

1    **§ 103. Battery: Definition of Offensive Contact**

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

3                   **(a) the contact is offensive to a reasonable sense of personal dignity; or**

4                   **(b) the contact is highly offensive to the other’s unusually sensitive**  
5                   **sense of personal dignity, and the actor knows that the contact is highly**  
6                   **offensive to the other.**

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

10    **Comment:**

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

16           Whether a contact offends a reasonable sense of dignity is ordinarily a question  
17    for the jury, applying its judgment about contemporary social norms. Relevant factors  
18    include the relationship of the parties (for example, whether they are strangers,  
19    coworkers, friends, or family members, and their respective ages), the social context of  
20    the interaction (for example, whether the contact occurs in the workplace, in public, or in  
21    private), the physical nature of the contact (for example, whether the contact is an  
22    isolated event or repeated, whether it is minor or highly forceful, and whether it is with  
23    plaintiff’s body), and the motives, beliefs, and intentions of the actor (for example,  
24    whether the actor acted out of malice or anger, had the purpose to cause harm or offense,  
25    or knew that he or she would cause offense). A highly culpable motive or intention is not  
26    necessary, however. If the actor plays a practical joke on the plaintiff, foolishly but  
27    honestly believing that the plaintiff will be highly amused, he remains subject to  
28    offensive-battery liability if his conduct causes a contact that is offensive to a reasonable  
29    sense of dignity. See § 102, Illustration 9, *supra*.

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

5 **Illustrations:**

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

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

12  
13 Social norms concerning the types of contacts that count as offensive change over  
14 time. One important indication of such a change is the existence of more pervasive legal  
15 regulation of the type of contact suffered by the plaintiff. Thus, if a physical contact is  
16 accompanied by sexual harassment, which federal law now regulates under Title VII in  
17 the workplace, it could readily be judged offensive. And smoking a cigar in a small office  
18 in the presence of an employee is more likely to be considered an offensive contact today  
19 than 40 years ago.

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

23  
24 **Illustration:**

25 3. Lawyers A and B are engaged in conversation in A's office with the  
26 door closed. C, a paralegal, opens the door to enter the office and give some  
27 papers to A. In order to continue the conversation in private, B gently pushes the  
28 door against C, thereby pushing C back into the hall, and closes the door. B is not

1           liable for offensive battery. Although B’s conduct is rude, it is insufficient to  
2           satisfy the requirement that B intentionally caused a contact with C that is  
3           offensive to a reasonable sense of dignity.

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

23          The requirement of offense to a reasonable sense of dignity often overlaps with  
24          other requirements of the tort of battery. For example, if B taps A on the shoulder at a  
25          movie theater, politely asking A to turn off his cell phone, B’s liability for battery is  
26          precluded for multiple reasons—because the minor contact does not offend a reasonable  
27          sense of dignity, because B reasonably believes that A consents to the contact (apparent  
28          consent), and perhaps because A actually consents to the contact (if the evidence shows  
29          that A has tapped the shoulders of others in similar situations). See § 102, Illustration 5,  
30          *supra*.

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

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

19           In unusual situations, for special reasons of policy or principle, courts may  
20 justifiably create categorical rules specifying what does or does not constitute “offensive  
21 to a reasonable sense of personal dignity.” For example, even if many patients share a  
22 fear that a particular type of contact with a medical practitioner might result in the  
23 communication of HIV, courts have declined to credit that fear as satisfying the  
24 reasonable-offense requirement if the fear is medically unfounded.

25           *b. The actor knows that the contact is highly offensive to the plaintiff.* The Caveat  
26 to Restatement Second, Torts § 19 declines to take a position on whether an actor is  
27 subject to offensive-battery liability when the actor knows the contact will be offensive to  
28 the other’s “known but abnormally acute sense of personal dignity.” Section 103(b)  
29 addresses this issue and endorses liability when the actor knows that the contact will be  
30 highly offensive to the plaintiff’s sense of personal dignity. However, the last paragraph

1 of § 103 imposes important qualifications on such liability. Liability should not be  
2 imposed if such liability would violate public policy or if requiring the actor to avoid  
3 contacting the plaintiff would be unduly burdensome. Moreover, the court is empowered  
4 to make these nonliability judgments as a matter of law.

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

11 Very few cases discuss the precise issue addressed by  
12 § 103(b)—whether an actor is liable for contacting a plaintiff when the actor is fully  
13 aware of the plaintiff's unusual sensitivity to serious offense. However, significant  
14 reasons of policy, principle, and coherence with the broader body of tort law support  
15 extending offensive-battery liability to such cases. First, an individual's right of  
16 autonomy with respect to physical contacts with his or her body historically has been  
17 very strongly protected. The actor must obtain the plaintiff's consent to a physical  
18 contact, even if the actor honestly believes that a physical contact will greatly benefit the  
19 plaintiff. Second, the individual's right to choose extends even to choices that reflect  
20 values not shared by most members of the community, such as unorthodox religious  
21 beliefs, unconventional cultural norms, or unusual subjective preferences. Thus, courts  
22 recognize that a patient who decides against a medical procedure for religious or highly  
23 personal reasons nevertheless is entitled to protection against even the good-faith  
24 decision of medical personnel to proceed with a treatment that they believe is beneficial  
25 to the patient and to which most patients would consent. It is difficult to square this  
26 widely accepted requirement of deference to highly unconventional beliefs about medical  
27 treatment with a standard under which plaintiff must show that the contact offended a  
28 "reasonable" sense of dignity.

