PROPOSED AMENDMENTS BY RICHARD W. WRIGHT TO SECTION 3 OF THE RESTATEMENT THIRD, TORTS, INTENTIONAL TORTS TO PERSONS, TENTATIVE DRAFT NO. 2 [TD2]

MOTION NO. 1 of 4 (seconded by Patricia A. Cain and Margaret Jane Radin)

Amend § 3(b)(ii), TD2, p. 1, lines 4-6, as revised by the Reporters 4-20-2017, as follows:

> **(ii) the actor contacts the other with the <u>sole or principal</u> purpose that the contact will be highly offensive.**

The Struves correctly point out that, without this change or something like it, any purpose, no matter how slight, would seem to suffice, even if it was only a small part of the reasons for the defendant's intentionally causing a physical contact with the plaintiff's person, but perhaps only if we ignore the no-undue-burden-on-defendant and lack of consent (including implied by law consent) requirements. As I believe the Reporters would agree, this language should be tightened up first, to make things clearer prior to discussion of the more controversial issues.

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MOTION NO. 2 of 4 (seconded by Patricia A. Cain and Margaret Jane Radin)

Amend § 3(b), TD2, p. 1, lines 4-6, as revised by the Reporters 4-20-2017, as follows:

> **(b) the contact is ~~highly~~ offensive to the other's unusually sensitive sense of personal dignity, and**
>
> > **(i) the actor knows to a substantial certainty that the contact will be ~~highly~~ offensive to the other; or**
> >
> > **(ii) the actor contacts the other with the [sole or principal] purpose that the contact will be ~~highly~~ offensive.**

Summary of Arguments in Support of Motion

(1) Rather than being a major expansion of the liability stated or allowed in the first and second Restatements, based solely on the Reporters' personal preferences, as alleged by the Struves, § 3(b)'s requirement that an offensive contact must be *highly* offensive and must be intended by the defendant to be *highly* offensive, in conjunction with the elimination of the Caveat to § 19 in the first and second Restatements, would result in a major reduction of the liability that is stated for assaults and allowed for offensive batteries in the first and second Restatements.

(2) Contrary to the Struves' assertions, there is no case that rejects the positions stated in § 3(b), with or without the word "highly" included. None of the cases cited in the Struve motion involve

the type of situations encompassed by § 3(b). Indeed, many of them provide support for § 3(b), but without any suggestion that the contact must be and must be intended to be *highly* offensive.

(3) Additional cases and jury instructions provide support for § 3(b), but not for its requirement that the contact must be and must be intended to be *highly* offensive. No case has been found that is inconsistent with § 3(b), with or without the "highly" qualifier.

(4) Situations in which the contact was known or desired to be subjectively offensive to the plaintiff but there nevertheless should not be liability are encompassed by § 3(b)'s preclusion of liability "if the court determines that avoiding the contact would be unduly burdensome or that imposing liability would be against public policy." Liability in these situations would also be precluded, redundantly, by consent [authorization] "implied by law," as discussed in the forthcoming sections on consent.

(5) Adoption of § 3(b), with or without the word "highly" included, will not lead to a flood of litigation. The cases encompassed by § 3(b) are extremely rare (since people generally respect others' unusual sensitivities), and when they do occur people are very unlikely to sue (as the empirical studies of litigation in general demonstrate, contrary to the popular perception). Both of these facts are demonstrated by the almost complete lack of such cases since the adoption of the first Restatement, despite its inclusion of § 27 and the Caveat to § 19.

(6) Conversely, elimination of § 3(b), or its adoption with "highly" included, would allow persons to ignore and exploit others' unusual sensitivities, even repeatedly, with no remedy or relief available to the victims, who could not even act to defend themselves without being themselves liable for assault and/or battery.

Arguments (1) through (3) require further elaboration.

