

Actual, apparent and hypothetical consent in tort law
by
Kenneth W. Simons*

Note to readers: if you are short on time, I suggest that you begin by reading the indented examples. I am especially interested in reactions to Sec. III on hypothetical or presumed consent, pp. 12-21.

Introduction

*Volenti non fit injuria.*¹ Consent is moral magic: in Heidi Hurd's widely quoted words, "Consent turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeliness into a biography."²

There is no denying the significance of the doctrine of consent in tort law. Even if the actor's conduct would otherwise satisfy the criteria of an intentional tort such as battery, assault, or false imprisonment,³ the plaintiff's consent precludes tort liability. In many cases it precludes liability by vitiating the wrong that the actor would otherwise have committed.

Consent is a significant dimension of moral and legal responsibility. It is also controversial and divisive. In the context of sexual conduct, of course, consent is a source of intense, heated contemporary debate. But in other contexts, too, disagreement abounds. What kinds of mistakes about consent should excuse an actor? When, if ever, is it permissible to act in the absence of evidence that the other party is willing to permit the conduct?

* Chancellor's Professor of Law and Philosophy, University of California, Irvine School of Law; Chief Reporter, Restatement, Third of Torts: Intentional Torts to Persons. The views expressed in this article are those of the author writing in his individual capacity. I do not purport to speak for the American Law Institute or for anyone else connected with the ongoing Restatement of Intentional Torts project. Portions of this article are excerpted from Restatement, Third of Torts: Intentional Torts to Persons (Council Draft No. 4, September 22, 2017), which has not been approved by the ALI. I thank Larry Alexander, Jonathan Cardi, Matt Dyson, Kim Ferzan, Harvey Perlman, Peter Westen and ___ for helpful advice.

¹ Black's Law Dictionary (10th ed. 2014) translates the phrase as follows: "Law Latin 'to a willing person it is not a wrong,' i.e., a person is not wronged by that to which he or she consents."

² Heidi Hurd, *The Moral Magic of Consent*, 2 *Legal Theory* 121, 123 (1996). For criticism suggesting that Hurd's examples are not simply illustrations of the normative force of consent, see Victor Tadros, *Wrongs and Crimes* 213-214 (Oxford 2016).

³ This paper focuses on these three torts, because I am most familiar with consent's meaning and scope in the context of these torts. However, similar problems arise when consent precludes liability for other torts, such as trespass to land or chattel or invasion of privacy.

In this article, I hope to demonstrate that controversies about the proper content and scope of consent rest in part on a failure to appreciate the distinct categories of consent that preclude tort liability. By distinguishing the different doctrines and demonstrating their significance and interrelationship, the criteria for resolving them can be more clearly articulated, and the controversies may become more tractable.

The first section addresses actual consent, or willingness that the actor's otherwise tortious conduct occur. The second section concerns apparent consent, which refers to cases in which the actor reasonably believes, perhaps mistakenly, that the plaintiff actually consents. The third section discusses hypothetical or presumed consent. Here, even if the actor knows that the plaintiff does not actually consent (because the plaintiff is asleep or unconscious or merely surprised), the actor is sometimes justified in proceeding in the absence of consent, so long as the actor has no reason to believe that the plaintiff would not have actually consented had that opportunity existed. The fourth section analyzes implied-in-law consent, the most attenuated category of consent, in which courts preclude tort liability even if the plaintiff expresses objection to the actor's conduct. A fifth section applies some of the analysis of the prior sections to the question of the scope of consent to sexual intercourse.

I. Actual consent

The gold standard of consent is actual consent—a person's subjective willingness to permit the otherwise tortious conduct of an actor. Other types of consent exist and are legally sufficient, but they are of inferior metal: they may be resorted to only if the most precious metal is unavailable. The terminology "actual" consent is somewhat arbitrary, though it does make salient the contrast with apparent consent, discussed below.⁴ What is key, however, is the content of this conception of consent: willingness to permit, or acquiescence in, another's otherwise wrongful conduct.

⁴ "Consent in fact" is the term employed in the Restatement, Second of Torts, but this is not ideal terminology, because it suggests a contrast with "consent in law" or "implied-in-law" consent, a contrast that ignores other important categories of consent.

The term "assent" would in some ways be preferable to "actual consent," especially if one treats the additional requirements of capacity, lack of duress, and lack of substantial mistake as extrinsic requirements rather than part of the definition of assent or actual consent. If P is willing to permit D to have intercourse with D in order to avoid an immediate threat of force from D, it is perhaps most conceptually clear to characterize the encounter as an instance of P assenting to intercourse but under such coercive circumstances that assent is insufficient for legally effective consent. This characterization also captures the idea that there is something especially wrongful about D proceeding to engage in otherwise tortious conduct if P does not even have the opportunity to assent, e.g. if P is unconscious or asleep. [Cite to case of Stanford student raping unconscious victim and receiving very mild penalty, triggering public outrage.] See Ferzan & Westen, How to Think (Like a Lawyer) About Rape, *_ Crim Law and Phil _* (Online 9 September 2016).

Consider several issues that the actual consent conception raises. First, on this conception, it is not necessary that the person desire or welcome the other's conduct.⁵ A reluctant consent can still be legally effective, if the reluctance does not stem from illegitimate coercion or pressure.

Boring guest. A invites B to dinner out of a sense of obligation, hoping B will decline. B comes to dinner and is just as boring as A had feared.

Here, A has consented, albeit reluctantly, to what otherwise would be a trespass.⁶

To be sure, a substantial difference exists, in kind as well as degree, between enthusiastically welcoming a passionate kiss from an intimate partner and tolerating, with the greatest reluctance, a firm and unpleasantly lengthy kiss on the cheek from an oblivious aunt. In the first case, the putative plaintiff affirmatively desires that the otherwise tortious conduct occur. In the second, the plaintiff is merely willing to permit the conduct. But in both cases, the actor's attitude suffices for actual consent.

Second, should actual consent be understood as a mental state or mental action, on the one hand, or as a communication or performative, on the other? There is a lively debate among moral and legal theorists about this question.⁷ My view, and the view that appears to be endorsed in American tort law,⁸ is the first: actual consent in tort law means willingness that the actor's conduct occur, but actual consent does not include a requirement that the consentor communicate (or attempt to communicate) such willingness to the actor.⁹ This conclusion depends on the legal or moral context: in tort, and probably in criminal law, a

⁵ [Discuss Tadros examples, at 209K, 210E].

⁶ See Alexander, *The Ontology of Consent*, 44 *Analytic Philosophy* 102, [] (2014).

⁷ Scholars favoring the mental state or mental action conception include Alexander, 44 *supra*; Alexander & Ferzan [cite]; Hurd, *supra*; Simons, *Consent and Assumption of Risk in Tort and Criminal Law*, in *Unravelling Tort and Crime* (Matthew Dyson, ed., Cambridge University Press 2014); Westen, *The Logic of Consent* (2004). Scholars favoring the communicative or performative conception include Feinberg, *Consent and Its Counterparts*, in *The Moral Limits of the Criminal Law Volume 3: Harm to Self* (1989); Hornle, *Sexual Consent*, *Routledge Handbook of the Ethics of Consent*, (2018) (forthcoming); Miller & Wertheimer, *Preface to a Theory of Consent Transactions: Beyond Valid Consent*, in Miller & Wertheimer, eds., *The Ethics of Consent* (2010); Owens, *The Possibility of Consent*, 24 *Ratio* 402 (2011); Ripstein; Tadros; and Schulhofer, *Unwanted Sex* (2000).

⁸ See Restatement (Second) of Torts §892(1) (1965): "Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor." However, no cases have been found that discuss the claim that such consent need not be communicated to the actor in order to be legally effective.

⁹ Similarly, if one's conception of actual consent presupposes not willingness but instead intention or desire to permit the actor's conduct, the first view is that such a mental state or mental action is sufficient for consent, while the second is that the person must communicate that mental state to the actor.

mental state conception is and should be employed, while in contract law, a communicative conception of consent may well make sense, in light of the important social value of enforcing agreements according to the public terms upon which the parties have agreed.

When does this distinction matter in tort law? In most cases, it does not, because proof of a person's willingness will typically not be convincing unless he communicates that willingness to another. Moreover, in a case where the plaintiff is not willing but the actor reasonably believes that the plaintiff is willing, the distinct category of apparent consent will protect the actor, as discussed below.

But the distinction does matter in the rare case where the evidence demonstrates that (a) the plaintiff is willing and (b) the actor does not reasonably believe that the plaintiff is willing.¹⁰ In such a case, the actor who proceeds cannot rely on apparent consent, and the question must squarely be faced: should tort law impose liability based on the culpability of the actor who engages in conduct that the actor does not reasonably believe is consensual, or should it decline to impose liability based on the principle that a person is not wronged if the person consents to what otherwise would be a wrong?

Here are two examples.¹¹

Punch in the stomach. Harry, an escape artist, decides to display his physical prowess by announcing that he will permit anyone to punch him in the stomach as hard

¹⁰ An actor is even more culpable if (b)* the actor *believes* that the plaintiff is not willing.