29 Third, under § 103(b), the actor is required to know that the plaintiff will find the  
30 contact highly offensive. ("Knows" should be understood as the actor's contemporaneous

1 awareness that plaintiff will almost certainly be highly offended. See Restatement Third,  
2 Torts: Liability for Physical and Emotional Harm  
3 § 1(b.) An actor who knows this will also invariably know that the plaintiff does not  
4 consent to the contact. Under such circumstances, the actor will ordinarily have no  
5 legitimate interest in proceeding to offend the plaintiff. Fourth, offensive-battery liability  
6 coheres better with the broader body of intentional-tort doctrine if such liability is  
7 extended to physical contacts that the actor knows will offend an unusually sensitive or  
8 vulnerable plaintiff. Thus, § 103(b) is consistent with the tort of assault, which imposes  
9 liability when the actor causes subjective anticipation of a contact, even in circumstances  
10 where a reasonable person would not have experienced that anticipation. See § 105,  
11 Comment *d*; Restatement Second, Torts, § 27. And it is consistent with the tort of  
12 intentional infliction of emotional distress, which considers, as one factor supporting  
13 liability, “whether the other person was especially vulnerable and the actor knew of the  
14 vulnerability.” Restatement Third, Torts: Liability for Physical and Emotional Harm § 46,  
15 Comment *d*.

16 **Illustrations:**

17 4. Before undergoing a Cesarean-section operation, Rachel informs her  
18 female surgeon that her moral and religious beliefs prohibit being touched  
19 unclothed by a male other than her husband. The surgeon assures Rachel that her  
20 convictions will be respected and conveys Rachel’s preference in writing to the  
21 nursing staff, including Daniel, a male nurse who is scheduled to assist the  
22 surgery a month later. During the surgery, Daniel, who believes that Rachel’s  
23 preference is foolish, assists the surgeon as requested. His assistance includes  
24 touching Rachel’s naked body. Daniel is subject to liability to Rachel for  
25 offensive battery.

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

1 subject to liability to Donna for offensive battery.

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

10 One objection to extending liability beyond "reasonable sense of personal  
11 dignity" cases to cases in which the actor knows that plaintiff will be highly offended is  
12 that the extension is unnecessary, because the "reasonable sense of personal dignity"  
13 criterion is flexible enough to accommodate cases of known extrasensitivity. Perhaps  
14 Rachel's preference, in Illustration 4, not to be touched by a male doctor or nurse reflects  
15 a "reasonable sense of personal dignity," in light of her particular moral and religious  
16 beliefs (and similarly for Omar's preference not to eat pork). Perhaps Donna's emotional  
17 distress also reflects a "reasonable sense of personal dignity," in light of her subjective  
18 dread of butterflies. This objection is unpersuasive. If "reasonable" is interpreted in this  
19 flexible a manner, the test is no longer an objective "reasonable person" test at all.  
20 (Suppose, for example, that Omar registered a strong objection to eating pork, not for  
21 religious reasons, but because a family member recently choked to death while  
22 consuming pork.) If a highly flexible test accommodating subjective preferences is  
23 considered desirable, it is more honest to employ a doctrinal test that directly expresses  
24 that policy, a test providing that it is tortious to contact a person when the actor knows of  
25 the person's unusual, subjective sensitivity to offense. Thus, instead of asking whether a  
26 reasonable person who is terrified of butterflies would be highly upset if someone placed  
27 a butterfly on her neck, the inquiry under the known extrasensitivity prong is more  
28 straightforward: Did the actor know that the plaintiff would be highly offended by the  
29 type of contact that the actor caused?

30 Concerns might also be raised that expanding liability to physical contacts that the

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

14 Moreover, the concern that the known extrasensitivity rule will impose  
15 unjustifiably wide liability is addressed in the last paragraph of § 103, which precludes  
16 liability when "liability would violate public policy" or when "requiring the actor to  
17 avoid the contact would be unduly burdensome." Thus, in Illustration 4, if the patient had  
18 demanded that she not be touched by a nurse or doctor of a particular race, the hospital  
19 and medical staff have no obligation to respect that preference, because such an  
20 accommodation would violate public policy. Likewise, if an employee strongly objects to  
21 being touched by any coemployee, and respecting this preference would have no impact  
22 on employees' ability to perform their work, then a coemployee who knowingly ignores  
23 the employee's objection is subject to liability. But if a second employee objects only to  
24 being touched by gay or Hispanic coemployees, and such a coemployee nevertheless  
25 shakes the second employee's hand, public policy should preclude liability.

26 The "undue burden" standard is not intended to be a very difficult standard to  
27 meet. Thus, if a female patient requests that only female nurses and doctors contact her  
28 during a medical procedure, and this would create modest staffing difficulties for the  
29 hospital, the hospital has no duty to respect the patient's preference, and can refuse to  
30 offer services on that basis. Similarly, if an employee with obsessive-compulsive disorder  
31 registers an objection to touching any papers that a coemployee has touched with his or



1 her bare hands, the employer need not require those who work with that employee to  
2 wear gloves on pain of liability for offensive battery.

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

9 *c. “Purpose to offend” as an alternative to § 103(b).* The American Law Institute  
10 voted to endorse § 103(b) only after a very close vote. Those who opposed this provision  
11 had concerns about the lack of explicit judicial support for adoption of this standard and  
12 about the risk that the Section will result in excessively broad liability. An alternative to  
13 § 103(b) that many ALI members supported is a purpose standard: the actor would be  
14 liable only if he or she contacted the plaintiff for the very purpose of offending (or of  
15 highly offending) the plaintiff. Under such a standard, Illustrations 4 and 6 would not be  
16 instances of liability, but Illustration 5 might be such an instance, if it could be shown  
17 that Bella placed the butterfly on Donna’s neck because she desired to offend her. (There  
18 would be less need for “undue burden” and “against public policy” limitations upon the  
19 tort if this alternative approach were adopted.)

