§ 103. Battery: Definition of Offensive Contact

A contact is offensive within the meaning of § 101(c)(ii) if:

(a) the contact ~~offends~~ is offensive to a reasonable sense of personal dignity; or

(b) the contact is highly offensive to the other's unusually sensitive sense of personal dignity, and the actor knows that the contact ~~will be~~ is highly offensive to the other.

Liability under (b) shall not be imposed if the court determines that imposing such liability would violate public policy or that requiring the actor to avoid the contact would be unduly burdensome.

Comment:

a. The contact offends a reasonable sense of personal dignity. Proof that the plaintiff subjectively was offended by a nonconsensual contact is insufficient for offensive-battery liability. Rather, plaintiff must prove that the contact in question offends a reasonable sense of personal dignity (or that the actor knew that the contact would be highly offensive to the plaintiff, as explained in Comment *b*).

Whether a contact offends a reasonable sense of dignity is ordinarily a question for the jury, applying its judgment about contemporary social norms. Relevant factors include the relationship of the parties (for example, whether they are strangers, coworkers, friends, or family members, and their respective ages), the social context of the interaction (for example, whether the contact occurs in the workplace, in public, or in private), the physical nature of the contact (for example, whether the contact is an isolated event or repeated, whether it is minor or highly forceful, and whether it is with plaintiff's body), and the motives, beliefs, and intentions of the actor (for example, whether the actor acted out of malice or anger, had the purpose to cause harm or offense, or knew that he or she would cause offense). A highly culpable motive or intention is not necessary, however. If the actor plays a practical joke on the plaintiff, foolishly but honestly believing that the plaintiff will be highly amused, he remains subject to offensive-battery liability if his conduct causes a contact that is offensive to a reasonable

sense of dignity. See § 102, Illustration 9, supra.

In contemporary society, any nonconsensual contact ~~of~~ with a sexual ~~nature~~ purpose satisfies the requirement of offending a reasonable sense of personal dignity, whether it involves sexual intercourse, fondling a person's genitals, buttocks, or breasts, or kissing a person in a sexual manner.

Illustrations:

~~1. While Pam is riding the subway, a three-year-old boy in the arms of his mother intentionally touches Pam's breast. The boy, a stranger to Pam, is not liable for an offensive battery, because the contact is not offensive to a reasonable sense of dignity.~~

~~2~~1. While Pam is riding the subway, a man intentionally touches Pam's breast. The man, a stranger to Pam, is subject to liability for an offensive battery.

2. While Pam is riding the subway, a three-year-old boy in the arms of his mother intentionally touches Pam's breast. The boy, a stranger to Pam, is not liable for an offensive battery, because the contact lacks a sexual purpose and thus is not offensive to a reasonable sense of dignity.

Social norms concerning the types of contacts that count as offensive change over time. One important indication of such a change is the existence of more pervasive legal regulation of the type of contact suffered by the plaintiff. Thus, if a physical contact is accompanied by sexual harassment, which federal law now regulates under Title VII in the workplace, it could readily be judged offensive. And smoking a cigar in a small office in the presence of an employee is more likely to be considered an offensive contact today than 40 years ago.

If plaintiff has an unusual sensitivity to offense of which the actor is unaware, and if the actor's conduct does not satisfy the objective requirement of offending a reasonable sense of personal dignity, then the actor is not liable for an offensive battery.

Illustration:

3. Lawyers A and B are engaged in conversation in A's office with the door closed. C, a paralegal, opens the door to enter the office and give some papers to A. In order to continue the conversation in private, B gently pushes the door against C, thereby pushing C back into the hall, and closes the door. B is not liable for offensive battery. Although B's conduct is rude, it is insufficient to satisfy the requirement that B intentionally caused a contact with C that is offensive to a reasonable sense of dignity.

~~In analyzing~~When the factfinder is asked to determine whether a contact is offensive, the circumstances surrounding the contact and the precise nature of the contact are critically important. Often, the mere fact that an actor intentionally contacted the plaintiff is not offensive. Rather, what is offensive is the nature and manner of the contact under the circumstances. Tapping someone's shoulder to get her attention is not offensive, but tapping her on the buttocks for the same purpose surely is. Shaking someone's hand with a firm grip when greeting him is not offensive, but squeezing his hand with both hands as tightly as humanly possible is. Indeed, the surrounding circumstances are also highly relevant when evaluating whether the actor has the requisite "intent to contact": an actor ordinarily intends some *type* or *manner* of contact with the other, such as a hug or a shove, and not just contact, period. And the circumstances are similarly crucial in analyzing the scope of consent: a plaintiff ordinarily consents to a specific type of contact (a hug rather than a tackle, a handshake rather than a hand-mauling, or an incision necessitated by a surgical operation rather than an unrelated incision), and not just to a contact. Moreover, in evaluating the relevant type of contact for purpose of determining offensiveness, intent, or consent, the actual beliefs of the actor and the other about the expected contact are highly relevant. In Illustration ~~2~~1, if the stranger on the subway meant only to tap Pam on the shoulder to gain her attention, but a lurch of the train caused him to touch her breast, he should not be liable for offensive battery.

The requirement of offense to a reasonable sense of dignity often overlaps with other requirements of the tort of battery. For example, if B taps A on the shoulder at a

movie theater, politely asking A to turn off his cell phone, B's liability for battery is precluded for multiple reasons—because the minor contact does not offend a reasonable sense of dignity, because B reasonably believes that A consents to the contact (~~reasonably~~ apparent consent), and perhaps because A actually consents to the contact (if the evidence shows that A has tapped the shoulders of others in similar situations). See § 102, Illustration 5, supra.

Nevertheless, although the offense ~~"reasonably offensive"~~ requirement frequently overlaps with the lack-of-consent requirement, the two requirements are not equivalent. To be sure, it is very likely that, if plaintiff has suffered legally adequate offense, he or she did not consent to the contact. However, sometimes, the plaintiff does not consent to a contact but the contact is not significant enough to offend a reasonable sense of dignity. Consider Illustrations 1 and 3: the plaintiff in these cases might not have actually (or apparently) consented to the contact, yet the contact does not count as "offensive." On the other hand, in certain categories of cases such as nonconsensual sexual contacts or surgeries in which the doctor exceeds the scope of the patient's consent, ~~it is justifiable to classify~~ any nonconsensual touching is properly classified as offensive to a reasonable sense of dignity.

The requirement of offense for purposes of offensive battery is significantly less demanding than the requirements of "extreme and outrageous conduct" and "severe emotional harm" for purposes of the tort of intentional infliction of emotional harm. Courts are very cautious about the scope of the latter tort, because of the enormous range of human conduct that it could embrace. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 46, Comment *d*. By contrast, a broader definition of "offense" for battery does not raise the same concern about unduly wide liability, because the physical-contact requirement for battery significantly limits the scope of this tort.

In unusual situations, for special reasons of policy or principle, courts may justifiably create categorical rules specifying what does or does not constitute "offensive to a reasonable sense of personal dignity." For example, even if many patients share a fear that a particular type of contact with a medical practitioner might result in the communication of HIV, courts have declined to credit that fear as satisfying the

reasonable-offense requirement if the fear is medically unfounded.

b. The actor knows that the contact is highly offensive to the plaintiff. The Caveat to Restatement Second, Torts § 19 declines to take a position on whether an actor is subject to offensive-battery liability when the actor knows the contact will be offensive to the other's "known but abnormally acute sense of personal dignity." Section 103(b) addresses this issue and endorses liability when the actor knows that the contact will be highly offensive to the plaintiff's sense of personal dignity. However, the last paragraph of § 103 imposes important qualifications on such liability. Liability should not be imposed if such liability would violate public policy or if requiring the actor to avoid contacting the plaintiff would be unduly burdensome. Moreover, the court ~~should be~~is empowered to make these nonliability judgments as a matter of law.

Of course, in most situations, an actor does not and cannot know that another person is highly offended by contacts that most persons would not find offensive. For these situations, § 103(a) works well. But when the actor actually knows that the person will find the contact highly offensive, § 103(a) does not provide enough protection to a person's right to choose what contacts to permit. In these circumstances, § 103(b) plays the valuable role of extending protection to individuals with unusual sensitivities.