¹¹ The Restatement Second, Torts § 892, Illustration 1 (Am. Law Inst. 1979), offers an illustration of private uncommunicated consent to trespass to land:

A informs his neighbor, B, that he is glad to have all of his neighbors make use of his swimming pool. C, another neighbor, without any knowledge of A's statement to B, enters the pool and enjoys himself. A brings action against C for trespass to land. On the basis of A's statement to B, it may be found that he has consented to C's entry and that C is not liable.

Another example provided by the Restatement Second, Torts § 49, Illustration 2 (Am. Law Inst. 1965), is as follows:

Upon the recommendation of A, his doctor, B assents to an operation for the removal of a septum from his nose. Nothing whatever is said about performing a tonsillectomy. Actually B has had trouble with his tonsils and desires that A remove them too, but he forgets to mention it. A removes the septum and the tonsils while B is under a general anesthetic. Although B has not assented to the tonsillectomy, his actual willingness to submit to that operation constitutes consent to it and A is not liable to B.

This example is troubling. Even if noncommunicated consent is usually considered sufficient to preclude liability, noncommunicated consent *to medical treatment* is another matter. A practice of permitting noncommunicated consent to preclude liability in this context might have the unfortunate consequence of diminishing the incentive for medical providers to obtain adequate consent from patients.

as they can at a particular time and public location. Penn, a magician who is envious of Harry, has no knowledge of the announcement but happens upon Harry at that time and place. Penn walks up to Harry, who has readied himself for a blow, and intentionally punches Harry in the stomach.¹²

Bold kiss. Bob, while attending a party, confides to his best friend that he is very attracted to Aya and would very much like to kiss her, but he has been afraid to express his feelings to her or to make the first move. Unknown to Bob, Aya is at the party. On a dare from a friend, she suddenly walks up to Bob and kisses him, before he has any chance to respond.¹³

Under the willingness conception of actual consent, neither Penn nor Aya is liable for battery. Both are culpable actors, and indeed both might be guilty of a criminal law attempt, but neither has engaged in tortiously wrongful conduct.¹⁴

Third, employing “willingness” as the standard of actual consent creates significant questions about the content and scope of the standard. What occurrent mental state, if any, must plaintiff possess? Is the mental state a disposition of some sort? If the law employs too loose a standard, the standard embodies an unduly weak conception of autonomy. Thus, if the standard were understood to be whether, *if asked*, plaintiff would have embraced or welcomed D’s conduct, or instead would have registered an objection to D’s conduct, then actual consent would exist in a very wide range of circumstances—including when plaintiff is asleep or unconscious. For reasons explained in Section III below, we must be very careful before we

¹² Harry Houdini, the famous magician and escape artist, is reputed to have died as a result of medical complications that ensued after he was punched in the stomach when he was not ready for the blow. The historical accuracy of this account has been disputed, however. See Simons, Exploring the Relationship between Consent, Assumption of Risk, and Victim Negligence, [cite] at n. 1.

¹³ See Council Draft No. 4, [cite].

¹⁴ However, in some cases, a person’s initial consent to conduct by the actor is based on a fundamental mistake that arguably vitiates that consent. Consider this hypothetical:

Mistaken identity philanderer. Phil attends a costume party thrown by an acquaintance. He expects not to know anyone else. He suddenly walks up to a woman wearing a mask, whom he does not recognize. Without a word, he fondles her breasts, then rushes out of the room. As it turns out, the woman he touched was his girlfriend, who recognized him and found his conduct a bit odd but unobjectionable. When she later discovers the full story, however, she becomes extremely upset that he was willing to act in such a way towards someone he believed to be a stranger.

See Simons, Consent and Assumption of Risk in Tort and Criminal Law [cite], at 343. Here, it is quite possible that the woman could recover for offensive battery, because she would understandably be seriously offended once she recognized Phil’s motivation and mistake in fondling her.

conclude that hypothetical or counterfactual consent is legally binding. It seems much preferable to characterize actual consent as a mental action—along the lines of a *decision* to permit another’s conduct, rather than a mere fleeting attitude of acquiescence to that conduct.¹⁵ For purposes of this paper, I will not explore this difficult issue further.

Fourth, we should distinguish two forms of actual consent: express and inferred. Express actual consent refers to cases in which the plaintiff’s subjective willingness is explicitly demonstrated, either in writing or orally. Inferred actual consent denotes cases in which such willingness is inferred from plaintiff’s conduct. (This second category is sometimes called “implied-in-fact” actual consent, but “inferred” actual consent is a much preferable locution, in light of the multiple possible meanings of “implied” consent.) Express and inferred consent are subcategories of actual consent. If a patient signs a consent form agreeing to a particular type of surgery, or verbally states unequivocally that he wishes to undergo the surgery, his willingness to permit the surgery is express. If a patient visits her doctor for an annual physical, the inference is very strong that she is willing to permit the ordinary physical contacts that are normally expected during such an examination. Her actual consent, although not explicit, can readily be inferred from the circumstances. Indeed, in some circumstances, actual consent can be inferred simply from silence or lack of objection.¹⁶

Fifth, what is the requisite object of consent? Actual consent vitiates the wrongfulness of an actor’s conduct, but of course such consent is consistent with the plaintiff suffering harm (where harm is understood as physical injury, property damage, or emotional distress caused by the actor’s conduct). If P agrees to arm-wrestle with D, D does not wrong P when D grabs and bends P’s arm in the course of the match, even if this causes physical harm. The legal result is that D is not liable in tort either for the conduct or for the consequent harm. We might characterize this result in one of two ways:

- (1) P actually consents both to the conduct and to the harm; or
- (2) P actually consents to the conduct, and to a *risk* of consequent harm, and as a matter of law, that consent precludes P from recovering for that harm.

The second view is a more accurate characterization in most circumstances,¹⁷ but I leave this question, and the broader question of how to characterize the object or target of consent, to one side for purposes of this paper.

¹⁵ See Tadros, at 205F; Ferzan, [cite].

¹⁶ A. John Simmons gives the example of a board meeting at which the chair announces, “We will meet again next Thursday unless there are objections to that date. Does anyone object?” If no one does, the chair may properly conclude that all have actually consented to his proposal. [cite Simmons]. Feinberg characterizes this example as an instance of “tacit” consent. Harm to Self, [cite].

¹⁷ An exception would be where P is a genuine masochist, willing to accept a 100% risk of suffering harm.

On the general distinction between consenting to a loss and consenting to the risk of a loss, see Dworkin, A Matter of Principle 276-278 (1985).

Sixth and finally, actual consent should not be understood to require that a person knowingly or intentionally waive a legal (or moral) right, under that description. Consent is a normative power, whereby a person permits what would otherwise be a violation of his rights or a breach of the actor's duty to him. But although this is indeed the legal (or moral) significance and effect of consent, the person who exercises the power to consent need not know or intend that by doing so, he is extinguishing a legal right he would otherwise have or is thereby releasing the actor from his duty. Rather, he only needs to satisfy the criteria of consent. The consenting person must, of course, be willing to permit the actor's conduct. That is what it means to satisfy the criterion of actual consent. But this is consistent with the person holding erroneous views of the legal effect of his permission. For example, suppose someone plays a contact sport such as football or wrestling, but he has an unusual belief. He thinks that if he is injured as a result of a normal type of physical contact for that sport, he can successfully sue the person who injures him, unless he signs a written release of liability. This individual has no intention to waive his right to sue for damages. But a court would properly conclude that he has indeed consented and indeed is precluded from a tort recovery.¹⁸

Now let us turn to other consent doctrines. Courts often use the umbrella term "implied" consent for any or all of these other doctrines (as well as the doctrine of inferred consent), in contradistinction to express actual consent. Such promiscuous use of a term does not further analytical clarity. Accordingly, in this paper I will not again refer to "implied" consent, except as part of the name of the last category of consent, "implied-in-law" or constructive consent.

¹⁸ English and Canadian law apparently do require an intention to waive legal rights in the analogous context of assumption of risk: a passenger who chooses to accept a ride with a drunk driver retains a right to sue unless he believes that in accepting the ride, he is waiving that right. [cite Simons, Reflections on Assumption of Risk] Insofar as a narrow version of assumption of risk is a defensible doctrine (and I think it is), this position is similarly problematic. After all, ordinary people often do not understand the legal implications (either inculpatory or exculpatory) of their actions. In most circumstances, all that matters is that, given the facts of which the person is aware, and the conduct they choose to engage in, the relevant legal implication indeed follows.

Consider two structurally similar issues. If an actor believes his conduct is criminal when it is not (e.g. because he does not realize that a drug prohibition has been repealed), the law will not punish him for attempting what he mistakenly believes to be a crime. Or if an actor believes that he is using proportional and necessary force in self-defense, but the law provides that under the circumstances as he believes them to be, he is using disproportionate force (e.g. deadly force to prevent a robbery) or force that is not necessary (e.g. he fails to retreat when he can safely do so), it is the law's characterization that governs.