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

24

#### REPORTERS’ NOTE

25 *a. The contact offends a reasonable sense of personal dignity.* For discussion of  
26 factors that are relevant to whether the actor has offended a reasonable sense of personal  
27 dignity, see I Harper & James, *supra*, at § 3.2; Prosser, *Handbook on the Law of Torts*  
28 § 9, p. 37 (4th ed. 1971). The list of factors identified in Comment *a* is similar to the  
29 factors that are relevant under the tort of intentional infliction of emotional harm. See  
30 Restatement Third, Torts: Liability for Physical and Emotional Harm § 46, Comment *d*  
31 (“Whether an actor’s conduct is extreme and outrageous depends on the facts of each  
32 case, including the relationship of the parties, whether the actor abused a position of  
33 authority over the other person, whether the other person was especially vulnerable and

1 the actor knew of the vulnerability, the motivation of the actor, and whether the conduct  
2 was repeated or prolonged.”) The motives, beliefs, and intentions of the actor are relevant  
3 to “offense” only if the plaintiff becomes aware of those motives, beliefs, and intentions.  
4 Supporting the point that the factfinder retains a significant role in judging what is  
5 “reasonably offensive,” see Goldberg & Zipursky, Oxford Introductions, at 201 (“Here,  
6 ... the courts have not aimed to provide a detailed code of conduct, but rather to frame a  
7 question that is sensibly delegated to the fact finder that can rely to some extent on  
8 common sense...”); Harper v. Winston County, 892 So. 2d 346, 354 (Ala. 2004)  
9 (question for jury whether contact was offensive; plaintiff alleged that defendant, her  
10 supervisor, forcefully grabbed or jerked her arm and pulled her back during a dispute  
11 over plaintiff’s tardiness; defendant asserted that she reached for plaintiff’s arm in an  
12 attempt to lead her into her office to permit them to continue their discussion in private).

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

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

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

44 An employee seeking a remedy under Title VII for hostile-work-environment  
45 sexual harassment must show both that the conduct in question is severe or pervasive  
46 enough to create a work environment that a *reasonable person* would find hostile or

1 abusive and that the employee *subjectively* perceived the environment to be abusive.  
2 *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993). However, the goals and remedies  
3 of Title VII differ sufficiently from those of offensive-battery doctrine that this combined  
4 objective-plus-subjective statutory test would not be suitable in the present context.

5 Practical joker and horseplay cases that have resulted in liability for harmful or  
6 offensive battery include: *Lambertson v. United States*, 528 F.2d 441 (2d Cir. 1976)  
7 (defendant suddenly jumped onto the plaintiff's back, pulled the plaintiff's hat over his  
8 eyes, and rode him piggyback, accidentally causing the plaintiff to fall and strike his face  
9 on meat hooks hanging nearby); *Fuerschbach v. Sw. Airlines Co.*, 439 F.3d 1197, 1200  
10 (10th Cir. 2006) (plaintiff's coworkers arranged a mock arrest, in which police officers  
11 handcuffed the plaintiff in the airport in which she worked before informing her that it  
12 was a joke); *Villa v. Derouen*, 614 So. 2d 714, 715 (La. Ct. App. 1993) (defendant  
13 pointed a welding torch in the plaintiff's direction, intentionally releasing gas into the  
14 plaintiff's groin area); *Maines v. Cronomer Valley Fire Dep't Inc.*, 407 N.E.2d 466, 469  
15 (N.Y. 1980) (in hazing incident, volunteer firemen pulled a bed sheet over the plaintiff's  
16 head, tied a leather belt to his waist, bound his feet with rope, held his arms to restrain  
17 him, carried him outside to a parking lot, and threw him in a garbage dumpster); *Sanford*  
18 *v. Century Sur. Co.*, 2008 WL 879704, at \*4 (S.D. Miss. Mar. 28, 2008) (Defendant's  
19 actions of greeting old friend in a headlock and choking him was sufficient for battery  
20 liability; "Sanford intended and did cause a contact with Worman's person. According to  
21 Worman's complaint, that contact was harmful and offensive, as Worman asked Sanford  
22 to stop choking him, even as Sanford ignored his requests."); *Kelly v. County of*  
23 *Monmouth*, 883 A.2d 411, 415-416 (N.J. Super. App. Div. 2005) (plaintiff alleged that  
24 the defendant had grabbed his genitals while shaking his hand; defendant claimed he was  
25 only joking or engaging in "horseplay"; held, factfinder should decide "whether the  
26 circumstances may be interpreted to mean that [Plaintiff] consented to the extenuation  
27 [sic] of the alleged joking conduct").

28 Numerous reported cases uphold offensive-battery liability based on a  
29 nonconsensual sexual contact. See, e.g., *Meadows v. Guptill*, 856 F. Supp. 1362 (D. Ct.  
30 Ariz. 1993) (upholding several instances of battery liability, where defendant repeatedly  
31 patted plaintiff employee on the rear end, grabbed her buttocks with both hands, cornered  
32 her in supply room and forced his body to press up against hers, and grabbed or tugged at  
33 her blouse); *Burns v. Mayer*, 175 F. Supp. 2d 1259 (D. Nev. 2001) (upholding battery  
34 liability where one defendant snapped plaintiff's bra strap and put his hands on her waist,  
35 and other defendants hit her on buttocks with clipboard and egg crate); *Kelly v. County*  
36 *of Monmouth*, *supra*, at 560 ("[W]e have held that a non-consensual touching of a  
37 woman's breast or buttocks constitutes a battery ... Likewise, we hold that the alleged  
38 touching of defendant's genitals [in the course of alleged horseplay between plaintiff and  
39 defendant] represents a similar type of contact that constitutes a battery in the absence of  
40 consent."). See also *Paul v. Holbrook*, *supra*, where the appellate court rejected the trial  
41 court's grant of summary judgment to defendant on the issue of offensiveness. "[T]he act  
42 of approaching a co-worker from behind while on the job and attempting to massage her  
43 shoulders is, in the circumstances of this case, not capable of such summary treatment.  
44 On these facts, offensiveness is a question for the trier of fact to decide." 696 So. 2d at  
45 1312. These circumstances included defendant's harassing conduct: he asked that the  
46 plaintiff wear revealing clothing and suggested that they engage in sexual relations.