V~~Although v~~ery few cases ~~explicitly~~ discuss ~~this~~ the precise issue addressed by § 103(b)—whether an actor is liable for contacting a plaintiff when the actor is fully aware of the plaintiff's unusual sensitivity to serious offense. However, ~~the results in some cases are best explained by the view that an actor is indeed subject to liability if the actor knows of the other's unusual sensitivity to serious offense. Moreover,~~ significant reasons of policy, ~~and~~ principle, and coherence with the broader body of tort law support extending offensive-battery liability to such cases. First, an individual's right of autonomy with respect to physical contacts with his or her body historically has been very strongly protected. The actor must obtain the plaintiff's consent to a physical contact, even if the actor honestly believes that a physical contact will greatly benefit the plaintiff. Second, the individual's right to choose extends even to choices that reflect values not shared by most members of the community, such as unorthodox religious beliefs, unconventional cultural norms, or unusual subjective preferences ~~and values~~.

Thus, courts recognize that a patient who decides against a medical procedure for ~~unusual,~~religious or highly personal reasons nevertheless is entitled to protection against even the good-faith decision of medical personnel to proceed ~~in a way~~with a treatment that they believe is beneficial to the patient and ~~that~~ to which most patients would consent ~~to~~. It is difficult to square this widely accepted requirement of deference to highly unconventional beliefs about medical treatment with a standard under which plaintiff must show that the contact offended a "reasonable" sense of dignity.

Third, under § 103(b), the actor is required to know that the plaintiff will find the contact highly offensive. ("Knows" should be understood as the actor's contemporaneous awareness~~, to a substantial certainty,~~ that plaintiff will almost certainly be highly offended. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 1(b).) An actor who knows this will also invariably know that the plaintiff does not consent to the contact. Under such circumstances, the actor will ordinarily have no legitimate interest in proceeding to offend the plaintiff. Fourth, ~~extending~~ offensive-battery liability coheres better with the broader body of intentional-tort doctrine if such liability is extended to physical contacts that the actor knows will offend an unusually sensitive or vulnerable plaintiff. Thus, ~~is also~~§ 103(b) is consistent with the tort of assault, which imposes liability when the actor causes subjective anticipation of a contact, even in circumstances where a reasonable person would not have experienced that anticipation. See § 105, Comment *d*; Restatement Second, Torts, § 27. And it is consistent with the tort of intentional infliction of emotional distress, which considers, as one factor supporting liability, "whether the other person was especially vulnerable and the actor knew of the vulnerability." Restatement Third, Torts: Liability for Physical and Emotional Harm § 46, Comment *d*.

Illustrations:

4. Before undergoing a Cesarean-section operation, Rachel informs her female surgeon that her moral and religious beliefs prohibit being touched unclothed by a male other than her husband. The surgeon assures Rachel that her

convictions will be respected and conveys Rachel's preference in writing to the nursing staff, including Daniel, a male nurse who is scheduled to assist the surgery a month later. During the surgery, Daniel, who believes that Rachel's preference is foolish, assists the surgeon as requested. His assistance includes touching Rachel's naked body. Daniel is subject to liability to Rachel for offensive battery.

5. Bella decides to play a practical joke on her coworker Donna. Knowing that Donna is terribly fearful of butterflies, Bella places a harmless butterfly on her neck. When Donna discovers its presence, she is extremely upset. Bella is subject to liability to Donna for offensive battery.

6. Caterer is hired to serve food for a wedding reception. He is informed that one of the guests, Omar, refuses to eat pork, because under his religion, consuming pork is a great sin. During the reception, as guests are about to be served food, Caterer realizes that he neglected to inform the food preparation team of Omar's request. Caterer decides not to inform Omar that the main course contains pork, in order to avoid the burden of preparing another meal for Omar at the last minute. When Omar discovers that he was served pork, he is extremely upset. Caterer is subject to liability to Omar for offensive battery.

One objection to extending liability beyond "reasonable sense of personal dignity" cases to cases in which the actor knows that plaintiff will be highly offended is that the extension is unnecessary, because the "reasonable~~...~~ sense of personal dignity" ~~inquiry~~ criterion is flexible enough to accommodate cases of known extrasensitivity. Perhaps Rachel's preference, in Illustration 4, not to be touched by a male doctor or nurse reflects a "reasonable sense of personal dignity," in light of her particular moral and religious beliefs (and similarly for Omar's preference not to eat pork). Perhaps Donna's emotional distress also reflects a "reasonable sense of personal dignity," in light of her subjective dread of butterflies. This objection is unpersuasive. If "reasonable" is interpreted in this flexible a manner, the test is no longer an objective "reasonable person" test at all. (Suppose, for example, that Omar registered a strong objection to eating pork, not for religious reasons, but because a family member recently choked to

death while consuming pork.) If a highly flexible test accommodating subjective preferences is considered desirable, it is more honest to employ a doctrinal test that directly expresses that policy, a test providing that it is tortious to contact a person when the actor knows of the person's unusual, subjective sensitivity to offense. Thus, instead of asking whether a reasonable person who is terrified of butterflies would be highly upset if someone placed a butterfly on her neck, the inquiry under the known extrasensitivity prong is more straightforward: Did the actor know that the plaintiff would be highly offended by the type of contact that the actor caused?

Concerns might also be raised that expanding liability to physical contacts that the actor knows to be highly offensive is unfair to the actor and results in an excessively broad rule of liability. These concerns, while genuine, can be answered. Liability here is not unfair to the actor, insofar as the actor must actually know of the plaintiff's unusual sensitivity to offense. It is not sufficient for plaintiff to show that the actor negligently failed to recognize that the contact would be offensive. To be sure, a "reasonable offense" requirement often serves the useful function of giving actors objective notice about what conduct is tortious. But the knowledge requirement for liability under § 103(b) also serves ~~that~~ the notice function. Similarly, it is not sufficient that the actor knows that the plaintiff will be offended. Rather, he or she must know that the contact will be *highly* offensive~~, and not merely offensive,~~ to the other's sense of personal dignity. This elevated threshold is employed in order to restrict liability to the most compelling claims and to reduce the risk that the known extrasensitivity category would cause the filing of fraudulent or unmeritorious claims.

Moreover, the concern that the known extrasensitivity rule will impose unjustifiably wide liability is addressed ~~in several ways~~in the last paragraph of § 103, which precludes ~~. § 103(b) precludes~~ liability when "liability would violate public policy" ~~and~~ or when "requiring the actor to avoid the contact would be unduly burdensome." ~~Thus, if a high school soccer player insists on other players not touching him, it would clearly be unreasonable and unduly burdensome to expect accommodation in light of the nature of the sport. Moreover~~Thus, in Illustration 4, if the patient had demanded that she not be touched by a nurse or doctor of a particular race, the hospital and medical staff have no obligation to respect that preference, because such an

accommodation would violate public policy. Likewise, if ~~E1~~ an employee strongly objects to being touched by any coemployee, and respecting this preference would have no impact on employees' ability to perform their work, then a coemployee who knowingly ignores ~~E1's~~ the employee's objection is subject to liability. But if ~~E2~~ a second employee objects only to being touched by gay or Hispanic coemployees, and such a coemployee nevertheless shakes the second employee~~E2~~'s hand, public policy should preclude liability.

The "undue burden" standard is not intended to be a very difficult standard to meet. Thus, if a female patient requests that only female nurses and doctors contact her during a medical procedure, and this would create modest staffing difficulties for the hospital, the hospital has no duty to respect the patient's preference, and can refuse to offer services on that basis. Similarly, if an employee with obsessive-compulsive disorder registers an objection to touching any papers that a coemployee has touched with his or her bare hands, the employer need not require those who work with that employee to wear gloves on pain of liability for offensive battery.

~~Moreover, these~~The "against public policy" and "unduly burdensome" ~~nonliability~~ judgments are ~~s are~~ to be made by the court, not by the jury, in order to assure that liability for known extrasensitivities is more predictable and is not unjustifiably far-reaching. The public-policy and undue-burden qualifications ~~the last paragraph of~~ are not to be understood as affirmative defenses, but as judgments that a court is empowered to make, similar to judicial no-duty determinations under Restatement Third, Torts: Liability for Physical and Emotional Harm §§ 6, 7.

