limited. Professor Simons concedes that Section 45 imposes liability when the defendant merely negligently breaches a duty to release. See email from Kenneth Simons to Nancy J. Moore dated.June 25, 2016 (on file with author).

[169] See Intentional Torts, T.D. No. 2 at §7, Reporters' Note to cmt f (stating that contrary to Section 45, where Comment b provided that "[it] is not within the scope of this Restatement to state when the duty to aid another in relase from confinement may arise," Section 7 "offers greater guidance by presuming that the affirmative duties specified in [Liability for Physical and Emotional Harm" apply).

[170] Intentional Torts, P.D. No. 4 at § 7, cmt f (including a caveat that such a presumption is "subject to appropriate modifications in light of the difference in context between an affirmative duty to protect a person from the risk of physical harm and an affirmative duty to release a person from confinement").

[171] Id.

It is one thing to recognize intentional tort liability for a deliberate, purposeful refusal to release a person from confinement. It is quite another to recognize intentional tort liability for an actor who, knowing that failure to release will result in continuing confinement,[172] fails to take reasonable steps to effectuate the plaintiff's release. Consider, for example, a case discussed in the Reporter's Note to a comment comparing false imprisonment and negligence liability.[173] A passenger confined in an airplane during a severe storm sued for false imprisonment, alleging that the confinement was the result of a lack of adequate ground staff. The court dismissed the claim, citing the lack of evidence of a purpose to confine or even knowledge that confinement was substantially certain to follow. Here the plaintiff was alleging a failure to take adequate precautions to prevent the confinement in the first place, which is a classic instance of merely negligent imprisonment. But what if the evidence supported a failure to take reasonable precautions *after* it was clear that the passengers were confined in the aircraft as a result of the snowstorm? Perhaps the defendants could have called in extra workers or used some equipment that they didn't think to use. Under Section 7, it would appear that the defendants could now be held liable for false imprisonment for failure to take reasonable steps to release the passengers from confinement; that is, for breaching a duty established under negligence law to require reasonable care to avoid physical harm, but now being used to establish intentional tort liability regardless of the low probability of physical harm as a result of the temporary confinement. The reporters provide no justification for the differing results under false imprisonment depending on the timing of when the defendant failed to exercise reasonable care to avoid the confinement.[174]

As for Section 10 on instigation and participation, the reporters state that "[t]his Section replaces Restatement Second, Torts § 45A and §§ 876 and 877(a) and (c), insofar as they apply to battery, purposeful infliction of harm, assault, intentional infliction of emotional harm, and false imprisonment."[175] Section 45A provides that "[o]ne who instigates or participates in the unlawful

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[172] The reporters state that the difference between the narrower "refusal" and the broader provision in Section 7 is "often unimportant because an omitting actor often will lack the intention to confine the other." Id. at Reporters' Note to § 7, cmt. f (47). However, such intention will be present whenever the actor knows with substantial certainty that a confinement of which the actor is aware will continue unless the actor is able to release the plaintiff. See Restatement Third: Liability for Phys. and Emot. Harm § 1. The cases with which I am concerned involve a defendant who attempts unsuccessfully to release a plaintiff and who might be deemed negligent in making that attempt. See infra note2 173-74 & accompanying text.

[173] See Vumbaca v. Terminal One Group Ass'n L.P., 859 F. Supp.2d 343 (E.D.N.Y. 2012), discussed in T.D. No. 2, Reporters Note to § 7, cmt. e, p. 46.

