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I. INTRODUCTION

The recently published Volume 1 of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*,[1] is a first-rate achievement, all the more so considering that it was captained by a succession of Reporters and underwent more than its fair share of twists and turns[2] as it wound its way to its final version and publication. It is regrettable, however, that in this latest torts restatement project, the American Law Institute ("Institute") was not able to address completely the nature of the intent required for traditional intentional torts to the person, such as battery. I hope the matter will be dealt with and perfected in a restatement project in the near future.

The new *Restatement (Third)*[3] defines intent in its first section, stating that "[a] person acts with the intent to produce a consequence if . . . the person acts with the purpose of producing that consequence; or . . . acts knowing that the consequence is substantially certain to result."[4] This definition is an umbrella one, providing an all-inclusive definition of what it means to "intend" something. It simply defines the state of mind needed to support a finding that a defendant intended "something" as a "consequence." But, before a person may be determined to have entertained the necessary intent for a specific tort, we have to also know what "consequence" must have been intended for that tort. The Section 1 definition does not address that aspect of intent—the nature of the "consequence" that must have been intended to support various traditional torts that require intent, such as battery. Rather, for the present, it expressly defers to the *Restatement (Second)* sections that address the substantive details and elements of those torts.[5] The comments state that the "Restatement (Second), Torts, remains largely authoritative in explaining the details of the specific torts encompassed by this Section and in specifying the elements and limits of the various affirmative defenses that might be available."[6] Thus, the current project did not address one dimension of the concept of intent. For further elaboration we are told to look to the *Restatement (Second)*, which continues to govern such torts "until future installments of the Restatement Third,

1. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010).

2. Emblematically, as it has wound its way toward final approval through various drafts, the new *Restatement* has had a variety of titles. In 1998, it was *Restatement (Third) of Torts: General Principles* (Preliminary Draft No. 1, 1998). In 2001, the title changed to the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* (Preliminary Draft No. 3, 2001). In 2005, the title became the *Restatement (Third) of Torts: Liability for Physical Harm* (Proposed Final Draft No. 1, 2005). And, in 2006, the title ultimately became the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (Council Draft No. 6, 2006), the title used in the final published version of Volume 1 of the Restatement *(Third) of Torts: Liability for Physical and Emotional Harm* (2010).

3. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010).

4. *Id.* § 1.

5. *Id.* § 1 cmt. a.

6. *Id.* § 5 cmt. a.

Torts"[7] deal with such matters.[8]

Battery is the first intentional tort addressed in the *Restatement (Second)*[9] and the most useful one with which to illustrate the continuing ambiguity of the torts restatements. It states in part that for a battery, the defendant must have intended "to cause a harmful or offensive contact . . . or an imminent apprehension of such contact . . . [and such contact] results."[10] But the language, "intending to cause a harmful or offensive contact," is unclear on precisely what "consequences" must have been intended to support the tort of battery. It does not tell us whether a defendant must have merely intended a contact (or its apprehension) that *turns out to be* harmful or offensive; *or* a defendant must have not only intended the contact (or its apprehension), but also intended that it *be* harmful or offensive.[11] It leaves

7. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM intro. at 1 (2010) ("Although this Restatement provides a definition of intent and the basis for liability for intentionally caused harm, it does not address the specific intentional physical-harm torts or their elements. That law has not undergone significant change since the Second Restatement of Torts and remains governed by it until future installments of the Restatement Third, Torts, address it."); *see also id.* § 5 cmt. a.

8. A number of *Restatement (Third) of Torts* projects are apparently contemplated or at least under consideration, one of which would perhaps be devoted to "Intentional Torts to Persons." Ellen Pryor, *Restatement (Third) of Torts: Coordination and Continuation*, 44 WAKE FOREST L. REV. 1383, 1392 (2009). Three projects have been at or are near completion: *Restatement (Third) of Torts: Products Liability* (1998), *Restatement (Third) of Torts: Apportionment of Liability* § 22 (2000), and *Restatement (Third) of Torts: Liability for Physical & Emotional Harm* (2010) (Volume 1 of which has been published). At least five additional projects may be undertaken "that might someday constitute the volumes of the Restatement (Third)," one of which would address "Intentional Torts to Persons." Pryor, *supra*, at 1389. That *Restatement (Third)* module-volume would cover "battery, assault, false imprisonment, intentional infliction of emotional distress, relevant defenses and privileges, and relevant remedies." *Id.* at 1392. *See generally* Ellen M. Bublick, *A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts*, 44 WAKE FOREST L. REV. 1335 (2009) (offering thoughtful suggestions and ideas on the title and coverage of such a project).

9. *See* RESTATEMENT (SECOND) OF TORTS §§ 13–20 (1965).

10. *Id.* §§ 13, 16, 18, 20.

11. The question has been recognized by quite a few authorities. *See, e.g.*, White v. Muniz, 999 P.2d 814, 816 (Colo. 2000) (addressing the question "whether an intentional tort requires some proof that the tortfeasor not only intended to contact another person, but also intended that the contact be harmful or offensive to the other person"); Wagner v. State, 122 P.3d 599, 603 (Utah 2005) (stating the issue as whether "the only intent required under the statute is simply the intent to make a contact," or whether it "requires the actor to intend harm or offense through his deliberate contact"); DAN B. DOBBS, THE LAW OF TORTS 58 (2000) [hereinafter DOBBS, THE LAW OF TORTS] (posing the question "[w]hether the plaintiff shows intent by showing merely an intent to touch that turned out to be offensive or harmful, or whether she must show that the harm or offense was also intended"); MARK A. GEISTFELD, TORT LAW 120–21 (2008) (recognizing the question whether battery requires merely "intent to cause a contact that turns out to be harmful or offensive," or also "to cause harm or offense," and noting the disagreement among the courts between the "single-intent and the dual-intent interpretations" of the definition of battery); Bublick, *supra* note 8, at 1343 ("[In] the context of battery . . . some courts recognize liability in cases in which the defendant has an intent to contact,

unanswered whether the consequence that the defendant must have intended encompasses merely intent to cause contact (or its apprehension), *or* also requires in addition an intent that the contact (or its apprehension) cause a harmful or offensive effect. These two rules have been referred to as the "single intent" and "dual intent" requirements, respectively.[12]

Thus, neither the *Second* nor, thus far, the *Third Restatements* resolve whether the consequence that a defendant must have intended is satisfied by *merely intent to contact* (the so-called *single intent* approach), or also requires in addition an intent that the contact cause a *harmful or offensive effect* (the so-called *dual intent* approach). By opting to continue, at least for now, with the *Restatement (Second)* provisions, the *Restatement (Third)* will perpetuate the ambiguity and uncertainty resulting from the failure of the *Restatement (Second)* to clearly define the actionable consequence that must be intended for these torts. The effect will be to largely continue with the archetypal ambiguity that began in the *First Restatement* in 1935.[13]

In fairness, it is understandable that at this time the various drafters of the latest project of the *Restatement (Third)* may have been disinclined to undertake to deal specifically with the elements and details of the traditional intentional torts, such as battery. A comprehensive revision of the full range of material on the traditional intentional torts to the person could have delayed revision of the important materials that were (or will soon be) addressed in the latest project.[14] On the other hand, the new *Restatement*

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but not an intent to harm. This is particularly true in single-intent jurisdictions in which intent to harm is not recognized as a necessary element of the battery tort."); Craig M. Lawson, *The Puzzle of Intended Harm in the Tort of Battery,* 74 TEMP. L. REV. 355, 35657, 36263 (2001) (identifying the two rules); Osborne M. Reynolds, Jr., *Tortious Battery: Is "I Didn't Mean Any Harm" Relevant?*, 37 OKLA. L. REV. 717, 717 (1984) (stating that the *Restatement* "equivocates," and asking "[d]oes this mean intent to cause contact that in fact turns out to be harmful or offensive, or does it mean intent to harm or offend?"); Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?,* 48 ARIZ. L. REV. 1061, 1066 (2006) ("Must the defendant intend only to cause the contact? Or must she also intend that the contact be harmful or offensive?"); *cf.* Mark Strasser, *A Jurisprudence in Disarray: On Battery, Wrongful Living, and the Right to Bodily Integrity,* 36 SAN DIEGO L. REV. 997, 1011 (1999) ("Regrettably, the language commonly used to describe the necessary intent is open to misinterpretation.").

12. *See, e.g.*, *White*, 999 P.2d at 817 (referring to the "dual intent" requirement); DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 51 n.2 (6th ed. 2009) [hereinafter DOBBS ET AL., TORTS AND COMPENSATION] (alluding to the "single intent" and "dual intent" rules); GEISTFELD, *supra* note 11, at 121 (referring to the "single-intent" and the "dual-intent" interpretation of the definition of battery); Simons, *supra* note 11, at 1066 (referring to the "dual intent or single intent" question and rules).

The "dual intent" terminology refers to the question of the consequences that must have been intended for the purposes of battery. The terminology should be distinguished from the "dual definition" phrase used in the Restatement itself. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 cmt. a & Reporters' Note cmt. a (2010). The latter phrase refers to the two bases in section 1 for establishing that a defendant entertained the requisite state of mind with respect to the required consequences (whatever they are).

13. *See infra* notes 46–48 and accompanying text.

14. Those include important sections on one aspect of intent, negligence liability, strict liability, causation, and proximate cause that were addressed in the completed Volume 1, and sections on duty

does devote a section to the nature of intent. In doing so, it leaves one crucial aspect of the element of intent in continuing uncertainty: the nature of the consequences that must be intended for the traditional intentional torts, including the bedrock tort of battery. Ideally, a comprehensive revision of the elements and details governing the traditional intentional torts to the person, such as battery, would have been included in the current project. However, if that was not feasible, then the latest project should have, at a minimum, clarified the nature of the consequence that must have been intended for the purposes of the traditional intentional personal injury torts, such as battery, notwithstanding that those torts would be comprehensively explored in some later project.

In the present Article, I will first elaborate on the current uncertainty of the nature of the intended consequence for traditional personal injury torts, focusing on the quintessential intentional tort of battery.[15] I will also discuss why I believe it is important for the Institute to clarify the concept of intent relating to battery and other traditional intentional torts.[16]

Second, I shall proffer a formulation of one possible way to reduce the uncertainty regarding the meaning of intent for the purposes of battery.[17] Namely, for the purposes of the intent requirement, I propose that in addition to proving that the defendant intended to cause the subject contact (or its apprehension), the plaintiff should also have to prove either: (1) that the defendant entertained a purpose or knew to a substantial certainty that the contact or its apprehension would be harmful or offensive, or alternatively, (2) that immediately prior to initiating the contact, the defendant both (a) knew that valid consent was required or that in its absence the contact or its apprehension would be of a harmful or offensive character, and (b) either (i) was aware and contemporaneously cognizant of the absence of or deviation from the reasonably evident consent of the contemplated recipient of the contact (meaning aware and contemporaneously cognizant of the absence of

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issues, standalone emotional distress claims, and liability of possessors of land, among others, that will be included in the second volume of this current *Restatement (Third)* project. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM Reps. Mem. (Tentative Draft No. 6, 2009) ("In this Tentative Draft we have the penultimate Chapter of the project that has come to be known, after an ALI record number of name changes, as Liability for Physical and Emotional Harm. This Chapter addresses the duties applicable to land possessors for harm that occurs to entrants on land from risks existing on that land; one Section treats land possessors' duties to those off the land. The final Chapter will concern the liability of actors who engage independent contractors. That Chapter, to be written by Professor Ellen Pryor, will complete the work.").

15. *See infra* Part II.

16. *See infra* Part II.

17. *See infra* notes 77–83 and accompanying text.

or his own lack of knowledge of information that a reasonable person would understand as establishing the existence of consent of the contemplated recipient of the contact, or aware and contemporaneously cognizant of the existence of information a reasonable person would understand as being inconsistent with the consent of the contemplated recipient of the contact), or (ii) did not honestly believe that he had valid consent of the contemplated recipient of the contact.[18]

Finally, I will take the occasion of the publication of volume 1 of the latest torts restatement project as an opportunity to reflect on the province and role of restatements.[19] As they craft restatements, I believe the drafters and the Institute should be guided by two goals. The first is to address and reduce uncertainty and complexity in the law, and, as adjuvant, to keep the restatement provisions current and vital. Second, I believe those formulating and revising restatements should consider not only the aim to "restate" the law, if the state of the law and its stability, salience, and broad-based acceptance make it feasible and appropriate to do so, but should also thoughtfully assess and guide the law's development. Thus, I believe the drafters and the Institute should embrace a broadly conceived, creative orientation, which is not inordinately focused on creating provisions that are reflections of composite nose counts, especially when faced with a conflicting, fluid, or largely indeterminate and opaque state law tapestry on a particular issue. The formulation of restatements should be informed not only by a sense of the weight of authority, but also guided by sound underlying policy goals. In particular, I will examine the evolving role of restatements and assess the validity of the putative dichotomy on whether to restate the law as it is (or may once have been) or to state the law as it ought to be.

II. DOCTRINAL UNCERTAINTY

A. The Inchoate Definition of Intent and the Meaning of "Consequence"

To prevail on a battery claim, the plaintiff must have suffered a nonconsensual harmful or offensive contact.[20] But the fact that the plaintiff experienced such a contact is not alone sufficient to support liability for battery. To satisfy the essential intent element, the plaintiff must also prove that the defendant intentionally caused the actionable contact.[21] This intent element has two dimensions. One relates to the required *state of mind* of the defendant, and the other (and the focus of this Article) to the *consequence*

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See* DOBBS, THE LAW OF TORTS, *supra* note 11, at 55–57.

21. *Id.* at 58.

that must have been intended under the requisite state of mind.[22]

Again, the *Restatement (Third)* defines the requisite state of mind that an actor must entertain for the purposes of intent. It states that "[a] person acts with the intent to produce a consequence if . . . the person acts with the purpose of producing that consequence; or . . . acts knowing that the consequence is substantially certain to result."[23] This generic[24] definition is designed to provide an all-inclusive definition of what it means to "intend" something. It simply defines the state of mind needed to support a finding that a defendant intended a "consequence;" it does not delineate the nature of the consequence that must have been "intended," nor is it particularized to specific torts. It defines when an actor intended an actionable result.[25] But, before a person may be determined to have entertained the necessary intent for a specific tort, we must also know what "consequence" (or threshold actionable result) must have been intended for that tort. The use of this generic and inchoate formulation made it essential that the relevant consequence be identified for the particular intentional tort to which the state-of-mind intent rule was to be applicable. But, with respect to many of the traditional intentional torts, such as battery, the new *Restatement* defers further elaboration, stating in its Introduction that "[a]lthough this Restatement provides a definition of intent and the basis for liability for intentionally caused harm, it does not address the specific intentional physical-harm torts or their elements,"[26] which remain governed by the *Second Restatement of Torts* until addressed in "future installments of the Restatement Third, Torts."[27] A comment explains:

> The rule of liability in this Section does not replace the doctrines for specific intentional torts, such as battery, assault, false

22. *Id.*

23. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 (2010).

24. An earlier draft version of this section defined intent with reference to "harm." *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 1 (Discussion Draft 1999) (stating that "[a]n actor's causation of harm is intentional if the actor brings about that harm either purposefully or knowingly"). The substitution of the current "consequence" language was a shift to more neutral, generic terminology. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law,* 54 VAND. L. REV. 1133, 1135, 1153 (2001) (advocating a generic formulation, contending that definition of intent should be couched in terms of a generic perspective, with terminology not tied to any specific tort).

25. An earlier treatise by William L. Prosser, the Reporter for the 1965 instilment of the *Restatement (Second) of Torts*, described intent as "an intent to bring about a result which will invade the interests of another in a way that the law will not sanction." WILLIAM L. PROSSER, THE LAW OF TORTS 31 (4th ed. 1971); *see also* RESTATEMENT (SECOND) OF TORTS iii (1965).

26. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM intro. at 1 (2010).

27. *Id.* at 1–2.

> imprisonment, and others. Rather, this Section provides a framework that encompasses many specific torts for intentionally caused physical harm. Restatement Second, Torts, remains largely authoritative in explaining the details of the specific torts encompassed by this Section and in specifying the elements and limits of the various affirmative defenses that might be available until the Third Restatement addresses the specific intentional torts.[28]

We are told that relevant law on these torts "has not undergone significant change since the Second Restatement . . . ."[29] The Reporters' Notes to an earlier draft offered the following reassurance: "It is possible that intentional-tort doctrine—then and now—limits the amount of litigation necessary to resolve claims because it is so clear as to encourage the filing of meritorious claims yet prevent the need for subsequent appeals."[30] If only it were so clear and simple in reality.

The latest project of the *Restatement (Third)* thus incorporates by reference the earlier *Restatement (Second)* formulation on the details of the intent requirement for battery and other traditional intentional torts. The latest project does not explicitly address the nature of the consequence that must have been intended in its black-letter provisions. Crucially, it does not specify whether the consequence that the defendant must have intended encompasses *merely intent to cause contact* (or its apprehension), the so-called single intent rule, or also requires in addition an intent that effect of the contact (or its apprehension) be *harmful or offensive*, the so-called dual intent rule.[31] At most, sparse, intermittent language in the comments hints vaguely and obliquely at the answer.

Some language in the comments seems to imply support for a dual intent approach that would require, in addition to intent to cause the contact, intent to cause harm or offense. The comments note that "[i]n general, the intent required in order to show that the defendant's conduct is an intentional tort is the intent to bring about harm (more precisely, to bring about the type of harm to an interest that the particular tort seeks to protect)."[32] However,

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28. *Id.* § 5 cmt. a.

29. *Id.* intro. at 1.

30. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 5, Reporters' Note cmt. c (Proposed Final Draft No. 1, 2005).