~~Second, § 103(b) includes the requirement that the actor know that the contact will be *highly* offensive, and not merely offensive, to the other's sense of personal dignity. This elevated threshold is employed in order to restrict liability to the most compelling claims and to reduce the risk that the known extrasensitivity category would cause the filing of fraudulent or unmeritorious claims.~~

c. "Purpose to offend" as an alternative to § 103(b). The American Law Institute voted to endorse § 103(b) only after a very close vote. Those who opposed this provision had concerns about the lack of explicit judicial support for adoption of this standard and

about the risk that the Section will result in excessively broad liability. An alternative to § 103(b) that many ALI members supported is a purpose standard: the actor would be liable only if he or she contacted the plaintiff for the very purpose of offending (or of highly offending) the plaintiff. Under such a standard, Illustrations 4 and 6 would not be instances of liability, but Illustration 5 might be such an instance, if it could be shown that Bella placed the butterfly on Donna's neck because she desired to offend her. (There would be less need for "undue burden" and "against public policy" limitations upon the tort if this alternative approach were adopted.)

This "purpose" alternative to the "knowledge" approach of § 103(b) is undoubtedly a significantly narrower liability rule. For that reason, it might be an attractive alternative to courts that are concerned about the potential scope of § 103(b), notwithstanding the limitations on liability that the last paragraph of § 103 incorporates.

~~Third, another tort doctrine, "implied-in-law" consent, also serves to limit the scope of battery liability in a small number of cases. See § 117 infra. This doctrine provides that socially justifiable contacts such as those that occur when an actor squeezes onto a crowded bus or subway car will not result in tort liability. The doctrine often serves a similar function as the public policy and undue burden provisions of § 103, protecting actors from liability when respecting the plaintiff's desire for immunity from a particular type of contact places too great a burden on the actor or on others.~~

REPORTERS' NOTE

a. The contact offends a reasonable sense of personal dignity. For discussion of factors that are relevant to whether the actor has offended a reasonable sense of personal dignity, see I Harper & James, supra, at § 3.2; Prosser, Handbook on the Law of Torts § 9, p. 37 (4th ed. 1971). The list of factors identified in Comment ~~*b*~~ *a* is similar to the factors that are relevant under the tort of intentional infliction of emotional harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 46, Comment *d* ("Whether an actor's conduct is extreme and outrageous depends on the facts of each case, including the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and whether the conduct was repeated or prolonged.") The motives, beliefs, and intentions of the actor are relevant to "offense" only if the plaintiff becomes aware of those motives, beliefs, and intentions. Supporting the point that the factfinder retains a significant role in judging what is "reasonably offensive," see Goldberg & Zipursky, Oxford Introductions, at 201 ("Here, … the courts have not aimed to provide a detailed code of conduct, but rather to frame a

question that is sensibly delegated to the fact finder that can rely to some extent on common sense…"); Harper v. Winston County, 892 So. 2d 346, 354 (Ala. 2004) (question for jury whether contact was offensive; plaintiff alleged that defendant, her supervisor, forcefully grabbed or jerked her arm and pulled her back during a dispute over plaintiff's tardiness; defendant asserted that she reached for plaintiff's arm in an attempt to lead her into her office to permit them to continue their discussion in private).

The legal term "offense" is not equivalent to emotional harm or suffering; the latter is neither necessary nor sufficient for the former. It is not necessary because offensive conduct need not cause emotional harm (e.g., where the victim coolly resents the actor's insulting conduct but is not upset by it). It is not sufficient because one can cause emotional suffering without causing "offense." Many behaviors (such as deceit, selfishness, and even some forms of cruelty) are emotionally hurtful but are not "offensive" in the sense of violating the victim's sense of dignity.

Insofar as plaintiff's subjective offense is ordinarily insufficient for liability and objective ("reasonable") offense is required, the following question arises. Is plaintiff required to show *both* objective and subjective offense? The answer is no. We have found no case in which plaintiff's claim for offensive battery failed because he or she was unusually "thick-skinned" and thus was able to show objective but not subjective offense. Such a fact pattern would be uncommon, and it would be unduly burdensome to require proof of subjective offense in routine cases. Moreover, the objective "reasonable sense of dignity" standard is flexible enough to include individualizing factors, such as a history of consent to a type of conduct, that offer appropriate protection to potential defendants. Suppose two friends have agreed to a practice of greeting each other with a vigorous hug of the sort that would be offensive if they were strangers or mere acquaintances. Such a hug does not offend a "reasonable" sense of dignity, taking into account their relationship and history. In the rare case where there is clear proof both that the contact was objectively offensive and that the contact did not offend the plaintiff, the availability of liability for battery is not troublesome, because such a plaintiff is unlikely to sue, and because the trier of fact is unlikely to award significant damages.

A few state jury instructions do seem to require proof of both objective and subjective offense. See, e.g., Calif. CACI 1300, Judicial Council Of California Civil Jury Instruction 1300 (2014) (requiring plaintiff to prove "That [*name of plaintiff*] was harmed [or offended] by [*name of defendant*]'s conduct; [and] … […That a reasonable person in [*name of plaintiff*]'s situation would have been offended by the touching]"); MAI 23.02, Mo. Approved Jury Instr. (Civil) 23.02 (7th ed. approved 1990) ("Second, defendant thereby caused a contact with plaintiff which was offensive to plaintiff, and Third, such contact would be offensive to a reasonable person.").

An employee seeking a remedy under Title VII for hostile-work-environment sexual harassment must show both that the conduct in question is severe or pervasive enough to create a work environment that a *reasonable person* would find hostile or abusive and that the employee *subjectively* perceived the environment to be abusive. Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993). However, the goals and remedies of Title VII differ sufficiently from those of offensive-battery doctrine that this combined objective-plus-subjective statutory test would not be suitable in the present context.

Practical joker and horseplay cases that have resulted in liability for harmful or offensive battery include: Lambertson v. United States, 528 F.2d 441 (2d Cir. 1976)

(defendant suddenly jumped onto the plaintiff's back, pulled the plaintiff's hat over his eyes, and rode him piggyback, accidentally causing the plaintiff to fall and strike his face on meat hooks hanging nearby); Fuerschbach v. Sw. Airlines Co., 439 F.3d 1197, 1200 (10th Cir. 2006) (plaintiff's coworkers arranged a mock arrest, in which police officers handcuffed the plaintiff in the airport in which she worked before informing her that it was a joke); Villa v. Derouen, 614 So. 2d 714, 715 (La. Ct. App. 1993) (defendant pointed a welding torch in the plaintiff's direction, intentionally releasing gas into the plaintiff's groin area); Maines v. Cronomer Valley Fire Dep't Inc., 407 N.E.2d 466, 469 (N.Y. 1980) (in hazing incident, volunteer firemen pulled a bed sheet over the plaintiff's head, tied a leather belt to his waist, bound his feet with rope, held his arms to restrain him, carried him outside to a parking lot, and threw him in a garbage dumpster); Sanford v. Century Sur. Co., 2008 WL 879704, at *4 (S.D. Miss. Mar. 28, 2008) (Defendant's actions of greeting old friend in a headlock and choking him was sufficient for battery liability; "Sanford intended and did cause a contact with Worman's person. According to Worman's complaint, that contact was harmful and offensive, as Worman asked Sanford to stop choking him, even as Sanford ignored his requests."); Kelly v. County of Monmouth, 883 A.2d 411, 415-416 (N.J. Super. App. Div. 2005) (plaintiff alleged that the defendant had grabbed his genitals while shaking his hand; defendant claimed he was only joking or engaging in "horseplay"; held, factfinder should decide "whether the circumstances may be interpreted to mean that [Plaintiff] consented to the extenuation [sic] of the alleged joking conduct").

Numerous reported cases uphold offensive-battery liability based on a nonconsensual sexual contact. See, e.g., Meadows v. Guptill, 856 F. Supp. 1362 (D. Ct. Ariz. 1993) (upholding several instances of battery liability, where defendant repeatedly patted plaintiff employee on the rear end, grabbed her buttocks with both hands, cornered her in supply room and forced his body to press up against hers, and grabbed or tugged at her blouse); Burns v. Mayer, 175 F. Supp. 2d 1259 (D. Nev. 2001) (upholding battery liability where one defendant snapped plaintiff's bra strap and put his hands on her waist, and other defendants hit her on buttocks with clipboard and egg crate); Kelly v. County of Monmouth, supra, at 560 ("[W]e have held that a non-consensual touching of a woman's breast or buttocks constitutes a battery … Likewise, we hold that the alleged touching of defendant's genitals [in the course of alleged horseplay between plaintiff and defendant] represents a similar type of contact that constitutes a battery in the absence of consent."). See also Paul v. Holbrook, supra, where the appellate court rejected the trial court's grant of summary judgment to defendant on the issue of offensiveness. "[T]he act of approaching a co-worker from behind while on the job and attempting to massage her shoulders is, in the circumstances of this case, not capable of such summary treatment. On these facts, offensiveness is a question for the trier of fact to decide." 696 So. 2d at 1312. These circumstances included defendant's harassing conduct: he asked that the plaintiff wear revealing clothing and suggested that they engage in sexual relations.