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

4  
5 A sexually motivated touching, even of an injured body part, clearly exceeds the  
6 scope of implicit or explicit consent a patient gives when he or she seeks medical  
7 treatment. [citations omitted] That is to say, even if one accepts the premise that it  
8 would have been medically appropriate for a doctor to perform vaginal exams on  
9 [plaintiff] for diagnostic purposes, it would be relatively uncontroversial to  
10 conclude that if [defendant’s] purpose in performing the exams was sexual rather  
11 than professional, then the touching was beyond the scope of consent.

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

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

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

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

33 Illustration 3 is based on *Wishnatsky v. Huey*, 584 N.W.2d 859 (N.D. Ct. App.  
34 1998). In *Wishnatsky*, the plaintiff stated by affidavit that due to his religious beliefs, “I  
35 am very sensitive to evil spirits and am greatly disturbed by the demonic.” He also  
36 asserted that defendant angrily told him to leave the office as he pushed him out the door.  
37 “This was very shocking and frightening to me. In all the time I have been working as a  
38 [paralegal], I have never been physically assaulted or spoken to in a harsh and brutal  
39 manner. My blood pressure began to rise, my heart beat accelerated and I felt waves of  
40 fear in the pit of my stomach. My hands began to shake and my body to tremble.” *Id.* at  
41 861. The court nevertheless upheld the trial court’s grant of summary judgment to  
42 defendant.

43 The reference in the Comment to the surrounding circumstances and to the type of  
44 contact in question helps address the concern raised by Professors Goldberg and Zipursky  
45 that the minimal terms “offensive contact” and “intent to contact” do not adequately  
46 signal the importance of surrounding circumstances, especially circumstances that

1 characterize the distinctive *nature* of the contact that proves offensive (or that is intended,  
2 or that is beyond the scope of plaintiff’s consent). See Goldberg and Zipursky, Oxford  
3 Introductions, at 197-198. Moreover, some cases and jury instructions treat as battery an  
4 actor’s intentionally contacting a person “in a harmful or offensive manner.” This  
5 language might be another way of expressing the point that one must often evaluate the  
6 *type* of contact in order to determine whether the offense, intent, and contact  
7 requirements of battery are met.

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

13  
14 Balas had just given Price a gift of Christmas cookies. Immediately before  
15 hugging Balas, Price thanked her and told her that she never ceased to amaze him.  
16 Given the circumstances surrounding the hug, we determine that Balas raises no  
17 genuine question of material fact as to whether the hug was objectively offensive.  
18

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

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

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

35  
36 [I]n a crowded world, a certain amount of personal contact is inevitable  
37 and must be accepted. Consent is assumed to all those ordinary contacts which are  
38 customary and reasonably necessary to the common intercourse of life. Smelling  
39 smoke from a cigar being smoked by a person in his own office would ordinarily  
40 be considered such an innocuous and generally permitted contact. ...

41 There being no competent evidence that the plaintiff suffered a physical  
42 illness from smelling the cigar smoke, we are left with evidence that defendant  
43 smoked cigars in his own office when he knew it was obnoxious to a person in the  
44 room for him to do so. That person did experience some mental distress as a result  
45 of inhaling the cigar smoke. We hold this is not enough evidence to support a  
46 claim for assault or battery.

1  
2 McCracken v. Sloan, 252 S.E.2d 250, 252 (N.C. Ct. App. 1979). This case would very  
3 likely result in liability today.

4 For the argument that “offense” should be treated as equivalent to lack of actual  
5 or apparent consent, see Dobbs et al. 2d § 33; Lawson, at 374-377; see also N. Moore, at  
6 1620 (asserting that an actor should be treated as knowing that he causes offense if he  
7 knows that the contact, if not consented to, would be offensive). There is some judicial  
8 language supporting this argument. See *Wagner*, supra, at 609:

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

17  
18 See also *Cowan v. Insurance Co. of North America*, 22 Ill. App. 3d 883, 318 N.E.2d 315,  
19 323 (1st Dist. 1974) (“[T]he gist of the action for battery is not the hostile intent of the  
20 defendant, but rather the absence of consent to the contact on the part of the plaintiff.”).

21 However, this equivalence argument is unpersuasive for reasons stated in the  
22 Comment. Examples of cases where the plaintiff does not consent to a contact yet the  
23 contact is not significant enough to satisfy the offense requirement might include  
24 Illustrations 2 and 3, and *Balas*, supra (brief hug to express thanks for gift). Another  
25 example is *Zraggen v. Wilsey*, 200 A.D.2d 818, 819, 606 N.Y.S.2d 444 (Sup. Ct. App.  
26 Div. 1994) (“Lack of consent on the part of plaintiff is an element to consider in  
27 determining whether the contact was offensive, but it is not ... conclusive”; held, jury  
28 question whether throwing plaintiff into swimming pool, when plaintiff had earlier  
29 helped throw defendant into pool, was offensive). See also *Zapach v. Dismuke*, 2001 WL  
30 35948685, at \*2 (Pa. Com. Pl. 2001), where the court found clear evidence that defendant  
31 struck plaintiff’s arm twice and then grabbed his arm in order to lead him away from the  
32 microphone at a town meeting. The court then distinguished the question of lack of  
33 consent from the question of offensiveness: “Although the force of these contacts appears  
34 to be slight, there is no denying that the contact occurred, that it was intentional, and that  
35 it was not consented to. Whether the contact was harmful or offensive to the plaintiff’s  
36 dignitary interest is a factual issue for the fact-finder to determine at trial.”