31. *See supra* note 12 and accompanying text.

32. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 cmt. b (2010). The comment also notes that "when tort-liability rules do attach significance to intended consequences, most of the time the consequence in question is the fact of harm, and it is the intention to cause such harm that under ordinary tort discourse renders the actor liable for an intentional tort[,]" and refers to the "focus of intentional torts on the intention to produce harm . . . ." *Id.*; *see also id.* § 1 illus. (suggesting that doctor who mistakenly gives the patient the wrong medication was not liable for battery because she was not substantially certain it would cause him harm); *id.* § 1 cmt. d (stating generally that "[a]n intentional tort requires that the actor desires the harm to occur or knows that the harm is substantially certain to occur"). *See generally id.* ch. 4, Scope Note (stating

the level of generality and the failure to specifically address the issue in the context of battery tend to cloud the meaning and force of the language. This is especially so in light of the fact that the latest *Restatement* broadly defers to the *Second Restatement* on the details of torts such as battery, presumably including the issue of the consequences that must have been intended for specific torts. And the problem is that the *Second Restatement* provisions are not only unclear and contradictory on this, but some language in its comments may arguably point in the other direction, toward a single intent rule, and thus conflicts with the implication of the preceding language from the *Restatement (Third)* comments.[33] Nor were the discussions of the *Restatement (Third)* at the 2001 proceedings conclusive on the matter, although they arguably may lean toward the single intent rule.[34] Some comments elsewhere in a different *Restatement (Third)* project might arguably assume a single intent rule, but they also express ambivalence about it.[35]

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that "liability for negligence or for intent is liability based on fault").

33. *See infra* notes 40–45 and accompanying text.

34. Some remarks at the 2001 ALI annual meeting discussing intent seem less than definitive, although ultimately perhaps favoring a single intent rule. Professor Richard W. Wright said that for some intentional torts, such as "offensive battery, . . . all you have to do is intend a certain consequence—the physical contact with the person for a battery . . . ." *The American Law Institute Seventy-Eighth Annual Meeting*, 78 A.L.I. PROC. 1, 35 (2001). He added that "even if you make a good-faith mistake about thinking . . . you have consent, there is no intent to harm, no intent to embarrass, the tort still exists." *Id.* This latter language by Wright seems to contemplate a single intent (mere intent to contact) rule. The Reporter, Professor Michael D. Green, then stated that "we agree with Professor Wright's point." *Id.* Wright also arguably suggests a mere intent to contact rule in the text of a proposed amendment to the *Restatement (Third) of Torts: Liab. for Physical & Emotional Harm* § 1 cmt. b (Tentative Draft No. 1, 2001):

> [S]ome intentional torts do not require the intent to cause harm, but rather only the intent to cause a certain mental or physical consequence. This is true for the intentional torts of assault, [and] offensive battery . . . . For a battery, the required intended consequence is merely a physical contact with the person of the plaintiff . . . . Although the essence of the injury in each case is an invasion of one's dignity or autonomy, there need not even be the intent to cause this non-physical, dignitary harm . . . .

The American Law Institute Seventy-Eighth Annual Meeting, supra, at 1001. That proposed amendment was apparently not incorporated into the final version. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 cmt. b (2010). Reporter Green believed that the existing language adequately conveyed Wright's point. *Id.* at 35–37.

35. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 12 cmt. b (2000). Comment b states that notwithstanding its adoption (irrespective of what rule is applied for non-intentional tortfeasors in the jurisdiction) of joint and several liability for intentional tortfeasors:

> [T]here . . . may be cases in which, although the *defendant technically has committed an intentional tort*, the defendant's culpability is quite modest, for example a defendant who committed a battery based on an unreasonable, yet honest, belief that the conduct was privileged. . . . In such situations, courts may decide that such low-culpability intentional tortfeasors should not be subject to the provisions of this Section and instead treated in accordance with the rule for nonintentional tortfeasors in the jurisdiction.

Battery is the most useful tort to illustrate the continuing ambiguity on the nature of intent. Unfortunately, the relevant language of the *Restatement (Second)*, to which the new *Restatement* defers, is ambiguous on the question that was not addressed by the new *Restatement*—precisely what "consequences" must have been intended to support the tort of battery. The core definition states that one is subject to liability for a battery if "he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and . . . a harmful contact with the person of the other . . . results."[36] A similar definition is used for batteries in which an "offensive contact" results.[37] We thus know that the resulting contact must have been either harmful or offensive.[38] Although we are afforded guidance on the nature of the consequences that ultimately must have *been suffered*, we are not afforded similar guidance on precisely what type of consequences must have *been intended*, if any. The key language, "intending to cause a harmful or offensive contact" (or its apprehension) does not tell us whether a defendant must have merely intended a contact (or its apprehension) that turns out to be harmful or offensive, or must have also intended that its effect be harmful or offensive.[39]

Id. (emphasis added); *cf. id.* § 1 Reporters' Note cmt. c (discussing special issues involving intentional torts, taking no position on "whether a plaintiff's negligence is a comparative defense to intentional torts," and referring to "when a defendant who otherwise batters a plaintiff honestly but unreasonably believes the conduct was privileged or that it was not harmful or offensive (such as when a defendant intentionally exposes a plaintiff to a pollutant that the defendant honestly but unreasonably believes is not harmful")).

36. RESTATEMENT (SECOND) OF TORTS §§ 13, 16 (1965). Occasionally, a suggestion is made that intent to engage in unlawful conduct, at least when likely to injure someone, may take the place of intent to cause a harmful or offensive contact and support liability for a harmful or offensive contact. *See* Lopez v. Surchia, 246 P.2d 111, 113 (Cal. Ct. App. 1952) (quoting the lower court with approval that "'if the defendant did an illegal act which was likely to prove injurious to another, he is answerable for the consequence which directly and naturally resulted from the conduct, even though he did not intend to do the particular injury which followed,'" and "'[s]ince the court found, in the case at bar, that the defendant was acting unlawfully and not in justifiable self-defense, the intent to commit the injury is presumed'"); DOBBS, THE LAW OF TORTS, *supra* note 11, § 30 at 60 (discussing the "unlawfulness" basis); Lawson, *supra* note 11, at 366–68. To the extent that a court viewed that as a sufficient substitute for intent to cause a harmful or offensive contact, the same issue might arise. Namely, for the purposes of a battery, should it be required that the defendant have been aware of the unlawfulness of his conduct, or merely that he have engaged in conduct that turns out to have been unlawful?

37. RESTATEMENT (SECOND) OF TORTS §§ 18, 20 (1965). Both sets of provisions also contain a transferred intent provision. *See id.* §§ 13(a), 16(2), 18(a), 20(2).

38. And, with respect to claims based on allegedly offensive contacts, the *Restatement* states that "[a] bodily contact is offensive if it offends a reasonable sense of personal dignity." *Id.* § 19. It adds that "it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted." *Id.* § 19 cmt. a.

39. The *Restatement* speaks in terms of "intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact . . . ." *Id.* at §§ 13, 18. For the sake of simplicity, this Article shall sometimes simply refer to "the contact" in discussing the issues. Of course, to the extent that the commentators or cases would rely on the full

Comments in the *Restatement (Second)* offer a few hints, but they are far from a definitive answer.[40] They state: "If an act is done with the intention described in this Section, it is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure him."[41] Such language might be read as suggesting that the defendant need not have intended a harmful or offensive effect to be liable, only the contact. But it is not definitive. Even if hostility or a desire to injure is not necessarily required, might intent at least to cause an offensive effect still be required (in other words, one or the other of harm or offense), thus making the preceding language inconclusive and not necessarily irreconcilable with a dual intent rule? Other language points more strongly to a single intent rule.[42] Thus, the comment elaborates on the preceding language, stating that:

> [T]he fact that the defendant who intentionally inflicts bodily harm upon another does so as a practical joke, does not render him immune from liability so long as the other has not consented. This is true although the actor erroneously believes that the other will regard it as a joke, or that the other has, in fact, consented to it.[43]

This language arguably points to a mere intent to cause contact (single intent) rule.[44] However, language elsewhere in the *Second Restatement* arguably could be read as suggesting a dual intent requirement, although it is too vague and general to be definitive.[45]

Restatement formulation, one would have to articulate the issues and intent rules in terms of the *contact or its apprehension*. See the proposed elements in Part III(A), *infra*.

40. *See infra* notes 41–43 and accompanying text.

41. RESTATEMENT (SECOND) OF TORTS § 13 cmt. c (1965).

42. *See infra* note 43 and accompanying text.

43. RESTATEMENT (SECOND) OF TORTS § 13 cmt. c (1965); *cf. id.* § 18 cmt. c (discussing the meaning of "contact," and stating that "[a]ll that is necessary is that the actor intend to cause the other . . . to come in contact with a foreign substance . . . which the other will reasonably regard as offensive"); *id.* § 34 (stating that, in connection with assault, "it is not necessary that the actor be inspired by personal hostility or desire to offend").

44. *See* Simons, *supra* note 11, at 1067 n.17.

45. *See* RESTATEMENT (SECOND) OF TORTS ch. 2, intro. note (1965) ("The interest in freedom from a bodily contact which causes no tangible harm but is merely offensive to a reasonable sense of personal dignity is, on the other hand, protected only against acts which are intended to invade it or to invade some other interest of personality of the person who is touched or of a third person."); RESTATEMENT (SECOND) OF TORTS § 892B cmt. c (1979) (stating that a defendant's "own mistake may indeed prevent his conduct from amounting to an intentional tort, as when there is no knowledge that a touching will be harmful"). The section 892B comment offers less than overwhelming support for the requirement that a defendant intend that the effect of the contact be harmful or offensive. *Id.* That section deals with when a plaintiff's mistake may nullify consent. *Id.* And in any event, this language does not address whether in the absence of intent that the contact be harmful, it is still required that the defendant have intended that the contact be offensive.

The relevant language from the *Second Restatement* was itself largely a repackaging of the corresponding language from the *First Restatement*.[46] The *First Restatement* addressed the intent requirement for battery, saying that the actor is liable for a battery if, *inter alia*, "the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person."[47] Like the subsequent *Restatement Second*, this formulation is similarly ambiguous. The language, "intention of bringing about a harmful or offensive contact or an apprehension thereof to the other," does not indicate whether a defendant must merely have intended a contact that turns out to be harmful or offensive, or must in addition also have intended that the effect be harmful or offensive. The sparse comments are also ambivalent and unrevealing, although perhaps suggesting a mere intent to contact (single intent) rule.[48]

B. Cases and Commentators

It is not my purpose to enter the debate over which approach to the intent question represents a majority view. As I will discuss, I believe such exercises are often simplistic and largely futile.[49] Few cases discretely engage the question in a thoughtful or unambiguous way. The authorities

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46. *Compare* RESTATEMENT OF TORTS §§ 13, 18 (1934), *with* RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965). Dean Prosser, the Reporter for the *Restatement (Second)*, in presenting a tentative draft of the sections on intentional torts, said:

> Tentative Draft No. 1 of the Second Restatement of Torts . . . represents the overhauling of the first 165 sections of the Restatement. The Reporter and the group of advisors went over that with a fine tooth comb, and found that the great bulk of those sections needed no changes or, at the most, minor corrections in language which it was not worthwhile bothering you with.

34 A.L.I. PROC. 280 (1957) (statement by William L. Prosser, Reporter); *see also* RESTATEMENT (SECOND) OF TORTS iii (1965).

47. RESTATEMENT OF TORTS §§ 13, 18 (1934) (dealing with battery liability for resulting harmful (under section 13) or offensive (under section 18) contacts).

48. Comment e says:

> If an act is done with the intention described in this Section, it is immaterial that the actor is not inspired by any personal hostility to or the desire to injure the other. Thus, the fact that the defendant who intentionally inflicts bodily harm upon another does so as a practical joke, does not render him immune from liability so long as the other has not consented thereto.

Id. § 13 cmt. e. This language might be read as suggesting that mere intent to contact is enough, but it is inconclusive. *See supra* text accompanying note 41. Another comment does seem to imply more strongly that mere intent to contact is enough. It states that one may be liable "if he throws a substance, such as water, upon the other," and that "[a]ll that is necessary is that the actor intend to cause the other, directly or indirectly, to come in contact with a foreign substance in a manner which the other will reasonably regard as offensive." *Id.* § 18 cmt. d. On the other hand, the Introductory Note to the chapter might arguably suggest that the defendant must also have intended "to invade" one's interest in freedom from contact or of personality, although again, it is not definitive. *See* RESTATEMENT OF TORTS ch. 2, intro. note (1935).

49. *See infra* Part IV(B)(2)(b).

disagree[50] on what consequence must have been intended for a battery, both in terms of which view is the prevailing approach and on which approach should be preferred. Some commentators suggest that the majority or prevailing battery rule merely requires that the defendant have intended the contact that turns out to be harmful or offensive but does not require that the defendant have intended that the effect of that contact be harmful or offensive.[51] Most of those commentators also seem to favor that approach.[52]

50. The fact that the matter has been addressed by a number of thoughtful commentators, including two who appear to take differing positions, attests to the worthiness of the inquiry. Professor Kenneth Simons has recognized the question as one of the "intriguing legal developments" in intentional tort law, and he supports a single intent approach. *See* Simons, *supra* note 11, at 1062, 1067 (preferring the mere intent to contact ("single intent") rule). Professors Dan Dobbs and Paul Hayden (and co-authors when applicable) have addressed the question in their leading treatises, have incorporated a useful case and some commentary on the matter into their casebook and accompanying teacher's manual, and have opted for the dual intent rule. *See* DOBBS, THE LAW OF TORTS, *supra* note 11, § 30, at 58–59; 1 DAN B. DOBBS & PAUL T. HAYDEN, THE LAW OF TORTS–PRACTITIONER TREATISE § 32, at 9–10 (Supp. 2009) [hereinafter DOBBS & HAYDEN, PRACTITIONER TREATISE]; DOBBS ET AL., TORTS AND COMPENSATION, *supra* note 12, at 48–51 & n.2 (noting that "[s]cholars have . . . disputed the point" and seeming to opt for the view "that the dual-intent rule is better advised"); DAN B. DOBBS ET AL., TEACHER'S MANUAL TO TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 35 (6th ed. 2009) [hereinafter DOBBS ET AL., TEACHER'S MANUAL] (stating that "intent to touch without intent to harm or offend should not be sufficient to establish a battery"). Dobbs et al. preferred the more demanding dual intent rule. They also sought to narrow the difference between the two rules by suggesting that the dual intent rule would itself operate broadly if the actor were deemed to intend to offend when he knows "the touching is not consented to, since intent to engage in unconsented-to conduct will always count as offense." DOBBS ET AL., TEACHER'S MANUAL, *supra*, at 35; *see also* DOBBS & HAYDEN, PRACTITIONER TREATISE, *supra* at 9–10 (stating that "the absence of apparent consent is itself the marker of offense, and the physician who knows he exceeds consent has intent to offend by touchings the patient did not consent to").

51. *See, e.g.*, PROSSER, *supra* note 25, at 36–37 (stating that the "intent required is only the intent to bring about such a contact," and "[t]he defendant may be liable although he . . . honestly believed that he would not injure the plaintiff, or even where he was seeking the plaintiff's own good," or "where he has intended . . . even a compliment . . . or a misguided effort is made to render assistance"); Henderson & Twerski, *supra* note 24, at 1135 & n.10 ("[A]n actor may commit an intentional tort without intending any harm whatsoever. . . . [W]hen A intentionally touches B in a manner that a reasonable person would find offensive, A commits an offensive battery on B even if A intends no harm, including offense."); Reynolds, *supra* note 11, at 718, 722, 725 (stating that the "clear majority" rule is that "intent to harm or offend is not necessary to the tort of battery," and that "[t]here must simply be intent . . . to cause contact, followed by contact that in fact *is* either harmful or reasonably offensive"); Simons, *supra* note 11, at 1066–67 (stating that the approach "requiring only an intent to contact" is "the only plausible interpretation of the case law in this area").

52. *See, e.g.*, PROSSER, *supra* note 25, at 36–37 (implying that the intent to contact is sufficient because of the interest in protecting personal dignity "according to the usages of decent society"); Reynolds, *supra* note 11, at 718, 722, 725, 731 (preferring this approach because "[g]enuinely harmed plaintiffs should not suffer because of artificial and rigid lines that would exclude from recovery those harmed by pranks, medical mistakes, or situations of mistaken identity"); Simons, *supra* note 11, at 1066–67 (stating that the approach "requiring only an intent to contact" is "much more defensible and indeed is the only plausible interpretation of the case law in this area").

Other commentators suggest that the prevailing[53] (or at least preferred[54]) rule requires both that the defendant have intended the contact and that the defendant have intended for that contact to harm or offend the plaintiff. Still other commentators seem to prefer some other rule or variation.[55] Moreover, notwithstanding the *Second Restatement's* ambiguity, some commentators believe that the *Second Restatement* seems to favor one view over the other.[56] The language of some cases seems to support the view that the

53. *See, e.g.*, DOBBS ET AL., TEACHER'S MANUAL, *supra* note 50, at 34 (endorsing the view that "the so-called 'dual intent' rule is the one followed by most states"); Lawson, *supra* note 11, at 356–57, 382 (stating that "[t]he traditional rule requires the plaintiff to prove that he was harmed or offended by contact, and that the defendant intended this harm or offense," although he also says that an "intentional unauthorized contact" rule is "implied in the current law"); *see also* White v. Muniz, 999 P.2d 814, 816 (Colo. 2000) (stating that "courts and legal commentators generally agree that an intentional tort requires some proof that the tortfeasor intended harm or offense").