[174] In an email exchange with Professor Simons, I raised this precise point. He responded, first that he believed "sec 45 probably did mean to impose liability when D merely negligently breaches a duty to release, while knowing that P is confined," citing comment b, which states that "'[t]he actor is not required to do more than is reasonable under the circumstances,'" although he conceded that one illustration was unclear and the others involved "a stronger form of 'refusal'." See email from Kenneth Simons to Nancy Moore dated Jun. 25, 2016 (on file with author). He also noted that "the case law is pretty clear that [liability] attaches when a court notifies prison officials to release P but due to negligence, the officials do not communicate the order to the relevant persons and secure P's release." Id. In my opinion, cases involving negligence on the part of prison officials to release a prisoner are not relevant because they involve the termination of a privilege to intentionally confine, not a failure to release absent an initial intent to confine. As for comment b to Section 45 of the Second Restatement, in my view there is a substantial difference between a *refusal* to do what is reasonable under the circumstances (which is what I believe the comment references) and negligently carrying out an effort to release, which is within the scope of Section 7. In any event, even if there is some authority for the reporters' position, this authority alone does not explain why there is a difference in result depending on the timing of the actor's negligence.

[175] Intentional Torts, P.D. No. 4 at § 10, cmt a.

confinement of another is subject to liability to the other for false imprisonment."[176] Neither the text nor the comment makes any reference to omissions liability. Indeed, "instigation" is defined as "words or acts which direct, request, invite or encourage the false imprisonment itself,"[177] and "participation" is defined to include "[o]ne who takes part in a false imprisonment, by aiding another to make it."[178] None of the illustrations involves an omission as the basis for liability under this section.[179] Section 876 concerns "Persons Acting in Concert."[180] Liability under this section requires either; (a) the doing of "a tortious act in concert with [another] or pursuant to a common design with [the other]; (b) giving "substantial assistance or encouragement to [another}", knowing "that the other's conduct constitutes a breach of duty"; or (c) giving "substantial assistance to [an]other in accomplishing a tortious result" when "his own conduct, separately considered, constitutes a breach of duty to the third person."[181] Once again, nothing in the comment or the illustration suggests liability for mere omissions under this section.[182] Finally, Sections 877(a) and (c) provide for liability for one who "orders or induces the [tortious] conduct of another if he knows or should know of circumstances that would make the conduct tortious if it were his own"[183] or "permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortuously."[184] Possibly the language of section (c) could be construed to include passively granting "permission"; however, that section is limited to a narrow set of circumstances and, even then, is apparently intended to apply to negligence actions, not intentional torts.[185] Nothing in the comment suggests the breadth of participation liability the reporters are proposing under Section 10 of Intentional Torts.[186]

The Comment to Section 10 provides two illustrations of its proposed liability for omissions. In the first, a police officer who merely "stands by as her partner…performs an illegal strip search" is liable for participation,[187] However, the cases on which that illustration is "loosely based"[188] actually consisted of more than a mere failure to intervene.[189] In the second illustration, a supervisor who witnesses and

[176] Second Restatement, § 45A ("Instigating or Participating in False Imprisonment").
[177] Id. at cmt c.
[178] Id. at cmt e.
[179] See id. at cmt c, Illustrations 1-3.
[180] Second Restatement § 876.
[181] Id.
[182] Id.
[183] Second Restatement § 877(a).
[184] Id. at § 877 (c).
[185] Id. at Comment (b) {"The rules stated in Clauses (b),(c) and (d) are subject to the general rules of negligence and of causation. The liability stated exists only if the resulting harm is within the risk created by the defendant's negligent conduct in acting or in failing to control."
[186] Id.
[187] Intentional Torts, P.D. No. 4 at § 10, cmt b, Illustration 5.
[188] Id. at Reporters' Note to cmt b.
[189] The two cases cited as support for this illustration are Schiller v. Strangis, 540 F. Supp. 605 (D. Mass 1982) and Estate of Davis v. United States, 340 F. Supp.2d 79 (D. Mass. 2004). In *Schiller*, the court found that the partner had actively participated in the false arrest of the plaintiff by the arresting officer. As to the subsequent beating by the arresting officer, the partner did not physically participate in that beating; however, the court found that, presumably as a result of his active participation in the arrest, the partner by his silence encouraged the beating itself. 540 F.Supp. at 620. In *Davis*, the plaintiff's claim against FBI agents was based on negligence, not participation in an intentional tort; moreover, the plaintiffs claimed not merely the defendants' failure to control informants who killed the plaintiff's decedent, but also their active efforts to protect the informants in question.