II. Apparent consent

Sometimes, although a person does not actually consent, the actor reasonably believes that the person actually consents. Most American courts will preclude liability in such a case, under the label of “apparent consent.” The following illustration is based upon *O’Brien v. Cunard Steamship Co.*,¹⁹ perhaps the most famous case exemplifying this category:

Vaccination. As passengers are leaving a ship, they are all individually informed that they must be vaccinated to enter the United States, and the risks of the vaccination are disclosed. B, a passenger, tells a friend that she is unwilling to be vaccinated, but she stands in line, passes before A, the ship’s nurse, and holds out her arm. A vaccinates B.²⁰

Because of B’s apparent consent, A is not liable to B for battery.

If an actor honestly believes that the plaintiff consents, but a reasonable person would not so believe, the actor cannot rely on apparent consent.

Sexual boor. Boris, on his first date with Pauline, suddenly kisses her fervently, and continues to do so despite her repeated and clear verbal protests. Boris hears her protests but ignores them because he honestly believes that her protests are insincere and that she actually consents.²¹

Boris is liable to Pauline for offensive battery.

For those familiar with criminal law concepts, the tort doctrine of apparent consent is essentially a mens rea doctrine in actus reus clothing. Tort liability requires, not just absence of actual consent, but also the absence of a reasonable belief that the victim consents. In effect, then, the tort defendant must be negligent with respect to the plaintiff’s lack of consent.²²

When an actor justifiably relies upon apparent consent, reasonably but mistakenly believing that a person has actually consented, “consent” does not perform the function of vitiating a wrong. Objectively speaking, the person who did not actually consent has indeed been wronged. In this respect, apparent consent is analogous to reasonable mistakes by actors who rely upon privileges such as self-defense or defense of property. If D reasonably but mistakenly believes that P is threatening him with a knife, D may use a degree of force that is proportional to such a threat. Objectively speaking, P might not actually be posing a threat of

¹⁹ 154 Mass. 272, 28 N.E. 266 (1891).

²⁰ See Council Draft No. 4 [cite].

²¹ See Council Draft No. 4 [cite].

²² Simons, Consent and Assumption of Risk in Tort and Criminal Law, [cite] at 336 n. 15, citing Simons, ‘A Restatement (Third) of Intentional Torts?’ (2006) 48 Arizona Law Rev. 1061.

serious harm, and thus self-defense doctrine does not play its usual role of fully justifying an actor's commission of a prima facie wrong.

On the other hand, in both situations, there is an important sense in which the actor has acted reasonably, justifiably, and properly. Not only is such an actor without fault, he or she also often engages in conduct that, from the ex ante perspective, is socially desirable.²³ A system in which doctors, nurses, athletes, and lovers are entitled to rely upon the reasonable appearance of consent facilitates affordable but autonomy-respecting medical care, mutually beneficial recreational activities, and valuable intimate personal relationships. But if the actor in all of these situations knew that he or she would face tort liability whenever the other person did not actually consent, without regard to whether such consent reasonably seemed to exist, the actor might either expend excessive time or resources in investigating whether actual consent exists,²⁴ or choose not to engage in the activity at all.

The distinction between apparent consent, on the one hand, and inferred or "implied-in-fact" actual consent, on the other, is sometimes a fine one. Indeed, often, the evidence supporting inferred actual consent also supports *apparent* consent and vice versa. Suppose a magician asks for a volunteer from the audience to be confined in a box as part of the magic act; plaintiff raises his hand, approaches the stage, and steps into the box. The evidence here amply shows not only that the plaintiff was willing to be confined, but also that the magician reasonably believed that plaintiff was willing to be confined.

Nevertheless, sometimes the evidence supports apparent consent but not inferred actual consent. Suppose a recent immigrant has never been treated by a doctor. At the suggestion of a friend, she visits a doctor's office, not realizing that a medical examination requires physical touching. Suppose the patient strongly objects to a routine touching pursuant to the examination, such as having her blood pressure taken. If the doctor or nurse could not reasonably have known about the patient's aversion to such a touching, they may rely on apparent consent to preclude liability, but they cannot rely on actual inferred consent, since a factfinder cannot plausibly infer actual consent from the circumstances in this unusual case.

One might conceptualize the distinction between inferred actual consent and apparent consent by imagining that, after the otherwise tortious conduct has occurred, the plaintiff is given a reliable truth serum and asked whether, at the time of the actor's conduct, he was willing to permit it. If plaintiff were to reply yes, then he actually consented. If plaintiff were to reply no, but a reasonable person in the actor's position would have believed at the time of the conduct that the plaintiff actually consented, then the plaintiff's recovery is properly precluded, but on the basis of apparent consent, not actual consent.

²³ Similarly, if an actor employing a criminal law defense is reasonably mistaken, sometimes she is, in this ex ante sense, justified, rather than excused, notwithstanding the mistake. See Simons [cite]; Duff [cite].

²⁴ Of course, apparent consent's requirement that the actor reasonably believe that the other actually consents does impose a duty to take *reasonable* steps to determine whether such consent exists.

Several policies justify precluding tort liability because of apparent consent. As a matter of fairness, actors should ordinarily be permitted to rely upon reasonable appearances. Also, a general practice of recognizing apparent consent facilitates the substantial social benefits of consensual interactions. In the absence of this doctrine, individuals who desire to play a contact sport, to provide medical treatment, or to engage in physically intimate conduct with another would be at risk that seemingly consensual interactions would result in tort liability if the factfinder later concluded that one of the participants did not actually consent. Finally, the apparent-consent doctrine is not unfair to those who reasonably appear to, but do not, actually consent. A person who objects to the behavior of an actor that most other persons find unobjectionable or desirable often retains the ability to express that objection and thus to deny the application of apparent consent. If P objects to a custom of shaking hands or hugging and voices that objection to D, D may no longer rely on either actual or apparent consent to preclude liability if D nevertheless follows the custom.

Moreover, the fault requirement that apparent consent encapsulates is especially appropriate for the torts of battery and false imprisonment, because the intent required for those torts is merely the intent to contact or to confine; the actor need not have the malicious purpose to cause physical or emotional harm or even the knowledge that such harm is substantially certain to occur.

Some courts endorse a narrower view of reasonableness for purposes of apparent consent: they require that the actor's reasonable belief that the person actually consents must be based on the words or conduct of the plaintiff. However, most courts that have addressed the issue reject that additional requirement, and I believe that this is the better view. To be sure, in most situations, the actor's belief that the plaintiff consented will not be reasonable unless his belief is based on the words or conduct of the plaintiff. But in other situations, the actor's belief that plaintiff actually consented can be reasonable even if it is based (a) on the words or conduct of someone other than the plaintiff or (b) on customary norms even if plaintiff has engaged in no affirmative conduct at all.

The narrower view of reasonableness treats apparent consent either as a kind of estoppel doctrine or as a doctrine focusing on the plaintiff's communication with the actor: plaintiff by his own words or conduct has created the misimpression that he or she actually consents. The narrower view might also presuppose an unduly narrow view of what the actor must be reasonably mistaken about, for it might incorrectly assume that the plaintiff's actual consent requires that the plaintiff affirmatively desire, or even manifest or express a desire, that the actor engage in the otherwise tortious conduct.

The broader view, by contrast, better furthers the policies that the apparent-consent doctrine promotes, because it precludes liability whenever the defendant is without fault in mistakenly believing that plaintiff consents, and it facilitates, to a greater degree, the social benefits of mutually advantageous human interactions.

Mistaken identity. Dana and her wife have been invited to a large party. Dana's wife, wearing a green dress that Dana especially likes, arrives at the party first. When Dana arrives at the party, the room is dark and filled with guests. Dana sees a woman facing her wearing a green dress, of the same height and with the same color hair as her wife. Believing that the woman is her wife and that the woman sees her approaching, Dana walks up to the woman and hugs her very closely. The woman turns out to be Vera, a stranger, wearing a very similar dress, who is offended by the intimate touching. If the factfinder determines that Dana's mistake was reasonable, Dana is not liable to Vera because of apparent consent.²⁵

Moreover, the narrower view cannot account for many other cases in which courts preclude liability even though the plaintiff does not use words or engage in affirmative conduct by which plaintiff intends, or that a reasonable actor would believe are intended, to express actual consent.

Handshake. At a business meeting, D greets P by reaching out and shaking P's hand before P has the chance to react. As it turns out, P actually objects to the contact.

Most courts would deny tort liability for battery here, because it is reasonable for D to believe that business people generally consent to such contacts. Yet P has not, by his own words or conduct, expressed a willingness to be touched.

Finally, it is worth addressing an objection to the terminology "apparent consent." The word "apparent" is an awkward fit in some cases, such as *Mistaken identity*. Vera, the stranger, arguably did not "apparently consent," insofar as she did nothing affirmative to convey willingness to be touched by Dana. Rather, the point is that Dana relied on reasonable appearances in believing that the conduct she engaged in was consented to. Perhaps it would be preferable not to employ the traditional terminology of "apparent consent" if it lends itself to this confusion. If a court agrees with the analysis suggested above, that a broad rather than narrow conception of apparent consent should be employed, a different locution might be desirable. Alas, no simple substitute phrase comes to mind.²⁶

²⁵ See Council Draft No. 4 [cite].