54. *See, e.g.*, DOBBS ET AL., TORTS AND COMPENSATION, *supra* note 12, at 48–51 & n.2 (noting that "[s]cholars have . . . disputed the point" and seeming to opt for the view "that the dual-intent rule is better advised"); DOBBS ET AL., TEACHER'S MANUAL, *supra* note 50, at 34–35 (stating that the authors do not read the cases as supporting the *mere intent to contact rule*, that the "dual intent" rule is followed by most states, and that the latter is preferred on policy grounds).

55. *See, e.g.*, Lawson, *supra* note 11, at 384. Professor Lawson has proposed a "hybrid" variation, making one subject to battery liability: "(a) if the plaintiff proves that the defendant intentionally caused a harmful or offensive contact with the plaintiff's person and the defendant fails to prove that the plaintiff effectively consented . . . or (b) if the plaintiff proves that the defendant intentionally caused an unauthorized contact with the plaintiff's person." *Id.* I agree with the general direction of Lawson's proposal. I nevertheless have some concerns. The language of clause (a) is similar to the language of the *Restatement*: that a defendant must have intended "to cause a harmful or offensive contact." RESTATEMENT (SECOND) OF TORTS § 13 (1965). But, the *Restatement* language is itself ambiguous—that is the problem. Perhaps Lawson means for the clause (a) language to require intent to harm or offend (unless the defendant proves consent). Lawson, *supra* note 11, at 384–85. Lawson places the burden to prove the absence of consent on the defendant under the (a) option. *Id.* at 384. I prefer, however, to keep the intent and absence of consent elements separate (except to the extent that awareness of the absence of consent may be relevant to the intent element) and to keep the burden on the plaintiff to prove both elements. *See infra* note 82 and accompanying text. Lawson's clause (b) alternative, Lawson, *supra* note 11, at 384, may impose too broad a liability in that it might be construed to impose liability when a defendant knew there was no consent, even if he were unaware of the essential harmful or offensive nature of the contact in the absence of consent and honestly believed the contact would not be offensive, and was unaware that individualized consent was required. Clause (b) is also unclear on when a defendant must have known of the absence of consent. Perhaps the language that I propose will obviate some of these concerns, while also taking a multi-alternative approach to intent with dual intent and awareness of the lack of consent options. *See infra* Part III.

56. *Compare* Henderson & Twerski, *supra* note 24, at 1135 n.10 (citing RESTATEMENT (SECOND) OF TORTS §§ 18–19 (1965) as support for recognizing potential battery "even if [the actor] intends no harm, including offense"), *with* DOBBS, THE LAW OF TORTS, *supra* note 11, at 59 (stating that the *Restatement's* formula "probably means intent to harm or offend as well as an intent to touch is required"), *and* Lawson, *supra* note 11, at 357, 366 (citing the *Restatement* for the dual intent rule). Henderson & Twerski seem to support their view by pointing to the fact that "[t]he proper test for offensive contact is completely objective—'a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.' In effect, A is held strictly liable for having acted in ignorance of prevalent social usages." Henderson & Twerski, *supra* note 24, at 1135 n.10 (quoting RESTATEMENT (SECOND) OF TORTS § 19 cmt. a (1965)). But, their reliance on and interpretation of section 19 is misplaced. That section addresses only the nature of the consequence that must result; it does not tell us the nature of the consequence that must have been intended. Dobbs states that his reading is "in line with the fault principle and also with the freedom to act

defendant must have intended the contact but need not have intended to harm or offend.[57] Language in other cases suggests that the defendant must have intended both the contact and intend that its effect be harmful or offensive.[58]

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encouraged by that principle." DOBBS, THE LAW OF TORTS, *supra* note 11, at 59. While his reading may be consistent with the policy objectives he invokes, that rationale is not explicit in the relevant Restatement language, and the comments are ambiguous or divergent. *See supra* notes 41–45 and accompanying text.

57. *See* Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197, 1205, 1209 (10th Cir. 2006) (reversing in part a case arising out of an alleged mock arrest prank in which the district court had granted the defendants' motion for summary judgment because the district court found "that the officers did not intend to cause an offensive contact," and on appeal suggesting generally that an intentional tortfeasor may be held liable "notwithstanding the characterization of the tort as a prank, or even a good faith but incorrect belief that the tort victim will enjoy the joke"); Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523, 529 (D.D.C. 1981) (stating that of primary importance "is the absence of consent . . . rather than the hostile intent of the defendant," and that although intent is required, it "is only the intent 'to bring about such a contact'"); White v. Univ. of Idaho, 797 P.2d 108, 109, 111 (Idaho 1990) (the intent required for battery "does not mean that the person has to intend that the contact be harmful or offensive" and "is satisfied if the actor's affirmative act causes an intended contact which is unpermitted and which is harmful or offensive"); Brenneman v. Famous Dave's of Am., Inc., 410 F. Supp. 2d 828, 846 (S.D. Iowa 2006) (relying on Iowa jury instruction that "[a] battery is committed when a person intentionally does . . . [a]n act resulting in bodily contact causing physical pain or injury [or] . . . [a]n act resulting in bodily contact which a reasonable person would deem insulting or offensive," but also citing trial court language in the case of *Bechen v. Francis*, No. 02-1183, 2003 WL 21464649, at *2 (Iowa Ct. App. June 25, 2003) that seems to point in another direction); Vitale v. Henchey, 24 S.W.3d 651, 657 (Ky. 2000) (stating that "while intent is an essential element of battery, it refers to the consequences of an act, i.e. the contact," adding that "it is an intent to make contact with the person"); Taylor v. Univ. Med. Ctr., Inc., No. Civ. A. 3:03CV-502-H, 2005 WL 1026190, at *4 (W.D. Ky. Apr. 26, 2005) ("To prevail on a claim of common law battery, [plaintiff] must prove intentional contact of a harmful nature."); Clayton v. New Dreamland Roller Skating Rink, Inc., 82 A.2d 458, 462 (N.J. Super. Ct. 1951) (stating in case in which the plaintiff had fractured her arm at the defendant's skating rink and the defendant's employee allegedly continued to attempt to manipulate the plaintiff's arm despite her protestations that "[a]lthough his acts may have been performed with the best of intentions . . . the jury might well have found that [the employee's] conduct constituted an assault and battery"); Frey v. Kouf, 484 N.W.2d 864, 868 (S.D. 1992) (battery required that the defendant act with either design or with substantial certainty "that bodily contact with [the plaintiff] would occur—that [the plaintiff] would be struck with the glass," and noting that intent "'is not necessarily a hostile intent, or a desire to do any harm,'" and adding somewhat ambiguously that "'it is an intent to bring about a result which will invade the interests of another in a way that the law forbids'" (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 36 (5th ed. 1984)); Wagner v. Utah, 122 P.3d 599, 603–04 (Utah 2005) ("We hold that the actor need not intend that his contact be harmful or offensive in order to commit a battery so long as he deliberately made the contact and so long as that contact satisfies our legal test for what is harmful or offensive."); J.W. v. Utah, No. 2:05CV00968K, 2006 WL 1049112, at *5 (D. Utah Apr. 19, 2006) (stating in connection with alleged conduct "committed by a mentally-handicapped child under the age of seven" that all that is required for a battery is that the contact was deliberately initiated); Garratt v. Dailey, 279 P.2d 1091, 1094 (Wash. 1955) (holding that if it were established that defendant, nearly six, caused plaintiff to fall purposefully or knew to a substantial certainty that when he moved the chair she would attempt to sit where it had been, then the mere absence of intent to injure, play a prank on, embarrass, or commit a battery on the plaintiff would not absolve the defendant from battery liability).

58. *See* Witt v. Condos. at Boulders Ass'n, No. 04-cv-02000, 2007 WL 840509, at *5 (D. Colo.

The question of the nature of the intent required for battery may warrant a somewhat different formulation of the issue in some cases in which the plaintiff's focus is on the absence of consent. The most common cases arise in the context of medical procedures administered in the absence of consent, raising the question of whether a defendant's awareness of his lack of consent is required for intent. As a general matter, a health care provider may, absent an applicable exception for an emergency,[59] be subject to potential liability for a battery[60] for performing a medical procedure to which the patient did not consent, or for deviating from or going beyond the scope of the treatment or procedure contemplated by the patient's consent.[61] Thus, at least if it were proven that a health care provider were aware of the

March 19, 2007) (stating that "[t]he intent element applies to both the intent to cause the contact, and the intent that the Plaintiff will find the contact to be harmful or offensive"); Austin B. v. Escondido Union Sch. Dist., 57 Cal. Rptr. 3d 454, 464 (Ct. App. 2007) (stating that, at least when a touching is not unlawful, "in the ordinary case . . . to be liable for battery, a defendant must intend to harm or offend the victim"); White v. Muniz, 999 P.2d 814, 819 (Colo. 2000) (holding "that regardless of the characteristics of the alleged tortfeasor, a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act"); Mullins v. Parkview Hosp., Inc., 865 N.E.2d 608, 611 (Ind. 2007) (noting in a case involving an alleged harmful intubation by a student in an emergency medical technician certification program in which the patient had allegedly indicated on the consent form that she did not consent to the presence of healthcare learners, that because the student had no reason to suspect that the patient had modified the consent form, she could rely on anesthesiologist's alleged granting permission to attempt intubation, her experience attempting to intubate a patient that day, and her preceptor's alleged direction, and, therefore, "[i]n the absence of any obligation . . . to obtain . . . independent, definitive knowledge of [the patient's] consent," she was not liable for battery for merely attempting the intubation, and that there was no other basis for her battery liability because there were no allegations or evidence that she "touched [the patient] with the intent to cause harm"); *cf.* Bechen v. Francis, No. 02-1183, 2003 WL 21464649, at *2 (Iowa Ct. App. June 25, 2003) (affirming a verdict for the defendant after the trial court had instructed the jury that plaintiff must prove that "[t]he striking was done with the intent to cause physical pain or injury . . . or to be insulting or result in offensive contact," by which the trial court meant "with the intent to cause physical pain or injury or to be insulting or offensive," but declining on procedural grounds to decide the validity of the plaintiff's contention that the trial court should not have so instructed the jury).

59. *See* RESTATEMENT (SECOND) OF TORTS § 892D (1979).

60. This absence-of-consent battery paradigm should be distinguished from an "informed consent" claim, in which the patient consented to the actual procedure, but alleges that the defendant provided insufficient information regarding the risks and other material information requiring disclosure. Most courts deem "informed consent" liability as a species of negligent malpractice rather than a battery. 1 DAVID W. LOUISELL & HAROLD WILLIAMS, MEDICAL MALPRACTICE § 8.06[2] (2009) ("[M]ost courts today reserve the assault and battery theory for cases in which the patient has not consented to the procedure actually performed, while using negligence as the basis for claims that the provider obtained the patient's consent without making a proper disclosure."). Notwithstanding the preceding distinction, even when plaintiff alleges a claim that if proven would fall within the definition of a battery, courts may sometimes still have to address the issue of the effect, if any, of a state's medical malpractice informed consent statute on claims that would otherwise allegedly fall within the definition of battery. *See, e.g.*, Christman v. Davis, 889 A.2d 746, 750–51 (Vt. 2005). That issue is beyond the scope of this article.

61. *See* LOUISELL & WILLIAMS, *supra* note 60, § 8.06[1] ("[F]ailure to obtain consent subjects the provider to liability for battery."); W. E. Shipley, Annotation, *Liability of Physician or Surgeon for Extending Operation or Treatment Beyond That Expressly Authorized*, 56 A.L.R.2d 695, § 2 (1957) (referring to the rule that "ordinarily a physician who undertakes to treat another without having obtained the patient's consent, express or implied, is guilty of at least a technical battery").

absence of evident consent or consciously exceeded the scope of patient's consent, the intent requirement would probably be deemed satisfied. This leaves the question of what the element of intent requires. Does the intent element require that the defendant have been aware of the absence of evident consent? Or, assuming such consent was absent,[62] may the intent requirement be satisfied and the defendant be subject to battery liability even when his alleged nonconsensual conduct or variance from the scope of the consent was based on an unwitting mistake or lack of awareness of his variance, and even though he honestly believed he had consent or was acting within the scope of the consent? Not many cases have explicitly addressed the question. In those that arguably have, the language appears divided[63]

62. On what constitutes consent, see generally RESTATEMENT (SECOND) OF TORTS § 892 (1979) (stating that "[c]onsent is willingness in fact for conduct to occur," and that "[i]f 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").

63. Some cases suggest awareness is required. *See, e.g.*, Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 440 (Ariz. 2003) (remanding case, and stating "that when a patient gives limited or conditional consent, a health care provider has committed a battery if the evidence shows the provider acted with willful disregard of the consent given"); Mullins v. Parkview Hosp., Inc., 865 N.E.2d 608, 611 (Ind. 2007) (noting in a case involving an alleged harmful intubation by a student in an emergency medical technician certification program in which the patient had allegedly indicated on the consent form that she did not consent to the presence of healthcare learners, that because the student had no reason to suspect that the patient had modified the consent form, she could rely on anesthesiologist's alleged granting permission to attempt intubation, her experience attempting to intubate a patient that day, and her preceptor's alleged direction, and therefore "[i]n the absence of any obligation . . . to obtain . . . independent, definitive knowledge of [the patient's] consent," she was not liable for battery for merely attempting the intubation); Murphy v. Implicito, 920 A.2d 678, 686 (N.J. Super. Ct. 2007) (stating in connection with remand for retrial that "[w]hen a patient gives limited or conditional consent, a doctor has committed a battery if the evidence shows that the doctor acted with disregard of the consent given and thus exceeded its scope"); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 1 illus. 5 & cmt. d (2010) (suggesting that doctor who mistakenly gives the patient the wrong medication was not liable for battery because she was not substantially certain it would cause him harm); Lawson, *supra* note 11, at 384 (supporting that view, and stating that "plaintiff will have to prove that defendant knew that the plaintiff had not consented").

Language in other cases suggests that awareness is not required. *See, e.g.*, Vitale v. Henchey, 24 S.W.3d 651, 657–58 (Ky. 2000) (adopting a mere intent to contact rule, and also stating that the defendant-surgeon was not entitled to rely on ineffective consent allegedly given by persons without authority to consent, thus implying that defendant-surgeon need not have realized that valid consent was allegedly absent); *see also* Simons, *supra* note 11, at 1067, 1075–76 (opining that "in many cases of medical treatment, doctors are found liable for battery for exceeding the scope of the patient's consent, notwithstanding their belief that they have acted within the scope of consent," but later perhaps equivocating by stating "if the patient explicitly imposes a condition upon his consent and the doctor *knowingly* acts in violation of that condition, the doctor has committed a battery" (emphasis added)); RESTATEMENT (SECOND) OF TORTS § 13 cmt. c (1965) ("[I]t is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure him. . . . This is true although the actor erroneously believes . . . that the other has, in fact, consented to [the contact].").

Some cases seem to apply different rules depending on the type of facts alleged. *See, e.g.*,

and offers little in the way of analysis.[64]

Consider a scenario in which a health care provider mistakenly removes the wrong tissue or otherwise mistakenly goes beyond the scope of the procedure contemplated by the patient's consent. Should the intent requirement be satisfied? Here too the cases appear divided on the question of whether the defendant must have been aware of his deviation from the patient's consent. Some suggest awareness is required and thus seem to reject the application of battery classification when the defendant's alleged variance from the patient's consent was based on a mistake or lack of awareness of the variance.[65] Other cases suggest that defendants might be

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Dennis v. Southard, 94 Cal. Rptr. 3d 559, 561–62 (Ct. App. 2009) (when the plaintiff allegedly "gave conditional consent to a medical procedure and . . . it is alleged that the defendant proceeded without the condition having been satisfied," the plaintiff must prove that the defendant knew the condition had not been satisfied; but suggesting that there is no separate knowledge requirement "when it is alleged the defendant performed a medical procedure without the plaintiff's consent," and that the "law presumes that '[w]hen the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present'" (quoting Piedra v. Dugan, 21 Cal. Rptr. 3d 36, 48 (Ct. App. 2004))).

Sometimes the court is silent on the nature of the intent requirement in the medical context. In *Hernandez v. Schittek*, 713 N.E.2d 203 (Ill. App. Ct. 1999), it was agreed that if a breast biopsy indicated malignancy the patient would undergo a quadrantectomy; if negative, the lump would be excised; and "there was no discussion as to what would happen if the frozen section was inconclusive." *Id.* at 208. The court concluded that based on the conversation between the parties, the defendant's performance of the quadrantectomy in the absence of a biopsy indicating malignancy was a substantial variance from the scope of the patient's consent. *Id.* at 207–08. Nevertheless, the defendant contended that the surgical consent form should still be construed to include consent to perform the quadrantectomy, an argument which the court rejected as inconsistent with the parties' discussion and because the form "would not allow for that strained construction." *Id.* at 208, 210. The court did not mention whether awareness of the alleged variance from the patient's consent was required, nor did it explicitly address what the defendant may actually have believed about the scope of the patient's consent. It thus perhaps implied that the defendant's actual knowledge of his alleged variance may not have been required, and that the defendant might still be subject to battery liability irrespective of whether or not he honestly believed he was acting within the scope of the patient's consent (including her written consent), if consent was absent.

64. *See* Lawson, *supra* note 11, at 356 (commenting that there has not been much "satisfactory explanation of the defendant's tortious intent").