fails to intervene in the sexual harassment of the plaintiff by fellow employees will be subject to liability for any intentional tort, such as battery, of which the fellow employees are liable.[190] The federal cases cited in support of this illustration were not themselves common law tort actions, but were rather based on alleged violations of state discrimination law.[191] The results in these cases were based on two predictions: first, that New Jersey courts would adopt Restatement Second's Section 876(b) to establish aiding and abetting liability under the New Jersey statute; and, second, that inaction can form the basis of aiding and abetting liability under that section "if is [rises] to the level of 'providing substantial assistance or encouragement.'"[192] No common law cases were cited for the proposition that inaction can result in instigation or participation liability under Section 876(b) or otherwise. Moreover, the circumstances of these cases were highly unusual, in that under the relevant state anti-discrimination statute only the employer could be found liable as a principal, and the question was whether "a harassing supervisor [could] be individually liable for aiding and abetting the actionable conduct of his employer, when the challenged conduct is failing to stop the supervisor's own harassment."[193]

If an affirmative duty to act presumptively transfers from negligence law to the law of intentional torts, and if intentional tort liability can be predicated on a failure to make reasonable efforts, rather than a "refusal" to act, then the line between the intentional torts and negligence is becoming increasingly blurred. Of course, reasonableness has always been an important standard in determining when defendants are privileged to engage in conduct that would otherwise constitute an intentional tort,[194] but it has never been the standard for determining when the plaintiff has established, prima facie, that the defendant's conduct is in need of justification.[195]

II. Distinguishing Intentional Torts From Negligence

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[190] Intentional Torts, P.D. No. 4 at Reporters' Note to cmt b, Illustration 6.

[191] See Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999); Gardenshire v. N.J. Mfrs. Ins. Co., 754 A.2d 1244 (Law Div. 2000), cited in Section 10, Reporters note to comment b, (Preliminary Draft No. 4) at p. 58. In *Gardenshire*, the court dismissed actions against an insurer and insurance adjuster for aiding and abetting violation of a New Jersey anti-discrimination statute. In *Hurley*, the court held that a supervisor could be held liable for violation of both federal and state anti-discrimination statutes for failure to intervene in sexual harassment. With respect to the state law claim, the court relied on Section 876(b) of the Second Restatement on the ground that "inaction can form the basis of aiding and abetting *if it rises to the level of providing substantial assistance or encouragement*." (emphasis added.). 174 F.3d at 126. For a discussion of the source of *Hurley*'s interpretation of Section 876(b), see infra notes 192-93 & accompanying text.

[192] *Hurley*, at 126 (citing Failla v. City of Passaic, 146 F.3d ,__ 158, n. 11, which relied on Dici v. Pennsylvania, 91 F.3d 542, 553 (3d Cir. 1996)).

[193] *Hurley*, 174 F.3d at 126.

[194] See, e.g., Second Restatement § 892(2) ("If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact."); id. at § 63 (1) ("An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.")

[195] One possible exception is the intentional infliction of emotional harm, which requires not only that the actor intentionally "or recklessly" cause severe emotional harm to another, but also that the actor's conduct is "extreme and outrageous." Second Restatement §46. By definition, conduct that is "extreme and outrageous" is unreasonable, and it is the plaintiff's burden, as part of the prima facie case, to prove such unreasonableness. This tort, however, is exceptional in that there are apparently no privileges which could be asserted to justify conduct that would otherwise be tortious.

In Part I, I addressed the implications of the piecemeal process of consideration and adoption of both the different projects within the Third Restatement of Torts and the different sections within Intentional Torts. In this section, I pick up and expand on my last point, which is the extent to which this project has increasingly blurred the line between the intentional torts and negligence.

