A Jurisprudence in Disarray: On Battery, Wrongful Living, and the Right to Bodily Integrity

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I. INTRODUCTION

The right to bodily integrity is firmly entrenched in the right to privacy jurisprudence. An individual who has that right violated by being subjected to an unwanted touching can sue for damages. For example, an individual who receives medical treatment against her will can bring an action for battery, even if that treatment provides her a net benefit.[1] Yet, the determination of whether our current system provides either sufficient compensation for the victim of a nonconsensual physical invasion or a sufficient disincentive to possible tortfeasors to prevent such invasions is only possible after the potential damages for such invasions are considered and discussed. Regrettably, the courts have been relatively unwilling to treat cases involving the provision of expressly refused, life-extending medical care in line with the existing jurisprudence in this area, and thus have helped to mute or negate the very protections that are often trumpeted as so important. Until the courts take seriously the protections against the provision of unwanted, life-extending medical care—which are already built into the law—one can only expect studies to continue indicating that medical personnel often provide treatment that has been expressly refused by the patient,[2] resulting in patients being forced to endure needless suffering at great cost to themselves and their families.

Part II of this Article discusses medical torts, distinguishing between battery and negligence, and the damages that are potentially awarded for each. Part III discusses claims for wrongful living damages, explaining how some courts have ignored the existing jurisprudence in order to prevent victims from recovering the compensation that they would have received had the long-established jurisprudence been respected. This Article concludes by suggesting that the existing jurisprudence provides the framework for just compensation in many wrongful living cases, but that some modifications may be necessary in certain kinds of cases if victims are to be awarded the compensation that is their due.

II. TORT IN THE MEDICAL CONTEXT

Medical torts may arise as a result of a medical professional's negligence or a professional's conscious decision to perform an unauthorized procedure.[3] Although the latter procedures are often

1. *See infra* Part II.D.

2. *See* Kellen F. Rodriguez, *Suing Health Care Providers for Saving Lives*, 20 J. LEGAL MED. 1, 5 (1999) (discussing study indicating that "[p]hysicians still were treating patients with high-tech, life-sustaining care despite clear documentation and awareness of the patient's decision to refuse such treatment").

3. Discussion of strict liability for medical products is beyond the scope of this

performed with the perceived best interests of the patient in mind,[4] the medical professional nonetheless is subject to more severe punishment because society places much value on patient autonomy.[5] Imposing treatment against a patient's will harms that patient regardless of the treatment's outcome,[6] and the law has traditionally treated such invasions accordingly.

A. The Right to Bodily Integrity

Over a hundred years ago, the Supreme Court made clear in *Union Pacific Railway Co. v. Botsford*[7] that the right to bodily integrity is of paramount importance. The Court stated: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[8] Yet, if that right indeed is sacred, then one would expect that the law would impose potentially severe sanctions against individuals who abridged that right. Justice Cardozo explained in *Schloendorff v. Society of New York Hospital*[9] that "a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[10] Thus, one who performs a medical procedure contrary to the express wishes of the patient risks imposition of civil liability.[11]

Schloendorff involved an individual who, according to her own testimony, had consented to a medical examination but had explicitly

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Article.

4. *Cf.* Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protection for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 501 (suggesting that "the doctor may believe that he or she is acting in the patient's best interests"); Gerald B. Robertson, *Ontario's New Informed Consent Law: Codification or Radical Change?*, 2 HEALTH L.J. 88, 95 (1994) ("[B]attery may be committed even though the perpetrator is acting in what he or she genuinely believes to be the victim's best interests.").
5. *See infra* note 8 and accompanying text.
6. *See infra* notes 50-55 and accompanying text.
7. 141 U.S. 250 (1891).
8. *Id.* at 251.
9. 105 N.E. 92 (N.Y. 1914).
10. *Id.* at 93.
11. *See* M. Cathleen Kaveny, *Managed Care, Assisted Suicide, and Vulnerable Populations*, 73 NOTRE DAME L. REV. 1275, 1288 (1998) ("The common law doctrine of battery provides a powerful tool to combat these incentives [toward over-treatment]. Essentially, that doctrine teaches that no one may touch a person without her consent, even a physician who wishes to perform a beneficial medical procedure.").