65. *See, e.g.*, Bowers v. Lee, 577 S.E.2d 9, 10 (Ga. Ct. App. 2003) (rejecting plaintiff's theory that a battery applied because she "did not consent to a sponge being left in her body," and noting "that battery is an intentional tort" "[a]nd the record in the present case is devoid of any evidence that [any health care providers] intentionally left the sponge in [the patient's] body"), *overruled on other grounds by* Mateen v. Dicus, 637 S.E.2d 377 (Ga. 2006); Hershey v. Peake, 223 P. 1113, 1114–15 (Kan. 1924) (holding, in a case in which the defendant-dentist allegedly mistakenly pulled teeth on the right side rather than the left side "which last-mentioned teeth the defendant stated he would pull and which plaintiff consented for the defendant to pull," that "the petition states a cause of action for negligence or malpractice rather than one for assault and battery"); Woolley v. Henderson, 418 A.2d 1123, 1133 (Me. 1980) (holding, in a case in which the plaintiff alleged that during surgery for a ruptured disc the defendant-surgeon performed a laminectomy and foraminotomy at the wrong interspace, and in which defendant sought to explain the error, contending that because a congenital abnormality of the spine made "counting and ascertaining the vertebral levels difficult," he performed the surgical procedures at "L 3, 4 rather than at L 4, 5," that "plaintiffs' allegation that the defendant operated at the wrong lumbar interspace does not come within the narrow area in which physicians remain liable for battery," that plaintiff "authorized the defendant to operate on her lumbar vertebrae" and "defendant did not perform this surgery against

subject to battery liability for allegedly exceeding a patient's consent even if the defendant was not aware that he was doing so and mistakenly believed that he was performing within the scope of the patient's consent.[66] Generalization is difficult because the state of the law on this question is not very clear,[67] and neither are the cases that ostensibly address the question.[68]

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the will of the plaintiff," "[n]or did the defendant perform an operation which he knew was substantially different from that to which the plaintiff had consented," and thus did not constitute "such egregious circumstances, the conscious disregard of the patient's interest in his physical integrity," so as to carry "the physician's conduct outside of the physician-patient relationship" and subject him to battery liability). The court in *Bowers* worried that the plaintiff's "theory would transform every medical malpractice claim into a battery claim, allowing the plaintiff to allege he or she did not consent to the negligent performance of the medical procedure." *Bowers*, 577 S.E.2d at 10; *accord* Morton v. Wellstar Health Sys., Inc., 653 S.E.2d 756, 757 (Ga. Ct. App. 2007) (quoting the preceding language from *Bowers* with approval).

66. *See, e.g.*, Kaplan v. Mamelak, 75 Cal. Rptr. 3d 861, 868 (Ct. App. 2008) (holding, in a case in which the surgeon allegedly twice mistakenly operated on the wrong disc, that defendant would be subject to battery liability if the jury concludes that operating on wrong disc is not one of the "complications inherent to the procedure," but rather "operating on the wrong disk within inches of the correct disk is a 'substantially different procedure'"); Gindraw v. Dendler, 967 F. Supp. 833, 840 (E.D. Pa. 1997) (stating in a case in which the plaintiff alleged "th[e] defendant pulled the wrong tooth . . . and that the tooth causing the problems that led to that visit was adjacent to the tooth that was pulled," that "if defendant removed the wrong tooth, he may have committed an assault and battery"); Sood v. Smeigh, 578 S.E.2d 158, 163 (Ga. Ct. App. 2003) (allegation that surgeon installed and re-assembled the prosthetic patella in a backward position during total knee replacement "would constitute an unconsented-to battery;" but compare to other Georgia cases *supra* in note 65); Gaskin v. Goldwasser, 520 N.E.2d 1085, 1089, 1095 (Ill. App. Ct. 1988) (holding, in case in which defendant allegedly "did not review the plaintiff's charts prior to the surgery" and "[a]s a result . . . five teeth were extracted without the plaintiff's consent" and in which defendant allegedly "was first made aware of his mistake when the patient returned to his office on the day after surgery," that if it were proven on remand that the defendant removed five teeth in addition to the fourteen to which plaintiff had consented, that there would be "sufficient evidence to support a battery theory of recovery"). For another California case applying a different rule in a different type of scenario, see generally *Dennis*, 94 Cal. Rptr. 3d at 561–62.

67. *See supra* notes 65–66 (contrasting holdings in *Sood* and *Bowers*); *see also Morton*, 653 S.E.2d at 757 (quoting both *Sood* and *Bowers* with approval). *Compare, e.g.*, *Sood*, 578 S.E.2d at 163, *with Bowers*, 577 S.E.2d at 10. *See generally* Shipley, *supra* note 61, at section 5 (stating that "[w]here the surgeon engaged to operate on a particular organ performs the operation on another and sound part of the body by mistake, it seems clear that he should be held liable, at least where the mistake is the result of his own fault or negligence," but failing to clearly delineate whether there is a prevailing rule that specifies whether the defendants are subject to liability for battery).

68. In *Washburn v. Klara*, 561 S.E.2d 682 (Va. 2002), for example, the plaintiff alleged that the defendant-surgeon "exceeded the scope of her consent by performing a cervical diskectomy at the C7-T1 level . . . in addition to the diskectomy at the C6-7 level to which [the plaintiff] had consented." *Id.* at 686. The defendant-surgeon not only argued that "he operated only at the C6-7 level" but also that plaintiff "failed to establish a *prima facie* case of battery because there was no evidence that he intentionally exceeded the scope of . . . consent," because even "if a fusion of [the plaintiff's] vertebrae at the C7-T1 level occurred . . . it resulted from his negligence or lack of skill and not because he *intentionally* operated at that level," and thus "that he did not commit a battery." *Id.* (emphasis added). In remanding for a new trial on the claim of battery, the court held that the evidence "was sufficient to present a factual issue . . . whether Dr. Borden *intentionally* performed a cervical diskectomy at two levels of Washburn's spine, thus exceeding the scope of her consent."

C. *The Institute's Rationale for Deferral*

The Institute's decision to defer addressing fully the concept of intent in battery is perhaps understandable because it would presumably have delayed completion of the other important sections of the latest project. However, the Institute's expressed rationale for not fully addressing in the present project the intent element for traditional intentional torts to the person, such as battery, is not convincing. A comment in an earlier draft version reasoned that "[a]lthough the intentional infliction of physical harm is . . . common in society, . . . litigation resulting from that harm is relatively uncommon."[69] The comment added that since the *Restatement (Second) of Torts* addressed battery in 1965, "there have been only a limited number of judicial opinions applying the physical-harm intentional-tort doctrines in that Restatement; and there is a scarcity of judicial opinions that have seriously called into question any of those doctrines."[70] But as I have discussed, there remains an ambiguity and, as near as one can tell from the opinions, a pronounced division of authority on the nature of the consequence that must have been intended.

The relevant language of the *Second Restatement* remains ambiguous and incomplete regarding the nature of intent for the purposes of battery. This ambiguity should not be perpetuated as "authoritative"[71] until the matter is addressed in a future project. One of the primary reasons for the restatements is to clarify the law and relieve uncertainty. Even if there were truly a dearth of case law, at the very least, the issue should have been clearly addressed in the comments.[72] But, in point of fact, there have been

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Id. (emphasis added). The problem with the court's language is that it does not clarify what it means by "intentionally." Is mere intent to perform the diskectomy where it ultimately occurred sufficient even if the doctor was mistaken about precisely where that was, if it turns out to be beyond the scope of consent? Or, must the defendant have also realized as he performed that what he was allegedly doing was extending the fusion beyond the scope of the patient's consent? For more on the court's thinking, see *Woodbury v. Courtney*, 391 S.E.2d 293, 295 (Va. 1990), cited by the court.

69. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 5 cmt. c (Proposed Final Draft No. 1, 2005).

70. *Id.*; *see also The American Law Institute Seventy-Eighth Annual Meeting, supra* note 34, at 58 (2001) (quoting Michael D. Green, Reporter from 2000 for the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, stating that his predecessor, Gary Schwartz, "looked at those specific intentional torts and the level of cases that have developed since 1974, didn't feel that any further refinement was necessary, and so there is just this one broad statement about intentionally caused harm in this Restatement"). At least one commentator has supported the decision to not revise the intentional torts materials in the latest project. *See* Simons, *supra* note 11, at 1062, 1079 (stating that "[a] new Restatement (Third) of Intentional Torts project should not be highest on the agenda of the ALI," even though "the various confusions and uncertainties in battery doctrine could usefully be clarified by a new Restatement," because "these confusions . . . are not sufficiently substantial or widespread to suggest a compelling and immediate need for a Restatement (Third) of Intentional Torts").

71. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 5 cmt. a (2009).

72. John W. Wade, *The Restatement (Second): A Tribute to Its Increasingly Advantageous Quality, and an Encouragement to Continue the Trend*, 13 PEPP. L. REV. 59, 76 (1985) [hereinafter

relevant cases, including some since the *Second Restatement*. As I have discussed, there remains an ambiguity, and the commentators and cases (as near as one can tell from the opinions) have seemingly endorsed conflicting views on the nature of the consequence that must have been intended.

The Reporters' Note to a prior draft version also offered the following reassurance regarding the drafters' decision to defer elaboration on the full nature of the intent element for battery: "It is possible that intentional-tort doctrine—then and now—limits the amount of litigation necessary to resolve claims because it is so clear as to encourage the filing of meritorious claims yet prevent the need for subsequent appeals."[73] Unfortunately, that statement is not only unfounded speculation, but it appears to misconceive the dynamics of personal injury litigation. That one believes the impact on future litigation will not be significant is no justification for indulging, at least for a time (perhaps a long time), the continuing ambiguity of the *Restatement* on the full meaning of intent. Ambiguity attracts litigation. It is a function of what Robert Cover called the "agonistic character of law,"[74] the tendency for attorneys and litigants to "search for and exploit any part of the structure that may work to their advantage."[75] The danger is that the opening created by the current and persisting ambiguity and uncertainty will morph into a dangerous tripwire rule of liability.

I believe that it would have been preferable if the *Restatement (Third)* had not deferred to the *Restatement (Second)* on the details of battery and similar torts,[76] but instead pressed ahead in the latest project to complete and perfect its definition of intent. It is hoped that the restatement will soon undertake to address and resolve the question of whether liability for battery requires that the defendant have not only intended the contact, but also have intended that such contact be harmful or offensive.

In the next section, I will briefly discuss the direction that the restatement might take when the Institute explicitly revisits the question of

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Wade, *The Restatement (Second): A Tribute*] ("If the topic has not been important enough to become the subject of litigation, it may perhaps be ignored. It may, however, be sufficiently important and likely enough to arise that something should be said about it. The statement would then be likely to be in the Comments rather than the Blackletter.").

73. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 5, Reporters' Note cmt. c (Proposed Final Draft No. 1, 2005).

74. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1623 (1986); *see also* Arthur Allen Leff, *Law and*, 87 YALE L.J. 989, 1003–04, 1009 (1978) (discussing the metaphor of the law and the trial as an "agonistic game").

75. Cover, *supra* note 74, at 1623.

76. Although I have only discussed battery in this Article, I also believe that the Institute should likewise clarify the intent element for the companion torts of assault and false imprisonment, which raise similar questions about the consequence that must have been intended in order for the resulting apprehension or restraint, respectively, to be actionable.

intent for battery in a more comprehensive way. My purpose is not to undertake a state-by-state survey or analysis of the details and nuances of the case law addressing the intent question. Rather, I will simply offer a tentative formulation to merely facilitate dialogue on the question and to serve as another model that the courts and, hopefully, the Institute may consider.

III. FORMULATING THE INTENT ELEMENT FOR BATTERY

A. Proposed Formulation

I offer here a tentative formulation on the nature of the intended consequences required for a battery. I believe that intent to contact should not alone be sufficient for the purposes of the intent requirement. Rather, a more restrictive liability rule for intent seems preferable, one that is a variation of the dual intent requirement. For purposes of the intent requirement, in addition to proving that the defendant intended the contact, the plaintiff should also have to prove either: (1) that the defendant entertained a purpose or knew to a substantial certainty that the contact or its apprehension would be harmful or offensive, or alternatively, (2) that immediately prior to initiating the contact, the defendant both (a) knew that valid consent was required or that in its absence the contact or its apprehension would be of a harmful or offensive character, and (b) either (i) was aware and contemporaneously cognizant of the absence of or deviation from the reasonably evident consent[77] of the contemplated recipient of the contact (meaning aware and contemporaneously cognizant of the absence of or his own lack of knowledge of information that a reasonable person would understand as establishing the existence of consent of the contemplated recipient of the contact, or aware and contemporaneously cognizant of the existence of information a reasonable person would understand as being inconsistent with the consent of the contemplated recipient of the contact), or (ii) did not honestly believe that he had valid consent of the contemplated recipient of the contact.[78] The elements of battery with my proposed

77. *See* DOBBS & HAYDEN, PRACTITIONER TREATISE, *supra* note 50 § 32, at 9–10 (referring to "the absence of apparent consent"). It should also be sufficient to satisfy this element that the defendant was aware that an otherwise sufficient manifestation of consent was invalid. With respect to the separate element of the absence of consent, the scope of potentially invalidating factors, and the question for *the purposes of that element* of what (or whether any) level of awareness or knowledge by a defendant of the alleged invalidating conditions or circumstances is required to invalidate consent is beyond the scope of this article, and will not be addressed here. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 892, 892A(2)(a), 892B (1979) (identifying requirements for effective consent and potentially invalidating grounds).

78. *Cf.* DOBBS ET AL., TORTS AND COMPENSATION, *supra* note 12, at 48–51 & n.2 (favoring the dual intent rule); DOBBS ET AL., TEACHER'S MANUAL, *supra* note 50, at 35 (suggesting that intent would also be found when defendant knows "the touching is not consented to"); DOBBS & HAYDEN,

formulation incorporated would require the plaintiff to prove each of the following:

First: That the defendant engaged in volitional conduct;

Second: That the defendant entertained a purpose or knew to a substantial certainty that the contact or its apprehension would result to the plaintiff (or to the person from whom intent was transferred[79]);

Third: Either: (1) that the defendant entertained a purpose or knew to a substantial certainty that the contact or its apprehension would be harmful or offensive, or alternatively, (2) that immediately prior to initiating the contact, the defendant both (a) knew that valid consent was required or that in its absence the contact or its apprehension would be of a harmful or offensive character, and (b) either (i) was aware and contemporaneously cognizant of the absence of or deviation from the reasonably evident consent[80] of the contemplated recipient of the contact (meaning aware and contemporaneously cognizant of the absence of or his own lack of knowledge of information that a reasonable person would understand as establishing the existence of consent of the contemplated recipient of the contact, or aware and contemporaneously cognizant of the existence of information a reasonable person would understand as being inconsistent with the consent of the contemplated recipient of the contact), or (ii) did not honestly believe that he had valid consent of the contemplated recipient of the contact;[81]

Fourth: That the conduct caused a harmful or offensive contact;

Fifth: That there was an absence of valid consent;[82] and

PRACTITIONER TREATISE, *supra* note 50, § 32, at 9–10 (stating that "the absence of apparent consent is itself the marker of offense, and the physician who knows he exceeds consent has intent to offend by touchings the patient did not consent to"); Lawson, *supra* note 11, at 384–85 (suggesting a two option variation which I believe represents a step in the right direction); *supra* note 50 (discussing the view of Dobbs et al.); *supra* note 55 (discussing Professor Lawson's view). Professor Simons criticizes this view because "it fails to impose liability on the actor who honestly but unreasonably believes he has the victim's consent." Simons, *supra* note 11, at 1070 n.27 (criticizing the Lawson view). But, that would not be true if awareness of the absence of reasonably evident consent were sufficient, as it would be under my proposed formulation, to satisfy the intent requirement. *See* DOBBS, THE LAW OF TORTS, *supra* note 11, at 59 (stating in the context of intent that the "plaintiff's apparent lack of consent must be judged objectively"); DOBBS & HAYDEN, PRACTITIONER TREATISE, *supra* note 50.

79. *See* RESTATEMENT (SECOND) OF TORTS §§ 13(a), 16(2), 18(a), 20(2) (1965).

80. *See supra* note 77 and accompanying text.

81. Determining the defendant's state of mind and awareness should be based upon all of the relevant evidence, and not merely upon what the defendant professes to have known or remembered. *See infra* notes 98–99 and accompanying text.

82. On what constitutes consent, see generally *Restatement (Second) of Torts* § 892 cmts. b, c (1979) (stating that "[c]onsent is willingness in fact for conduct to occur," and that "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;" and thus explaining that consent means either that

Sixth: That such contact was impermissible or unwarranted under the circumstances.[83]

Under my proposed formulation, intent can be established not only when a defendant intended to harm or offend, but also when a defendant knew that consent was required (or knew of the harmful or offensive character of such contacts in the absence of consent) and was aware of the absence of evident consent (or did not believe he had consent). Conceptually, intent alternative (2) in the Third element above could be

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the plaintiff "is in fact willing for the conduct to occur," or when his conduct "would be understood by a reasonable person as intended to indicate consent and they are in fact so understood" by the defendant); *id.* § 892D (addressing an emergency action without consent). I have treated the absence of consent as an element. *See* RESTATEMENT (SECOND) OF TORTS § 10 cmt. c (1965) (stating with respect to "invasions of the interests of personality," that "the burden is upon the plaintiff to prove absence of consent"). For emergency situations, see generally *id.* § 13 cmt. d ("[T]he absence of consent is a matter essential to the cause of action, and it is uniformly held that it must be proved by the plaintiff as a necessary part of his case."); *see also, e.g.*, Costanzo v. Gray, 963 A.2d 1039, 1048 n.9 (Conn. App. Ct. 2009) (stating that for an alleged battery claim, "[o]rdinarily, it is the plaintiff's burden to prove lack of consent"); Vitale v. Henchey, 24 S.W.3d 651, 658 (Ky. 2000) ("Lack of consent is an essential element of battery. Therefore, the absence of consent must be proved as a necessary part of the plaintiff's case."). There does appear, however, to be some disagreement on whether the absence of consent is an element or whether consent is a defense. *See* Studnicka v. Pinheiro, No. 05-723, 2008 WL 611605, at *3 n.1 (D. Minn. Mar. 5, 2008) (not resolving the question), *aff'd* No. 09-1702, 2010 WL 3325601 (8th Cir. 2010); Jack K. Levin, 6 AM. JUR. 2d *Assault and Battery* §§ 7, 116 (database updated Apr. 2010) ("Consent is a defense to civil actions for assault or battery, or lack of consent is considered an element of battery.").