37 A recent Pennsylvania Supreme Court decision supports the proposition that in  
38 certain categories of cases, a nonconsensual contact is invariably offensive to a  
39 reasonable sense of dignity. See *Cooper ex rel. Cooper v. Lankenau Hosp.*, 51 A.3d 183,  
40 191 (Pa. 2012) (“by proving the surgery or ‘touching’ was intentional and not consented  
41 to, a patient establishes that it was ‘offensive,’ sufficient to render the unauthorized  
42 surgery a battery”).

43 On the other hand, even when the nonconsensual contact is not an “offensive”  
44 contact, the contact can result in liability if it turns out to cause physical harm to the  
45 plaintiff. This scenario is significant, for it is one of the few situations in which the  
46 single-intent approach clearly imposes broader liability than the dual-intent approach. See

1 § 102, Comment *b*, *supra* (discussion of category 5).

2 Moreover, a plaintiff’s actual nonconsent is not always a necessary condition of a  
3 contact being offensive. Suppose plaintiff is a young child who is sexually molested by  
4 an adult. The child lacks the legal capacity to consent, but might demonstrate “actual  
5 consent” in the minimal sense of willingness that the contact occur. Given the objective  
6 offensiveness of such a contact, and the child’s inability to appreciate that offensiveness,  
7 the proper analysis is that the child has suffered an offensive contact, not because the  
8 child did not actually consent, but whether or not she actually consented. For discussion  
9 of this type of case, see *Dobbs et al.*, § 34, p. 86; *Lawson* \_.

10 New York’s jury instructions incorporate a definition of offensive contact that is  
11 broader than that suggested in this Restatement and in the Restatement Second. The jury  
12 instructions state: “An offensive bodily contact is one that is done for the purpose of  
13 harming another or one that offends a reasonable sense of personal dignity, *or one that is*  
14 *otherwise wrongful*” (emphasis added). N.Y. Pattern Jury Instr.—Civil 3:3 (3d ed. 2013).  
15 Several New York cases employ the language “wrongful under all the circumstances,”  
16 see, e.g., *Higgins v. Hamilton*, 18 A.D.3d 436 (N.Y. App. Div. 2005), and the Court of  
17 Appeals has noted the “otherwise wrongful” jury-instruction language with approval,  
18 *Jeffreys v. Griffin*, 801 N.E.2d 404, 410 n.2 (N.Y. 2003). However, the meaning of these  
19 phrases is unclear from the case law. Some other jurisdictions also expand the definition  
20 of battery to include “unlawful” contact, e.g., *Miller v. Idaho State Patrol*, 252 P.3d 1274,  
21 1287 (Idaho 2011) (“Civil battery consists of an intentional contact with another person  
22 that is either unlawful, harmful, or offensive.”). And some replace “harmful or offensive”  
23 with “unlawful.” E.g., *Andrew v. Begley*, 203 S.W.3d 165, 171 (Ky. Ct. App. 2006)  
24 (“Battery is any unlawful touching of the person of another.”) The term “unlawful” is  
25 also ambiguous, however. See *Lawson*, at 366-367.

26 A number of jurisdictions employ colorful formulations such as “any rude,  
27 insolent, or angry touching.” See, e.g., *Harper v. Winston County*, *supra*, 892 So. 2d at  
28 353 (Alabama); *Wallace v. Rosen*, *supra*, 765 N.E.2d at 197 (Indiana). The source of this  
29 formulation is 1 William Hawkins, *Pleas of the Crown 1716-1721*, 134 (“It seems that  
30 any injury whatsoever, be it never so small, being actually done to the person of a man, in  
31 an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way  
32 touching him in anger, or violently jostling him out of the way, are batteries in the eye of  
33 the law.”) Such formulations are problematic. These terms, although vivid and evocative,  
34 are insufficient to address the full range of contacts that could offend a reasonable person.  
35 For example, they do not embrace contacts that would frighten a reasonable person, nor  
36 do they seem to include contacts that are meant as a practical joke but cause humiliation  
37 or insult. Under the approach endorsed in this Restatement, such contacts count as  
38 offensive batteries.

39 *Brzoska v. Olson*, 668 A.2d 1355 (Del. 1995), is a leading example of a court in  
40 effect restricting the scope of “reasonably offensive” for reasons of policy. In that case,  
41 the court declined to permit an offensive-battery claim against an HIV-infected dentist in  
42 the absence of proof of actual exposure to HIV. The offensive-battery claim was denied  
43 even though the dentist had open lesions, because there was no proof of bleeding from  
44 the dentist or of any contact between a wound or lesion of the dentist and a break in the  
45 skin or mucous membrane of any of the plaintiffs. The court was also concerned about  
46 opening “a Pandora’s Box of ‘AIDS-phobia’ claims by individuals whose ignorance,

1 unreasonable suspicion or general paranoia cause them apprehension over the slightest of  
2 contact with HIV-infected individuals or objects.” Id. at 1363. The court concluded: “we  
3 find that, without actual exposure to HIV, the risk of its transmission is so minute that  
4 any fear of contracting AIDS is *per se* unreasonable” and thus the contacts did not offend  
5 a reasonable sense of personal dignity. Id. at 1364.

6  
7 Similarly, in *Kerins v. Hartley*, 33 Cal. Rptr. 2d 172, 181 (Ct. App. 1994), the  
8 court would not permit a battery claim against a doctor who operated on a patient while  
9 infected with HIV, who did not disclose his condition, and who responded to patient’s  
10 question about his health by assuring her that his health was good; the court emphasized  
11 that the actual risk of infection was insignificant. And in *K.A.C. v. Benson*, 527 N.W.2d  
12 553, 561 (Minn. 1995), the court did not permit a battery claim against a doctor who  
13 performed a gynecological examination at a time when he suffered from AIDS and had  
14 running sores on his hands and arms because plaintiff did not allege that the doctor  
15 performed a different procedure from that to which she consented; moreover, since the  
16 doctor’s conduct did not significantly increase the risk that plaintiff would contract HIV,  
17 “it cannot be said that Dr. Benson failed to disclose a material aspect of the nature and  
18 character of the procedure performed.” Id. at 561.