(1) Rather than being a major expansion of the liability stated or allowed in the first and second Restatements, based solely on the Reporters' personal preferences, as alleged by the Struves, § 3(b)'s requirement that an offensive contact must be *highly* offensive and must be intended by the defendant to be *highly* offensive, in conjunction with the elimination of the Caveat to § 19 in the first and second Restatements, would result in a major reduction of the liability that is stated for assaults and allowed for offensive batteries in the first and second Restatements.

A Caveat to § 19 in the first and second Restatements states:

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

Such Caveats usually are a signal to the courts that the drafters believe that it would be appropriate to expand liability as stated in the Caveat, although the existing case law is not yet sufficient to support the Restatement's explicit adoption of such liability. This clearly was the motivation for the insertion of the Caveat to § 19 in the first and second Restatements. In the "treatise" that he

submitted to accompany the 1925 draft of the first Restatement, which served as what is now called the Reporter's notes, the Reporter, Francis Bohlen, stated:

> While in all the decided cases the touchings held actionable were offensive to a reasonable sense of dignity of the ordinary man of the class concerned at the time and place where the touching was inflicted, it would seem that even the abnormally sensitive man should be protected against touchings which, though usually tolerated by less sensitive people, are known to be offensive to him. . . . In such case the offense to the particular plaintiff is as great as that caused to an ordinary man by a touching commonly regarded as insulting. The defendant who knows and takes advantage of the plaintiff's peculiar sensitiveness should not be allowed to shelter himself behind the plaintiff's abnormality. He has intentionally inflicted a touching upon the plaintiff which he knows is offensive to him, and the defendant should be as fully liable as where his knowledge of the offensive character of the touching is derived from the fact that the ordinary man resents it. [Francis Bohlen, Torts, Treatise No. 1(a) Supporting Restatement No. 1 (1925), pp. 44-45, commenting on § 13 on offensive battery]

The ALI explicitly adopted the more plaintiff-protective position in the assault action. Section 27, entitled "Unreasonable Character of Apprehension," states: "If an act is intended to put another in apprehension of an immediate bodily contact and succeeds in so doing, the actor is subject to liability for an assault although his act would not have put a person of ordinary courage in such apprehension." Comment *a* elaborates:

> *a*. *Actor's surprising success.* It is only necessary that the other actually be put in apprehension of an immediate and harmful or offensive contact by an act done with the intention of bringing about the contact or apprehension. It is immaterial that, owing to the abnormally sensitive reactions of the other, he is put in apprehension by acts which would not have caused such an apprehension on the part of normally constituted persons.

Section 3(b)'s definition of offensive contact applies to the assault action in § 5 as well as to the battery actions in § 1. Thus, although comment *d* to § 5 (see Tentative Draft No. 1, § 105 comment *d* (2015)) retains the subjective assessment of the plaintiff's perception of an imminent harmful or offensive contact that is stated in § 27 and its comment *a* in the first and second Restatements, liability for an assault based on a perceived imminent offensive contact under § 5, similar to liability for an offensive battery under § 1, will be greatly reduced by the requirement in § 3(b) that an offensive contact must be *highly* offensive and must be intended to be *highly* offensive.

(2) Contrary to the Struves' assertions, there is no case that rejects the positions stated in § 3(b), with or without the word "highly" included. None of the cases cited in the Struve motion involve the type of situations encompassed by § 3(b). Indeed, many of them provide support for § 3(b), but without any suggestion that the contact must be and must be intended to be *highly* offensive.

The Struves only state the facts and holding for a single case, **Gerber v. Veltri**, 203 F. Supp. 3d 846 (N.D. Ohio 2016), appeal filed (Sixth Cir., Case No. 16-4062, September 19, 2016). As Struve's Motion 1 states, the trial court found that Veltri had touched Gerber, a fellow law professor, on the shoulder as they passed each other in a hallway to get Gerber's attention and ask him to go to the nearby faculty lounge so the two could speak privately about Gerber's recent angry confrontation with the law school librarian. Both parties agreed that Veltri removed his hand when Gerber demanded that he do so. The trial court held that there was no battery since there was implied consent to such touchings, which ordinarily do not offend a reasonable sense of personal dignity. Id. at 848-49. 852-53.