As the reporters clearly recognize, there are two sorts of practical ramifications of characterizing an action as either negligence or one of the intentional torts. The first set of consequences are "internal to tort doctrine," and they include ignoring the comparative fault of the plaintiff, a broader scope of liability, and the ability to recover without proof of actual harm, either physical or emotional. [196] The second set of consequences are based on "collateral legal rules, i.e., on rule from outside tort doctrine, and they include both plaintiff-friendly rules, such as the ability to sue despite workers' compensation, and defendant-friendly rules such as a shorter statute of limitations, sovereign immunity protection for government defendants and exclusion of insurance coverage.[197] Both sorts of consequences have important practical effects on the litigants. I have previously joined the reporters in recommending that determining when collateral effects should flow should be considered independent of internal tort doctrine;[198] however, I now conclude that this is unlikely to happen. As a result, we cannot simply ignore these external collateral effects (as well as the internal effects) of characterizing conduct as intentional rather than merely negligent.

In their Scope Note to the Intentional Torts project, the reporters attempt to describe what makes intentional torts "categorically distinct from other torts."[199] They state that "[t]hey are intentional because they involve an action that is intended to affect another person and that results in an invasion of the rights of another"[200] and that "[u]nlike negligence, intentional torts upon persons cannot be committed through simple inadvertence."[201] It is true that intentional torts cannot be committed through mere inadvertence; even when omissions liability is recognized, the defendant must intend a particular result, such as knowing that the plaintiff will remain confined if the defendant does not use reasonable care to release him or her.[202] But not all, or even most, negligent conduct is the result of mere inadvertence,[203] and when it is not, the reporters have not adequately captured what features of intentional torts justify the consequences of that characterization.

It is not sufficient to say that these results are justified "because they involve an action that is intended to affect another person,"[204] particularly when the manner in which they are so intended may be without any significant degree of fault, as is the case when single intent creates liability for a

[196] Intentional Torts, T.D. No. 1 at 3 (Reporters' Scope Note).
[197] Id.
[198] See id. at 4; Moore, supra note 2 at 1633.
[199] Intentional Torts, T.D. No. 1 at 3.
[200] Id. at 2.
[201] Id. at 3.
[202] See Intentional Torts, §7(a) (T.D. No. 2)..
[203] See, e.g., Liab. For Phys. and Emot. Harm, §1, cmt. b (("[P]eople all the time voluntarily engage in conduct---swinging a golf club, raising a stick so as to separate two dogs, turning a steering wheel in order to turn a car on a highway, selling a product, transmitting electricity through power lines.
[204] See supra note 200 & accompanying text.

defendant who intends some minor bodily contact but intends neither harm nor offense.[205] Moreover, why attach such significance to the fact that an intended act "results in an invasion of the rights of another"[206] when that invasion may be entirely unforeseeable, as when a contact not offensive to a reasonable sense of personal dignity unexpectedly results in serious physical harm?

The reporters further note that "the different intentional torts to persons developed differently as a historical matter, and are distinct in their structure and in the interests they protect."[207] Again, this is clearly correct, but it does not explain why we put our stamp of approval on these historical developments[208] or why, at the very least, we don't draw the line at expanding the availability of intentional tort recovery without having a clear idea of why intentional tort liability is warranted in such situations.[209]

Another perceived difference is that the interests protected by the intentional torts are the "fundamental interests in autonomy, dignity, and security."[210] Yet, at the reporters urging, the ALI has now recognized an entirely new tort of purposeful infliction of bodily harm,[211] which protects against the very same interest thatgligence and strict liability. Similarly, the reporters have approved continuing a controversial change initiated by the Second Restatement, whereby plaintiffs unconscious of their confinement are permitted to sue in false imprisonment when their confinement results in harm, clarifying, however, that there must be bodily and not some other type of harm.[212]

Finally, the reporters explain that the shape of intentional torts is "more rule-like and more precise than negligence doctrines, which often take the form of flexible and general standards of reasonableness."[213] Of course, there has always been a general standard of "reasonableness" in determining the availability of the traditional affirmative defenses to intentional torts, such as apparent

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[205] See supra note 75 & accompanying text. As previously discussed, the plaintiff may have unexpectedly suffered severe bodily harm with substantial damages for which the defendant will be liable in battery, but not in negligence. See supra note 119 & accompanying text

[206] See supra note 200 & accompanying text.