No case has been found in which a nonconsensual sexual contact was considered insufficiently offensive to satisfy the "reasonable sense of dignity" requirement. See also Madden v. Abate, 800 F. Supp. 2d 604, 610 (D. Vt. 2011):

> A sexually motivated touching, even of an injured body part, clearly exceeds the scope of implicit or explicit consent a patient gives when he or she seeks medical

treatment. [citations omitted] That is to say, even if one accepts the premise that it would have been medically appropriate for a doctor to perform vaginal exams on [plaintiff] for diagnostic purposes, it would be relatively uncontroversial to conclude that if [defendant's] purpose in performing the exams was sexual rather than professional, then the touching was beyond the scope of consent.

Although battery and assault liability sometimes provide a remedy for sexual harassment, many forms of harassment do not fall within the scope of these torts. See Martha Chamallas, The Architecture of Bias: Deep Structures in Tort Law, 146 U. Pa. L. Rev. 463, 515 (1998) ("Although some harassment takes the form of physical contact amounting to battery or assault, the far more common type of harassment consists of claims of hostile working or educational environments, and involves verbal conduct and patterns of abuse that do not fall neatly into the traditional intentional tort categories.")

Illustrations 1 and 2 are variations on hypothetical examples discussed in *Wagner*, supra, 122 P.3d at 609.

Relatively minimal contacts can suffice to establish an offensive battery, depending on the other circumstances. See, e.g., Jarrett v. Butts, 379 S.E.2d 583, 585-586 (Ga. Ct. App. 1989) (Fourteen-year-old testified that after school photographer's repeated requests, she reluctantly allowed him to take some pictures of her fingernails; he then directed her to pose for additional pictures, in a loud and intimidating manner, and in so doing touched her wrists and hair; held, even this minimal touching can support a battery claim).

If an actor has the actual purpose to cause harm or offense to the plaintiff, that will weigh significantly in favor of a conclusion that the resulting contact is offensive to a reasonable sense of dignity. See N.Y. Pattern Jury Instr.—Civil 3:3 (3d ed. 2013) ("An offensive bodily contact is one that is done for the purpose of harming another or one that offends a reasonable sense of personal dignity, or one that is otherwise wrongful.")

Illustration 3 is based on Wishnatsky v. Huey, 584 N.W.2d 859 (N.D. Ct. App. 1998). In *Wishnatsky*, the plaintiff stated by affidavit that due to his religious beliefs, "I am very sensitive to evil spirits and am greatly disturbed by the demonic." He also asserted that defendant angrily told him to leave the office as he pushed him out the door. "This was very shocking and frightening to me. In all the time I have been working as a [paralegal], I have never been physically assaulted or spoken to in a harsh and brutal manner. My blood pressure began to rise, my heart beat accelerated and I felt waves of fear in the pit of my stomach. My hands began to shake and my body to tremble." Id. at 861. The court nevertheless upheld the trial court's grant of summary judgment to defendant.

The reference in the Comment to the surrounding circumstances and to the type of contact in question helps address the concern raised by Professors Goldberg and Zipursky that the minimal terms "offensive contact" and "intent to contact" do not adequately signal the importance of surrounding circumstances, especially circumstances that characterize the distinctive *nature* of the contact that proves offensive (or that is intended, or that is beyond the scope of plaintiff's consent). See Goldberg and Zipursky, Oxford Introductions, at 197-198. Moreover, some cases and jury instructions treat as battery an actor's intentionally contacting a person "in a harmful or offensive manner." This language might be another way of expressing the point that one must often evaluate the *type* of contact in order to determine whether the offense, intent, and contact

requirements of battery are met.

Other cases in which courts have concluded that the contact did not satisfy the "reasonable sense of personal dignity" requirement include the following. In Balas v. Huntington Ingalls Industries, Inc., 711 F.3d 401, 411 (4th Cir. 2013), the court ruled that even if plaintiff did not consent to a hug by her supervisor, as a matter of law the hug was not objectively offensive:

> Balas had just given Price a gift of Christmas cookies. Immediately before hugging Balas, Price thanked her and told her that she never ceased to amaze him. Given the circumstances surrounding the hug, we determine that Balas raises no genuine question of material fact as to whether the hug was objectively offensive.

In Gatto v. Publix Supermarket, Inc., 387 So. 2d 377, 379 (Fla. Dist. Ct. App. 1980), plaintiff was suspected of shoplifting. "The evidence … establishes no more than a casual touching of Gatto's hand by Stepp during Stepp's efforts to retrieve what he reasonably believed to be Publix's property. There is no evidence to show … that the contact was harmful or offensive to [Gatto], or that his personal dignity was offended by the touching."

In recent years, legislatures have dramatically expanded criminal and civil statutory protections for victims of stalking and sexual harassment. See § ~~103~~105, Reporters' Note to Comment *e*. These developments are highly relevant to whether a particular physical touching of a person who is being stalked or sexually harassed is "offensive" within the meaning of battery doctrine.

For another illustration of changing social norms, consider the following 1979 case, in which the court upheld the dismissal of a plaintiff's assault-and-battery claim against his supervisor who deliberately smoked a cigar in his own office despite awareness of plaintiff's allergy to tobacco smoke. The court appears to rely both on implied-in-law consent and on the lack of an objectively offensive contact:

> [I]n a crowded world, a certain amount of personal contact is inevitable and must be accepted. Consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life. Smelling smoke from a cigar being smoked by a person in his own office would ordinarily be considered such an innocuous and generally permitted contact. …
>
> There being no competent evidence that the plaintiff suffered a physical illness from smelling the cigar smoke, we are left with evidence that defendant smoked cigars in his own office when he knew it was obnoxious to a person in the room for him to do so. That person did experience some mental distress as a result of inhaling the cigar smoke. We hold this is not enough evidence to support a claim for assault or battery.

~~See~~ McCracken v. Sloan, 252 S.E.2d 250, 252 (N.C. Ct. App. 1979). This case would very likely result in liability today.

For the argument that "offense" should be treated as equivalent to lack of actual or apparent consent, see Dobbs et al. 2d § 33; Lawson, at 374-377; see also N. Moore, at 1620 (asserting that an actor should be treated as knowing that he causes offense if he

knows that the contact, if not consented to, would be offensive). There is some judicial language supporting this argument. See *Wagner*, supra, at 609:

> A harmful or offensive contact is simply one to which the recipient of the contact has not consented either directly or by implication. *Prosser, supra*, § 9, at 41–42. Under this definition, harmful or offensive contact is not limited to that which is medically injurious or perpetrated with the intent to cause some form of psychological or physical injury. Instead, it includes all physical contacts that the individual either expressly communicates are unwanted, or those contacts to which no reasonable person would consent.

See also Cowan v. Insurance Co. of North America, 22 Ill. App. 3d 883, 318 N.E.2d 315, 323 (1st Dist. 1974) ("[T]he gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff.").

However, this equivalence argument is unpersuasive for reasons stated in the Comment. Examples of cases where the plaintiff does not consent to a contact yet the contact is not significant enough to satisfy the offense requirement might include Illustrations ~~1~~ 2 and 3, and *Balas*, supra (brief hug to express thanks for gift). Another example is Zgraggen v. Wilsey, 200 A.D.2d 818, 819, 606 N.Y.S.2d 444 (Sup. Ct. App. Div. 1994) ("Lack of consent on the part of plaintiff is an element to consider in determining whether the contact was offensive, but it is not … conclusive"; held, jury question whether throwing plaintiff into swimming pool, when plaintiff had earlier helped throw defendant into pool, was offensive). See also Zapach v. Dismuke, 2001 WL 35948685, at *2 (Pa. Com. Pl. 2001), where the court found clear evidence that defendant struck plaintiff's arm twice and then grabbed his arm in order to lead him away from the microphone at a town meeting. The court then distinguished the question of lack of consent from the question of offensiveness: "Although the force of these contacts appears to be slight, there is no denying that the contact occurred, that it was intentional, and that it was not consented to. Whether the contact was harmful or offensive to the plaintiff's dignitary interest is a factual issue for the fact-finder to determine at trial."