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

22  
23 The Institute expresses no opinion as to whether the actor is liable if he inflicts  
24 upon another a contact which he knows will be offensive to another’s known but  
25 abnormally acute sense of personal dignity.

26  
27 Restatement First, Torts § 19, contains an identical caveat. This Section resolves the  
28 question in favor of liability.

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

36 There is little explicit support in the case law and in jury instructions for the rule  
37 stated in § 103(b). However, a Texas jury instruction extends offensive-battery liability to known  
38 extrasensitivity cases:  
39

40  
41 A person commits an assault if he ... intentionally or knowingly causes physical  
42 contact with another when he or she *knows* or should reasonably believe *that the*  
43 *other will regard the contact as offensive* or provocative.

44 Texas Pattern Jury Charges PJC 6.6 (2012) (emphasis added). The jury instruction  
45 derives from the criminal-assault statute, which contains the same language. Tex. Penal



1 Code § 22.01 (2009). Several Texas courts have employed that statutory standard in civil  
2 assault and battery cases. See *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 801 n.4  
3 (Tex. 2010); *Wal-Mart Stores, Inc. v. Odem*, 929 S.W.2d 513, 522 (Tex. App. 1996). A  
4 recent Texas Supreme Court case states that the language quoted above corresponds to a  
5 form of common-law battery, but the court does not focus on the known extrasensitivity  
6 language. *City of Watauga v. Gordon*, 434 S.W.3d 586, 590 (Tex. 2014).

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

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

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

25 A number of cases offer implicit support for the rule in § 103(b). Thus,  
26 Illustration 4 is based on *Cohen v Smith*, 648 N.E.2d 329 (Ill. App. Ct. 1995). In the case  
27 itself, the court did not specifically address the question whether the contact in question  
28 offended a “reasonable” sense of dignity, nor did it explicitly endorse offensive- battery  
29 liability in cases where the actor knows of the plaintiff’s extrasensitivity. However, the  
30 court did note the allegation that the nurse defendant had been informed of plaintiff’s  
31 unusual preference not to be observed or touched by a man while plaintiff was unclothed.  
32 *Id.* at 333.

33 Illustration 6 is loosely based on *Siegel v. Ridgewells, Inc.*, 511 F. Supp. 2d 188,  
34 194 (D.D.C. 2007) (no battery liability where shrimp and other nonkosher sushi was  
35 served to wedding guests because no proof that plaintiff came into contact with or  
36 ingested the nonkosher food).

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

44 In *Bradley v. Morton Thiokol*, 661 So. 2d 691 (La. App. 1995), the court ruled  
45 that a supervisor did not commit a battery when he patted plaintiff on the back and (at  
46 the suggestion of her coworkers) asked if she had seen a frog, as a result of which

1 plaintiff suffered severe stress, a phobic reaction, and depression. Coworkers knew of  
2 plaintiff's phobia of frogs and had deliberately placed a realistic-looking frog fishing lure  
3 inside a canister that plaintiff later inspected. The court noted that the supervisor was  
4 unaware of their prank and of her phobia.

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

15 In the famous case, *Leichtman v. WLW Jacor Commc'ns, Inc.*, 634 N.E.2d 697,  
16 699 (Ohio Ct. App. 1994), defendant deliberately blew smoke in the face of plaintiff, an  
17 antismoking advocate, on a television show. The fact pattern arguably involves a plaintiff  
18 with a special sensitivity, and yet the court upheld offensive-battery liability. However,  
19 the court's analysis focuses not on the definition of offensiveness, but on whether the  
20 contact was legally sufficient. In the court's view, purpose to contact is sufficient, even  
21 when the contact is merely by way of smoke particles; but knowing (to substantial  
22 certainty) contact would not be sufficient if the contact occurred by way of smoke. The  
23 court does not explicitly suggest that "offense" is defined differently if plaintiff is  
24 unusually sensitive. On the other hand, the case does mention the "glass cage" defense  
25 discussed in *McCracken*, supra, a case that does reject liability for known  
26 extrasensitivity. (The quote in *McCracken* is from Prosser: "[I]t may be questioned  
27 whether any individual can be permitted, by his own fiat, to erect a glass cage  
28 around himself, and to announce that all physical contact with his person is at the expense  
29 of liability.") *Leichtman* reasons that there is no need to discuss this "defense" because  
30 defendant deliberately blew smoke in plaintiff's face; so perhaps the court is implicitly  
31 suggesting that defendant's purpose to offend, not just defendant's purpose to contact, is  
32 critical to liability.

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

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

46 Academic support exists for the rule stated in § 103(b). In his treatise, Professor

1 Dobbs notes that a formulation limited to “a reasonable sense of dignity” and ignoring  
2 cases in which the actor knows that the other is offended could be interpreted as  
3 “disregard[ing] the plaintiff’s own wishes,” which in most cases “count for everything;  
4 she has a right to reject unprivileged touchings that others would find reasonable.” Dan  
5 B. Dobbs, *The Law of Torts* § 29, at 56 (2000); see also Dobbs et al., *The Law of Torts*  
6 2d § 34, at 86.

7 A 1934 article asserts that offensive-battery liability is available in cases of  
8 known extrasensitivity, but provides no citations. See Charles E. Carpenter, *Intentional*  
9 *Invasion of Interest of Personality*, 13 *Or. L. Rev.* 227, 227 (1934) (“The touching must  
10 have been harmful, or if not harmful, of such character that looked at objectively it would  
11 have been offensive to the normal person, except in the case where the touching was  
12 actually offensive to the plaintiff who was, and was known by the defendant to be,  
13 unusually sensitive.”). See also *Fowler V. Harper*, Fleming James, Jr., and Oscar S. Gray,  
14 1 *Harper, James and Gray on Torts* § 3.2, 311 (“Thus, a pat or similar display of affection  
15 by a sincere and even passionate lover may be highly offensive to an unresponsive  
16 woman who has not consented thereto, and an elephantine sense of humor may be  
17 responsible for contacts that are offensive to one with a more delicate sensitivity.”)