[207] See Intentional Torts, T.D. No. 1 at 3.

[208] See, e.g., Moore, supra note 2 at 1645-1646 ("given that modern tort law now recognizes actions for intentional infliction of severe emotional distress, for negligent infliction of emotional distress, and for sexual harassment in the workplace, how far should courts be willing to go to protect either 'bodily integrity' or 'bodily autonomy'?").

[209] See, e.g., supra notesn173-74 & accompanying text (discussing expansion of liability in false imprisonment to include a negligent attempt to release someone from confinement). An example of expanded liability that was clearly warranted is the modern recognition of the tort of intentional infliction of emotional harm, including conduct that is merely reckless rather than intentional. See Liab. For Phys. & Emot. Harm §46 & cmt h. Given that there is no general duty to avoid the negligent infliction of emotional harm, recognition of the intentional tort was necessary to permit recovery for serious emotional harm in cases involving "extreme and outrageous" conduct.

[210] Intentional torts, T.D. No. 1 at 3.

[211] See supra note 27 & accompanying text.

[212] See supra notes 123-26 & accompanying text (Section 7(c) permits recovery when plaintiff is aware of confinement or suffers bodily harm as a result); T.D. No. 2 at Reporters' Note to §7 (describing how Second Restatement differs from first Restatement in permitting unaware plaintiffs to recover in false imprisonment for bodily harm). See also Philip Halpern, "Intentional Torts and the Restatement: A Petition for Rehearing," 7 Buffalo L. Rev. 7, 23-26 (1957) (describing and criticizing Second Restatement's extension of liability when harm results as inconsistent with the historical limitation of the trespassory torts to situations in which harm is not required and also urging their either all or no unaware victims of confinement should be permitted to recover because the presence or absence of harm should be irrelevant).

[213] See Intentional Torts, T.D. No. 1 at 3.

consent, self-defense and defense of property.[214] More important, the Intentional Torts reporters are crafting new provisions that rely on even vaguer standards, for example, the implied-in-law privilege, under which a defendant must establish a reasonable belief that his or her otherwise tortious conduct was "necessary to further public policies or private interests that substantially outweigh the gravity of the invasion."[215]

The medical treatment area is one in which there is a pressing need to better define the boundary lines between battery and negligence. If a physician deliberately acts without the consent of the patient, including knowing extensions of the scope of treatment, then the decision to treat the bodily contact as a battery seems totally justifiable.[216] But if a physician is merely negligent in acting without such consent, as when the physician inadvertently operates on the wrong limb, why isn't the action in negligence clearly preferable to treating the physician as an intentional tortfeasor?[217] Professor Simons has responded by arguing both that intentional tort law is more plaintiff-friendly because it includes recovery for a broader scope of damages[218] and that an action in battery is necessary to vindicate the plaintiff's reasonable sense of dignity.[219] I see no reason to presumptively favor plaintiff-friendly doctrines, at least in the absence of substantial moral fault on the part of the defendant

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[214] Even here, the standard of reasonableness is not open-ended, as it is in negligence, where "[a] person acts negligently if the person does not exercise reasonable care under all the circumstances." Liab. For Phys. and Emot. Harm, §3. Rather, the defendant must act reasonably with respect to fairly specific standards, such as the use of "reasonable force, not intended or likely to cause death or serious bodily harm" to defend against harmful or offensive contact "which he reasonably believes that [the plaintiff' is about to inflict intentionally upon him." Second Restatement §63 (Self-Defense by Force Not Threatening Death or Serious Bodily Harm). See also, e.g., Second Restatement §77 (privilege "to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels"); Second Restatement 892(2) ("If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.").

[215] P.D. No. 4 at §17(b)(2). See also supra notes 167-174 & accompanying text (Reporters' recommendation for an extension of liability for omissions in false imprisonment to include negligent attempts to release another from confinement).