A recent Pennsylvania Supreme Court decision supports the proposition that in certain categories of cases, a nonconsensual contact is invariably offensive to a reasonable sense of dignity. See Cooper ex rel. Cooper v. Lankenau Hosp., 51 A.3d 183, 191 (Pa. 2012) ("by proving the surgery or 'touching' was intentional and not consented to, a patient establishes that it was 'offensive,' sufficient to render the unauthorized surgery a battery").

On the other hand, even when the nonconsensual contact is not an "offensive" contact, the contact can result in liability if it turns out to cause physical harm to the plaintiff. This scenario is significant, for it is one of the few situations in which the single-intent approach clearly imposes broader liability than the dual-intent approach. See § 102, Comment *b*, supra (discussion of category 5).

Moreover, a plaintiff's actual nonconsent is not always a necessary condition of a contact being offensive. Suppose plaintiff is a young child who is sexually molested by an adult. The child lacks the legal capacity to consent, but might demonstrate "actual consent" in the minimal sense of willingness that the contact occur. Given the objective offensiveness of such a contact, and the child's inability to appreciate that offensiveness,

the proper analysis is that the child has suffered an offensive contact, not because the child did not actually consent, but whether or not she actually consented. For discussion of this type of case, see Dobbs et al., § 34, p. 86; Lawson _.

New York's jury instructions incorporate a definition of offensive contact that is broader than that suggested in this Restatement and in the Restatement Second. The jury instructions state: "An offensive bodily contact is one that is done for the purpose of harming another or one that offends a reasonable sense of personal dignity, *or one that is otherwise wrongful*" (emphasis added). N.Y. Pattern Jury Instr.—Civil 3:3 (3d ed. 2013). Several New York cases employ the language "wrongful under all the circumstances," see, e.g., Higgins v. Hamilton, 18 A.D.3d 436 (N.Y. App. Div. 2005), and the Court of Appeals has noted the "otherwise wrongful" jury-instruction language with approval, Jeffreys v. Griffin, 801 N.E.2d 404, 410 n.2 (N.Y. 2003). However, the meaning of these phrases is unclear from the case law. Some other jurisdictions also expand the definition of battery to include "unlawful" contact, e.g., Miller v. Idaho State Patrol, 252 P.3d 1274, 1287 (Idaho 2011) ("Civil battery consists of an intentional contact with another person that is either unlawful, harmful, or offensive."). And some replace "harmful or offensive" with "unlawful." E.g., Andrew v. Begley, 203 S.W.3d 165, 171 (Ky. Ct. App. 2006) ("Battery is any unlawful touching of the person of another.") The term "unlawful" is also ambiguous, however. See Lawson, at 366-367.

A number of jurisdictions employ colorful formulations such as "any rude, insolent, or angry touching." See, e.g., Harper v. Winston County, supra, 892 So. 2d at 353 (Alabama); Wallace v. Rosen, supra, 765 N.E.2d at 197 (Indiana). The source of this formulation is 1 William Hawkins, Pleas of the Crown 1716-1721, 134 ("It seems that any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law.") Such formulations are problematic. These terms, although vivid and evocative, are insufficient to address the full range of contacts that could offend a reasonable person. For example, they do not embrace contacts that would frighten a reasonable person, nor do they seem to include contacts that are meant as a practical joke but cause humiliation or insult. Under the approach endorsed in this Restatement, such contacts count as offensive batteries.

Brzoska v. Olson, 668 A.2d 1355 (Del. 1995), is a leading example of a court in effect restricting the scope of "reasonably offensive" for reasons of policy. In that case, the court declined to permit an offensive-battery claim against an HIV-infected dentist in the absence of proof of actual exposure to HIV. The offensive-battery claim was denied even though the dentist had open lesions, because there was no proof of bleeding from the dentist or of any contact between a wound or lesion of the dentist and a break in the skin or mucous membrane of any of the plaintiffs. The court was also concerned about opening "a Pandora's Box of 'AIDS-phobia' claims by individuals whose ignorance, unreasonable suspicion or general paranoia cause them apprehension over the slightest of contact with HIV-infected individuals or objects." Id. at 1363. The court concluded: "we find that, without actual exposure to HIV, the risk of its transmission is so minute that any fear of contracting AIDS is *per se* unreasonable" and thus the contacts did not offend a reasonable sense of personal dignity. Id. at 1364.

Similarly, in Kerins v. Hartley, 33 Cal. Rptr. 2d 172, 181 (Ct. App. 1994), the court would not permit a battery claim against a doctor who operated on a patient while infected with HIV, who did not disclose his condition, and who responded to patient's question about his health by assuring her that his health was good; the court emphasized that the actual risk of infection was insignificant. And in K.A.C. v. Benson, 527 N.W.2d 553, 561 (Minn. 1995), the court did not permit a battery claim against a doctor who performed a gynecological examination at a time when he suffered from AIDS and had running sores on his hands and arms because plaintiff did not allege that the doctor performed a different procedure from that to which she consented; moreover, since the doctor's conduct did not significantly increase the risk that plaintiff would contract HIV, "it cannot be said that Dr. Benson failed to disclose a material aspect of the nature and character of the procedure performed." Id. at 561.

b. The actor knows that the contact is highly offensive to the plaintiff. A caveat to Restatement Second, Torts § 19 states:

> The Institute expresses no opinion as to whether the actor is liable if he inflicts upon another a contact which he knows will be offensive to another's known but abnormally acute sense of personal dignity.

Restatement First, Torts § 19, contains an identical caveat. This Section resolves the question in favor of liability.

The language "is highly offensive to the plaintiff's sense of personal dignity" is similar to the language in Restatement Second, Torts § 652B (requiring, for the privacy tort of intrusion on seclusion, that "the intrusion would be highly offensive to a reasonable person"); see also id. § 652D (requiring, for the privacy tort of publicity to private life, that "the matter publicized is of a kind that … would be highly offensive to a reasonable person"). Note, however, that the privacy torts employ an objective test, evaluating the offensiveness of the actor's conduct "to a reasonable person."

~~Professor Dobbsnotes that a formulation limited to "a reasonable sense of dignity" and ignoring cases in which the actor knows that the other is offended could be interpreted as "disregard[ing] the plaintiff's own wishes," which in most cases "count for everything; she has a right to reject unprivileged touchings that others would find reasonable." Dan B. Dobbs, The Law of Torts § 29, at 56 (2000); see also Dobbs et al., The Law of Torts 2d § 34, at 86. In Judge Cardozo's famous words, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault [or, under modern tort law, a battery], for which he is liable in damages." Schloendorff v. Society of New York Hospital, 105 N.E. 92, 93 (N.Y. 1914).~~

~~A 1934 article asserts that offensive-battery liability is available in cases of known extrasensitivity. See Charles E. Carpenter, Intentional Invasion of Interest of Personality, 13 Or. L. Rev. 227, 227 (1934) ("The touching must have been harmful, or if not harmful, of such character that looked at objectively it would have been offensive to the normal person, except in the case where the touching was actually offensive to the plaintiff who was, and was known by the defendant to be, unusually sensitive.").~~There is little explicit support in the case law and in jury instructions for the rule stated in

§ 103(b). However, a Texas jury instruction extends offensive-battery liability to known extrasensitivity cases:

> A person commits an assault if he … intentionally or knowingly causes physical contact with another when he or she *knows* or should reasonably believe *that the other will regard the contact as offensive* or provocative.

Texas Pattern Jury Charges PJC 6.6 (2012) (emphasis added). The jury instruction derives from the criminal-assault statute, which contains the same language. Tex. Penal Code § 22.01 (2009). Several Texas courts have employed that statutory standard in civil assault and battery cases. See Waffle House, Inc. v. Williams, 313 S.W.3d 796, 801 n.4 (Tex. 2010); Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 522 (Tex. App. 1996). A recent Texas Supreme Court case states that the language quoted above corresponds to a form of common-law battery, but the court does not focus on the known extrasensitivity language. City of Watauga v. Gordon, 434 S.W.3d 586, 590 (Tex. 2014).