²⁶ One option is "reasonable mistake about consent," but this is not optimal, because a court should be able to employ the category of apparent consent when the evidence clearly shows that the actor reasonably believed that the other actually consented, even if it is less clear whether the other actually consented. In such a case, the actor might not have been *mistaken* about actual consent.

III. Hypothetical or presumed consent

Apparent consent, as characterized in the prior section, presupposes that the actor reasonably believes that the person actually consents. But what should be the result when the actor knows that the person does not actually consent, yet the actor also reasonably believes that the person *would* actually consent, if asked? Sometimes, I will suggest, in such a case involving hypothetical or presumed consent, the actor should not be liable.

This tantalizing possibility confronts an important objection. Ronald Dworkin famously balked at the use of hypothetical or counterfactual consent in the context of political justification: “[A] counterfactual consent is not some pale form of consent. It is no consent at all.”²⁷ In the present context, at least, I disagree.²⁸ Hypothetical or presumed consent has an important role to play in tort law, though its role ordinarily is and should be subsidiary to the role of actual consent, as we will see.

This section will explore the following issues. What is an appropriate general standard of presumed consent? What is the relevance of the value of surprise and spontaneity? And finally, what role does presumed consent play relative to the other categories of consent?

A. The general standard of presumed consent

Let us begin by considering the most recent draft of the Restatement Third, Torts: Intentional Torts to Persons, which formulates this category of consent as follows:

§ 16. Apparent Consent

A person apparently consents to an actor’s otherwise tortious intentional conduct if ... the actor is justified in engaging in the conduct in the absence of the person’s actual consent, and the actor has no reason to believe that the person would

²⁷ Dworkin, *supra* at 278. Dworkin’s assertion is a critique of Posner’s use of counterfactual consent to justify the view that courts should decide cases so as to maximize wealth, and a critique of Rawls’ use of hypothetical consent in *A Theory of Justice*. *Id.* at 275-280. In earlier writing, Dworkin made a very similar critique of Rawls’ original position argument: “A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.” Dworkin, *Taking Rights Seriously* 151 (1978).

For further discussion of this objection that hypothetical consent is no substitute for the real thing, see Enoch, *Hypothetical Consent and the Value(s) of Autonomy*, 128 *Ethics* 6 (2017).

²⁸ David Enoch’s thoughtful recent article about hypothetical consent is instructive here. As he explains, *id.* at 22, “The thing to do is to ask why it is that actual consent matters, when in fact it does. And then we need to ask whether the concerns to which actual consent answers are also answerable by hypothetical consent (and if so, which hypothetical consent, in which hypothetical conditions).”

not have actually consented to the conduct if the person had had the opportunity to do so.²⁹

Perhaps the most accurate name for this category of consent is presumed consent, though “hypothetical” consent³⁰ and “dispositional” consent³¹ are other possibilities.

The emergency doctrine, justifying emergency life-saving treatment when it is infeasible to obtain consent from the plaintiff or from a person authorized to consent for the plaintiff, is best understood as an instance of the presumed consent category that is unusually compelling because the plaintiff’s life or health is at stake.³² Consider these examples:

²⁹ Council Draft, § 16(b). This category of consent is importantly different from the apparent consent category described in the prior section. It is treated as a subcategory of “apparent consent” in the Restatement because the terminology of “presumed” or “hypothetical” consent is not in wide usage.

³⁰ This is the terminology most widely employed in the analogous context of consent theories that purport to justify the legitimacy of the state. See [cites]. Peter Westen also employs it in the context of consent to sexual conduct for purposes of criminal liability. Westen, *supra*, at 284-293. For discussion of Westen’s views on this point, see Simons, *The Conceptual Structure of Consent*, [cite, at 629-631].

³¹ See Feinberg, *Harm to Self* [cite]:

Dispositional consent ... is not actual consent, and can only be presumed, not known. Where actual consent can be determined at little cost or delay, mere presumed dispositional consent will not be sufficient to transfer any responsibility to B for A's act, or to deprive B of his rightful grievance after the fact. But where (1) the evidence of B's disposition to consent is overwhelmingly strong (much more than a mere guess or a morally risky “presumption”), and (2) A has no opportunity to solicit it from B in the available time, and (3) the envisaged action of A is necessary not merely to secure a benefit for B but to avert a serious loss or harm, then the *Volenti maxim* can be stretched without strain to protect A from liability to B and to deprive B of any grievance against A. Thus if A sees a truck bearing down on B, who has his back turned to the danger, and there is no time even to shout a warning, he may with some violence push B out of the path of danger, even without B's explicit authorization to do so. That is not because of some actual consent that existed unvoiced, but because of the reasonable expectation that normal authorization would have been forthcoming had there been an opportunity for it. ... Since those conditions are vague, there will be many troublesome borderline cases.

Feinberg, *supra* [cite]. In speaking of “authorization,” Feinberg is referring to his communicative conception of consent. But his analysis can also be applied to a mental state or mental action conception of consent such as willingness.

³² The Restatement Third of Intentional Torts § 18 provides the following criterion for the emergency doctrine:

If an actor engages in otherwise tortious intentional conduct for the purpose of preventing or reducing a risk to the life or health of another, the actor is not liable to the other, provided that:
(a) the actor reasonably believes that:

Broken arm. P is crossing the street when he receives a much-anticipated text message from a potential employer. P stops to read the text. D, realizing that P is about to be hit by an approaching car, tackles P, breaking his arm.³³

Confinement in police car. Due to an anonymous tip, D police officers reasonably believe that P's husband has a gun and is threatening her within her home. The police surround P's house and knock on her door. When P answers, the police try to explain the situation, but she is too inebriated to understand. When the husband appears, police grab P and carry her to the police car to ensure her safety.³⁴

Because of the emergency doctrine, neither D would be liable for battery or (in the second case) for false imprisonment.

Now consider five other examples of presumed consent that might not fall within the emergency doctrine:

Tap on the shoulder. Ellen taps a stranger, Roberta, from behind on the shoulder in a movie theater, asking Roberta to turn off her cell phone. The tap aggravates a preexisting shoulder injury, causing Roberta bodily harm. Because of presumed consent, Ellen is not liable to Roberta for harmful battery.³⁵

(i) his or her conduct is necessary in order to prevent or reduce a risk to the life or health of the other that substantially outweighs the other's interest in avoiding the otherwise tortious conduct; and

(ii) it is necessary to act immediately, before it is practicable for the actor to obtain actual consent from the other or from a person empowered to consent for the other, in order to prevent or reduce the risk to life or health; and

(b) the actor has no reason to believe that the other would not have actually consented to the conduct if the other had had the opportunity to do so.

³³ See Council Draft No. 4 [cite].

³⁴ See Council Draft No. 4 [cite].

³⁵ For a somewhat similar analysis, see Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 Harv. L. Rev. 942, 950-951 & n. 24 (2017) (reviewing Ripstein, *Private Wrongs*):

When I'm standing on the street corner, oblivious to your presence, I haven't done anything that should lead you to believe that you have my permission to tap me on the shoulder. What you should believe is that you don't need my permission to tap me, not that you have it. ... [C]onsent is a state of mind, and one need not be in that state of mind when on a street corner. Now, it is true that tort sometimes treats people as if they've consented, even when they haven't. ... But there is an important difference between holding one's arm up for a vaccination and standing on a street corner. The former reads as consent because presenting one's body to be touched is a common way of signaling the willingness to be touched. In contrast, standing on a street corner is not a common way of signaling anything, much less one's willingness to be touched.

Pat on the buttocks. Ethan and Roberto are members of the high school basketball team. During a game, a teammate passes the ball to Roberto, who makes a difficult layup. Ethan rushes up to Roberto, congratulates him, and gives him a hard pat on the buttocks. Unknown to Ethan, Roberto finds any such contact very objectionable. Because of presumed consent, Ethan is not liable to Roberto for offensive battery.

Sleeping camper. A and B, who are acquaintances, are camping together. B falls asleep by the fire. As the fire peters out, the sleeping B begins shivering. A places a sleeping bag over B in order to keep B warm. Because of presumed consent, A is not liable to B for offensive battery.³⁶

Padlocked cabin. C and D, who are acquaintances, are camping together, staying in a cabin in the woods. C falls asleep. D hears boisterous, drunken noises nearby and decides to investigate. The only way for D to lock the cabin is with D's padlock. To assure C's safety in the brief period when D speaks with the neighbors, D locks the cabin and departs to speak with the drunken neighbors. C awakens before D returns. Because of presumed consent, D is not liable to C for false imprisonment.