[216] See, e.g., Intentional Torts, P.D. No. 4 at §14, Illustration 1 to cmt. b (physician decided to operate on patient's left ear rather than on right ear, despite fact that patient had expressly consented only to operation on right ear).

[217] The reporters' draft of Section 14 (Scope of Actual Consent) provides that "[a] person's actual consent does not extend to conduct of the actor that is substantially different in nature from the conduct that the person is subjectively willing to permit." Although the comment to that section does not expressly address a situation in which the substantial difference is attributable to the physician's negligent rather than intentional deviation, a comment to another section makes clear that the reporters are rejecting cases holding that "a medical practitioner is not liable for a battery unless he or she 'intentionally deviated' from the scope of the consent that was originally given." Id. at §16, cmt d. See also Moore, supra note 2 at 1648-53 (arguing in favor of the intentional deviation standard).It should be noted that if the physician's mistake is reasonable, then the physician may rely on the apparent consent privilege. See id at 138. The concern, therefore, is with situations in which a physician negligently (i.e., unreasonably) operates beyond the scope of the plaintiff's consent, as when he or she inadvertently operates on the wrong limb, having failed to take reasonable precautions to avoid doing so.

[218] Email from Ken Simons to Nancy Moore, Feb. 20, 2017 (pointing out that negligence requires physical harm and that even when physical harm occurs, if the physician performed the operation properly, courts would permit recovery for a bad side-effect under a battery but not a negligence theory).

[219] See, e.g., Intentional Torts, P.D. No. 4 at §19 a, cmt b ("courts treat any physical touching in the context of medical treatment that is beyond the scope of the patient's consent as offensive to a reasonable sense of dignity as a matter or law").

(beyond that of negligence).[220] And in the vast majority of medical treatment cases, I suspect that patients are far more concerned with a physician's potential incompetence than with a possible invasion of the patient' s personal dignity. Certainly that is the case when the physician inadvertently extends the scope of treatment by operating on the wrong limb. If the gravamen of the plaintiff's complaint is the physician's incompetence, then I see no reason why the appropriate action should be in intentional tort rather than negligence.

It is not my intent here to suggest precisely how tort law should characterize the difference between intentional tort and other torts, especially negligence, but rather to express my disappointment that the Intentional Torts project has not done more to adequately address this issue. Indeed, I am most disappointed that rather than clarifying what the boundaries should be and what the justification should be for drawing lines, the Intentional Torts project has added to the current confusion on this question, particularly in the provisions that differ substantially from the Second Restatement. And I further suggest that, in large part, the reason for the continued confusion may lie in the piecemeal process by which the Third Restatement has been adopted, including most prominently, the incorrect and misleading provision in Liability for Physical and Emotional Harm regarding the distinction between liability for the intentional and negligent causation of physical harm.

Conclusion

Given extensive developments in tort law since the adoption of the Second Restatement in 1965, the need for a Third Restatement of Torts was obvious,. These developments were most striking in the subjects covered by the now-completed Third Restatement projects, including Products Liability, Apportionment of Harm, and Liability for Physical and Emotional Harm (based primarily on negligence or strict liability). It was unfortunate, however, that in planning these separate projects, the ALI initially assumed that there was no need to restate the intentional torts because the law was both clear and uniform. As Professors Simons and Bublick have persuasively argued, intentional torts doctrine is neither clear nor uniform; moreover, there is no obvious unifying theory that explains the distinctions between the intentional and the nonintentional torts.

The ALI now seeks to correct this mistake, but certain aspects of its process have complicated the reporters' task. Section 5 of earlier adopted Liability for Physical and Emotional Harm purports to establish an umbrella rule for intentional torts resulting in physical harm, but it inaccurately describes intentional tort doctrine. In addition, that section (and others) appear to assume a hierarchy of fault and a dual intent standard for battery, both of which are ostensibly rejected in the Intentional Torts project. There is no plan to revise Section 5 (or other relevant sections of Liability for Physical and Emotional Harm) or even to unify the separate projects into a single document; as a result, these contradictions and inconsistencies will inevitably confuse both judges and lawyers seeking to understand intentional tort doctrine through the various projects of the Third Restatement.