The Struves do not note that this case is not the type of case encompassed by § 3(b). Moreover, they fail to note that, in its Conclusions of Law denying liability, the court repeatedly emphasized that there was no evidence, even assuming that Gerber was unusually sensitive to such touchings, that Veltri was or should be aware of such unusual sensitivity:

> [T]he record does not reflect that Gerber's complaints of feeling personally targeted by Veltri were communicated to Veltri such that Veltri would be substantially certain touching Gerber's shoulder would be harmful or offensive. [Id. at 852]
>
> [E]ven accepting their strained relationship, "it [was] reasonable for [Veltri] to believe that [Gerber did] not object to the ordinary, minor physical contact" of touching Gerber's shoulder to direct his attention to the faculty lounge. [Id. at 853]
>
> Gerber fails to show Veltri knew (or had reason to know) Gerber would be unreasonably affected by such contact. [Id. at 854]
>
> Finally, Gerber adduced no evidence that Veltri knew of Gerber's heightened state of apprehension such that he would be offended. [Id. at 854]

The court had no reason to make these multiple statements unless it believed that, if Veltri had been aware beforehand of Gerber's objection to being touched in the manner that occurred, there would or might be a valid battery action. Note, moreover, that these statements do not suggest that, in order for there to be a battery, the contact must be and must be known by the defendant to be *highly* offensive.

The Struves similarly fail to note that each of the other cases that they cite fail to come within the reach of § 3(b) and, moreover, that several of them, like *Gerber v. Veltri*, strongly imply that there would be liability if there had been evidence satisfying the requirements of § 3(b), even without the word "highly" being included in § 3(b).

In **Balas v. Huntington Ingalls Industries, Inc.**, 711 F.3d 401, 411 (4th Cir. 2013), as part of a labor dispute following termination of employment that included claims of sexual harrassment during her employment, Balas included a battery claim against her supervisor, Price, arising from his hugging her on one occasion. The court held that there was no battery as a matter of law:

> Balas had just given Price a gift of Christmas cookies. Immediately before hugging Balas, Price thanked her and told her that she never ceased to amaze him. Given the circumstances surrounding the hug, we determine that Balas raises no genuine question of material fact as to whether the hug was objectively offensive. [Id. at 411]

However, the court indicated that the result might well be different if Balas had objected to the hug or some aspect of it and Price had been aware of her objection:

> [S]he does not dispute that she never told Price to stop or that the hug was unwelcome. To the contrary, rather than objecting to the hug itself, she testified that it was the manner of the hug that made her uncomfortable. [Id. at 411]
>
> Balas presented no evidence that the hug was harmful or offensive, or that Price intended the hug to involve any contact beyond the hug itself or intended to make Balas think that it would. The circumstances indicate that the requisite intent was absent." [Id. at 412]

Holdren v. General Motors Corp., 31 F. Supp. 2d 1279, 1286-87 (D. Kan. 1998), is another labor dispute, in which the defendant's employee, plaintiff's supervisor, allegedly was trying to get rid of the plaintiff due to plaintiff's failure to comply with the supervisor's order to find ways to get rid of older employees. The supervisor, "on several occasions, placed his hands on plaintiff's back or tapped him with a single sheet of rolled-up paper, while asking plaintiff how he was doing or calling him 'buddy.'" The court stated: "[T]he question presented here is whether an ordinary person would be offended if someone (who was an opponent in a civil lawsuit) tapped him or her with a single sheet of rolled-up paper or touched him or her on the back during the course of a casual greeting." The court concluded:

> Although [given prior relations] plaintiff may have been offended by Mr. White's contacts, there is no evidence in the record that plaintiff ever indicated to Mr. White that he was offended by Mr. White's conduct or that he asked Mr. White to refrain from touching him.