Although this element might be largely subsumed into the Third element, that would not always be so. It might be discovered after the contact that, despite appearances to the contrary, the plaintiff had been willing prior to the contact. Liability should be precluded because there was actual willingness, consent in fact. *See* § 892 cmt. b & illus. 1.

83. By impermissible or unwarranted, I mean that, absent consent, society deems contacts with the features of the contact that the defendant intended unacceptable. This requirement may be largely redundant, considering that situations satisfying the Third element would usually almost by definition be impermissible. Also, it may be largely addressed by the *Restatement (Second)* definition of "offensive" contact as "one which would offend the ordinary person and . . . one not unduly sensitive as to his personal dignity." *Id.* § 19 cmt. a. Note, however, that section 19 contains a caveat as to whether a defendant may be liable if he knows a contact "will be offensive to another's known but abnormally acute sense of personal dignity." *Id.* I have included the Sixth element to help address that potential rare situation in which a defendant knows that an intentional contact will be offensive, but his conduct might still be deemed permissible. Say, for example, that the defendant is aware that the plaintiff suffers from claustrophobia, but the defendant nevertheless chooses to sit next to and in physical contact with the plaintiff in the only vacant seat on a crowded subway, rather than to stand. That contact should probably not be actionable as battery. *See* DOBBS, THE LAW OF TORTS, *supra* note 11, § 29, at 56 ("Suppose . . . the subway rider makes it plain to all passengers that she must not be touched by others as they attempt to exit the crowded car. Would other riders be liable for a battery if they must push though the throng to reach the exit? Presumably not. Not only are such jostlings socially accepted, they are necessary to protect the rights of others who must also live in an unpleasantly crowded world. The plaintiff's right to avoid bodily contact is important, but so is the defendant's right to take the subway and get to work. The plaintiff cannot preempt the subway space for herself alone."). Perhaps a different conclusion would arguably be warranted if the subway had other available seats, and the defendant still chose to sit next to the plaintiff. *See id.* at 57 ("When the entitlement of others disappears, as where the subways car is not crowded, the plaintiff is free to insist that she not be touched even if many others would not object to an unnecessary jostle.").

presented in two ways. One way would be to treat it as a corollary to alternative (1). We would simply reason that an intentional contact with the state of mind contemplated in (2) would be deemed an intent to harm or at least offend.[84] Or, we could give separate billing to alternative (2).[85] I have listed (2) as a separate alternative for the sake of salience and clarity.

B. Formulation as Applied

To briefly illustrate the preceding formulation, let us consider a battery claim against a hypothetical dental surgeon. Assume that the trier of fact determined that our dental surgeon removed a left molar instead of the right molar, the one to which the patient had consented. Assume further that the dental surgeon removed the wrong tooth by mistake and that he did not realize he was deviating from the patient's consent. Our dental surgeon did not intend to harm or offend the patient, so intent would not be satisfied under alternative (1) of the Third element above. Nor should alternative (2) support a finding of intent. At the moment of the contact, he mistakenly believed that he was extracting the correct molar, the one to which he believed the patient had consented. The dental surgeon of course knew what the essential nature of the contact—losing the wrong tooth—would be if the plaintiff were unwilling to undergo the contact or consent were otherwise absent. And, at one time he may also have known that the patient had expressed consent only to the extraction of the right molar. But, later, at the crucial moment of initiating the contact, he mistakenly extracted the wrong tooth. Therefore, he was not contemporaneously cognizant that he was deviating from the patient's evident consent. He did not realize that he was about to extract the wrong tooth. The prior conduct of the patient indicating which tooth to extract was not within the surgeon's decisional consciousness. Therefore, I believe that under such circumstances, whether our dental surgeon should be liable for mistakenly

84. *See* DOBBS ET AL., TEACHER'S MANUAL, *supra* note 50, at 35 ("If you agree that offense is intended when the defendant intends to touch knowing that the plaintiff has not consented to it, a jury could easily conclude that . . . intent to offend . . . existed. Liability is imposed when the defendant . . . knows that the touching is not consented to, since intent to engage in unconsented-to conduct will always count as offense."); DOBBS & HAYDEN, PRACTITIONER TREATISE, *supra* note 50, § 32, at 9–10 (stating that "the physician who knows he exceeds consent has intent to offend by touchings the patient did not consent to").

85. *Cf.* Lawson, *supra* note 11, at 384. Although I agree with the two-alternative direction represented by Lawson, I advocate a more robust, full set of elements, all of which the plaintiff must satisfy in every case. *See supra* note 55 discussing and critiquing the Lawson proposal.

extracting the wrong tooth should depend solely on negligence principles[86] and should not be actionable under the intentional tort of battery.[87]

C. *Policy Justifications for Proposed Formulation*

I believe the proposed formulation is worthy of consideration. First, it better harmonizes the intentional tort of battery with the fault system.[88] While there may be sound policy reasons for imposing strict liability for certain types of activities, such as abnormally dangerous activities,[89] those considerations do not apply to battery liability. Unless a defendant's conduct satisfies the proposed intent requirement, liability should depend on negligence principles.[90] Imposing battery liability without satisfying the Third element blurs the fault line between negligence and battery and rings hollow. It elevates "what is essentially a negligence action to the status of an intentional tort based on the fortuity that touching is a necessary incident to treatment in a relationship which is consensual in nature."[91]

The distributive goals of loss spreading[92] and loss allocation[93] are also adequately served by a battery liability circumscribed by the parameters I have suggested, coupled with potential negligence liability. The proposed formulation, although contemplating a narrower battery liability than one based on the mere intent to contact rule, would nevertheless still address the more egregious cases. Indeed, the fact that harm or offense was deliberately caused, for example, may actually contribute to the plaintiff's offense or level of suffering.[94] Negligence law provides a satisfactory regime for cases

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86. *See, e.g.*, Pacheco v. Ames, 69 P.3d 324, 325, 328 (Wash. 2003) (holding that res ipsa loquitur was applicable to a claim asserting negligent malpractice in which it was alleged that an oral surgeon who undertook to remove "three impacted wisdom teeth" and allegedly drilled on the wrong side of the patient's jaw causing nerve damage, and stating that "it is within the general experience of mankind that the act of drilling on the wrong side of a patient's jaw would not ordinarily take place without negligence").

87. *See* Lawson, *supra* note 11, at 377.

88. *See* DOBBS, THE LAW OF TORTS, *supra* note 11, at 59.

89. *See* Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 349–60 (1996).

90. Some commentators would even go further in restricting the scope of intentional torts. *See* Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 UCLA L. REV. 585, 594 (2002) ("I reject the idea that we benefit from having a separate tort for unconsented-to, offensive, physical touching. Rather, I believe we should ask whether the touching of one by another was reasonable or not. If it was reasonable, then generally there should be no liability, and certainly not fault-based liability.").

91. Woolley v. Henderson, 418 A.2d 1123, 1133 (Me. 1980).

92. *See* Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 182–85 (2004) [hereinafter King, *Pain and Suffering*].

93. *See id.* at 185–87.

94. As a leading treatise states, "the state of mind of the actor may make offensive a contact not otherwise so." 1 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 3.3, at 311 (3d ed. 2006). A recent study found that the amount of self-reported pain was greater when "the events producing the pain were understood as intentionally . . . caused." Kurt Gray & Daniel M. Wegner,

that do not satisfy the proposed intent formulation for battery.

Admittedly, the possibility of experiencing unwelcome contacts may affect one's sense of autonomy. I believe, however, that such interests are sufficiently protected by the proposed battery rule when coupled with the possibility of recovering under negligence principles. A broader battery liability rule—one requiring only intent to cause a contact—could reciprocally impair the autonomy of not only potential defendants but of the broader society to engage in activities, without an equivalent enhancement of the autonomy of potential recipients of contacts.

Finally, I believe that the mere intent to contact rule is an atavism of an outdated historical rationale for battery. The earliest goal of tort law was the preservation of the peace.[95] Affording victims a tort remedy was thought to help preserve peace by reducing the impetus for victims to seek revenge or self-help by violent means.[96] This goal figured centrally in the law of battery.[97] The preservation of the peace rationale—whatever its original validity—has been obviated by criminal law and more developed social constraints. Moreover, in any event, battery liability would remain a viable option under my proposed formulation in more egregious cases.

The standard of intent in battery cases is for the most part subjective, focusing largely on what the defendant knew and was thinking.[98] There may be concern that my proposed rule affords defendants too much latitude to avoid a finding of intent. Even if a defendant is shown to have intended the contact, there may be concern that the defendant might still attempt to avoid battery liability under the Third element merely by proclaiming that he neither intended to harm or offend the plaintiff nor had knowledge of the absence or his deviation from the scope of consent and thought he had consent. I believe, however, that such a concern would be unwarranted. For one thing, the state of mind component of intent may consist of either a purpose or knowledge to a substantial certainty. Thus, it will be sufficient if the defendant knew to substantial certainty that the contact would be harmful or offensive or was aware of the absence of evident consent. Moreover, in assessing a defendant's state of mind—what was on his mind and what he

The Sting of Intentional Pain, 19 PSYCHOL. SCI. 1260 (2008). The authors explained that "[a]lthough pain was traditionally conceived to be solely physical in nature . . . its experience varies substantially with psychological context," adding that "the meaning of a harm—whether it was intended—influences the amount of pain it causes." *Id.* at 1260–61.

95. DOBBS, THE LAW OF TORTS, *supra* note 11, at 12 (noting that in medieval Britain, tort law aimed principally at discouraging violence and revenge).

96. *Id.*

97. HARPER ET AL., *supra* note 94, § 3.1, at 304; *see also* GEISTFELD, *supra* note 11, at 117–18, 122.

98. DOBBS, THE LAW OF TORTS, *supra* note 11, § 24, at 49.

knew—the courts and juries should consider all relevant facts. Professor Dobbs aptly comments that "[a]lthough the relevant intent is subjective, the trier of fact has no mind reading machine to determine that subjective intent. One's subjective intent is necessarily determined from external or objective evidence."[99] Furthermore, under alternative (2) of the Third element, although *what facts* of which a defendant was aware is a subjective matter, *whether those facts would be understood by a reasonable person* as establishing the presence or absence of reasonably evident consent would depend on what an objective, reasonable interpretation of those facts would be.

The intent formulation I have posited may hopefully contribute to the reduction of the uncertainty regarding the nature of the consequence that must have been intended to support a claim for the tort of battery. I also offer it for consideration as a possible way of sensibly conforming the tort of battery to the policy goals of tort law that underlie it. Although it may not be the final solvent (nothing ever is), it will hopefully contribute to the conversation on the matter.

In the next section, I will examine goals that I believe should guide the restatement process.

IV. THE PROVINCE OF RESTATEMENTS: ADDRESSING UNCERTAINTY AND THOUGHTFULLY ASSESSING AND GUIDING THE LAW

A. Addressing Uncertainty in the Law

The American Law Institute was founded in 1923, after a thirty-five year process leading to its establishment.[100] It is composed of a number of

99. *Id.*; *see also* White v. Muniz, 999 P.2d 814, 817 (Colo. 2000) ("Juries may find it difficult to determine the mental state of an actor, but they may rely on circumstantial evidence in reaching their conclusion. No person can pinpoint the thoughts in the mind of another, but a jury can examine the facts to conclude what another must have been thinking."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 36 (5th ed. 1984) (saying that although it is "plainly incorrect for a court to instruct a jury that an actor is presumed to intend the natural and probable consequences of the actor's conduct . . . it is correct to tell the jury that, relying on circumstantial evidence, they may infer that the actor's state of mind was the same as a reasonable person's state of mind would have been. Thus . . . the defendant on a bicycle who rides down a person in full view on a sidewalk where there is ample room to pass may learn that the factfinder (judge or jury) is unwilling to credit the statement, 'I didn't mean to do it.'"); Paul v. Holbrook, 696 So. 2d 1311, 1312 (Fla. Dist. Ct. App.1997) (stating that "[p]roof of intent to commit battery is rarely subject to direct proof, but must be established based on surrounding circumstances").

100. Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute—The Fairchild Lecture*, 1995 WIS. L. REV. 1, 7 (1995). For a history and background on genesis and formation of the Institute, see *id.* at 7–13; N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 56–96 (1990).

leading law professors, judges, and attorneys.[101] Perhaps its most prominent work has been the creation and publication of restatements of the law.[102] The impetus for both the formation of the Institute and the production of its many restatements was to address and reduce the uncertainty in the law that had been inwrought and intractable in the then-forty-eight state legal frame of reference, as the "monstrous"[103] number and complexity of judicial opinions mushroomed.[104] This led Benjamin Cardozo to remark that "[t]he fecundity of our case law would make Malthus stand aghast."[105] The *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute* ("*Report*"), which was the initial report explaining the creation of the Institute, identified the "[t]wo chief defects in American law" as "its uncertainty and its complexity."[106] It noted that "[t]hese defects cause useless litigation, prevent resort to the courts to enforce just rights, make it often impossible to advise persons of their rights, and when litigation is begun, create delay and expense."[107] Specifically with respect to

101. *Part I: Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 1, 2 (1923) ("[T]he success of the undertaking required the co-operation of all the organized forces of the profession, that is, courts, bar associations, law schools and learned societies."); Abrahamson, *supra* note 100, at 3, 7, 24 ("The American Law Institute, an organization of about 3500 lawyers, judges and law professors, is perhaps best known for its preparation and production of restatements of the law."); Hull, *supra* note 100, at 82 (stating that "the authors [of the *Report*] realized that an alliance between treatise-writing professors and front-line practitioners and judges was the only battle plan for long-term success").

102. Abrahamson, *supra* note 100, at 3; *see also* Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1216 (1993) ("[T]he Institute is best known for drafting 'Restatements of the Law' in various areas.").

103. *Report of the Committee*, *supra* note 101, at 71.

104. *See, e.g.*, Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 254 (2007) (discussing the problem of proliferation of the case law, the high percentage of cases reversed, and "the inevitable contradictory opinions that were generated," and commenting that "[i]t was this crisis, whether perceived or real, to which the American Law Institute was attempting to respond through the creation of its Restatements and which it continues to address in modern times"); Abrahamson, *supra* note 100, at 12–13 ("Many in the bar were concerned with the explosive growth of the common law, with the rapidly rising number of published judicial opinions. The ALI's founding committee blamed this uncontrolled growth for the uncertainty and complexity in American law."); W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 26 (1985) (stating that the "American Law Institute was founded to accomplish a primary goal of bringing 'certainty and order' to decisional or case law," and that the original impetus for restatements was to address the problem that "ever-increasing volume of court decisions heightened the law's uncertainty and lack of clarity").

105. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 4 (1924).

106. *Report of the Committee*, *supra* note 101, at 6.

107. *Id.*

restatements, the *Report* stated that "[w]e speak of the work which the organization should undertake as a restatement; its object should . . . be to help make certain much that is now uncertain and to simplify unnecessary complexities."[108]

Importantly for present purposes, the 1923 *Report* specifically said of torts that it "is a subject which has developed unsystematically and is therefore full of the evil of uncertainty."[109] Completing and perfecting the definition of intent for battery would thus promote one of the original purposes of restatements—addressing uncertainty in the law. Clearly, there is uncertainty and ambiguity in the various restatement versions and disagreement in the case law as well as among the commentators, both in terms of the state of the law and the most sensible approach.

An important dimension to addressing uncertainty is keeping the *Restatement* as current as possible.[110] This ongoing responsibility for the Institute has been recognized from the start.[111] "There will never be a time when the work is done . . . . Such a task, by the very definition of its object, is continuous."[112] The *Restatement* has fallen short of this goal when it comes to the nature of the intent requirement for battery and other traditional

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108. *Id.* at 14; *see also* Abrahamson, *supra* note 100, at 12 ("The new organization, wrote the committee, should begin by producing restatements to clarify and simplify selected areas of the common law."). The *Report* recognizes the need to gain control over "this monstrous and ever-increasing record of judicial precedent." *Report of the Committee*, *supra* note 101, at 71. It further notes that "though the doctrine of *stare decisis* is the foundation stone of such certainty as the common law has, yet their very number and still more their contrariety tend to destroy the value of the principle and to substitute uncertainty for certainty." *Id.* at 73.

109. *Report of the Committee*, *supra* note 101, at 45.

110. Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185, 187 (1968) [hereinafter Wechsler, *Restatements and Legal Change*] (article based on a paper presented to the Conference of Chief Justices at its Annual Meeting on August 1, 1968) (writing that "we have and must undoubtedly maintain a continuing commitment to keeping the Restatements current and to improving them in every way we can"); Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L.J. 145, 164–65 (2007) ("As the Restatement Second series and the Restatement Third series have demonstrated, there will be a constant need for updating.").

111. Thus, the Founders' *Report* admonished:

> [A]s the conditions of life are never static, law, which is the expression of those conditions, to fulfill the functions of its existence must be a body of rules continuously subject to modification and change. Long before it would be possible to complete a restatement of all the principal topics of the law, the topics first completed might need in one direction expansion, in another modification, in another perhaps positive change. As we conceive it, the work of the American Law Institute which we propose is not like that of those who build a house. There will never be a time when the work is done and its results labeled "A Complete Restatement of the Law." The work of restating the law is rather like that of adapting a building to the ever-changing needs of those who dwell therein. Such a task, by the very definition of its object, is continuous.