[220] Of course, it is also the case that there may be more defendant-friendly consequences of labeling the physician's conduct as intentional rather than negligent, including a shorter statute of limitations, sovereign immunity, and a lack of insurance coverage (which may discourage plaintiffs' attorneys from taking the case even when the physician has personal assets to cover an adverse judgment). See supra note 197 & accompanying text (discussing the collateral consequences of characterizing a tort as intentional).

The separate drafting and adoption of these different projects has had other adverse consequences. For example, the Second Restatement left open the possibility of recognizing liability for negligent false imprisonment; however, such a tort does not fit neatly into either Liability for Physical and Emotional Harm or Intentional Torts. Thus the possibility goes unaddressed. Similarly, Liability for Physical and Emotional Harm did not restate the law of professional malpractice. As a result, Intentional Torts cannot adequately differentiate negligence and battery in situations where a physician mistakenly believes that the patient consented to medical treatment.

Even within the single Intentional Torts project, the piecemeal adoption of various sections has undermined the consistency and coherence of that project. Not knowing what these future related sections would provide, the ALI has already voted on issues that will be impacted by those later sections. Theoretically, the membership could reconsider the earlier adopted sections, but this is not likely to occur. Thus the favorable vote on single over dual intent will likely make necessary the subsequent adoption of an entirely new "implied-in-law" consent, with its attendant difficulties of interpretation and application---all of which could have been avoided if the dual intent standard had been adopted. Similarly, the membership has voted on some but not all of the sections that implicate liability for omissions, but their current drafts reflect a both a lack of consistency across sections (for example, no liability for omissions in battery, but liability for participation in a battery can be based on an omission) as well as a failure to clearly differentiate between a duty to act in negligence and a duty to act in intentional torts.

Although there is much to admire in the Intentional Torts project, my greatest disappointment is its failure to take on Professor Bublick's challenge to articulate and implement a conceptual view of the distinction between the intentional and the nonintentional torts. Rather, instead of clarifying the line between them, the project often blurs that line. This occurs both in the project's treatment of liability for some omissions (in which a duty to act is simply borrowed from the duty to act in negligence cases) and in its approval of physicians' liability for battery rather than negligence when they mistakenly extend treatment (such as by operating on the wrong limb). There are important practical consequences of the decision to locate liability in battery rather than negligence,, but the project reporters do not adequately explain how to distinguish between the two.

The reporters should not necessarily be faulted for the conceptual inadequacy of the project. Tort law scholarship has not paid much attention to the conceptual underpinnings of the intentional torts,[221] and the reporters have been kept busy working through the multitude of challenging issues that arise in articulating and applying intentional tort law doctrine. We can only hope that the salience of the ALI undertaking the Intentional Torts project will prompt tort law scholars to provide the theoretical justification for continuing to distinguish between intentional and nonintentional torts.[222]

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[221] Professors Simons and Bublick have both attempted to articulate the conceptual differences between the intentional and non-intentional torts. See supra notes 6-12; 17 & accompanying text. For other commentators who have made similar efforts, see, e.g., Halpern, supra note 46; Cane, supra note 46; Epstein, supra note 46. See also John Finnis, "Intention in Tort Law," in David G. Owen, ed., Philosophical Foundations of Tort Law 229 (1995).

[222] At least one commentator has recently argued that a more comprehensive Restatement (Fourth) of Torts would divide torts into only two categories---fault and no-fault---with no separate category of intentional torts. See Stephen D. Sugarman, "Rethinking Tort Doctrine: visions of a Restatement (Fourth) of Torts, 50 UCLA L. Rev. 585 (2002).See also Calnan, supra note 46) (intentional torts and negligence are not inherently distinguishable).