Workman v. United Fixtures Co., 116 F. Supp 2d 885, 895-97 (W.D. Mich. 2000), is yet another labor dispute. The plaintiff alleged that a battery occurred when a nurse employee of the defendant allegedly "grabbed the doctor's prescription [for back pain] from [his] person" when she accompanied him from work to an offsite doctor's office for breathalyzer tests that confirmed he was under the influence of alcohol, which resulted in termination of his employment. In its summary judgment motion dismissing Workman's claims, the court stated:

> Under some circumstances, a defendant's offensive contact with an object attached to or identified with the plaintiff's body may be sufficient to constitute a battery. *See Picard v. Barry Pontiac-Buick, Inc.*, 654 A.2d 690, 694 (R.I. 1995) (citing Restatement (Second) of Torts, § 18, and concluding that touching of camera plaintiff was using to take pictures of defendant was sufficient to constitute a battery under Rhode Island law); *Morgan v. Loyacomo*, 190 Miss. 656, 1 So.2d

> 510 (1941) (store manager committed assault and battery when, after following plaintiff from store, he confronted her, indicating he suspected her of stealing, and forcibly seized a package from under her arm); *S.H. Kress & Co. v. Brashier*, 50 S.W.2d 922 (Tex.Civ.App.1932) (store manager committed an "assault or trespass upon the person" of plaintiff where he approached her, accused her of stealing, and violently jerked merchandise from her possession). Here, however, even assuming that [the nurse] did remove a paper from Workman's hand, nothing in the record suggests that Frantom's alleged actions amounted to an offensive contact battery. *See Wishnatsky v. Huey*, 1998 ND APP 8, 584 N.W.2d 859 (defendant's actions in pushing shut door of office in order to prevent plaintiff from entering room did not constitute battery, even though evidence showed that action caused plaintiff to be pushed into hallway; "bodily contact was momentary, indirect, and incidental" and, although "rude and abrupt" would not be "offensive to a reasonable sense of personal dignity"). Given the evidence of record, the court concludes that Frantom committed no assault or battery as a matter of law.

The court did not explain why the nurse's conduct, as alleged, was insufficient when compared to the conduct in the first three cited cases, and instead apparently relied solely on a comparison with the conduct in the *Wishnatsky* case, which however is a clearly wrongly decided case, as discussed immediately below. In any event, as with all the other cases cited by the Struves, *Workman* is not a case in which there was an alleged unusually sensitive plaintiff whose unusual sensitivity was known by the defendant.

In **Wishnatsky v. Huey**, 584 N.W. 2d 859, 860-62 (N.D. Ct. App. 1998), the defendant, Huey, an assistant attorney general, was in attorney Peter Crary's office discussing a case in which they were opposing counsel. Wishnatsky worked for Crary as a paralegal. Wishnatsky's affidavit, supported by an affidavit by Crary, stated in part:

> I entered the office . . . to give [Crary] certain papers that had been requested. . . . As I began to enter the office Mr Huey threw his body weight against the door and forced me out into the hall. I had not said a word to him. At the same time, he snarled: "You get out of here." This was very shocking and frightening to me. . . . My blood pressure began to rise, my heart beat accelerated and I felt waves of fear in the pit of my stomach. My hands began to shake and my body to tremble. Composing myself, I reentered the office, whereupon Mr. Huey began a half-demented tirade against me and stormed out into the hall. I looked at Mr. Crary in wonder.

The court quoted Chief Justice Holt's opinion in *Cole v. Turner*, 90 Eng. Rep. 958 (1704), in which he declared:

> 1. That the least touching of another in anger is a battery. 2. If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it is no battery. 3. If any of them use violence against the other, to force his way in a rude inordinate manner, it is a battery.

and William Blackstone's often quoted statement, in 3 William Blackstone, *Commentaries* *120:

> The least touching of another's person willfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.