refused to have an operation performed.[12] Lack of permission notwithstanding,[13] a tumor had been removed once the patient had been anesthetized.[14] Justice Cardozo pointed out that surgery without permission might be permissible "in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained."[15] That, however, was not the case in *Schloendorff*. The point in dispute was not whether emergency conditions required the surgery without consent, but whether the permission in fact had been given.[16] If the jury believed the patient rather than the medical personnel and found that the authorization for the procedure had not been given, the doctors might be held liable for the patient's injuries,[17] assuming that those injuries were directly caused by the surgery.[18]

Justice Cardozo noted that one of the especially troubling facets of

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12. *See Schloendorff*, 105 N.E. at 93 ("She consented to . . . an examination, but notified Dr. Bartlett, as she says, that there must be no operation.").

13. Whether she had in fact consented was contested. *See id.*

14. *See id.*

15. *Id.*; *see also* Barnett v. Bachrach, 34 A.2d 626, 628 (D.C. 1943). The *Barnett* court stated:

> We hold the law to be that in case of emergency a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands even when it means extending the operation further than was originally contemplated; and that for so doing he is neither to be held in damages, or denied recovery of his fee.

Id. (footnote omitted). In *Perry v. Hodgson*, 148 S.E. 659, 662 (Ga. 1929), the court said: "If the operation was performed contrary to the agreement, and injury resulted, then the surgeon would be liable in damages as for a trespass, as there is no evidence to show an emergency or necessity for an additional operation . . . ." *Id.* As one scholar has observed:

> Exceptions will be recognized in unusual circumstances where it is impracticable to obtain the consent of the patient and where there is a serious threat to the life or health of the patient which must be dealt with immediately, either by rendering wholly unauthorized medical treatment or by extending the scope of an authorized operation to remove or overcome an unforeseen condition.

Allan H. McCoid, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381, 392 (1957).

16. *See Schloendorff*, 105 N.E. at 93 (stating that doctors and some of the nurses claimed that the patient had in fact consented).

17. *See id.* ("Following the operation, and, according to the testimony of her witnesses, because of it, gangrene developed in her left arm, some of her fingers had to be amputated, and her sufferings were intense.").

18. *See id.* (outlining testimony that surgery caused the harm); *see also* Zoski v. Gaines, 260 N.W. 99, 101 (Mich. 1935). *Zoski* upheld the lower court finding that

> the operation was unlawful and the defendants were therefore guilty of an assault, but that the blindness which developed after the operation could not be traced back to such operation; that the operation could not be considered as having either a causal or precipitating relationship to the blindness, and plaintiff was therefore not entitled to recover any damages for such blindness.

Id.

Schloendorff was that "the wrong complained of [involved] trespass, rather than negligence."[19] Trespass (i.e., in this case, battery)[20] and negligence are treated differently in the law, both in tort law generally and medical torts in particular. For example, in a case of negligence, harm to the patient must be established before the patient will be entitled to recover damages.[21] In a case involving a battery, however, the patient will be entitled to damages even if no injury beyond the battery itself can be established.[22] Furthermore, damages may be awarded even if they are not reasonably foreseeable if the defendant has committed an intentional tort,[23] whereas only damages that are reasonably foreseeable will be awarded for negligent acts.[24] Thus, because intentional torts are viewed with more disfavor by the law than are mere negligent acts,[25] damages for the former may be awarded in circumstances in which no damages would be awarded were the latter merely at issue.

B. Battery Versus Negligence

Courts distinguish between two types of torts that might arise in the medical context: battery and negligence. A battery occurs if, for

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19. *Schloendorff*, 105 N.E. at 93.