Report of the Committee, *supra* note 101, at 43; *see also* RESTATEMENT (SECOND) OF TORTS intro., at vii (1965) ("The object of the grant was to assure that the Restatements would be revised periodically to keep pace with the growth of the decisions in each subject. The discharge of that continuing responsibility has been and is a major function of the Institute.").

112. *Report of the Committee*, *supra* note 101, at 43.

intentional torts. The matter was first addressed in 1934 in the *First Restatement of Torts*.[113] And, despite two subsequent *Restatements of Torts*, the attendant ambiguities persist.

The concept of entropy, as popularized by essayist K.C. Cole, can be viewed as a "measure of the amount of disorder,"[114] which "can only increase . . . [o]nce it's created."[115] Professor Carl Nave explains that for isolated systems, the natural progression is toward greater disorder.[116] According to Cole, "[e]ntropy wins not because order is impossible but because there are always so many more paths toward disorder than toward order."[117] In the law too, "[l]egal certainty decreases over time [and] [r]ules and principles of law become more and more uncertain in content and in application because legal systems are biased in favor of unraveling those rules and principles."[118] As each new restatement project comes and goes without fully explicating and clarifying the essential nature of intent for the core intentional torts, the state of the law moves inexorably from order to disorder. Clarification of the intent element also responds to the broader concerns about the increasingly legal complexity and disorder in the civil justice system in general.[119] As Cole exhorts, the most impressive relief from entropy is "the creation of life."[120] Sometimes a new formulation is needed.

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113. *See* RESTATEMENT OF TORTS §§ 16, 18 (1934); *supra* notes 46–48 and accompanying text.

114. K.C. Cole, *Hers*, N.Y. TIMES, Mar. 18, 1982, at C2. For background on the concept of entropy, see Carl R. Nave, *Entropy as Time's Arrow*, HYPERPHYSICS, http://hyperphysics.phy-astr.gsu.edu/hbase/therm/entrop.html#e2 (last visited Oct. 5, 2010) [hereinafter Nave, *Entropy as Time's Arrow*]; Carl R. Nave, *Second Law: Entropy*, HYPERPHYSICS, http://hyperphysics.phy-astr.gsu.edu/hbase/thermo/seclaw.html (last visited Oct. 5, 2010) [hereinafter Nave, *Second Law: Entropy*]. I have previously discussed the matter of uncertainty in the law and the challenges of entropy in other legal contexts. *See* Joseph H. King, Deus ex Machina *and the Unfulfilled Promise of* New York Times v. Sullivan*: Applying the Times for All Seasons*, 95 KY. L.J. 649, 709–11 (2007).

115. Cole, *supra* note 114, at C2 (describing entropy's "unnerving irreversibility").

116. Nave, *Second Law: Entropy*, *supra* note 114.

117. Cole, *supra* note 114, at C2.

118. Anthony D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 1 (1983).

119. *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 307 (1995) ("[The] basic message is spare: under the dominant constraint of scarcity, insist that every new legal wrinkle pay its way by some improvement in the allocation of social resources. All too often today's law does just the opposite: it makes more complex rules that hamper the productive efficiency of the society they regulate."); Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 50 (1992) ("[T]he critique of legal complexity extends far beyond [the tort system] to all areas of public policy."). According to Schuck, the costs of legal complexities include transaction costs, which are like "friction in mechanics, they are ubiquitous and limit the system's performance," and governance costs. Schuck, *supra*, at 19–20.

120. Cole, *supra* note 114, at C2.

B. *Role of Restatements in Thoughtfully Assessing and Guiding the Development of the Law*

1. "Is" Versus "Ought" Debate

Addressing the question of the consequence that must have been intended to establish a viable battery claim would also be compatible with the evolving nature of the restatements' role. From the beginning, there have been tensions resulting from differing views of the restatements' proper role.[121] Perhaps the most prominent has been the "tension . . . between stating what the law is and what [the law] ought to be."[122] Herbert Wechsler stated the issue as "Affirm the Law or Reform the Law?"[123]

Variations on this "is or ought" dialectic have also been expressed as a tension between the goals of rigidity and flexibility,[124] between stability and growth,[125] between the interests of uniformity and of law reform,[126] and between common law and legislation.[127] Some commentators have gone

121. Abrahamson, *supra* note 100, at 17.

122. Michael Greenwald, *Professional Associations Related to Law Librarians: American Law Institute*, 79 LAW. LIBR. J. 297, 301 (1987); *see also* Abrahamson, *supra* note 100, at 7 ("What is the mission of the ALI? Is it a 'restater' of the law as it is, or an agent of law reform?"); Richard L. Cupp, Jr., *Proximate Cause, the Proposed Basic Principles Restatement, and Products Liability*, 53 S.C. L. REV. 1085, 1088 (2002) ("The[] changes [to the Restatement (Third)] raise the time-honored question of when the restatements should follow the courts, and when they should seek to lead them. Stated another way, when should restatements focus on 'is,' and when should they focus on 'ought'?"); Alex Elson, *"From the Trenches and Towers": The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 627 (1998) ("How has the purpose of ALI changed from its inception to date? More specifically, to what extent has the ALI moved from stating the law as it is to law reform?"); John P. Frank, *The American Law Institute, 1923–1998*, 26 HOFSTRA L. REV. 615, 617 (1998) (referring to the "is or the ought" problem of whether "the function of a Restatement [is] to report precisely what the law is, as by counting decisions"); Herbert Wechsler, *Report of the Director*, 1966 A.L.I. ANN. REP. 5, 5 (1966) [hereinafter Wechsler, *Report of the Director* (1966)] ("Ever since the institute began to work on the Restatements it has had to face the problem of how far judgment as to what the law should be legitimately plays a part in reaching a decision as to what it is.").

123. Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 149 (1969) [hereinafter Wechsler, *The Course of the Restatements*] (drawing from a paper presented to the Conference of Chief Justices at its Annual Meeting on August 1, 1968).

124. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 75 (discussing the importance of striking a balance between excessive rigidity and excessive flexibility).

125. *Id.* at 70 (discussing the need to "find[] some path of compromise between the need for stability and the principle of growth").

126. *Id.* ("The Institute has not fully succeeded in establishing and communicating to the profession . . . a clear policy regarding the relation of the *Restatements* to law reform and efforts to attain uniformity in the law.").

127. Adams, *supra* note 104, at 226 ("One view of the Restatement movement is that it was an attempt to protect the common law against codification [but some scholars] also claim the Restatements ultimately have borne great similarity, in form and in goals, to a code."); *see also* Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351, 371 (1969) ("The philosophy of the Restatements was opposed to the philosophy of codification. In fact, the Restatements were supposed to save the common law from the horrors of codification. But the

further and sought to identify tensions more in terms of underlying jurisprudential philosophies, such as tensions between activists and conservatives[128] or between formalism and legal realism.[129]

Some commentators suggest that there was disagreement among the Institute founders with respect to their original intent for the restatements. Thus, Justice Abrahamson comments that "[f]rom the very beginning, the founding members were divided about what the goals of the organization should be. Should it simplify and state the law that is, or should it prescribe the law that ought to be?"[130]

A number of influential players in the formative years of the Institute, including its first two directors, have been described as supporting the view that the restatement's purpose was to state what that law is.[131] But other

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Restatements' goals were strikingly similar to those of the codifiers.").

128. Adams, *supra* note 104, at 206.

129. *Id.* at 242; *see also* Abrahamson, *supra* note 100, at 13 ("Not everyone greeted the formation of the ALI or the restatements with enthusiasm. American realists with a disdain for rules criticized the very concept of restatements."); Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 82 (noting that the First Restatement engendered "arrows of criticism from various points of view" including from "traditionalists" and "legal realists with their disdain for 'rules'").

130. Abrahamson, *supra* note 100, at 17 n.60 ("The tension between the 'is' and the 'ought' apparently stems from the beginnings of the ALI, when some AALS members sought law reform, while others attempted to curb the professors' zeal for change.").

131. *See* Abrahamson, *supra* note 100, at 17. Abrahamson noted that the views of ALI founders William Draper Lewis and Herbert F. Goodrich both indicated that the *Restatements* were intended to restate the law as it existed. *Id.* at 19. Indeed, Goodrich indicated that the purpose of the *Restatement* was "to state the existing common law as developed by the courts with such care and accuracy that courts and lawyers may rely upon the Restatement as a correct statement of the law as it now stands." *Id.* at 19 n.69 (quoting HERBERT F. GOODRICH, THE AMERICAN LAW INSTITUTE: A SHORT SUMMARY OF PERTINENT FACTS 5 (1933)); A. James Casner, *Restatement (Second) of Property as an Instrument of Law Reform*, 67 IOWA L. REV. 87, 88 (1981); Keyes, *supra* note 104, at 24 ("The goal of the original *Restatements* was to set down a correct statement of the 'general law' (or 'common law') of the United States; the attempt was made to do so and, with some notable exceptions, the goal was achieved. However, with little fanfare, and to the surprise and disappointment of many, this goal is no longer even being attempted by the American Law Institute in drafting the second *Restatement*."). Casner stated:

> William Draper Lewis' statement about the objective of the Institute in preparing the initial *Restatements* restricted the process of determining what the law is. Evidently, what the law ought to be was not to be a factor in determining what the law is when the ought-to-be result had no judicial support or was a minority position. What the law is could not be stated in an area in which judicial feet had not trod or had made only slight inroads. This led to the use of caveats in which the Institute stated that it took no position in regard to such areas. Once this process had determined what the law was, no critical analysis of whether that ought to be the law was officially undertaken by the Institute.

Casner, *supra*, at 88. But Goodrich would later remark, and be frequently quoted, that:

> Over and over again the statement was made that we were endeavoring to state the law as it was, not as some of us would like it to be. All the time we recognized that there were places for a give and take even within that limitation; in cases of division of opinion a choice had to be made and naturally we chose the view we thought was right.

commentators believed that the founders contemplated that the restatements would undertake a broader mission, which would include recommending changes in the law. Thus, Professor Yntema commented that "[t]he initial plan contemplated an ideal statement of law, analytical, critical, and constructive, embodying whatever improvements in the law itself might be recommended by exhaustive study."[132] Professor Hull presents a detailed argument that the vision of the Institute's first director, William Draper Lewis, was that of "a group of 'progressive-pragmatic' legal academics, who wished to reform law and promote the influence of law professors in the wider world of legal practice."[133] Identifying Lewis's view of the restatements' role is, however, clouded by some of his writing that seemed to distinguish between the Institute's role and the restatements' role. For example, although Lewis commented that the role of "the Institute as organized is not confined to stating existing law,"[134] he rejected Yntema's view that restatements should embody recommended improvements in the law.[135] As Lewis said, "[w]e started out with the desire to restate the existing law."[136] But Professor Hull points to other, less formal evidence that Lewis himself may have viewed restatement projects as vehicles for improving the law.[137] Lewis's other writings are ambiguous on the issue.[138]

Herbert F. Goodrich, *Report of the Director*, 1948 A.L.I. ANN. REP. 1, 18 (1948).

132. Hessel E. Yntema, *What Would Law Teachers Like to See the Institute Do?*, 8 AM. L. SCH. REV. 502, 505 (1936) [hereinafter Yntema, *Law Teachers*]. He then bemoaned the fact that "[t]he actual Restatement of the Law purports to be, and is substantially limited to, a statement of the law as it is. This departure from the original conception, it need not be emphasized, is a material nullification of the major objective of the Institute." *Id.* at 505. He explained further:

> The first and fundamental *desideratum* is to have a thorough clarification of ideas as to what the Restatement of the Law is about. This much is certain, that the notion of improving the law by restating it as it is is [*sic*] unsatisfactory. Nay more, it constitutes an indefensible retreat from the objective of the Institute. The Institute was created to ameliorate, not to perpetuate, the existing difficulties in the legal system.

Id. at 507; *see also* Hessel E. Yntema, *What Should the American Law Institute Do?*, 34 MICH. L. REV. 461, 465 (1936) [hereinafter Yntema, *What Should the American Law Institute Do?*].

133. Hull, *supra* note 100, at 56, 83, 85, 86.

134. William Draper Lewis, *What Would Law Teachers Like to See the Institute Do?*, 8 AM. L. SCH. REV. 510, 511 (1936) [hereinafter Lewis, *Law Teachers*].

135. *Id.* Lewis was responding to Yntema, *Law Teachers*, *supra* note 132, at 505. Lewis explained:

> I should like to deal first with the suggestions of Mr. Yntema. . . . I was quite surprised when I found what he had got out of a very careful study of the Report on which the Institute was started. . . .
>
> I think you made just one mistake. In reading the Report you mixed what was specifically recommended to be done in the way of Restatement with the analysis of the defects in the law. The *Restatement* was never conceived for a moment as a work to correct the defects of the law. It is an attempt to give an orderly statement of the existing law.
>
> As stated, the *Institute* as organized is not confined to stating existing law.

Lewis, *Law Teachers*, *supra* note 134, at 511 (emphasis added).

136. Lewis, *Law Teachers, supra* note 134, at 510.

137. *See* Hull, *supra* note 100, at 55–56.

One important source for divining the founders' original intent is the crucial *Report*.[139] The formative steps leading to the eventual creation of the Institute can be traced to actions taken by the Association of American Law Schools in 1914 and 1915, then (after interruption by the First World War) to the creation of several committees, culminating in the Committee on the Establishment of a Juristic Center,[140] and finally to the Committee on the Establishment of a Permanent Organization for the Improvement of the Law.[141] This committee proceeded to draft a report with the intention of breathing life into the Institute. On June 28, 1922, there occurred an important basal meeting of key players to discuss the proposed report eight months prior to its publication.[142] The conveners and participants at the pre-report meeting "focused on what the proposed [R]estatement should contain and what form it should take. The agenda also identified three goals for the [r]estatement: clarification, simplification, and 'adaptation [of the law] to the needs of life.'"[143] According to Professor Hull, "[t]he first two goals responded to the oft-repeated complaints of both progressive and formalist academics, and practitioners and judges," while "the [t]hird, explicitly reformist goal, represented the contribution of the progressive-pragmatist professors."[144]

The foundational *Report*[145] was published on February 23, 1923.[146] Key language of this *Report* provides strong support for the view that the founders of the Institute contemplated a broader mission for the *Restatement* than merely attempting a nose-count for case-law categories. The *Report* states:

> We speak of the work which the organization should undertake as a restatement; its object should not only be to help make certain

138. *See* William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law: "How We Did It"*, 1945 RESTATEMENT IN THE CTS. 1, 8, 12 [hereinafter Lewis, *History of the American Law Institute*] ("[T]he rule that the Restatement should be prepared in the light of case authority has been adhered to. The Restatement does represent the considered opinion of those constructing it, of the way in which the law would be decided in the light of decisions by the courts. . . . The Restatement states the law as it would be today decided by the great majority of courts.").

139. *Report of the Committee*, *supra* note 101, at 1.

140. *Part II: An Account of the Proceedings at the Organization of the Institute in Washington, D. C., on February 23, 1923*, 1 A.L.I. PROC. 1, 3 (1923).

141. *Id.*

142. Hull, *supra* note 100, at 81.

143. *Id.* (alteration in original).

144. *Id.*

145. The Report was drafted by the Permanent Organization Committee. *Id.*

146. *Report of the Committee*, *supra* note 101, at 1.

much that is now uncertain and to simplify unnecessary complexities, *but also to promote those changes which will tend better to adapt the laws to the needs of life.* The character of the restatement . . . should be at once analytical, critical and constructive.

. . . .

The restatement should be critical, because it must be more than a collection and comparison of statutes and decisions, . . . more than an exposition of the existing law, even though such exposition were an accurate photograph of all the law's existing certainties and uncertainties. There should be a thorough examination of legal theory. The reason for the law as it is should be set forth, or where it is uncertain, the reasons in support of each suggested solution of the problem should be carefully considered.

. . . .

Again, *where the law is uncertain or where differences in the law of different jurisdictions exist not due to differences in economic and social conditions, the restatement, while setting forth the existing uncertainty, should make clear what is believed to be the proper rule of law.* The degree of existing uncertainty in the law would not necessarily be reduced by a mere explanation of rival legal theories. Indeed, a restatement which confined itself to such an explanation would reduce the degree of existing uncertainty only in those instances where but one line of decisions was supported by reasons worthy of consideration. *Where the uncertainty is due, as it often is, to the existence of situations presenting legal problems on the proper solution of which trained lawyers may differ, the courts can best be helped by support given to one definite answer to the problem.*

. . . .

. . . *Such a restatement will also effect changes in the law, which it is proper for an organization of lawyers to promote and which will make the law better adapted to the needs of life.*[147]

While "real cases" were to be given their due "based on a careful study," it was for the purpose of a "statement of what is *or what should be the law.*"[148] The *Report* also specifically acknowledges and discusses, in the context of how courts might use the restatements, the situations in which "the statement of the law set forth is against the weight of authority in most of the states."[149] The *Report* also states that "[t]he Institute must not only

147. *Id.* at 14–15, 18 (emphasis added).

148. *Id.* at 22 (emphasis added).