Incredibly, while claiming that it was "[v]iewing the evidence in the light most favorable to Wishnatsky," the court concluded that "Huey's conduct in response to Wishnatsky's intrusion into his private conversation with Crary, while 'rude and abrupt,' would not "be offensive to a reasonable sense of personal dignity." To the contrary, such rude, angry, and forceful conduct would be offensive to any person. The Reporters, along with Chief Justice Holt and Blackstone, hopefully would agree. Noting that "[a] number of jurisdictions employ colorful formulations such as 'any rude, insolent, or angry touching,'" they criticize these formulations only because they are insufficiently inclusive. TD2, p. 15, lines 30-41.

However, the Reporters use a modified version of *Wishnatsky*, in which "B gently pushes the door against C, thereby pushing C back into the hall," as the basis for illustration 3, and claim that, "[a]though B's conduct is rude, it is insufficient to satisfy the requirement that B intentionally caused a contact with C that is offensive to a reasonable sense of dignity." TD2, p.2, lines 23-29. I disagree, and I believe many others also would disagree. Although Wishnatsky entered without knocking (a fact noted several times by the court), he did so to deliver requested papers to Crary, and this likely was a common practice. Even if it had been Wishnatsky's office rather than Crary's, the proper, non-offensive conduct in such a situation is calmly to ask the entering person to wait outside and to close the door after he stepped back into the hall, rather than closing the door forcefully not only in his face but on his face and the rest of his body. As I remarked when first objecting to this illustration at the annual meeting in 2014, I believe almost every member of the ALI would find the conduct described in the illustration to be offensive to a reasonable sense of personal dignity if the roles had been reversed, so that a paralegal was forcefully pushing the door against a lawyer to block his entry and push him back out into the hallway. Surely, the issue is at least debatable, and thus not properly resolvable through a summary judgment or usable as an illustration in the Restatement, since such illustrations are supposed to be ones in which the stated proper result is clear based on the stated facts.

In any event, once again, this is not a case involving a plaintiff with an unusual sensitivity whom the defendant knew would be offended (especially highly) solely because of such unusual sensitivity. As the Reporters note (TD2, p. 12, lines 31-39), the plaintiff did state in his affidavit that "I am a born-again Christian and cultivate holiness in my life [and] as a result I am very sensitive to evil spirits and am greatly disturbed by the demonic." *Wishnatsky*, 584 N.W.2d at 861. He also stated that the defendant had the day before the incident in question "visited the ministry where I was working . . . with an ex parte court order." Id. However, even if this might support a finding that the defendant (who claimed otherwise) knew the plaintiff, knew he was a Christian, and knew it was the plaintiff who was entering the room, this would not suffice for a finding that he knew that the plaintiff, unlike anyone else, would be offended (especially highly) by the defendant's conduct because he was a Christian. On the other hand, if, as I believe is true, anyone would be offended by the defendant's conduct, any unusual sensitivity of the plaintiff due to his

specific religious beliefs and psychological makeup would only raise an eggshell plaintiff issue regarding the proper extent of damages rather than basic liability.

In **Haddock v. Wal-Mart Stores East, LP**, 2014 WL 2434194 (M.D. Tenn. 2014), video evidence established that Walmart's employee's merely put her hand on plaintiff's shopping cart as the plaintiff exited the store to stop or slow the cart to be able to check the receipt given the existence of unbagged items in the cart. The plaintiff shopper alleged some jerking of the cart caused physical contact with her, which however was disproved by the video evidence, or perhaps (although not mentioned) wanted to treat the cart as an "extension of her person" as in *Workman*, above. There was no allegation of any extrasensitivity of the plaintiff, much less any knowledge by the employee of any such extrasensitivity or purpose to exploit it. Moreover, it would be "unduly burdensome" to normal store operations to treat such conduct as a battery even if there were known extrasensitivity.