20. For a detailed discussion of trespass to land and trespass to persons, see *infra* notes 141-66 and accompanying text.

21. *See* Anderson v. St. Francis-St. George Hosp., 614 N.E.2d 841, 847 (Ohio Ct. App. 1992) ("In contrast to battery, however, if the court finds negligence, but no compensable harm, it should not allow nominal damages.") (citations omitted); Scott v. Bradford, 606 P.2d 554, 557 (Okla. 1979) ("[I]f the physician obtains a patient's consent but has breached his duty to inform, the patient has a cause of action sounding in negligence for failure to inform the patient of his options, regardless of the due care exercised at treatment, *assuming there is injury*.") (emphasis added).

22. *See* McCoid, *supra* note 15, at 383-84 ("In a battery action there is no need to show any actual physical injury, the mere invasion of the plaintiff's right to be free from unwarranted touching being sufficient to establish damages.").

23. *See infra* notes 129-52 and accompanying text.

24. *See* Flanagan v. Wesselhoeft, 712 A.2d 365, 371 (R.I. 1998) ("[V]ictims of a negligent tortfeasor are ordinarily permitted to recover for all the injuries and damages that can be proven to have been reasonably foreseeable and proximately caused by the tortfeasor's negligence.") (citations omitted).

25. *Cf.* Sligh v. First Nat'l Bank, 704 So. 2d 1020, 1028 (Miss. 1997). The court stated:

> Our tort doctrine has evolved into two types of torts, ordinary torts and intentional torts. Public policy deems it so important to deter the commission of intentional torts or acts of gross negligence, that we allow victims of gross negligence or intentional torts to recover damages above and beyond what is necessary to compensate them for their injuries, i.e., punitive damages.

Id.

example, a doctor performs an operation without consent.[26] However, if a doctor performs an operation with the patient's consent, but neglected to mention all of the possible side effects, the doctor may be held to have been negligent.[27] In the latter situation, "[N]o intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information.... [Thus] the action should be pleaded in negligence."[28] Where a physician performs an authorized procedure, but failed to give all of the information that a reasonable patient would have wanted in the circumstances,[29] the physician may be liable if that failure was the

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26. *See* Cobbs v. Grant, 502 P.2d 1, 8 (Cal. 1972). The court stated that

> battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.

Id.; *see* Moser v. Stallings, 387 N.W.2d 599, 601 (Iowa 1986) ("A medical battery claim is appropriate only in circumstances when a doctor performs an operation to which the patient has not consented.") (citing Cowman v. Hornaday, 329 N.W.2d 422, 424 (Iowa 1983); Perin v. Hayne, 210 N.W.2d 609, 618 (Iowa 1973)); Baltzell v. Van Buskirk, 752 S.W.2d 902, 906 (Mo. Ct. App. 1988) ("A claim in battery or trespass may lie by reason of treatment furnished by a physician where an operation is performed without the patient's consent or where the operation is not the surgical procedure to which the patient gave his consent.") (citing Hershley v. Brown, 655 S.W.2d 671, 678 (Mo. Ct. App. 1983)); Physicians' and Dentists' Bus. Bureau v. Dray, 111 P.2d 568, 569 (Wash. 1941) ("That an unauthorized operation constitutes an assault and battery[] may be conceded."); 2 ALAN MEISEL, THE RIGHT TO DIE § 17.2, at 353 (2d ed. 1995) ("The provision of treatment to a patient without valid consent constitutes a battery.").

27. *See Cobbs*, 502 P.2d at 8 (discussing case of negligence in which "the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs"); *see also Baltzell*, 752 S.W.2d at 906 ("[W]here the consent to the treatment was given but with insufficient or incomplete disclosure of risks, the cause of action is in medical malpractice based on negligence of the physician to meet a recognized standard of care.") (citing Zahorsky v. Griffin, Dysart, Taylor, Penner and Lay, P.C., 690 S.W.2d 144, 154 (Mo. Ct. App. 1985) (citing Douthitt v. United States, 491 F. Supp. 891 (E.D. Mo. 1980))).