149. *Id.* at 26.

ascertain what the law is but what it ought to be."[150]

The ostensible lack of consensus, in the vision of the founders, for the nature of restatements may reflect not so much a fundamental disagreement or even a realization at the time of a so-called "is-ought" divide. After all, not only was the Institute something new, but so was the notion of restatements. I suspect that the founders' visions of the appropriate frame of reference and contours for the restatements was not as crystallized or manifest as their views have been perceived in hindsight, especially when informed by the realities of the various restatements as they materialized and evolved over the decades after 1923. To the extent that the founders did have a vision for the future restatements, it probably vacillated somewhere between the "is" and "ought" poles. As Professor Greenwald has opined, "[a]lthough the Restatements were clearly not intended to be radical reformulations of the law . . . the founding Committee envisioned something more than mere restatement of existing uncertainty and confusion."[151]

The first systematic written account in Greek mythology of the inception, or coming into existence, or salience of the universe was a poem of only a thousand lines.[152] Examining the inception of a phenomenon is easier when there is a predominant account, even of the mythological universe. The founders' *Report* is similarly the most complete account of the origin of the Institute. But unlike the mythological vision of a completed "permanent and unchanging"[153] universe, the Institute founders' *Report*, while being the most important first word on the origins of the Institute, was certainly not the only or last word. Crucially, the nature of restatements is evolving as the debate continues over their role and form. Nearly a quarter of a century after the formation of the Institute, one of its most respected and influential directors, Herbert Wechsler, saw the continuing need to address the "question of how far in the restatement of the law it is appropriate to take account of an opinion as to what the law should be."[154] A few years later, he posed the question: "Affirm the Law or Reform the Law?"[155] Later, Dean Wade even questioned whether there ever was a test or accepted antecedent

150. *Id.* at 55.

151. Greenwald, *supra* note 122, at 301.

152. *See* JENNY STRAUSS CLAY, HESIOD'S COSMOS 1–2 (2003) (stating that the Hesiod's "*Theogony* offers an account of the genesis of the cosmos and the gods" and was "the first systematic presentation of the nature of the divine and human cosmos, of Being and Becoming"); ELIZABETH VANDIVER, CLASSICAL MYTHOLOGY: COURSE GUIDEBOOK 20 (2000) (referring to the *Theogony* as the "most complete surviving Greek account" of the universe coming "into being").

153. CLAY, *supra* note 152, at 8.

154. Wechsler, *Report of the Director* (1966), *supra* note 122, at 5.

155. Wechsler, *The Course of the Restatements*, *supra* note 123, at 149 (article drawn from a paper presented to the Conference of Chief Justices at its Annual Meeting on August 1, 1968).

for what it was that the restatements were stating.[156] Commentators have noted that "[t]he dispute as to the mission of the [Institute] has not been resolved and, no doubt, will continue well into the future."[157]

2. The False "Is or Ought" Dichotomy

a. Questionable Premises

The much proclaimed grand tension between the goals of restating the law as it is and of stating the law as it ought to be, assumes a separateness of the two perspectives that may be largely illusory. It is a false dichotomy. Unity, rather than separateness, aptly describes not only the attitude, but also the perspective of the courts in crafting the law. That same unity of the law as it is currently, and as it is believed ought to be, should be acknowledged and embraced by those "restating" "the law."[158] Neither the role of courts in deciding the course of the law nor the role of the restatements in stating core substantive legal rules should be boxed into a semantic bivalence that assumes an is-or-ought dichotomy, a separateness of those two perspectives, or that such a dichotomous proposition points to exactly one of two truth values.

Herbert Wechsler, who served as the American Law Institute's third director during the Institute's most transformative period from 1963 to 1984,[159] took an increasingly holistic view of the appropriate goals for the restatement. In 1966, when what might be termed the "Wechsler Manifesto" began to crystallize, Wechsler wrote of the reasoning and decision-making in the courts:

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156. *See* Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 62 ("Those primarily responsible for the Second *Restatement* did not attempt to develop a firmly established test for determining the present state of the general common law. They instead came to utilize a growing amount of leeway in making this determination and in choosing the language for stating the rule or principle.").

157. Elson, *supra* note 122, at 630; *see also* Abrahamson, *supra* note 100, at 17 ("Should it simplify and state the law that is, or should it prescribe the law that ought to be? This division between the 'is' and the 'ought' appears in the ALI's founding documents and continues to this day."); Frank, *supra* note 122, at 617 (referring to the "is or the ought" problem of whether it is "the function of a Restatement to report precisely what the law is, as by counting decisions, or should it give some consideration to what the law ought to be," as one "which has confronted the Institute from then until now"); *cf.* A. Dan Tarlock, *Touch and Concern Is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 805 n.3 (1998) ("The question of the basic purpose of the . . . (ALI) continues to be the subject of lively historical and contemporary debate.").

158. *See* Wechsler, *Restatements and Legal Change*, *supra* note 110, at 190 ("[I]f we ask ourselves what courts will do in fact within this area, can we divorce our answers wholly from our view of what they ought to do, given the factors that appropriately influence their judgments, under the prevailing view of the judicial function?").

159. Ali.org, *Herbert Wechsler 1909–2000*, THE ALI REPORTER, Summer 2000, http://www.ali.org/ali/R2204_Wechsler.htm (last visited Oct. 3, 2010) ("Herbert Wechsler . . . served from 1963 to 1984 as the Institute's third Director.").

> Does not the statement of a rule involve, then, something more than the conclusion that it is supported by the past decisions? Is there not also the implicit judgment that our courts today would not perceive a change of situation calling for the adaptation of the rule or even for a new departure? And if we ask ourselves what courts will do in fact within this area, can we divorce our answer wholly from our view of what they ought to do, given the factors that appropriately influence their judgments . . . ?[160]

That statement was a premise for Wechsler's holistic vision for the restatements. Wechsler asked rhetorically "if we are not obliged in our own deliberations to weigh all of the considerations relevant to the development of common law that our polity calls on the courts to weigh in theirs."[161] A year later he would reiterate for those crafting restatements his "working formula that we should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs."[162] Wechsler later more explicitly pointed to a convergence and commingling of the "is and ought" dichotomy. He observed that "any statement that the law is such and such is more than an empiric finding that decisions have so held—that it implies a normative assertion as to what should now be held."[163] Wechsler's formula is a convergence of the polestars for case law and the restatement rules, which should be, according to Wechsler, animated by the similar considerations.

b. Specious Premise of a Discernible Static State of the Law

The perceived dichotomy between whether the restatements should state the law as it "is" or as it "ought" to be also may depend on unrealistic

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160. Wechsler, *Report of the Director* (1966), *supra* note 122, at 6.

161. *Id.* at 9. Seeing a more creative role for the restatements than merely parroting the law as it was perceived to have been, he wrote:

> [S]hould we not at least make clear, as we proceed, the areas in which we think such renovation is in order, especially when we believe the task to fall within the province of the courts of last resort under a proper view of the judicial function? . . . My purpose . . . is to ask if we are not obliged in our own deliberations to weigh all of the considerations relevant to the development of common law that our polity calls on the courts to weigh in theirs.

Id.

162. Herbert Wechsler, *Report of the Director*, 1967 A.L.I. ANN. REP. 1, 5 (1967) [hereinafter Wechsler, *Report of the Director* (1967)]; Michael D. Green & William C. Powers, Jr., *Liability for Physical and Emotional Harm: An Introduction*, *in* A CONCISE RESTATEMENT OF TORTS, at xiii (2d ed. 2010) (quoting the preceding, and noting that the words "grace the wall of the conference room at the Institute").

163. Wechsler, *The Course of the Restatements*, *supra* note 123, at 150.

assumptions about the underlying legal landscape. One is that an issue has been addressed by a well delineated corpus of case law, neatly divided into majority and minority positions. Sometimes, of course, the cases are clear, and there is no marked division of authority,[164] which could arguably lessen the salience of the "is-ought" dichotomy. But, often the state of the law is not clear or discernible or has not produced well-delineated majority and minority positions. The case law often is unclear, ambiguous, or inconclusive so that a court's approach to a question simply cannot be deduced from the opinion. We find not a linear case law panorama, but one of subtle nuances and black holes. Moreover, even when the courts have clearly spoken on a question, there may be many permutations, with nuances, caveats, and polycentric variables. There may also be more than two approaches to a question, sometimes many more, depending on how simplistic an analysis of the case law a scholar-analyst is willing to indulge. The vitality of the "is or ought" debate depends on whether a restater can come up with a meaningful categorization and nose count of the cases, so that they might know whether there is a consensus position, one that represents a majority or minority rule, or something else. I believe tallying or reckoning of positions may not even be feasible.[165] The position of a case (or more commonly a series of cases) in a jurisdiction may not be that transparent. Dean Wade states the obvious reality that "[m]any court decisions are very difficult to interpret and thus very difficult to 'line up.'"[166]

Moreover, assessing the weight of the case law requires that one freeze the frame of a case law that is often evolving at multiple levels, that is in other words a very movable target. Dean Wade, the Reporter for about half of the *Restatement (Second) of Torts* said "[i]f there ever was a thought that the restatement would 'catch' the condition of the law at a particular time and crystallize and hold it there, that idea has long since been abandoned. . . . It is prepared with an eye to the future as well as the past."[167]

Nor are judicial decisions and opinions fungible, and, thus, the states may not be realistically commensurable for the purposes of a tally. Some jurisdictions may have barely hinted at resolution of a question, while others may have produced an impressive line of cases that address the question. Cases also may vary by level of the court and date or currency,

164. *See* Kenneth S. Abraham, *Stable Divisions of Authority*, 44 WAKE FOREST L. REV. 963, 964 (2009) (stating that as the law has matured,"[o]ver time, the law of different states will converge").

165. *Cf.* DAVID G OWEN, PRODUCTS LIABILITY LAW 165 n.89 (2d ed. 2008) ("One must be cautious about counting jurisdictions on most legal issues, particularly issues . . . that are fuzzy at best.").

166. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 62.

167. John W. Wade, *Second Restatement of Torts Completed*, 65 A.B.A. J. 366, 371 (1979) [hereinafter Wade, *Second Restatement of Torts Completed*].

and there may also be significant differences in the quality and rigor of the courts' reasoning. Herbert Wechsler said that:

> [E]ven as a law student forty years ago, I knew that germinal opinions like those of Judge Cardozo in the *Palsgraf* case, *MacPherson* . . . or *Ultramares* . . . had been embraced in the drafts of the first *Restatement* long before they had much following in other courts in the view that they were right and should be followed, and that this was the very process pursued in adopting Section 402A.[168]

Nearly two decades later, Dean Wade would second this.[169] Searching for a static state of the law through a rear-view often "shakes a dead geranium."[170]

Even when there appears to be a clearly delineated and fairly stable division of authority on a question,[171] the "is or ought" dichotomy is more academic than real. In those instances, the wisdom of the restatement guiding the direction of the law should be obvious.

c. The Heisenberg Principle

In 1926, Werner Heisenberg formulated the "uncertainty principle."[172] He postulated that an object's velocity and present position cannot be measured without shining light on it, but that the energy from shining the light may alter the particle's velocity.[173] Therefore, "the more accurately you try to measure the position of the particle, the less accurately you can measure its speed."[174] In other words, the light of analysis may affect the result. A more popularized conception of the rule might be that "the act of observing . . . may itself distort the phenomenon under observation."[175] A

168. Wechsler, *The Course of the Restatements*, *supra* note 123, at 149–50.

169. *See* Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 62. He commented: "Some opinions are much more cogently reasoned and persuasive than others . . . . Some rules . . . more logically consistent with the principles underlying the particular area of the law; some rules balance the conflicting interests of the parties more fairly." *Id.* at 62. Especially when there appear to be two separate lines of authority, "[t]he decision is not only influenced by the number of states espousing each, but also by the convincing quality of the several court opinions and the viewpoint of the Restaters as to which is the better rule—the more principled one." *Id.* at 77.

170. T.S. ELIOT, *Rhapsody on a Windy Night*, *in* T.S. ELIOT, COLLECTED POEMS 1909–62, at 16 (1970).

171. *See* Abraham, *supra* note 164, at 964.

172. STEPHEN HAWKING, A BRIEF HISTORY OF TIME 56 (10th ed. 1998). My brief summary is based in part on a previous article. *See* King, *supra* note 92, at 179–80.

173. HAWKING, *supra* note 172, at 56–57.

174. *Id.* at 57.

175. Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 909 (1982); *see also*

similar phenomenon may apply to the restatement process. A restatement project may stretch over years, and the evolving process may itself significantly affect the course of the case law. Drafts are circulated, analyzed, and increasingly relied upon by the courts. Influential law review commentary on the questions addressed in the various official restatement drafts emanates. Herbert Wechsler wrote that "when the Institute's adoption of the view of a minority of courts has helped to shift the balance of authority, it is quite clear that this has been regarded as a vindication of our judgment and a proper cause for exultation."[176]

Thus, the object assessed—the state of the law—may itself be shaped to a significant extent by the restatement process of assessment, synthesis, analysis, and drafting. As Alexander Pope marvelously put it, "Like following life through creatures you dissect, You lose it in the moment you detect."[177]

d. Evolving Sense of the Role of Restatements

An "is versus ought" dichotomy is also based on the unrealistic premise that restatements follow a set normative course. But what restatements do is dynamic and polycentric. There is no neat fixed monolithic restatement operative model. A shift in the role of the restatements was evident in various pronouncements of directors of the Institute. In 1948, Director Herbert Goodrich stated:

> Over and over again the statement was made that we were endeavoring to state the law as it was, not as some of us would like it to be. All the time we recognized that there were places for a give and take even within that limitation; in cases of division of opinion a choice had to be made and naturally we chose the view we thought was right.[178]

In 1966, Director Herbert Wechsler also addressed the situation in which the case law was divided, requiring that a choice be made. And in deciding what was "right," he explained:

Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 17–19 (1989); Daniel S. Goldberg, Comment, *And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism*, 39 HOUS. L. REV. 463, 479–81 (2002).

176. Wechsler, *Report of the Director* (1966), *supra* note 122, at 6; *see also* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 511 n.35 (2006) ("Even when a particular section of a particular Restatement rejects a clear majority rule in favor of some minority position . . . the position advocated by the Restatement often becomes the new majority rule.").

177. ALEXANDER POPE, *An Epistle To Sir Richard Temple, Lord Cobham*, *in* THE OXFORD AUTHORS: ALEXANDER POPE 319, 320, lines 29–30 (Pat Rogers ed., 1993).

178. Goodrich, *Report of the Director*, *supra* note 131, at 18.

> In judging what was "right," a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but it has not been thought to be conclusive. And when the Institute's adoption of the view of a minority of courts has helped to shift the balance of authority, it is quite clear that this has been regarded as a vindication of our judgment and a proper cause for exultation.[179]

He also later made it clear that even "in the absence of a cleavage of authority . . . the institute is not obliged to govern its appraisals by a count of jurisdictions."[180] Perhaps most importantly, while acknowledging what the practice had been when there was no substantial split of authority,[181] he suggested as his guiding course that the restatements be guided by "all of the considerations . . . [that] the courts . . . weigh in theirs."[182] In later citing support for his position, Wechsler made it clear that his rule was not limited to situations in which the case law was divided. He thus flatly rejected "the dogma that a rule supported by decisions must be stated in the absence of a cleavage of authority and without assessment of the influence that such decisions would or should exert on a contemporary court."[183] The restatements should be guided by the same considerations as those to which the courts should look, including not only precedent,[184] but also "a change of situation calling for the adaption of the rule or even for a new departure."[185]

Dean John Wade was the Reporter for many of the most revised and reshaped sections of the *Second Restatement of Torts*.[186] He described the evolving attitudes toward the role of the restatements:

> As the first *Restatement* was getting underway . . . [i]t expected its Blackletter sections to be accepted on the basis of the magisterial

179. Wechsler, *Report of the Director* (1966), *supra* note 122, at 6; *see also* Wechsler, *The Course of the Restatements*, *supra* note 123, at 149.

180. Wechsler, *The Course of the Restatements*, *supra* note 123, at 150.

181. He noted that "where no substantial cleavage has as yet appeared in the decisions . . . the practice on the whole has been to state the rule of such decisions as there are . . . even if [a] case . . . of first impression," with possible caveats and elaboration on doubts about the decisions. Wechsler, *Report of the Director* (1966), *supra* note 122, at 6.

182. *Id.* at 9; *see also* Wechsler, *Report of the Director* (1967), *supra* note 162, at 5.

183. Wechsler, *The Course of the Restatements*, *supra* note 123, at 150.

184. Wechsler, *Report of the Director* (1966), *supra* note 122, at 5 ("The common law calls on the courts to show a due regard for the precedent but also calls on them to choose between conflicting lines of doctrine . . . .").

185. *Id.* at 6.

186. *See* RESTATEMENT (SECOND) OF TORTS §§ 504–951 (1977 & 1979). Dean Wade broke much new ground, such as the total reworking of the law on defamation and privacy, and extensive development of the economic torts.

> authority of the Institute, rather than the persuasive nature of an explanation of the rule. Only occasionally did it adopt a rule that was followed by only a small minority of the courts.[187]

But, even in the *First Restatement*, this position became somewhat relaxed.[188] And, "[a]s the second *Restatement* got underway some two decades later, the Restaters . . . felt more free to adopt a minority rule if a clear trend existed in that direction, and this was normally done with a candid explanations of the matter."[189]

The actual *Second Restatement* displayed an even more proactive, creative orientation:

> [The first] two volumes . . . played a significant part in the development of the law—for instance, Section 402A and the growth of strict liability for products.

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187. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 68. For a recent example of the drafters' formulation of a rule that they believed was the "best way," despite the dearth of relevant law on the matter, see RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIABILITY § 26 (2000); *id.* Reporters' Note cmt. d (stating that although "[t]here is very little case law or statutory language addressing these issues" and the approach of "dividing damages by causation before applying comparative responsibility," that "[u]ltimately, its support depends not on case law, but on its being the best way, whenever feasible, to effectuate the goals of causation and comparative responsibility").

188. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 68, 72. Wade said:

> In later work on some parts of the first *Restatement* this position appears to have been somewhat relaxed.
>
> . . . .
>
> [The practice] in which a choice has been made between two recognized lines of authority and the minority position is selected for the Blackletter rule . . . was followed in a good number of cases, even in the first *Restatement*, and it is fully in accord with statements in the original Report of the Committee on Establishment.