In **Brzoska v. Olsen**, 668 A.2d 1355, 1363-64 (Del. 1995), the plaintiffs were treated by the defendant dentist, who had an HIV infection but did not inform them of his infected condition. The court held:

> It is unreasonable for a person to fear infection when that person has not been exposed to a disease. . . . AIDS is a disease that spawns widespread public misperception based upon the dearth of knowledge concerning HIV transmission. Indeed, plaintiffs rely upon the degree of public misconception about AIDS to support their claim that their fear was reasonable. To accept this argument is to contribute to the phobia. Were we to recognize a claim for the fear of contracting AIDS based upon a mere allegation that one *may* have been exposed to HIV, totally unsupported by any medical evidence or factual proof, we would open a Pandora's Box of "AIDS-phobia" claims by individuals whose ignorance, unreasonable suspicion or general paranoia cause them apprehension over the slightest of contact with HIV-infected individuals or objects. . . . In sum, we find that, without actual exposure to HIV, the risk of its transmission is so minute that any fear of contracting AIDS is *per se* unreasonable. We therefore hold, *as a matter of law,* that the incidental touching of a patient by an HIV-infected dentist while performing ordinary, consented-to dental procedures is insufficient to sustain a battery claim in the absence of a [fluid-to-fluid] channel for HIV infection. In other words, such contact is "offensive" only if it results in actual exposure to the HIV virus.

Again, this case did not involve unusually sensitive plaintiffs. Indeed, as the court explained, the problem in this medical treatment context is that the fear of contracting AIDS due to treatment by an HIV-infected medical provider is normal and widespread. Nevertheless, as a matter of public policy, the court held that such fear is medically unfounded and thus "per se" unreasonable. As for the plaintiffs' "informed consent" claim that they would not have consented to be treated by the defendant if they knew that he was infected by HIV, the court noted that such claims must be brought as negligence claims rather than battery claims. Id. at 365-66.

Finally, the relevant portion of the opinion in **MacNeil Environmental, Inc. v. Allmon**, 2002 WL 767754 (Minn, Ct. App. 2002) (unpublished opinion), states:

> MacNeil and Allmon had known each other for many years; Allmon was a former employee of MacNeil. The contact occurred during a break in a meeting that had become tense. Allmon testified that he made the gesture in the context of an apology to MacNeil because Allmon thought he might have embarrassed MacNeil during the meeting. Testimony does not reflect that Allmon had intended or MacNeil perceived any aggression in the gesture. An ordinary person would not have found the knuckle-rub offensive as that term is used in the context of battery.

In sum, the cases cited by the Struves support an assertion that is the exact opposite of their assertion that "the case law not only does not support the Reporters' proposed extension of the tort of offensive battery, but is flatly contrary to it." Struve Motion 1, p. 4. None of the cases cited by the Struves involve the sort of situations encompassed by § 3(b), and several of them have language suggesting that, if the evidence had satisfied the requirements of § 3(b), there would or might have been liability.

(3) Additional cases and jury instructions provide support for § 3(b), but not for its requirement that the contact must be and must be intended to be *highly* offensive. No case has been found that is inconsistent with § 3(b), with or without the "highly" qualifier.

The Reporters' survey of the judicial sources appears in the Reporters' Note. The only case they found in which the defendant knew of the plaintiff's unusual sensitivity and yet knowingly (and perhaps purposely) exploited it is **McCracken v. Sloan**, 252 S.E.2d 250 (N.C. Ct. App. 1979). McCracken was an employee in a post office in which Sloan was the postmaster. McCracken was highly allergic to cigarette smoke and had complained about smoking in the office, distributed literature noting the dangers of smoking, and applied for leaves due to his allergic condition, which had been denied. According to the agreed facts, when, on two dates, McCracken met with Sloan in Sloan's office to discuss his applications for sick leave, Sloan smoked a cigar and told McCracken: "Bill, I know you claim to have an allergy to tobacco smoke and you have presented statements from your doctor stating this, but there is no law against smoking, so I'm going to smoke." Id. at 251. The court nevertheless upheld a summary judgment for the defendant, in the absence of any evidence of physical harm, relying on consent [authorization] implied by law:

> Consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life. Smelling smoke from a cigar being smoked by a person in his own office would ordinarily be considered such an innocuous and generally permitted contact. In this case there is the added factor that the defendant was on notice that the smelling of cigar smoke was personally offensive to the plaintiff who considered it injurious to his health. In examining the plaintiff's claim, we observe that it has been said "it may be questioned whether any individual can be permitted, by his own fiat, to erect a glass cage around himself, and to announce that all physical contact with his person is at the expense of liability." [Id. at 252 (citation omitted)]

The Reporters describe McCracken as the only case that they found that rejected the positions adopted in § 3(b). However, if the court had considered the applicability of § 3(b), it undoubtedly

would have held that requiring McCracken not to smoke his cigar in his office would be "unduly burdensome," so even this case is one in which § 3(b) would not apply, given the court's reasoning, which might have had some plausibility given the widespread practices and policies regarding smoking at the time. However, as the Reporters state, "This case might well result in liability today." TD2, p. 14, lines 4-5.

Conversely, the Reporters discuss two cases in which the facts do match the conditions stated in § 3(b) and liability was imposed or would be allowed. In **Cohen v. Smith**, 648 N.E.2d 329 (Ill. App. Ct. 1995), "the court concluded that a patient stated a cause of action for battery by alleging that a male nurse intentionally touched and observed her naked and unclothed body during an operation even though the nurse had been informed of her religiously based objection to members of the opposite sex observing or touching her while unclothed." [TD2, p. 17, lines 36-40] In **Kumar v. Gate Gourmet, Inc.**, 325 P.3d 193 (Wash. 2014), "the Supreme Court of Washington concluded that it was error to dismiss a battery claim based on employees' allegations that they were required to eat employer-supplied food and were deceived into eating meat rather than vegetarian meals, in violation of their religious beliefs, even though the employer knew this would cause an offensive contact." [TD2, p18, lines 19-23]. Although there was no explicit discussion of an objective versus subjective sense of offense, both cases involve unusually sensitive plaintiffs and, as the Reporters state, to try to explain these cases based on the objective "reasonableness" standard would dissolve the distinction between the objective and subjective standards.

The Reporters note the numerous cases, including *Cohen v. Smith*, that uphold the right of patients to reject conventional medical treatment because of their religious or moral or personal beliefs, even if those beliefs are not widely shared in the general population, and for sexual partners to decline consent to a particular type of sexual contact even if most people would readily consent to such a contact. [TD 2, p. 5, lines 8-16, p. 22, lines 16-35] The Struves attempt to distinguish these lines of cases as somehow being distinct developments unrelated to the basic principles underlying and incorporated in § 3(b), but in fact their development was based directly on those basic principles, which insist upon one's right to control what is done with and to one's own body.

The reporters also discuss [TD2, pp. 18-20] the substantial number of cases that provide implicit support for § 3(b), including **Gerber v. Veltri**, **Balas v. Huntington Ingalls Industries, Inc.**, **Holdren v. General Motors Corp.**, and **MacNeil Environmental, Inc. v. Allmon**, discussed above on pages 4-5 and 8-9 of this document, and **Bradley v. Morton Thiokol**, 661 So. 2d. 691 (La. App. 1995), in which liability was denied but the court noted that there was a lack of evidence that the defendant was aware of the plaintiff's (actual or possible) unusual sensitivity. In *Bradley*,

> the plaintiff's supervisor patted the plaintiff on the back and (at the suggestion of her coworkers) asked if she had seen a frog, as a result of which plaintiff suffered severe stress, a phobic reaction, and depresssion. Coworkers knew of plaintiff's phobia of frogs and had deliberately placed a realistic-looking frog fishing lure inside a canister that plaintiff later inspected. The court noted that the supervisor was unaware of their prank and her phobia. [TD2, p. 19, lines 4-9]

The Reporters fail to note that none of the cases that they discuss provide support for § 3(b)'s requirement that the contact must be and must be intended to be *highly* offensive.