18 Recognizing liability under § 103(b) makes offensive-battery liability cohere  
19 more closely with other intentional-tort doctrines, including the subjective definition of  
20 “anticipation” in the tort of assault and the weight given to the actor’s knowledge of the  
21 special vulnerability of a plaintiff in the tort of intentional infliction of emotional distress.  
22 See *Restatement Third, Torts: Liability for Physical and Emotional Harm* § 46, Comment  
23 *d* (“Whether an actor’s conduct is extreme and outrageous depends on the facts of each  
24 case, including ... whether the other person was especially vulnerable and the actor knew  
25 of the vulnerability...”). See also *id.*, Comment *j* (“[T]he law intervenes only when the  
26 plaintiff’s emotional harm is severe and when a person of ordinary sensitivities in the  
27 same circumstances would suffer severe harm. There is no liability for emotional harm  
28 suffered only because of the unusual vulnerability of a victim, unless the actor knew of  
29 that special vulnerability.”); *id.*, Illustration 11. However, the argument for including  
30 known extrasensitivity in the tort of intentional infliction of severe emotional distress is  
31 arguably stronger than for including it in offensive battery. See Frank S. Ravitch, *Hostile*  
32 *Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable*  
33 *Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive*  
34 *Employees*, 36 *B.C. L. Rev.* 257 268 n.53 (1994-1995) (analyzing the caveat in  
35 *Restatement Second, Torts* § 19):

36  
37 One might be justified in causing a seemingly benign contact that one knows will  
38 be offensive to another simply due to the other person’s unusual sensitivity. On  
39 the other hand, the nature of the conduct required for intentional infliction of  
40 emotional distress precludes a justification defense because the required conduct  
41 is inherently unjustified.  
42

43 An analogous issue arises in defining the scope of the crime of rape. Jurisdictions  
44 that define rape as requiring the use or threat of physical force usually permit conviction  
45 if the victim submits to intercourse because of a fear of physical force, but they  
46 sometimes require the prosecution to establish that the victim’s fear was “reasonable.”

1 See, e.g., *State v. Rusk*, 424 A.2d 720, 727 (Md. 1981). Some jurisdictions, however,  
2 permit conviction if the prosecution can establish “[either that] the victim’s fear was  
3 reasonable under the circumstances, or, if unreasonable, [that] the perpetrator knew of the  
4 victim’s subjective fear and took advantage of it.” *People v. Iniguez*, 872 P.2d 1183,  
5 1188 (Cal. 1992). See also *State v. Brooks*, 265 P.3d 1175, 1185 (Kansas Ct. App. 2011)  
6 (“A perpetrator who knowingly exploits a victim’s extreme phobia, by definition an  
7 irrational fear, to overcome resistance probably commits rape.”).

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

15 The newly revised explanation of the nature of a Restatement underscores the  
16 value of overall coherence and consistency when specific Restatement rules are  
17 articulated, even if explicit judicial support for a specific rule is lacking. Thus, a  
18 Restatement is “not bound by precedent that is inappropriate or inconsistent with the law  
19 as a whole.” Moreover, one step in the Restatement process is “to determine what  
20 specific rule fits best with the broader body of law and therefore leads to more coherence  
21 in the law.” See Revised Style Manual (*Capturing the Voice of The American Law*  
22 *Institute: A Handbook for ALI Reporters and Those Who Review Their Work*) (2015).

23 Numerous cases uphold the right of patients to reject conventional medical  
24 treatment because of their religious or moral or personal beliefs, even if those beliefs are  
25 not widely shared in the general population. If that right is not respected, the medical  
26 practitioner is subject to liability for offensive or harmful battery. See, e.g., *Perkins v.*  
27 *Lavin*, 648 N.E.2d 839, 841 (Ohio App. 1994) (summary judgment for defendant on  
28 offensive-battery claim rejected when “plaintiff [Jehovah’s Witness] specifically  
29 informed defendant that she would consider a blood transfusion offensive contact”);  
30 *Phillips By and Through Phillips v. Hull*, 516 So. 2d 488 (Miss. 1987), overruled on other  
31 grounds, *Whittington v. Mason*, 905 So. 2d 1261 (Miss. 2005) (“[A] competent  
32 individual has a right to refuse to authorize a procedure, whether the refusal is grounded  
33 on doubt that the contemplated procedure will be successful, concern about probable  
34 risks or consequences, lack of confidence in the physician recommending the procedure,  
35 religious belief, or mere whim.”).

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

41 In some known extrasensitivity cases, such as *Cohen v. Smith*, *supra*, the actor  
42 agrees to accommodate the plaintiff’s preference. When the actor subsequently fails to  
43 honor that agreement, arguably it is the plaintiff’s consent to be touched only in  
44 accordance with the agreement, rather than the known extrasensitivity principle of  
45 § 103(b), that justifies tort liability. But this argument does not demonstrate that § 103(b)  
46 is gratuitous. After all, sometimes an actor has a duty to accommodate the plaintiff’s

1 unusual preferences, even if the actor has not explicitly agreed to do so. Hospital staff  
2 have a duty to respect the desire of a Jehovah’s Witness not to receive a blood  
3 transfusion. They also have a duty to respect some other preferences that are not unduly  
4 burdensome to accommodate. (Suppose a hospital could easily accommodate the  
5 preference of the plaintiff in *Cohen* not to be touched by a doctor or nurse of the opposite  
6 sex.) Similarly, if A has expressed objection to a particular form of sexual intimacy, but  
7 B proceeds to touch A in a manner that A has objected to, B is subject to liability for  
8 offensive battery even if B has not agreed to comply with A’s wishes.