When judicial decisions and jury instructions define the meaning of "offense," most employ the language of § 103(a), or similar language, requiring that the contact be offensive to a reasonable sense of personal dignity. And some cases do reject liability because of plaintiff's failure to meet this standard. See, e.g., *Wishnatsky*, supra; *Balas*, supra.

However, almost no cases can be found that clearly reject the position in § 103(b), because almost no cases clearly involve a fact pattern in which plaintiff was highly offended by some type of contact, and in which defendant also knew that plaintiff would be highly offended. The critical question is whether a court should permit liability on that very specific set of facts.

One case has been found that rejects the position in § 103(b). See McCracken v. Sloan, 252 S.E.2d 250, 252 (N.C. Ct. App. 1979), discussed above. The court stated: "[W]e are left with evidence that defendant smoked cigars in his own office when he knew it was obnoxious to a person in the room for him to do so. That person did experience some mental distress as a result of inhaling the cigar smoke. We hold this is not enough evidence to support a claim for assault or battery." However, as noted above, it is doubtful that most courts today would agree with the *McCracken* court that, on the facts presented, defendant did not offend a reasonable sense of dignity.

A number of cases offer implicit support for the rule in § 103(b). Thus, Illustration

~~A Texas jury instruction extends offensive battery liability to known extrasensitivity cases:~~

> ~~A person commits an assault if he … intentionally or knowingly causes physical contact with another when he or she *knows* or should reasonably believe *that the other will regard the contact as offensive* or provocative.~~

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~~(Tex. 2010); Wal-Mart Stores, Inc. v. Odem, 929 S.W.2d 513, 522 (Tex. App. 1996). A recent Texas Supreme Court case states that the language quoted above corresponds to a form of common-law battery, but the court does not focus on the known extrasensitivity language. City of Watauga v. Gordon, 434 S.W.3d 586, 590 (Tex. 2014).~~

~~Illustration~~ 4 is based on Cohen v Smith, 648 N.E.2d 329 (Ill. App. Ct. 1995). In the case itself, the court did not specifically address the question whether the contact in question offended a "reasonable" sense of dignity, nor did it explicitly endorse offensive-battery liability in cases where the actor knows of the plaintiff's extrasensitivity. However, the court did note the allegation that the nurse defendant had been informed of plaintiff's unusual preference not to be observed or touched by a man while plaintiff was unclothed. Id. at 333.

Illustration 6 is loosely based on Siegel v. Ridgewells, Inc., 511 F. Supp. 2d 188, 194 (D.D.C. 2007) (no battery liability where shrimp and other nonkosher sushi was served to wedding guests because no proof that plaintiff came into contact with or ingested the nonkosher food).

Two cases have cited a comment from a torts treatise that "unless the defendant has special reason to believe that more or less will be permitted by the individual plaintiff, the test is what would be offensive to an ordinary person not unduly sensitive to personal dignity." Prosser and Keeton, § 9 at 42; see also Prosser, § 9, at 37. However, neither case actually applied a more individualized standard. See Paul v. Holbrook, 696 So. 2d 1311, 1312 (Fla. Dist. Ct. App. 1997); Wallace v. Rosen, 765 N.E.2d 192, 197 (Ind. Ct. App. 2002).

In Bradley v. Morton Thiokol, 661 So. 2d 691 (La. App. 1995), the court ruled that a supervisor did not commit a battery when he patted plaintiff on the back and (at the suggestion of her coworkers) asked if she had seen a frog, as a result of which plaintiff suffered severe stress, a phobic reaction, and depression. Coworkers knew of plaintiff's phobia of frogs and had deliberately placed a realistic-looking frog fishing lure inside a canister that plaintiff later inspected. The court noted that the supervisor was unaware of their prank and of her phobia.

In Holdren v. Gen. Motors Corp., 31 F. Supp. 2d 1279 (D. Kan. 1998), the court implies, without clearly holding, that a defendant's knowledge of a plaintiff's unusual sensitivity towards certain contacts might support a finding of offensive battery. Applying Kansas law, the court affirmed the grant of summary judgment to the defendants mainly because the plaintiff could not prove that the contact by his job supervisor (tapping him with a single sheet of rolled-up paper and placing his hands on plaintiff's back during a casual greeting) was offensive to a "reasonable sense of personal dignity"; however, the court also noted that "there is no evidence in the record that plaintiff ever indicated to [defendant] that he was offended by [defendant]'s conduct or that he asked [defendant] to refrain from touching him." 31 F. Supp. at 1287.

In the famous case, Leichtman v. WLW Jacor Commc'ns, Inc., 634 N.E.2d 697, 699 (Ohio Ct. App. 1994), defendant deliberately blew smoke in the face of plaintiff, an antismoking advocate, on a television show. The fact pattern arguably involves a plaintiff with a special sensitivity, and yet the court upheld offensive-battery liability. However, the court's analysis focuses not on the definition of offensiveness, but on whether the contact was legally sufficient. In the court's view, purpose to contact is sufficient, even when the contact is merely by way of smoke particles; but knowing (to substantial

certainty) contact would not be sufficient if the contact occurred by way of smoke. The court does not explicitly suggest that "offense" is defined differently if plaintiff is unusually sensitive. On the other hand, the case does mention the "glass cage" defense discussed in *McCracken*, supra, a case that does reject liability for known extrasensitivity. (The quote in *McCracken* is from Prosser: "[I]t may be questioned whether any individual can be permitted, by his own fiat, to erect a glass cage around himself, and to announce that all physical contact with his person is at the expense of liability.") *Leichtman* reasons that there is no need to discuss this "defense" because defendant deliberately blew smoke in plaintiff's face; so perhaps the court is implicitly suggesting that defendant's purpose to offend, not just defendant's purpose to contact, is critical to liability.

In MacNeil Environmental, Inc. v. Allmon, 202 Minn. App. LEXIS 449, at *6-*8 (Minn. Ct. App. 2002) (unpublished decision), defendant and plaintiff (who was defendant's former employer and had known defendant for many years) were attending a tense meeting. During a break in the meeting, defendant intentionally rubbed plaintiff's head with his knuckles. The court upheld summary judgment for the defendant on the battery claim. "Testimony does not reflect that [defendant] had intended *or [plaintiff] perceived* any aggression in the gesture. An ordinary person would not have found the knuckle-rub offensive as that term is used in the context of battery" (emphasis added).

It is significant that, in a number of cases where a court concludes that plaintiff did not satisfy the "reasonable offense" standard, the court specifically notes that defendant was unaware that plaintiff would find the contact offensive. See *Balas*, supra; *Bradley*, supra; *Holdren*, supra; *MacNeil*, supra. However, these judicial statements cannot be fairly described as *explicitly* supporting the rule in § 103(b).

Academic support exists for the rule stated in § 103(b). In his treatise, Professor Dobbs notes that a formulation limited to "a reasonable sense of dignity" and ignoring cases in which the actor knows that the other is offended could be interpreted as "disregard[ing] the plaintiff's own wishes," which in most cases "count for everything; she has a right to reject unprivileged touchings that others would find reasonable." Dan B. Dobbs, The Law of Torts § 29, at 56 (2000); see also Dobbs et al., The Law of Torts 2d § 34, at 86.

A 1934 article asserts that offensive-battery liability is available in cases of known extrasensitivity, but provides no citations. See Charles E. Carpenter, Intentional Invasion of Interest of Personality, 13 Or. L. Rev. 227, 227 (1934) ("The touching must have been harmful, or if not harmful, of such character that looked at objectively it would have been offensive to the normal person, except in the case where the touching was actually offensive to the plaintiff who was, and was known by the defendant to be, unusually sensitive."). See also Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, 1 Harper, James and Gray on Torts § 3.2, 311 ("Thus, a pat or similar display of affection by a sincere and even passionate lover may be highly offensive to an unresponsive woman who has not consented thereto, and an elephantine sense of humor may be responsible for contacts that are offensive to one with a more delicate sensitivity.")