28. *Cobbs*, 502 P.2d at 8; *see Baltzell*, 752 S.W.2d at 906, which stated:

> A claim in battery or trespass may lie by reason of treatment furnished by a physician where an operation is performed without the patient's consent or where the operation is not the surgical procedure to which the patient gave his consent. By contrast, where the consent to the treatment was given but with insufficient or incomplete disclosure of risks, the cause of action is in medical malpractice based on negligence of the physician to meet a recognized standard of care.

Id. (citations omitted); *see* Perna v. Pirozzi, 457 A.2d 431, 438 (N.J. 1983) ("If the claim is characterized as a failure to obtain informed consent, the operation may constitute an act of medical malpractice; if, however, it is viewed as a failure to obtain any consent, it is better classified as a battery.").

29. *See* Sard v. Hardy, 379 A.2d 1014, 1021 (Md. 1977), which stated:

> In recent years, however, an ever-expanding number of courts have declined to apply a professional standard of care in informed consent cases, employing instead a general or lay standard of reasonableness set by law and

proximate cause of the patient's injury.[30] Basically, the difference between medical negligence and a medical battery in this context is that the failure to obtain consent with full disclosure involves negligence;[31] however, "the battery theory remains applicable where a medical treatment or procedure is completely unauthorized."[32] As a Wisconsin

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independent of medical custom. These decisions recognize that protection of the patient's fundamental right of physical self-determination—the very cornerstone of the informed consent doctrine—mandates that the scope of a physician's duty to disclose therapeutic risks and alternatives be governed by the patient's informational needs. Thus, the appropriate test is not what the physician in the exercise of his medical judgment thinks a patient should know before acquiescing in a proposed course of treatment; rather, the focus is on what data the patient requires in order to make an intelligent decision.

Id. (citing Canterbury v. Spence, 464 F.2d 772, 785 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972); Fogal v. Genesee Hosp., 344 N.Y.S.2d 552, 559 (1973); Wilkinson v. Vesey, 295 A.2d 676, 688 (R.I. 1972); Miller v. Kennedy, 522 P.2d 852, 861 (Wash. Ct. App. 1974); Scaria v. St. Paul Fire & Marine Ins. Co., 227 N.W.2d 647, 653 (Wis. 1975)).

30. *See Miller*, 522 P.2d at 864, which states:

[I]n the event a patient has consented to a proposed treatment or operation, a failure of the physician or surgeon to fully inform the patient of all of the material risks present in his medical situation before obtaining such consent is negligence; and a physician or surgeon is liable for any injury proximately resulting from the treatment if a reasonably prudent person in the patient's position would not have consented to the treatment if adequately informed of all the significant perils.

Id. (footnote omitted).

31. *See* Nishi v. Hartwell, 473 P.2d 116, 118-19 (Haw. 1970), which stated:

Here, the touching was with consent and was of the same nature and scope as that to which the consent was given, but involved an undisclosed collateral hazard. Cases such as this involve the doctrine of informed consent, and are deemed to sound in negligence, as raising the question of a neglect of duty required to be observed by a physician in his relationship with his patient.

Id. (citations omitted); *see* Retkwa v. Orentreich, 584 N.Y.S.2d 710, 711 (Sup. Ct. 1992) (describing negligence law as covering the "failure to obtain consent without full disclosure of all known risks").