9 To be sure, battery claims involving medical treatment and sexual contact are  
10 distinctive in one respect: courts are likely to treat any nonconsensual contact in these  
11 domains as offensive per se. Thus, actors are arguably on notice that they have a more  
12 stringent duty to obtain the plaintiff’s consent before proceeding with such a contact, and  
13 they arguably should recognize that any nonconsensual contact is offensive to a  
14 reasonable sense of dignity. However, even within these domains, the plaintiff might  
15 insist on conditions on his or her consent that reflect idiosyncratic or unusual subjective  
16 preferences, conditions that the actor may have a duty to respect (as in *Cohen v. Smith*).  
17 Moreover, outside of these domains, if the actor knows that the plaintiff has a subjective  
18 preference not to be touched in a particular manner, it is even less plausible to rely on the  
19 “reasonable sense of dignity” test as an explanation of a duty to respect that preference.  
20 (An example is Illustration 4, involving the plaintiff’s idiosyncratic fear of butterflies.)

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

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

40 It might be argued that the “against public policy” and “undue burden” limitations on §  
41 103(b) liability are unnecessary because, under § 103(a), only a “reasonable” sense of  
42 dignity is required, and it would be “unreasonable” not to accommodate an unusual  
43 sensitivity unless accommodation is against public policy or is an undue burden.  
44 However, this argument confuses the reasonableness of a plaintiff’s sense of offense with  
45 the reasonableness of an actor’s decision not to accommodate another’s (unusual and thus  
46 “unreasonable”) sense of offense. Section 103(a) addresses only the first issue. With

1 respect to the second issue, it would indeed be possible to replace the public-policy and  
2 undue-burden limitations with a requirement that the actor not “unreasonably” decline to  
3 accommodate plaintiff’s unusual sensitivity. But those limitations are more precise and  
4 focused. Promiscuous and unnecessary use of “reasonableness” criteria in tort doctrine  
5 should be avoided.

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

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

14  
15 648 N.E.2d at 335.

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

26 Another tort doctrine, “implied-in-law” consent, also serves to limit the scope of  
27 battery liability in a small number of cases. See § 117 *infra*. This doctrine provides that  
28 socially justifiable contacts such as those that occur when an actor squeezes onto a  
29 crowded bus or subway car will not result in tort liability. The doctrine often serves a  
30 similar function as the public-policy and undue-burden provisions of § 103, protecting  
31 actors from liability when respecting the plaintiff’s desire for immunity from a particular  
32 type of contact places too great a burden on the actor or on others. See *Wallace v. Rosen*,  
33 765 N.E.2d 192, 198 (Ind. Ct. App. 2002) (concluding that defendant’s moving a person  
34 on a stairway in the direction of the building exit, in the course of a school fire-drill  
35 evacuation, is an example of a socially justifiably contact in a “crowded world,” and thus  
36 no harmful battery liability attached) (quoting Prosser et al., *Prosser & Keeton on Torts* §  
37 9, at 42 (5th ed. 1984)). Suppose that no physical harm had resulted in *Wallace*. Suppose  
38 further that plaintiff had loudly objected to being turned towards the exit down the stairs,  
39 so that defendant knew that plaintiff considered her conduct highly offensive. Still, the  
40 court would undoubtedly have rejected offensive-battery liability based on implied-in-  
41 law consent.

42  
43 The function of the “highly” offensive threshold requirement is similar to the  
44 function of the “serious” emotional-harm requirement for negligent infliction of  
45 emotional harm. See Restatement Third, *Torts: Liability for Physical and Emotional*

1 Harm § 47, Comment *l*:

2  
3 The requirement that emotional harm be serious in order to be recoverable  
4 ameliorates two concerns regarding providing a claim for negligent infliction of  
5 emotional harm. The threshold reduces the universe of potential claims by  
6 eliminating claims for routine, everyday distress that is a part of life in modern  
7 society. And at the same time, the seriousness threshold assists in ensuring that  
8 claims are genuine, as the circumstances can better be assessed by a court and  
9 jury as to whether emotional harm would genuinely be suffered.

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

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

31  
32 [T]he jury had to find that [defendant] appreciated the offensiveness of her  
33 conduct in order to be liable for the intentional tort of battery. It necessarily had to  
34 consider her mental capabilities in making such a finding, including her age,  
35 infirmity, education, skill, or any other characteristic as to which the jury had  
36 evidence.

37  
38 *Muniz*, 999 P.2d at 818. Suppose an actor with a mental disability believes that touching a  
39 stranger’s genitals is not an offensive contact forbidden by the law, although he realizes  
40 that the stranger will be upset by the touching. Even under the dual-intent approach, the  
41 actor’s beliefs should suffice as “intent to offend,” because the actor does know facts (the  
42 nature of the touching, and the fact that it will upset plaintiff) that, as a matter of law,  
43 render the touching legally offensive. See also Dressler, *supra*, at § 13.01 (explaining that  
44 in criminal law, mistake of governing criminal law is ordinarily no defense).

45 *c. “Purpose to offend” as an alternative to § 103(b).* The “purpose to offend”

1 alternative would impose significantly narrower liability than § 103(b). Purpose is much  
2 more difficult to prove than knowledge. See § 104, Comment *c*. Moreover, if the purpose  
3 requirement is narrowed to require a desire to cause *serious* offense, analogous to the  
4 § 103(b) requirement of knowledge that the contact will be *highly* offensive, proof will be  
5 especially difficult. If, however, a purpose to cause *any* degree of offense suffices, then  
6 this alternative would impose much wider liability, perhaps unduly wide if the purpose of  
7 the purpose test is to restrict battery liability more sharply. (A possible narrower variation  
8 on the latter approach would limit liability to (a) purpose to cause any degree of offense  
9 so long as (b) the contact is *highly* offensive to plaintiff.)

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

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