Holding hands. E and F are on a first date. After an enjoyable dinner, as they are leaving the restaurant, E suddenly reaches out and holds F's hand. F pulls away and explains that F is not ready for any physical intimacy. E is not liable to F for offensive battery. Even if F was not willing to permit the contact, and even if the touching was sufficiently sudden that E does not reasonably believe that F is willing to permit the contact, E can rely upon F's presumed consent under the circumstances.³⁷

In these five illustrations, the plaintiff does not actually consent, because he or she had little or no opportunity to give actual consent prior to the actor's conduct. And the actor also cannot rely on apparent consent: a reasonable person in the position of the actor would not

³⁶ Here is a variant, based on an example in Enoch, at 13 n. 17:

Sleeping passenger. H, on the same train as G, overhears that G is getting off at stop X. As the train approaches X, G is soundly sleeping. H shouts to G that G's stop is very soon, but G remains asleep. H shakes G on the shoulder in order to wake him up.

H is not liable to G because of presumed consent.

³⁷ These five examples are drawn from Council Draft No. 4 [cites].

believe that the plaintiff had given actual consent. However, in all five of those Illustrations, the actor had no reason to believe that the plaintiff *would not* have consented to the actor's conduct if the plaintiff had considered the question. This circumstance is critical. In each case, if this circumstance were otherwise—for example, if Ellen knew that Roberta would object to the shoulder tap, or E knew that F would object to E holding F's hand—then the actor would properly be subject to liability. In addition, in each Illustration the actor's conduct seems justified given current societal norms—a factor that is further discussed below.

In most circumstances, an actor should seek the plaintiff's actual consent and is not entitled to rely on presumed consent. Presumed consent is not established simply because the actor has no reason to doubt that the plaintiff would have actually consented if the plaintiff had thought about the question. If a jurisdiction employed such a broad conception of presumed consent, the consequences would be most unfortunate: actors would be entitled to interfere with the rights of others based on a generally reliable predictive judgment even in circumstances when obtaining actual consent would be entirely feasible. A doctor or nurse could treat a patient without seeking actual consent based merely on reliable estimates of the typical patient's predilections. An actor could engage in a form of sexual intimacy that most individuals would permit, without determining whether the actor's partner shares that typical preference. But tort law properly does not permit a person's individual right to decide whether to permit a tortious invasion to be overridden so easily.

Put differently, actual consent is the gold standard of consent, resting on concrete proof of what a person does prefer, rather than a merely hypothetical or counterfactual judgment of what he or she (or a reasonable person) would prefer. The law should apply the gold standard whenever this is feasible.

Accordingly, presumed consent under Subsection (b) requires proof of an additional element—that the actor is justified in engaging in the conduct in the absence of the other's actual consent. Examples of such justification include minor contacts for the benefit of the plaintiff or for the benefit of the actor if such a contact is customary in the community. Other examples include one sexual partner initiating a form of physical intimacy with his or her partner that differs in kind but not in degree of intimacy, or that differs only modestly in degree of intimacy, from the sexual conduct that they had mutually agreed to in the past. If the plaintiff can easily communicate an objection to the actor's conduct, that factor, while not dispositive, supports the conclusion that the actor is justified in proceeding despite the absence of the plaintiff's actual consent.

Customary norms and expectations are highly significant in determining whether the actor is justified in proceeding absent actual consent. Consider variations of *Pat on the buttocks* in which the actor who slaps the plaintiff's buttocks is another player's parent or a member of the opposing team: it would then be a much closer question whether presumed consent applies and precludes liability. Similarly, in *Holding hands*, if E and F were consensually

holding hands and E suddenly kissed F on the lips and touched F's breasts, the factfinder might find that this sudden increase in the level of intimacy is unjustifiable in light of customary norms and expectations.

In a recent article, David Enoch argues that hypothetical consent or nonconsent should be given greater moral weight if it reveals a person's deep commitments or a person's second-order desires. Thus, Enoch reasons, if a Christian Scientist would refuse a life-saving blood transfusion for religious reasons, it is morally problematic to administer the blood transfusion in the parallel case where the Christian Scientist is unconscious. But if an anxious patient with a fear of needles would for that reason refuse a blood transfusion, it is much less morally problematic to administer the blood transfusion in the parallel case where the anxious patient is unconscious.³⁸

I agree that there is some force to Enoch's argument for a moral difference here, but I am not convinced, in the end, that that difference suffices to justify treating the blood transfusion as morally impermissible in the first case but not the second. Even more strongly, I believe that the law should not recognize such a difference, at least if there is adequate proof in both cases of the unconscious patient's wish not to permit a blood transfusion under any circumstances. The legal right to define the permissible scope of physical touchings of one's body, including even medical treatment designed to save one's life, is and ought to be very strongly protected. Thus, if the medical provider knows that the anxious patient has signed a consent form in which the patient clearly objects to a blood transfusion (though not for religious reasons), tort law's emergency doctrine should not apply, and a doctor who ignores the patient's objection should be liable for battery.

B. The value of surprise and spontaneity

A second issue about the scope of presumed consent concerns the point that, in some contexts, surprise and spontaneity are essential to the value of an activity. Too rigid a conception of consent would threaten that value. But at the same time, care must be taken to ensure that the actor does not persist in the activity (a) over the actual objection of a participant, or (b) in circumstances where it is reasonably likely that the participant would object, if given the opportunity to do so.

³⁸ Enoch, at 23-28. Enoch believes that the moral difference rests on a particular autonomy value—a concern with alienation. For the Christian Scientist, his religious commitments are central to his self-conception. For the anxious patient, his desire not to receive the blood is more superficial; indeed, it is a desire that he might wish to rid himself of.

Tickle. A and B are close female friends. One day, A suddenly approaches B from behind and tickles her. B finds the touching very upsetting.

Unless A knows or should know that B would find this conduct objectionable, A is not liable to B for offensive battery.

But notice that if A were to ask B immediately beforehand whether it is okay for A to tickle B, the pleasure that both might enjoy from A's conduct would be greatly diminished, if not eliminated. To be sure, it would be possible for A to ask well in advance whether B objected to being tickled. That would be the safer course, in recognition of the fact that some people do object to being tickled. And this more cautious approach would not jeopardize the ability of the parties to derive pleasure from a later tickle. But it is doubtful that such advance consent is or should always be required, on pain of tort liability if it turns out that the tickled person objects. Liability is most clearly unwarranted if the parties are friends and only a minor, brief touching occurs.

On the other hand, if B responds to A's tickling her by objecting "Stop," yet A persists, A should probably be liable for battery—even if A believes that B's objection is insincere. At least this is so if A's belief is unreasonable (for example, if B is no longer smiling or laughing, and repeatedly expresses a clear objection). If A's belief is reasonable, taking into account both the potential benefits of continuing the activity and the potential risk that she is wrong about B only pretending to object, then A should not be liable.³⁹

In some cases, on the other hand, advance consent should, and probably would, be required.

Haunted house. D offers customers the opportunity to ride through a dark tunnel, during which scary creatures will suddenly lurch toward the customer for the purpose of frightening them. Fully apprised of these features of the ride, C takes the ride. By the conclusion of the ride, C is quite upset by the experience.

D is not liable to C for what would otherwise constitute an assault (intentionally causing C to anticipate a harmful or offensive contact).⁴⁰

³⁹ The fact that a person being tickled laughs should not be taken as conclusive evidence that the person actually consents to being tickled, just as the fact that a person coerced into sexual intercourse experiences an orgasm should not be taken to demonstrate that the person was not coerced. See Westen [cite]. When a person experiences pleasure involuntarily, as a result of another's conduct to which the person did not consent, the very fact that the person had a normally desirable experience in an involuntary context might justify treating that consequence as especially harmful or wrongful.

⁴⁰ Consider *Griffin v. The Haunted Hotel, Inc.*, 42 Cal.App.4th 490, 493, 509 (2015):

Scott Griffin purchased a ticket to experience The Haunted Trail, an outdoor haunted house type of attraction where actors jump out of dark spaces often inches away from patrons,

But now consider the following variation:

Concealed haunted house. D2 informs customers that the ride will be a simulation of a quiet, bucolic trip down a lazy river, but actually the ride is identical to *Haunted house*.

Some customers might derive even greater pleasure from being frightened in this variation than in *Haunted house*, a ride that customers know in advance will be frightening. However, many other customers will find the ride quite objectionable. Now, although D2's surprising conduct may again confer value or benefit to customers—indeed, higher value or benefit for some—the risk that many customers will be highly upset and will object should result in tort liability for assault. Thus, advance consent (as in *Haunted house*) is necessary. Contrast *Tickle*, in which there is a much smaller risk that the person tickled will object and in which it is relatively easy for the person to promptly object and terminate the conduct before it causes significant distress.

Finally, notice that rather extreme conduct may nevertheless be consensual if the participant gives advance consent that includes a provision for a contemporaneous objection permitting the participant to opt out. This is so even if the conduct involves a high level of surprise and a risk of physical and emotional harm.

holding prop knives, axes, chainsaws, or severed body parts. After passing what he believed was the exit and “giggling and laughing” with his friends about how much fun they had, Griffin unexpectedly was confronted by a final scare known as the “Carrie” effect —so named because, like the horror film *Carrie*, patrons are led to believe the attraction is over, only to be met by one more extreme fright. This was delivered by an actor wielding a gas powered chainsaw (the chain had been removed), who approached Griffin, frightened him, and gave chase when Griffin ran away. Griffin was injured when he fell while fleeing. Griffin sued ... alleging negligence and assault.