Recognizing liability under § 103(b) makes offensive-battery liability cohere more closely with other intentional-tort doctrines, including the subjective definition of "anticipation" in the tort of assault and the weight given to the actor's knowledge of the special vulnerability of a plaintiff in

~~In judging whether an actor has committed~~ the tort of intentional infliction of emotional distress~~,~~ , ~~weight is given to whether an actor knows of the plaintiff's "vulnerability."~~ See Restatement Third, Torts: Liability for Physical and Emotional Harm § 46, Comment *d* ("Whether an actor's conduct is extreme and outrageous depends on the facts of each case, including … whether the other person was especially vulnerable and the actor knew of the vulnerability…"). See also id., Comment *j* ("[T]he law intervenes only when the plaintiff's emotional harm is severe and when a person of ordinary sensitivities in the same circumstances would suffer severe harm. There is no liability for emotional harm suffered only because of the unusual vulnerability of a victim, unless the actor knew of that special vulnerability."); id., Illustration 11. However, the argument for including known extrasensitivity in the tort of intentional infliction of severe emotional distress is arguably stronger than for including it in offensive battery. See Frank S. Ravitch, Hostile Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees, 36 B.C. L. Rev. 257 268 n.53 (1994-1995) (analyzing the caveat in Restatement Second, Torts § 19):

> One might be justified in causing a seemingly benign contact that one knows wiII be offensive to another simply due to the other person's unusual sensitivity. On the other hand, the nature of the conduct required for intentional infliction of emotional distress precludes a justification defense because the required conduct is inherently unjustified.

An analogous issue arises in defining the scope of the crime of rape. Jurisdictions that define rape as requiring the use or threat of physical force usually permit conviction if the victim submits to intercourse because of a fear of physical force, but they sometimes require the prosecution to establish that the victim's fear was "reasonable." See, e.g., State v. Rusk, 424 A.2d 720, 727 (Md. 1981). Some jurisdictions, however, permit conviction if the prosecution can establish "[either that] the victim's fear was reasonable under the circumstances, or, if unreasonable, [that] the perpetrator knew of the victim's subjective fear and took advantage of it." People v. Iniguez, 872 P.2d 1183, 1188 (Cal. 1992). See also State v. Brooks, 265 P.3d 1175, 1185 (Kansas Ct. App. 2011) ("A perpetrator who knowingly exploits a victim's extreme phobia, by definition an irrational fear, to overcome resistance probably commits rape.").

Moreover, recognizing intentional-tort liability for those who refuse to accommodate the extrasensitive psyches of others is also broadly consistent with the duty of actors not to *negligently* cause harm to others, a duty that sometimes requires taking additional precautions to accommodate the unusual susceptibility of others to physical injury when the actor is aware of that susceptibility. See, e.g., Vaughn v. Northwest Airlines, Inc., 558 N.W.2d 736 (Minn. 1997) (airline has tort-based duty to assist physically disabled passenger when airline is aware of that disability).

The newly revised explanation of the nature of a Restatement underscores the value of overall coherence and consistency when specific Restatement rules are articulated, even if explicit judicial support for a specific rule is lacking. Thus, a Restatement is "not bound by precedent that is inappropriate or inconsistent with the law as a whole." Moreover, one step in the Restatement process is "to determine what

specific rule fits best with the broader body of law and therefore leads to more coherence in the law." See Revised Style Manual (*Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work*) (2015).

Numerous cases uphold the right of patients to reject conventional medical treatment because of their religious or moral or personal beliefs, even if those beliefs are not widely shared in the general population. If that right is not respected, the medical practitioner is subject to liability for offensive or harmful battery. See, e.g., Perkins v. Lavin, 648 N.E.2d 839, 841 (Ohio App. 1994) (summary judgment for defendant on offensive-battery claim rejected when "plaintiff [Jehovah's Witness] specifically informed defendant that she would consider a blood transfusion offensive contact"); Phillips By and Through Phillips v. Hull, 516 So. 2d 488 (Miss. 1987), overruled on other grounds, Whittington v. Mason, 905 So. 2d 1261 (Miss. 2005) ("[A] competent individual has a right to refuse to authorize a procedure, whether the refusal is grounded on doubt that the contemplated procedure will be successful, concern about probable risks or consequences, lack of confidence in the physician recommending the procedure, religious belief, or mere whim."). ~~It is difficult to square this widely accepted requirement of deference to highly unconventional beliefs about medical treatment with a standard that uniformly requires that a contact be offensive to a "reasonable" sense of dignity.~~

Similarly, if A and B are sexually intimate with each other, each has a right to decline consent to a particular type of sexual contact even if most people would readily consent to such a contact. If A expresses a refusal to sleep with, or even to kiss, B until they are married, B is subject to liability for offensive battery if he or she proceeds to intentionally touch A in a manner contrary to A's expressed desires.

In some known extrasensitivity cases, such as Cohen v. Smith, supra, the actor agrees to accommodate the plaintiff's preference. When the actor subsequently fails to honor that agreement, arguably it is the plaintiff's consent to be touched only in accordance with the agreement, rather than the known extrasensitivity principle of § 103(b), that justifies tort liability. But this argument does not demonstrate that § 103(b) is gratuitous. After all, sometimes an actor has a duty to accommodate the plaintiff's unusual preferences, even if the actor has not explicitly agreed to do so. Hospital staff have a duty to respect the desire of a Jehovah's Witness not to receive a blood transfusion. They also have a duty to respect some other preferences that are not unduly burdensome to accommodate. (Suppose a hospital could easily accommodate the preference of the plaintiff in *Cohen* not to be touched by a doctor or nurse of the opposite sex.) Similarly, if A has expressed objection to a particular form of sexual intimacy, but B proceeds to touch A in a manner that A has objected to, B is subject to liability for offensive battery even if B has not agreed to comply with A's wishes.

To be sure, battery claims involving medical treatment and sexual contact are distinctive in one respect: courts are likely to treat any nonconsensual contact in these domains as offensive per se. Thus, actors are arguably on notice that they have a more stringent duty to obtain the plaintiff's consent before proceeding with such a contact, and they arguably should recognize that any nonconsensual contact is offensive to a reasonable sense of dignity. However, even within these domains, the plaintiff might insist on conditions on his or her consent that reflect idiosyncratic or unusual subjective preferences, conditions that the actor may have a duty to respect (as in Cohen v. Smith).

Moreover, outside of these domains, if the actor knows that the plaintiff has a subjective preference not to be touched in a particular manner, it is even less plausible to rely on the "reasonable sense of dignity" test as an explanation of a duty to respect that preference. (An example is Illustration 4, involving the plaintiff's idiosyncratic fear of butterflies.)

The difficulty of identifying what counts as a "reasonable" sense of dignity, and the concern about interpreting "reasonableness" too flexibly in light of subjective factors, are problems that arise with the tort of negligence as well as with intentional torts. In negligence law, the factfinder must determine whether a person (either the plaintiff or the defendant) failed to act as a reasonable person would. In judging whether a plaintiff suing for negligence failed to reasonably mitigate his own damages, for example, it is difficult to answer the question whether a "reasonable Jehovah's Witness" would reject a blood transfusion. Under the "reasonable sense of personal dignity" standard, it is similarly difficult to answer the question whether a reasonable person who is terrified of butterflies would be highly upset if someone placed a butterfly on her body.

In support of the view that protecting the vulnerable is an important aim of tort law, see John Kircher, The Four Faces of Tort Law: Liability for Emotional Harm, 90 Marq. L. Rev. 789 (2007); Jane Stapleton, The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable, *Centenary Essays for the High Court of Australia*, ed. Peter Cane (Butterworths 2004) 242-255; Carl F. Stychin, The vulnerable subject of negligence law, 8 International J. of Law in Context 337 (2012); see generally Martha Fineman, The Vulnerable Subject, 20 Yale Journal of Law and Feminism 1 (2008); Vulnerability: New Essays in Ethics and Feminist Philosophy (Edited by Catriona Mackenzie, Wendy Rogers, and Susan Dodds) (Oxford 2013).