The Reporters note [TD2, p. 17, lines 6-18] the explicit adoption in a Texas jury instruction, which has been employed in several civil assault and battery cases, of offensive-battery liability in known extrasensitivity cases:

> A person commits an assault if he . . . intentionally or knowingly causes physical contact with another when he or she knows or should reasonably believe that the other will regard the contact as offensive or provocative. [Texas Pattern Jury Charges PJC 6.6 (2012)]

Note, again, that this instruction does not require that the contact must be or must be intended to be *highly* offensive. The same is true for instruction 407.4 in Florida's judicially authorized Jury Instructions in Civil Cases, applicable in false imprisonment cases, which references and thus implicitly accepts the subjectively based assault liability stated in § 27 of the first and second Restatements (see the discussion on page 3 of this document):

> Though claimant's belief that claimant is completely restrained is unreasonable, restraint may nevertheless occur if claimant is peculiarly susceptible and defendant acts to exploit that susceptibility. See, by analogy, Restatement § 27. [In re Standard Jury Instructions in Civil Cases-Rept No. 09-01 (Reorganization of the Civil Jury Instructions), Instruction 407.4, Intentional Restraint, note 3, 35 So.3d 666, 742 (Fla. S. Ct. 2010)]

In sum, the state of the legally authoritative sources, including cases and jury instructions, is exactly contrary to what is asserted by the Struves. Although the case law continues to be sparse, no case explicitly rejects or has facts and a holding contrary to the positions adopted in § 3(b), even if the "highly" qualifier is omitted. On the other hand, some jury instructions explicitly adopt the positions adopted in § 3(b), without the "highly" qualifier, a substantial number of cases can only be plausibly explained based on the positions adopted in § 3(b), without the "highly" qualifier, and an additional substantial number of cases provide implicit support for the positions adopted in § 3(b), without the "highly" qualifier, by suggesting that liability would have existed if all the conditions in § 3(b), without the "highly" qualifier, had been satisfied.

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[Motions No. 3 and 4 are on the next page]

MOTION NO. 3 of 4 (seconded by Patricia A. Cain and Margaret Jane Radin). To be proposed if the Struves' motions are adopted or my Motion No. 2 is rejected:

Replace § 3, TD2, p. 1, lines 1 through 9, as revised by the Reporters 4-20-2017, with the following text:

> **§ 3. Battery: Definition of Offensive Contact**
>
> > **A contact is offensive within the meaning of § 1(c)(ii) if the contact is offensive to a reasonable sense of personal dignity.**
>
> **Caveat:**
>
> **The Institute expresses no opinion as to whether the actor is liable if he inflicts upon another a contact which he knows or desires will be offensive to another's known but abnormally acute sense of personal dignity.**

As is discussed in argument (1) in favor of my Motion No. 1, § 3(b)'s requirement that an offensive contact must be highly offensive and must be known or desired by the defendant to be highly offensive, in conjunction with the elimination of the Caveat to § 19 in the first and second Restatements, would result in a major reduction of the liability that has long been stated for assaults and allowed for offensive batteries in the first and second Restatements. The Struves' motions, if successful, would provide no protection for plaintiffs with an unusual sensitivity. Either result would leave plaintiffs generally (under the Reporters' approach) or always (under the Struves' approach) unable even to defend themselves against others' knowingly or purposely exploiting their unusual sensitivity without themselves being liable for assault and/or battery. As is discussed in arguments (2) and (3) in favor of my Motion No. 1, either result would have no basis in existing case law and, indeed, would be contrary to the substantial number of recent cases that strongly imply that there should be liability for knowingly or purposely exploiting a plaintiff's unusual sensitivity when avoiding such would not impose any undue burden on the defendant or be contrary to public policy. Rather than adopting either approach, it would be much better to return to the positions in the first and second Restatements and allow the case law to continue to develop in the rare cases that might arise.

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MOTION NO. 4 of 4 (seconded by Patricia A. Cain and Margaret Jane Radin)

Delete illustration 3, TD2, p. 2, lines 23-29 and replace it with an illustration that is clear rather than at least highly debatable and actually wrong.

See the discussion of illustration 3 and the *Wishnatsky* case on which it is based on pages 6 and 7 of this document.