... The trial court granted Haunted Hotel's motion for summary judgment, determining under the primary assumption of risk doctrine Haunted Hotel did not breach any duty to Griffin. We affirm. The risk that a patron will be frightened, run, and fall is inherent in the fundamental nature of a haunted house attraction like *The Haunted Trail*. Moreover, on this record there is no evidence creating a triable issue Haunted Hotel unreasonably increased the risk of injury beyond those inherent risks or acted recklessly. ...

Being chased within the physical confines of *The Haunted Trail* by a chainsaw carrying maniac is a fundamental part and inherent risk of this amusement. Griffin voluntarily paid money to experience it.

Extreme haunted house. At Misery Manor,⁴¹ customers pay to be kidnapped by the staff, then gagged, bound with rope, covered in tarantulas, roaches, and fake blood, force-fed, slapped, stomped on, locked in a coffin, and held under water. All of these conditions are fully described in a lengthy waiver that customers sign in advance. Customers are also provided with a safe word that permits their exit at any time. Alex survives the ordeal for an hour but then gives up by uttering the safe word. He suffers nightmares and loss of sleep for months.

This is the very rare case in which consent to what otherwise would constitute intentional infliction of emotional distress would likely preclude tort liability. Normally, it is highly implausible that any person would consent to the outrageous, extreme conduct that that tort requires.

Similarly, if two individuals decide to engage in a form of BDSM or sado-masochistic conduct, sexual or otherwise, tort liability is inappropriate if the agreement provides sufficient notice of the behavior contemplated and if a safe word exit option is specified.⁴² (No cases on point have been found, however.)

⁴¹ The illustration is based on McKamey Manor, which operates two such haunted house/ survival locations. The website does not indicate whether safe words exist that require staff to end the experience if the customer no longer wants to continue with the physical and emotional abuse. Readers beware: the videos contained in the accompanying links are not for the faint of heart:

<https://www.mckameymanor.com/>

<https://www.theguardian.com/lifeandstyle/2015/oct/30/extreme-haunted-house-masochists-mckamey-manor>

According to one story, the operator in the past did not allow participants to use a safe word but now does allow this.

http://www.al.com/news/index.ssf/2017/08/mckamey_manor_extreme_haunt_te.html

⁴² The Model Penal Code: Sexual Assault and Related Conduct, Council Draft 8 (September 17, 2017) provides an affirmative defense in Sec. 213.9 for actors who use physical force, threats, or restraint, or who ignore expressions of unwillingness, in connection with an act of sexual penetration, oral sex or sexual contact. The actor must obtain the other's explicit prior permission for such conduct, and must permit safe words or gestures that suffice to withdraw the permission.

Moreover, the affirmative defense is unavailable if the actor causes a risk of death or serious bodily injury. This paternalistic override of the consent defense is common within the criminal law, but it is not clear whether courts will insist upon a similar override in a tort lawsuit. I have found no cases in which courts have held that an adult who clearly consented to conduct of an actor risking death or serious bodily injury was nevertheless permitted to obtain compensatory damages for the consequent injuries. In the somewhat analogous situation in which individuals agree to fight one another, the criminal law punishes their conduct notwithstanding their consent, but most courts in tort cases conclude that the parties' consent operates to preclude a lawsuit for the resulting injuries.

C. The role of presumed consent relative to other consent categories

A third and final point concerns the role of presumed consent relative to other categories of consent. The discussion thus far reveals that different categories of consent can be viewed as points on a continuum. At one end is actual consent, in which the plaintiff has the opportunity to give actual consent and is willing to permit the actor's conduct. This is followed by apparent consent, in which the actor reasonably believes that the plaintiff actually consents. (The five Illustrations above beginning with *Tap on the Shoulder* are not instances of either actual or apparent consent, as we have seen.) Next on the spectrum are presumed consent and the emergency doctrine. At the far end of the spectrum is implied-in-law consent, in which the actor is not liable for invading the plaintiff's interests even if the plaintiff makes it clear to the actor that the plaintiff objects to the invasion.⁴³ (Consider *Crowded Bus*, discussed below.)

In the vast majority of cases when consent precludes liability for an intentional tort, the consent falls within the category of either actual consent or apparent consent. In a small number of cases—those in which the plaintiff is asleep, surprised, or is otherwise unaware, prior to the actor's conduct, that the actor intends an otherwise tortious invasion of plaintiff's interests—the category of presumed consent may operate to preclude liability. But courts should be cautious about treating a case as falling within this subcategory, in order to assure that the individual plaintiff's actual preferences are respected. In an even smaller number of cases, the category of implied-in-law consent precludes liability, as we shall see. Courts should be even more cautious about treating a case as falling within this category, because the category reflects only an attenuated sense of consent: the plaintiff is precluded from recovery even if the plaintiff explicitly communicates lack of actual consent to the tortious invasion.

IV. Implied-in-law or constructive consent

The last category of consent is often called "implied-in-law" consent⁴⁴ (and sometimes called "constructive" consent). The following is the Restatement Third of Intentional Torts'

⁴³ The five illustrations immediately above are not instances of implied-in-law consent, because, if the plaintiff in those Illustrations had objected to the actor's conduct in advance, the actor would be subject to liability for proceeding in the face of that objection.

⁴⁴ The "implied in law" concept is employed in many different legal contexts. In contract law, for example, it describes a quasi-contractual remedy. See Restatement Second, Contracts § 4, Reporter's Note to Comment *b* (Am. Law Inst. 1981) ("As opposed to the inferred from fact ('implied in fact') contract, the 'implied in law' quasi-contract is no contract at all, but a form of the remedy of restitution."); Williston on Contracts §1:6 (West 2016) ("There are two kinds of implied contracts, one implied in fact and the other implied in law: the first does not exist unless the parties manifest assent, by reason of words or conduct, while the second is quasi or constructive, and does not require mutual

provision addressing this category:

§ 17. Implied-in-Law Consent

An actor is not liable to another person for the actor's otherwise tortious intentional conduct, even in the absence of the person's actual consent, if:

- (a) a reasonable person would actually consent to the actor's conduct under the circumstances;
- (b) the invasion of the person's interests is de minimis; and
- (c) the social benefits of engaging in the conduct without first securing the actual consent of persons affected by that conduct substantially outweigh the de minimis invasion.

This category of consent applies in a relatively small number of cases. It includes conduct that causes socially justifiable minor physical contacts, such as pushing against pedestrians in order to pass them on a very crowded street; pushing against bus or subway passengers in crowded conditions in order to enter or exit or to allow room for more passengers; pushing against others while squeezing into or exiting a crowded elevator; or physically contacting other people in the process of evacuating a building quickly during a fire alarm.⁴⁵

Cases within this category often can also be analyzed as instances of actual or apparent consent. If A steps into a public bus and bumps into passengers B and C while moving to the back of the bus, A can ordinarily rely on the actual or apparent consent of B and C to these minor and expected contacts. Bus passengers usually consent to this slight infringement of their right of bodily autonomy in order to obtain the benefits of convenient and affordable public transportation. If teacher D directs those around her to quickly exit the building because of a fire alarm, and D pushes visitor E toward the stairs to ensure that E does not impede the

assent but is imposed by a fiction of the law, to enable justice to be accomplished, even when no contract was intended by the parties.”).

Many states have so-called “implied consent” statutes that empower a state agency to revoke a person's driver's license if the person does not take a chemical sobriety test. See, e.g. *Stevens v. Commissioner of Public Safety*, 850 N.W. 2d 717 (Ct. App. Minn. 2014). Such a statutory requirement is sometimes justified by the argument that the driver “consents” to have her license revoked if she chooses not to take the test. This use of “implied consent” is largely fictional: the driver does choose to drive, and might be aware of this government-imposed condition, but the driver does not necessarily willingly accept this condition on driving.

⁴⁵ Several courts have approvingly cited Prosser's assertion that “in a crowded world, a certain amount of personal contact is inevitable, and must be accepted. Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life.” See *Wagner v. State*, 122 P.3d 599, 609 (Utah 2005); *McCracken v. Sloan*, 252 S.E.2d 250, 252 (N.C. Ct. App. 1979).

exit, D can ordinarily rely on the apparent consent of E to this minor contact inflicted for a compelling safety purpose.

But actual consent and apparent consent are not always sufficient to explain nonliability in these types of cases. If B, C, or E clearly voice their objection to being physically touched, A and D can no longer rely on actual or apparent consent. Under implied-in-law consent, however, imposing tort liability on A and D is inappropriate.

Crowded bus. Tony enters a crowded bus and loudly shouts, “Keep your distance! Do not touch me!” The bus driver announces: “Please move to the back of the bus, to make room for other passengers.” Ben, despite hearing Tony’s statement, squeezes past Tony toward the back of the bus, brushing against Tony. Ben is not liable to Tony for offensive battery.⁴⁶

Subsection (a) of Sec. 17 identifies an important feature of cases within this category: a reasonable person engaged in the relevant activity would actually consent to the actor’s conduct under the circumstances. This feature helps assure that Subsection (a) rests on a consensual rationale, albeit a counterfactual or hypothetical one. Courts regularly employ an analogous counterfactual rationale in the context of determining the contours of a medical practitioner’s duty to obtain informed consent, for they ask whether the actual patient (or a reasonable patient) would consider the information relevant to the decision whether to undergo medical treatment. Subsection (a) is also useful in minimizing the scope of the implied-in-law category, thus preserving, in most cases, the plaintiff’s right to obtain a recovery for an intentional tort when the plaintiff has not actually or apparently consented.