It might be argued that the "against public policy" and "undue burden" limitations on § 103(b) liability are unnecessary because, under § 103(a), only a "reasonable" sense of dignity is required, and it would be "unreasonable" not to accommodate an unusual sensitivity unless accommodation is against public policy or is an undue burden. However, this argument confuses the reasonableness of a plaintiff's sense of offense with the reasonableness of an actor's decision not to accommodate another's (unusual and thus "unreasonable") sense of offense. Section 103(a) addresses only the first issue. With respect to the second issue, it would indeed be possible to replace the public-policy and undue-burden limitations with a requirement that the actor not "unreasonably" decline to accommodate plaintiff's unusual sensitivity. But those limitations are more precise and focused. Promiscuous and unnecessary use of "reasonableness" criteria in tort doctrine should be avoided.~~An alternative way to narrow the subjective prong of offensive battery is to require that the actor's conduct be for the *purpose* of offending (or of highly offending) the plaintiff. This would considerably narrow the scope of § 103(b), but might be attractive to courts concerned about the potential breadth of this category of assault liability.~~

~~The function of the "highly" offensive threshold requirement is similar to the function of the "serious" emotional harm requirement for negligent infliction of emotional harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 47, Comment *l*:~~

~~The requirement that emotional harm be serious in order to be recoverable ameliorates two concerns regarding providing a claim for negligent infliction of~~

~~emotional harm. The threshold reduces the universe of potential claims by eliminating claims for routine, everyday distress that is a part of life in modern society. And at the same time, the seriousness threshold assists in ensuring that claims are genuine, as the circumstances can better be assessed by a court and jury as to whether emotional harm would genuinely be suffered.~~

With respect to the question of undue burden to accommodate a plaintiff's extrasensitivity, the court in Cohen v. Smith, supra, had this to say:

> Patricia Cohen was not trying to, and was not entitled to, impose her religious beliefs on others. When she informed the Hospital of her moral and religious beliefs against being viewed and touched by males, the Hospital was free to refuse to accede to those demands. But, according to her complaint, when Cohen made her wishes known to the Hospital, it, at least implicitly, agreed to provide her with treatment within the restrictions placed by her beliefs.

648 N.E.2d at 335.

Under contemporary disability law, reasonable accommodation of the particular physical or mental characteristics of a plaintiff is required, and the requirements are specified in some detail. However, for purposes of offensive-battery liability, the inquiry should simply be whether the actor must incur an undue burden in order to accommodate unusual or idiosyncratic emotional qualities of the plaintiff of which the actor is subjectively aware. Thus, if the hospital and nursing staff in Illustration 4 (and in *Cohen*, supra) declined to accommodate a patient's desire not to be touched by a male nurse or doctor because this would present staffing difficulties, they would not be liable for offensive battery. This would be so even if the hospital were the only local medical facility available to plaintiff for her surgery.

Another tort doctrine, "implied-in-law" consent, also serves to limit the scope of battery liability in a small number of cases. See § 117 infra. This doctrine provides that socially justifiable contacts such as those that occur when an actor squeezes onto a crowded bus or subway car will not result in tort liability. The doctrine often serves a similar function as the public-policy and undue-burden provisions of § 103, protecting actors from liability when respecting the plaintiff's desire for immunity from a particular type of contact places too great a burden on the actor or on others.

~~For an example of the "implied-in-law" consent category, s~~See Wallace v. Rosen, 765 N.E.2d 192, 198 (Ind. Ct. App. 2002) (concluding that defendant's moving a person on a stairway in the direction of the building exit~~a stairway~~, in the course of a school fire-drill evacuation, is an example of a socially justifiably contact in a "crowded world," and thus no harmful battery liability attached) ~~when defendant turned plaintiff in the direction of an exit down the stairs in the course of the evacuation)~~ (quoting Prosser et al., Prosser & Keeton on Torts § 9, at 42 (5th ed. 1984)). Suppose that no physical harm had resulted in *Wallace*. Suppose further that plaintiff had loudly objected to being turned towards the exit down the stairs, so that defendant knew that plaintiff considered her conduct highly offensive. Still, the court would undoubtedly have rejected offensive-battery liability based on implied-in-law consent.

The function of the "highly" offensive threshold requirement is similar to the function of the "serious" emotional-harm requirement for negligent infliction of emotional harm. See Restatement Third, Torts: Liability for Physical and Emotional Harm § 47, Comment *l*:

> The requirement that emotional harm be serious in order to be recoverable ameliorates two concerns regarding providing a claim for negligent infliction of emotional harm. The threshold reduces the universe of potential claims by eliminating claims for routine, everyday distress that is a part of life in modern society. And at the same time, the seriousness threshold assists in ensuring that claims are genuine, as the circumstances can better be assessed by a court and jury as to whether emotional harm would genuinely be suffered.

A final issue that may arise with liability for "knowingly" causing serious offense is as follows. Suppose that Bella in Illustration 5 sincerely claims that, although she knew that Donna would be quite upset by having a butterfly placed on her neck, Bella honestly did not believe that causing a person distress due to a harmless butterfly is the kind of injury for which the law would permit civil liability. The short answer to Bella's claim is that she has made a legally immaterial mistake of law. A defendant's mistaken belief that the contact she caused does not legally ~~constitute~~ qualify as either "offensive to a reasonable sense of dignity" or "highly offensive" to plaintiff should not by itself preclude liability. If such a belief were understood as negating the intent or knowledge required for battery, this would undermine the law's definition of "offense."

The point that mistake of law is not a general tort defense is important, not just for the known-extrasensitivity doctrine discussed in this Comment, but also for the dual-intent rule for battery, which a number of jurisdictions endorse. See § 102, Comment *b*, and Reporters' Note thereto. If a jurisdiction employs the dual-intent rule, cases will arise in which the actor's liability depends on whether she acts with the purpose to cause offense or with the substantially or almost certain knowledge that she will do so. Again, care must be taken to characterize that intent correctly. An actor's mistaken belief that the contact she caused does not legally constitute "offensive to a reasonable sense of dignity" should not be a defense; if it were a defense, the objective definition of "offense" would be undermined. Accordingly, the following passage in the court's opinion in White v. Muniz, supra (applying the dual-intent rule), is somewhat problematic:

> [T]he jury had to find that [defendant] appreciated the offensiveness of her conduct in order to be liable for the intentional tort of battery. It necessarily had to consider her mental capabilities in making such a finding, including her age, infirmity, education, skill, or any other characteristic as to which the jury had evidence.

Muniz, 999 P.2d at 818. Suppose an actor with a mental disability believes that touching a stranger's genitals is not an offensive contact forbidden by the law, although he realizes that the stranger will be upset by the touching. Even under the dual-intent approach, the actor's beliefs should suffice as "intent to offend," because the actor does know facts (the nature of the touching, and the fact that it will upset plaintiff) that, as a matter of law,

render the touching legally offensive. See also Dressler, supra, at § 13.01 (explaining that in criminal law, mistake of governing criminal law is ordinarily no defense).

c. "Purpose to offend" as an alternative to § 103(b). The "purpose to offend" alternative would impose significantly narrower liability than § 103(b). Purpose is much more difficult to prove than knowledge. See § 104, Comment *c*. Moreover, if the purpose requirement is narrowed to require a desire to cause *serious* offense, analogous to the § 103(b) requirement of knowledge that the contact will be *highly* offensive, proof will be especially difficult. If, however, a purpose to cause *any* degree of offense suffices, then this alternative would impose much wider liability, perhaps unduly wide if the purpose of the purpose test is to restrict battery liability more sharply. (A possible narrower variation on the latter approach would limit liability to (a) purpose to cause any degree of offense so long as (b) the contact is *highly* offensive to plaintiff.)

Some jurisdictions treat contacting another with the "purpose to harm" as conduct that automatically satisfies the requirement of offending a plaintiff's "reasonable sense of personal dignity." See N.Y. Pattern Jury Instr.—Civil 3:3, supra. Such a jurisdiction might treat a purpose to offend in the same manner. However, if it is considered desirable to impose liability on an actor who knows that another is extrasensitive to offense and contacts the other for the purpose of offending (or of highly offending) the other, it is preferable to employ this explicit criterion of liability rather than to recognize such liability under the malleable and uncertain category of "reasonable sense of dignity." See also Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, 1 Harper, James and Gray on Torts § 3.2, 310 (3d ed. 2006) (Touching another to get his attention is ordinarily not an offensive battery; "If, however, a supersensitive person is known to resent such contacts, a deliberate touching for the purpose of offense would probably involve liability.")

If a jurisdiction adopts the purpose criterion in lieu of § 103(b), there would seem to be little need to adopt the language in the last paragraph of § 103, precluding liability when "requiring the actor to avoid the contact [with the extrasensitive plaintiff] would be unduly burdensome" or when liability would "violate public policy." In some cases, however, the latter constraint might still be desirable. Suppose P declares to his coemployees that he would be highly offended if he were touched by a gay person or by any object that a gay person has touched. Librarian D later hands a book to P that P had requested. As soon as P has taken the book in his hands, and for the purpose of upsetting P, D declares to P, "And by the way, I'm gay." In such a scenario, it seems appropriate to permit a court to preclude tort liability because liability would be against public policy.