Id. There are examples of this broader, more creative focus even in the *First Restatement*. In the drafting of the provision dealing with the effect of "Assent to Invasion Constituting a Crime," the restaters adopted what they admitted was a minority position. *See* RESTATEMENT OF TORTS § 6, prob. 4, at 17 (Preliminary Draft No. 3, 1923) (Reporter's Brief) ("At the meeting at Cambridge there was a substantial unanimous vote of my advisers then present that the statement should reject the vastly preponderated weight of American authority . . . that consent to a battery, involving a breach of the peace or any other unlawful contact, is no bar to an action of trespass for such battery."); RESTATEMENT OF TORTS § 6 (Preliminary Draft No. 2, 1923) ("Consent prevents a touching from being a battery, though the touching consented to is one which offends the peace and good order of the state and so becomes an offense against the state itself, and not merely against the state as vindicator of the private rights of its citizens."). They also inserted the following "Note for the Council": "This section states the view of a numerical minority of the American jurisdictions before which the question has been presented for decision. The reasons for preferring the minority view are fully stated in the *Columbia Law Review*, December, 1924. RESTATEMENT (FIRST) OF TORTS § 70, n.1 (Preliminary Draft No. 10, 1924). The preceding note was inserted by the drafters to accompany then section 70 (previously section 6), which along with the exception in section 71 were eventually approved with minor revisions as sections 60–61, which in turn evolved into section 892C of the *Second Restatement*. *See* RESTATEMENT (SECOND) OF TORTS § 892C (1979).

189. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 68 ("It is normal practice to state the majority rule in the Blackletter. Sometimes, however, a minority rule is stated in the same Blackletter as if it were the majority rule.").

> Volumes 3 and 4 *depict the trend toward reform* of the common law of torts to eliminate anomalies and logical inconsistencies and *to make the state of the law more reflective of modern social and economic conditions and current mores and concepts of justice.* There are many important changes that are *"restated"* in these latest volumes.
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> . . . .
>
> . . . An attempt has been made *to extrapolate from the principles stated in or deduced from the* [Supreme Court First Amendment defamation] *opinions.*
>
> . . . .
>
> The American Law Institute has worked assiduously to bring the restatement of torts up to date and to make it accurately descriptive of the current state of the law and *reflective of recognizable trends that foretell impending developments.*
>
> . . . .
>
> . . . The chapters on defamation reflect an interpretation of Supreme Court decisions and *prognostications of their implications for other issues not covered in the cases.*[190]

Wade's vision of the *Restatement* contemplated not only many changes in substantive tort law, but a forward-looking perspective, one "reflective of recognizable trends that foretell impending developments."[191] More recently, Professor Michael Greenwald said that "one of the most significant contributions of the Restatements has been the extent to which they have anticipated the direction in which the law is tending and suggested salutary avenues of development, consistent with established principles, in areas in which there have been few or no decided cases."[192]

Wade suggested flexibility in appraising the state of the law:

> Those primarily responsible for the second *Restatement* did not attempt to develop a firmly established test for determining the present state of the general common law. They instead came to utilize a growing amount of leeway in making this determination and in choosing the language for stating the rule or principle.[193]

190. Wade, *Second Restatement of Torts Completed*, *supra* note 167, at 366–67, 371 (emphasis added).

191. *Id.* at 371.

192. Greenwald, *supra* note 122, at 301.

193. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 62.

Wade addressed the question of the role of restatements in various case law postures.[194] He questioned the assumption that the test for deciding what rule should be propounded "would normally be the position taken by a majority of the states passing on the issue."[195] He explained that "[i]t is hard to believe that the Reporters and their Advisors, even in the first *Restatement*, made a point of compiling the number of states lined up on each side of an issue and mechanically adopted the side with the most votes."[196] Where there are majority and minority views, restaters for the *Second Restatement* "felt more free to adopt a minority rule if a clear trend existed in that direction, and this was normally done with a candid explanation of the matter."[197] He elaborated, stating that although it was the "normal practice to state the majority rule in the Blackletter," nevertheless "[s]ometimes . . . a minority rule is stated in the same Blackletter as if it were the majority rule."[198] He reasoned that "[l]aying down the bad rule may have the effect of reinforcing it and prolonging its lifespan. Stating a better rule may lead one who relies upon it into unfortunate consequences when the court does not follow it."[199] This was not, however, a true dilemma because "[a] Restater can select either horn without fully committing himself if he explains the situation and indicates why the choice was made."[200] When "there are several different positions taken on a particular issue in the various states," the restaters would "normally look first to see if there is a clear majority" but recognized that in many situations other considerations "may . . . play a significant part in reaching conclusions as to what the Restatement should say; the result may be an amalgam of these various considerations."[201] Wade asked rhetorically:

> Should they give greater weight to the opinions of those courts generally recognized as possessing superior talent, or to particular opinions that are unusually well-reasoned and therefore more persuasive?
>
> Should they instead look to the broad principles underlying the rules governing particular issues and determine what rule is most consistent with the general principle? Does this mean, if the rule seems to fit in well with the general principles but the legal analysis generally given in support of the rule seems logically unsound, that they should make use of the more logical analysis while retaining

194. *Id.* at 65.
195. *Id.* at 62.
196. *Id.*
197. *Id.* at 68.
198. *Id.* "The [S]econd Restatement has followed the practice of stating expressly in the Comments or in the Reporter's Notes when this has been done." *Id.* at 83.
199. *Id.* at 67.
200. *Id.* at 68.
201. *Id.* at 65.

> the rule? Should they give any consideration to their own viewpoint regarding logical consistency and the desirability of the ultimate results of particular rules?[202]

He elaborated that when there are two separate lines of authority, "[t]he decision is not only influenced by the number of states espousing each, but also by the convincing quality of the several court opinions and the viewpoint of the restaters as to which is the better rule—the more principled one."[203] Similarly, Wechsler wrote that "[i]n judging what was 'right[,'] a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but it has not been thought to be conclusive."[204]

When there appears to be one case law position and "little or no authority the other way[,]" Wade says that ordinarily "[t]he Blackletter would reflect the actual state of the law, but the discussion would suggest the desirability of changing it for a better rule."[205] But, even here, Herbert Wechsler has suggested that the role of restatements appears to be shifting.[206] Thus, he wrote that the Institute "should . . . liberate the process of restatements from any surviving rigid limitations, like the dogma that a rule supported by decisions must be stated in the absence of a cleavage of authority and without assessment of the influence that such decisions would or should exert on a contemporary court."[207]

Rather than focus exclusively on a nose count of the states (often a vain effort) and then "restate" the "majority rule," the restatements themselves evidence a broadening focus to encompass and weigh trends in the law. For signs of this, one need only consider the observations of the influential reporters for the two major segments of the *Restatement (Second) of Torts*. The quintessential example of the restatement adopting a so-called minority rule was the adoption of Section 402A in the *Second Restatement*.[208] According to Herbert Wechsler, "members of the institute were well aware when they approved Section 402A that decisions in support could be adduced in only a minority of states," but nevertheless were persuaded by "the direction that the law was taking on the strength of its momentum."[209]

202. *Id.*
203. *Id.* at 77.
204. Wechsler, *Report of the Director* (1966), *supra* note 122, at 6.
205. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 72–73.
206. Wechsler, *The Course of the Restatements*, *supra* note 123, at 150.
207. *Id.*
208. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
209. Wechsler, *The Course of the Restatements*, *supra* note 123, at 149.

Dean William Prosser, the Reporter for Sections 1-503 of the *Restatement (Second) of Torts*,[210] explained the impetus for Section 402A. Prosser saw a products liability case law that was "expanding with almost explosive force."[211] Prosser expressed concern that if a more restrictive version were published that summer "it will be on the edge of becoming dated before it is published[,]" adding that he "would venture to predict that in another 50 years this has fair chances of becoming a majority rule in the United States . . . ."[212] This turned out to markedly underestimate the rapidity of change.[213] And, later, Dean Wade commented that "[v]olumes 3 and 4 depict the trend toward reform of the common law . . . reflective of modern social and economic conditions and current mores and concepts of justice."[214] The modern view was summed up as follows:

> Especially in modern times, . . . members of the American Law Institute have not viewed the Restatements as mere compendia of "majority rules"; to varying degrees, modern Restatements strive to identify the law as it should be rather than as it is, and the fact that most states have rejected a particular legal rule will not necessarily keep the relevant Restatement from embracing it.[215]

Recently, two of the Reporters for the latest torts restatement project put it succinctly: "Restatements are not simply a 'restatement' of what courts have done. In many cases they attempt to synthesize decisions that seem disparate or confused. Sometimes, they attempt to rationalize a doctrine . . . . Sometimes they are prescriptive rather than descriptive, providing rules that the Institute believes are an improvement."[216]

Thus, important players and commentators in restatements have propounded a more flexible, proactive, and creative orientation for restatements. However, not everyone has endorsed this broader orientation.[217] The Institute's Handbook itself displays some

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

211. 41 A.L.I. PROC. 349 (1964) (remarks of Reporter William L. Prosser).

212. *Id.* at 350.

213. *See* Dominick Vetri, *Order Out of Chaos: Products Liability Design-Defect Law*, 43 U. RICH. L. REV. 1373, 1374 (2009) ("Section 402A caught on like wildfire in American state courts. No single doctrinal common law principle was ever adopted so widely and quickly in the United States as strict products liability."(footnotes omitted)).

214. Wade, *Second Restatement of Torts Completed*, *supra* note 167, at 366.

215. Nelson, *supra* note 176, at 51 n.35.

216. Green & Powers, *supra* note 162, at xiii.

217. *See* Cupp, *supra* note 122, at 1088. Cupp states:

> Except in areas truly crying out for reform, I tend to lean toward the notion that restatements should follow more than they lead. They likely garner more respect, and more relevance, when the legal community senses that the restatements are thoughtful and accurate reflections of the courts' dominant approaches to legal issues. In some instances following the courts is impractical, because the decisions are jumbled or hopelessly confused, and in such situations the restatements need to say what the law

ambivalence.[218] Yet, at the same time, it states that "Restatements aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands *or might plausibly be stated by a court*."[219] The Handbook candidly acknowledges "the central tension between the two impulses at the heart of the Restatement process from the beginning, the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process."[220]

I believe the *Restatement* should embody the broader orientation, one that encompasses not merely the sense of the weight of authority, but a broader range of considerations like those that guide courts in deciding the direction of the law. Moreover, when there exists a readily discernible line of competing authority on a question, that should be noted in the comments[221] along with a sufficient explanation of the position taken in the black-letter language and the Institute's rationale.

e. Restatement as Gesamtkunstwerk

The validity of an "is or ought" dichotomy is also undercut by the broader focus of the restatements beyond statements of black-letter law, one that addresses the policies and principles underlying the rules. There is some evidence of this tendency even from the start. The founding *Report* stated:

> ought to be. However, I suspect that the natural desire to make improvements even when the majority approach is relatively clear may sometimes come through too strongly . . . .

Id.

218. *See* CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (2005) (emphasis added). It says that "Restatement blackletter formulations assume the stance of describing the law as it is." *Id.* The handbook was prepared by the Institute's Committee on Institute Style. *See id.* at viii.

219. *Id.* at 4 (emphasis added).

220. *Id.* The Handbook elaborates:

> A Restatement thus assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole . . . but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending . . . .
>
> Restatements are instruments for innovations of this sort. Nevertheless, the improvements wrought by Restatements are necessarily modest and incremental, seamless extensions of the law as it presently exists.

Id. at 5.

221. *See* Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 83 ("The second *Restatement* has followed the practice of stating expressly in the Comments or in the Reporter's Notes" when it has adopted a so-called "minority position.").

> The restatement should be critical, because it must be more than a collection and comparison of statutes and decisions, more than an improved encyclopedia of law, more than an exposition of the existing law, even though such exposition were an accurate photograph of all the law's existing certainties and uncertainties. *There should be a thorough examination of legal theory. The reason for the law as it is should be set forth . . . .*[222]

In the same year, Benjamin Cardozo explained the importance of the restatements:

> When, finally, it goes out . . . it will be something less than a code and something more than a treatise. It will be invested with unique authority, not to command, *but to persuade.* It will embody a composite thought and speak a composite voice . . . . Restatement is needed, "not to repress the forces through which judgemade law develops, but to stimulate and free them."[223]

Wechsler believed that "the emphasis has shifted from dogmatic affirmation to . . . reasoned exposition."[224] And, Wade stated that "[t]he *Restatement* can cut though this verbiage [when courts develop and state rule in awkward fashion] and determine the essence of the rule. One of the original concepts of the Institute was to find and express the principles underlying the rules."[225]

This shift in focus reflects Wechsler's thesis that restaters should take into account the same considerations that influence the courts.[226] Importantly, the approach of the courts to the common law has changed from the notion "that the common law was an integral system existing independently of the actions of the courts" in which the "function of the courts was not to create the law but to discover it."[227] A new view of the law was emerging, one in which the law was "not entirely and irrevocably changeless."[228] Wade describes the shift:

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222. *Report of the Committee*, *supra* note 101, at 14 (emphasis added).

223. Cardozo, *supra* note 105, at 9–10 (emphasis added) (quoting Benjamin N. Cardozo, *Ministry of Justice,* 35 HARV. L. REV. 113, 117 (1921)).

224. Wechsler, *The Course of the Restatements*, *supra* note 123, at 150.

225. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 74, 82 (referring to the original concept for the restatements in "analyzing, organizing, and expressing ('re-stating') the underlying principles in certain important fields of the law"). While acknowledging that restaters normally look "to see if there is a clear majority rule," Wade said that they should also "look to the broad principles underlying the rules governing particular issues and determine what rule is most consistent with the general principles." *Id.* at 65.

226. *See supra* notes 160–63 and accompanying text.

227. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 63.

228. *Id.*

> [A] growing number of appellate courts have substantially changed the nature of their approach. They are no longer discovering the "true law" but are instead in the process of managing the developing evolution of the common law in order to point it in the right direction. These courts no longer hesitate to change a rule of law when they decide that it is unjust and out of accord with current ideals and mores and does not properly meet present social and economic needs. Openly and frankly declaring that they are changing the law, they are ready to regard this action as part of the judicial function.[229]

This change is "quite relevant to an understanding of the task of the Restaters."[230] Thus, according to Wade, "the issue to be decided in determining the common law rule in a particular state is not necessarily what was the rule applied in its last judicial holding, but what the Institute believes the state's highest court would now decide if the case were before it at this time."[231] This approach facilitates flexibility, thoughtful analysis, and reasoned compromise. As Wade explained: "Sometimes . . . it is possible to produce a compromise between the two positions—to take the more desirable elements of each position and merge them into a single rule. This felicitous result can aid not only in reforming the law but also in promoting uniformity."[232]

The distinction between stating the law as it is and as it ought to be has also been attenuated by a change in the relative importance of the black-letter part of the *Restatement.*[233] Even with respect to the *Restatement (Second)*, its Reporter, Dean Wade, would write that "the Blackletter loses some of its dominance and serves more as an introduction to the Comments."[234] As the sophistication and extensiveness of the restatements' comments and reporters' notes grow, the *Restatement* becomes more of a

229. *Id.*

230. *Id.* at 65.

231. *Id.* at 66.

232. *Id.* at 77.

233. *See* Frank, *supra* note 122, at 621, 623 ("The early Restatements were authoritative without authorities. The commentaries were brief. Case analyses were not set out. . . . Serious changes were made in the Second Restatement. *Ex cathedra* pronouncements were no longer the rule–discussions by way of commentary were enlarged and expanded."); Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 841–42 (1994) (stating that "there is a generational change in style" between the First Restatement, which "did not undertake policy justifications," and subsequent ones that incorporate policy justification, and noting that "some drafts of the third *Restatement* give policy rationales such prominence that they may appear as the views of the American Law Institute").

234. Wade, *The Restatement (Second): A Tribute*, *supra* note 72, at 75.

Gesamtkunstwerk, with multiple components making up the whole restatement architecture.

V. CONCLUSION

The latest project of the torts restatements[235] declined to comprehensively address the nature of the intent required for traditional intentional torts such as battery. The *Restatement (Third)* defines intent, stating that "[a] person acts with the intent to produce a consequence if . . . the person acts with the purpose of producing that consequence; or . . . acts knowing that the consequence is substantially certain to result."[236] This language defines the state of mind needed to support a finding that a defendant intended a "consequence." However, it does not address what "consequence" must have been intended in order to support various traditional torts that require intent. Rather, we are told to look instead to the *Restatement (Second)* for the details of many of the traditional intentional torts, such as battery, until a future torts restatement project addresses the matter. Unfortunately, the *Restatement (Second)* language to which the new *Restatement* defers is ambiguous and perhaps inconsistent of what "consequences" must have been intended in order to support the traditional intentional torts such as battery. Delaying consideration of this may perpetuate uncertainty over this crucial aspect of the element of intent, an uncertainty that has existed since the first torts *Restatement* in 1935.

In this Article, I have also posited a possible formulation for the courts, commentators, and the Institute to consider in their efforts to address the uncertainty over the nature of the consequence that must have been intended to support a claim for battery.

Additionally, I have reflected on the role of restatements. I believe the drafters and the Institute should heed two goals. The first is to address and reduce uncertainty and complexity, and, in doing so, keep the restatement provisions current and vital. Secondly, I urge a more broadly conceived proactive and creative perspective, one that strives not merely to mirror an often largely inchoate and opaque multi-state tapestry, but rather to thoughtfully rationalize and guide the development of the law. Thus, the formulation of rules should not only be informed by a sense of the weight of authority, but also guided by the sound underlying policy goals undergirding the rules, especially when the state of the law is divided, unclear, unstable, not fully manifest, or rapidly evolving.

235. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (2010).

236. *Id.* § 1 (emphasis added).