However, Subsection (a) alone is insufficient to define this category of consent. Unless qualified, Subsection (a) would preclude liability simply because the actor assumed that the person would probably have consented to invasions of his or her interests that a reasonable person would consent to. Such a broad interpretation of implied-in-law consent is unacceptable. It would, for example, permit those who provide medical treatment to rely on gross, overbroad generalizations about what most patients or “reasonable patients” would consent to without inquiring into the individual patient’s preferences. Thus, Subsections (b) and (c) further restrict the scope of implied-in-law consent by requiring that the tortious invasion (e.g., the physical touching or the confinement) be *de minimis*, and that the social benefits of engaging in the relevant conduct without securing the person’s actual consent substantially outweigh that invasion.

In typical cases that qualify as implied-in-law consent under this Section, requiring actors to avoid tortious invasions (such as physical contacts) in order to accommodate the

⁴⁶ Council Draft No. 4, [cite].

unusually sensitive preferences of a small number of participants would be infeasible or would significantly interfere with the purposes of the activity; moreover, permitting tort liability for such contacts might jeopardize the social benefits of the activity. Thus, in *Crowded Bus*, the law should not permit an unusually sensitive person to unilaterally erect a zone of immunity from contact in the crowded conditions on a bus or subway car. Rather, a court could properly conclude that efficient and affordable public transportation has sufficient social value that it overrides the minor burden on a person's right to personal autonomy in this context. Minor contact between passengers is reasonably necessary to achieve that social value.

Of course, there are limits to the types of conduct that are shielded from liability pursuant to this category. If Ben gives Tony a hard shove in order to clear his path to the back of the bus, implied-in-law consent does not protect him from liability. In such a case, a reasonable person in Tony's circumstances would not actually consent to Ben's conduct. Moreover, Ben's conduct is more than a de minimis invasion of Tony's right of bodily integrity.

As the *Crowded Bus* example suggests, a helpful criterion for identifying those cases that fall exclusively within this category of consent is that liability ought to be excluded *even if the victim of the intentional tort clearly expresses lack of consent*. At the same time, this category might also be employed in situations where it is not entirely clear whether the other person actually or apparently consents.

Accident scene. Roberto is driving to work when he suddenly arrives at the scene of a serious accident. A police officer orders him to wait in his car while the accident scene is cleared. 15 minutes later, Roberto is able to proceed. The police are not liable to Roberto for false imprisonment.

The conclusion that the police are not liable can very likely be explained both by the apparent-consent doctrine and by the implied-in-law consent doctrine. Indeed, both doctrines rely on similar evidence and sources, including the customs and norms of the community with respect to the conduct or activity in question. Thus, in *Accident scene*, apparent consent very likely applies: it is reasonable for the police to believe that most automobile drivers actually consent to the inevitable inconvenience of waiting for accidents to be cleared in order to facilitate the safe and orderly resumption of traffic. However, consider this variation of the illustration: Roberto exits his car and demands that the officer permit him to turn his car around to find another route. The officer refuses his request because of a concern that permitting him and other drivers to turn around will create safety risks. In this variation, the police can no longer rely upon apparent consent, since they know that Roberto objects to their policy and they know that the policy results in his continued confinement in his automobile. Only implied-in-law consent can explain nonrecovery.

I must concede that the implied-in-law consent doctrine sits uneasily among the other consent categories. In the first place, its rejection of liability even when the person clearly voices an objection to the actor's conduct reveals that it embodies an attenuated sense of consent, at best. The weak consensual rationale is along the following lines: a bus passenger chooses to employ public transit rather than another mode of transportation, and it is not unfair to ask the passenger to surrender a minor degree of personal autonomy in exchange for the benefit he or she receives. Thus, it is arguably appropriate to employ the category implied-in-law "consent," rather than the legal category of "privilege" that applies to self-defense or defense of property, to explain nonliability in this set of cases.⁴⁷

Second, one might criticize the Restatement Third's suggested criterion as improperly resting upon a "reasonable person" rationale. The ability to consent is an aspect of personal autonomy; the duty to respect another's nonconsent is a duty not to interfere with autonomy. But in the core case of consent, actual consent, it is irrelevant whether the person acted with "reasonable care" for his or her own safety or interests. Sometimes it may be "reasonable" to consent, sometimes it may be "unreasonable" to do so, but that is neither here nor there. Contributory negligence and comparative fault are doctrines that are quite distinct from consent. It might or not be reasonable for a person to agree to play a contact sport, to choose a riskier surgery over a less risky one, or to subject herself to an extreme haunted house. But reasonableness *vel non* is beside the point of consent. Indeed, contemporary law recognizes this distinction by denying all recovery if A consents to conduct by B but permitting partial comparative fault recovery if A, the victim of B's negligence, also acts negligently. (Suppose A is an inattentive pedestrian run over by an inattentive driver.) To be sure, the Restatement Third criterion asks what a reasonable person would *consent* to, not what a reasonable person would

⁴⁷ Consider Hershovitz, at 951, n. 24, discussing Arthur Ripstein's approach to consent:

Ripstein could, I suppose, insist that anyone who appears in public consents to the sorts of touchings that are customary in public. Courts sometimes suggest as much. See, e.g., *McCracken v. Sloan*, 252 S.E.2d 250, 252 (N.C. Ct. App. 1979). To take that view, we'd have to ignore the fact that some people are homeless and do not appear in public by choice, as well as the fact that life as a hermit is not an option, even for most people who have homes. But even if we set all that aside, the insistence that anyone who appears in public consents to customary touchings is an empty slogan, as consent plays no role in determining which touchings are permissible; custom does all the work.

I would not go so far as to characterize this argument as an empty slogan: taking public transportation, knowing that it may involve the need for minor physical touchings, can be understood as voluntary and knowing in at least an attenuated sense. Compare a person who is forced at gunpoint to take a bus, and is thereby involuntarily exposed to these risks.

do. Nevertheless, it may be worrisome that the criterion employs a reasonable person standard at all.⁴⁸

Third, another criticism of the Restatement Third criterion is that it is too narrow. Indeed, an earlier version was not limited to de minimis invasions.⁴⁹ Some ALI members have encouraged the Reporters to recognize a much broader privilege to override the usual consent categories whenever it would be reasonable, or socially justifiable, to do so. But this cure seems worse than the disease. If implied-in-law consent is a doctrine potentially applicable in any intentional tort case, the autonomy values underlying the narrower consent doctrines of actual, apparent, and hypothetical (or presumed) consent would be very insecure. Implied-in-law consent might, on this broad view, become an all-purpose privilege, swallowing up all other tort privileges and unjustifiably favoring the rights of actors over the rights of potential victims.

Of course, privileges such as self-defense, defense of property, the privilege to detain or arrest, and necessity do override the right of a person to deny consent to conduct that is thus privileged. But these privileges are rather narrowly defined. They do not apply in all intentional tort cases. Unlike a very broad “justification” privilege, and unlike its equivalent, a very broad “implied-in-law” consent privilege, the collection of individual privileges does not threaten to undermine the core consent categories.

Fourth, courts sometimes recognize no-duty or limited-duty rules that appear to be consent-based but are not embraced within the Restatement Third formulation of implied-in-law consent. Perhaps this category should be expanded to include consent-based “no duty” rules and “primary assumption of risk” rules, such as the rule that the professional caregiver of an Alzheimer’s patient may not sue the patient either for negligence or for an intentional tort.⁵⁰ The current formulation of implied-in-law consent in the Restatement Third does not readily apply to such cases.

Similarly, courts frequently impose limited duties or recognize other doctrinal limits when a plaintiff sues for injuries suffered in athletic and recreational activities. Perhaps these limits are justified, in part, by the notion that it is socially undesirable to impose excessive liability on such activities, even if the activities are not actually or even apparently consented to. But perhaps an attenuated conception of consent is playing a role here, too. Suppose a football player makes it clear to other players that he does not consent to playing the game if other players violate any of the safety rules of the game. A court is still unlikely to permit

⁴⁸ The same problem arises with jurisdictions that require that a doctor obtain the informed consent of a patient to the material risks of medical treatment. Should materiality be measured by the risks that matter to the individual patient, or instead to a reasonable person? And should causation in informed consent cases be judged by whether the individual patient would have consented if informed of the risk, or by whether a reasonable patient would have consented? Courts are divided about the answers to both questions.

⁴⁹ See Prelim. Draft No. 4, [cite].

⁵⁰ See *Gregory v. Cott*, 331 P.3d 179 (Cal. 2014).

liability for all intentional contacts that violate safety rules, including, for example, every late hit or every instance of roughing the quarterback. Perhaps these cases should also be assimilated within the implied-in-law consent category.

V. Consent to sexual intercourse

Consider how the categories of consent discussed thus far would apply to an issue of contemporary controversy, consent to sexual intercourse. Specifically, I will examine the following questions. First, if willingness to permit the conduct of another is the standard for actual consent, how would a jurisdiction implement two widely-shared norms about the proper scope of consent—“NO means NO” and “Only YES means YES”? Second, does an actor who ignores the victim’s failure to express consent have a valid argument that spontaneity and surprise in sexual conduct justify the actor’s conduct? Third, does the view that actual consent need not be communicated to the actor have the problematic implication that victims of violent or apparently unwelcome sexual assault will often lose the right to sue for battery because the actor can simply assert that the victim was actually willing to permit the sexual intercourse, notwithstanding her verbal and physical resistance?

Turning to the first question, it would seem, at first glance, that these norms could be implemented within the category of apparent consent. The slogan “NO means NO” is generally understood as requiring criminal liability, tort liability, or student disciplinary sanctions when an actor persists in initiating sexual intercourse despite the actor’s partner clearly expressing opposition to that conduct by words or conduct. Although the criminal law of rape has traditionally required force in addition to nonconsent, many jurisdictions now impose criminal liability on those who engage in intercourse without the consent of the other person, and they sometimes specify that a clearly expressed “No” or “Stop” or “Don’t” suffices to register such nonconsent.

Consider an example:

NO means NO. C and D are on a first date. After consensually kissing, C and D disrobe. C asks D if D is willing to engage in sexual intercourse. D clearly and firmly says “no.” C replies, “I know you really want to,” and takes the initiative while D is passive, with the result that C and D engage in intercourse.⁵¹

A court is likely to conclude that D does not apparently consent; a reasonable person in C’s position would recognize that D does not actually consent. Assuming that D also does not

⁵¹ Council Draft No. 4, [cite].

actually consent, C should be liable to D for battery.⁵² Social norms about the permissible bounds of sexual behavior have evolved, and the meaning of a “reasonable” belief that the plaintiff was willing for a type of sexual conduct to occur must adapt to those norms. It is now widely understood that actual consent to a modest degree of sexual intimacy, such as a kiss, does not entail consent to a much greater degree of intimacy, such as sexual intercourse. It is also widely accepted that if plaintiff expresses his or her objection to any sexual act, the actor must not proceed. As a matter of law, an actor who immediately proceeds in the face of such an objection cannot rely upon the plaintiff’s apparent consent, especially if the actor engages not just in a minor sexual touching but in sexual intercourse.

Similarly—and again on first glance—the slogan “Only YES means YES” can readily be incorporated within the apparent consent category. I will take this standard to require that a person clearly express willingness to engage in sexual intercourse (either by words or conduct), even if the person has given consent to lesser sexual intimacy during the same encounter with the actor. Such a standard gives protection to potential victims who express neither willingness nor unwillingness to engage in sexual intercourse. Those who support the standard believe it appropriately requires actors who initiate sexual intercourse to be quite certain that the other is willing to proceed, in light of the potentially devastating emotional and physical consequences that an unwilling victim might suffer.⁵³ Consider another example:

Only YES means YES. E and F are on a first date. After consensually kissing, E and F disrobe. E asks F if F is willing to engage in sexual intercourse. Although inwardly objecting, F says nothing and does not express unwillingness by words or conduct. E takes the initiative and F is passive, with the result that E and F engage in intercourse.⁵⁴

If a jurisdiction concludes that a reasonable person in E’s position should not treat F’s conduct as consensual unless F has affirmatively expressed willingness, then as a matter of law, E may not rely on apparent consent, and it then seems to follow that E must be liable to F for battery.

However, this first glance view is not sufficient to fully implement these two norms. For suppose a jurisdiction adopts the rule of law that “NO means NO” for purposes of whether the actor reasonably believes that the person is consenting. The actor might nevertheless argue

⁵² Surprisingly, I have found no reported tort cases addressing whether “NO means NO” or “Only YES means YES” is the standard for consent to sexual intercourse.

⁵³ The Model Penal Code: Sexual Assault project initially proposed an affirmative consent standard, but the proposal was rejected by the membership of the ALI because of concerns about overcriminalization, the arguably modest culpability of the conduct in light of prevailing social norms, the difficulty of articulating the standard precisely, and the likelihood that severe collateral consequences would follow from treating defendants in such cases as sex offenders. However, tort liability arguably does not raise these concerns or does not raise them to the same extent as criminal liability.

⁵⁴ Council Draft No. 4, [cite].

that the person who clearly said “NO” was insincere and genuinely was willing that the sexual intercourse take place.⁵⁵ In short, although the actor cannot rely on apparent consent, the actor might argue that the person actually consented. Similarly, in a jurisdiction adopting the rule that “Only YES means YES,” the actor might argue that the person who did not communicate “YES” was willing that the sexual intercourse take place. Put differently, even if we conclude that the actor was unreasonable in believing that the person actually consented, it might turn out that the person actually did consent. Indeed, even if the actor is highly culpable, believing that the person did not actually consent, it might turn out that the person did actually consent.⁵⁶

Accordingly, if a jurisdiction wishes fully to implement these norms, it must modify the definition of actual as well as apparent consent. Thus, in order to assure that “NO means NO” is suitably implemented for actual as well as apparent consent, it is necessary to change the definition of actual consent to reflect this—for example, by providing that a person actually consents to sexual intercourse if the person was willing to permit the sexual intercourse, unless the person expressed a clear verbal refusal.⁵⁷ A similar change in the definition of actual consent would crystallize the norm that “only YES means YES.”⁵⁸

Second, as we have seen, spontaneity and surprise can enrich the value of certain activities, and moral and legal conceptions of consent should accommodate this value to some extent. One earlier example, *Holding hands*, implicitly recognized this factor in the context of presumed consent: if an increase in physical or sexual intimacy is relatively minor, and there is no reason to believe that the other would object, then imposing tort liability is unwarranted. On the other hand, the value to both parties of spontaneity should be balanced against the risk that the conduct is inconsistent with the surprised person’s actual or presumed consent. That risk should be accorded much heavier weight when the conduct involves an escalation of intimacy from sexual touching to sexual intercourse or sexual penetration, because the harm to the victim if the conduct is nonconsensual might then be extremely grave. Of course, the very point of “NO means NO” and “Only YES means YES” standards is to provide a categorical rule that strongly protects against that risk.

⁵⁵ See also Ripstein, *Equality, Responsibility, and Luck* (), at [].

⁵⁶ [Note the Bink case, discussed by Ferzan and Westen, in which V pretended to be coerced by D into a sexual act in order to entrap D while police were watching and thus secure D’s conviction].

⁵⁷ See Model Penal Code: Sexual Assault, Tent. Draft No. 2 (approved 2016):

Sec. 213.0(4)(e). Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as “No,” “Stop,” or “Don’t”—establishes the lack of consent or the revocation or withdrawal of previous consent. ...

⁵⁸ For example, the jurisdiction might provide that a person actually consents to sexual intercourse only if the person was willing to permit the intercourse and the person clearly expressed such willingness to the actor, by words or conduct.

Third, does the view, defended earlier, that actual consent need not be communicated to the actor have the troublesome implication that victims of violent or apparently unwelcome sexual assault will frequently lose the right to sue for battery, based simply on the actor's assertion that the victim was actually willing to permit the conduct, notwithstanding her verbal and physical resistance? The short answer is no. If an actor suddenly and aggressively escalates the level of sexual intimacy from a kiss to intercourse while the plaintiff verbally or physically resists, a jury is exceedingly unlikely to conclude that the plaintiff actually consented. Moreover, suppose a jurisdiction adopts a per se rule, treating an actor's initiation of sexual conduct (a) despite the partner's expression of "NO" or (b) when the partner has not expressed "YES" as nonconsensual as a matter of law. Such a jurisdiction will have no difficulty imposing liability in these scenarios.

The longer answer, however, is "maybe yes," in jurisdictions that do not choose to adopt such a per se rule. In light of the widespread use of text messaging and email today, it is no longer unrealistic that a factfinder might conclude that a plaintiff who physically or verbally resists an aggressive or indifferent actor was actually willing to permit the conduct. Suppose, for example, the plaintiff sent numerous texts to friends immediately before or after the encounter expressing desire or willingness that the conduct occur, and suppose the plaintiff continued dating the actor.

Some will view the possibility of escaping tort liability in such cases as problematic, because normal tort procedural rules (which place the burden of production and persuasion on plaintiff with respect to plaintiff's absence of consent) might permit too many erroneous findings of actual consent. On the other hand, in a clear enough case, arguably the plaintiff should indeed be found to have actually consented. A feasible, and perhaps sensible, response to these competing concerns is to shift the burden of production and even of persuasion to the actor on the issue of actual consent in certain cases—for example, in sexual intercourse cases in which the actor employs force or in which the plaintiff, by words or conduct, expresses unwillingness to the actor.

VI. Conclusion

[To be completed.]