32. Lounsbury v. Capel, 836 P.2d 188, 193 (Utah Ct. App. 1992); *see Nishi*, 473 P.2d at 118 ("Battery is an unlawful touching of another person without his consent. . . . A touching with consent, but of a different nature or scope from that to which consent was given, is also battery.") (citations omitted); Cornfeldt v. Tongen, 262 N.W.2d 684, 699 (Minn. 1977) ("An action for battery is appropriate where the treatment consists of a touching that is of a substantially different nature and character from that to which the patient consented.") (emphasis omitted); *Perna*, 457 A.2d at 438 ("If the claim is characterized as a failure to obtain informed consent, the operation may constitute an act of medical malpractice; if, however, it is viewed as a failure to obtain any consent, it is better classified as a battery."); Martin v. Richards, 531 N.W.2d 70, 76 (Wis. 1995) ("When a patient fail[s] to authorize treatment or consent[s] to one form of treatment and the physician perform[s] a substantially different treatment, the patient ha[s] a cause of action for battery.") (citations omitted); 2 MEISEL, *supra* note 26, § 17.11, at 382-83

appellate court explained, "This means that unless the patient consents to the physician's recommended treatment approach, the physician may not proceed with that approach even if the physician personally believes the recommended approach to be in the patient's best interests."[33] The physician's decision to impose her own beliefs about the proper course of treatment on the patient will make her liable for at least nominal damages.[34]

The requirement that the patient's wishes be followed does not only extend to the decision of whether or not to initiate a course of treatment. Should an informed, competent patient decide that a particular course of treatment was too onerous, that patient would have the right to have the treatment stopped and to choose a different (medically approved) course of treatment. As one court explained, "A competent patient's right to select from among medically acceptable treatment alternatives also encompasses the right to change one's mind about the treatment approach selected."[35] Yet, this does not merely mean that the patient would, for example, have to choose a different form of aggressive

("Battery is usually the theory that should be used if the physician has *totally* (rather than inadequately) failed to provide material information to the patient or has failed to obtain consent to treatment whether the prior disclosure of information was adequate or not.").

33. Schreiber v. Physicians Ins. Co., 579 N.W.2d 730, 734 (Wis. Ct. App. 1998); *see* Shetter v. Rochelle, 409 P.2d 74, 79 (Ariz. Ct. App. 1965) ("It seems to be well-established that if a doctor operates upon a patient without his patient's consent, that he has committed a battery upon the patient and is liable in damages therefor."); Rosebush v. Oakland County Prosecutor, 491 N.W.2d 633, 635 (Mich. Ct. App. 1992) ("[I]f a physician treats or operates on a patient without consent, the physician has committed a battery and may be required to respond in damages.") (citations omitted).

34. *See* ACI Chems., Inc. v. Metaplex, Inc., 615 So. 2d 1192, 1202 (Miss. 1993) ("In cases of intentional tort, nominal damages can . . . be awarded in the absence of actual injury."); Kennedy v. Parrott, 90 S.E.2d 754, 757 (N.C. 1956) ("On the other hand, if her cause of action is for damages for personal injuries proximately resulting from an assault or trespass on her person, as she now asserts, and such operation was neither expressly nor impliedly authorized, she is entitled at least to nominal damages."); Anderson v. St. Francis-St. George Hosp., 614 N.E.2d 841, 846 (Ohio Ct. App. 1992) ("When, however, the nonconsensual treatment is harmless or beneficial, damages for the wrongful act are nominal only, not actual.") (citing Lacey v. Laird, 139 N.E.2d 25, 26 (Ohio 1956)); Lounsbury v. Capel, 836 P.2d 188, 192-93 (Utah Ct. App. 1992) ("[P]roof of an unauthorized invasion of the plaintiff's person, even if harmless, entitles him to at least nominal damages."). Nominal damages are usually for a very small amount. *See, e.g.*, Zok v. State, 903 P.2d 574, 578-79 (Alaska 1995) ("[N]ominal damages are usually one cent or one dollar."); Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 158 (Wis. 1997) (awarding nominal damages of one dollar). Some courts have suggested that even an award of nominal damages of one thousand dollars is not excessive. *See* Ponce de Leon Condominiums v. DiGirolamo, 232 S.E.2d 62, 64 (Ga. 1977) (upholding one thousand dollars nominal damage award). *But see* Pugliese v. Town of Northwood Planning Bd., 408 A.2d 113, 118 (N.H. 1979) (suggesting that one dollar is usually appropriate nominal damage award and that one hundred dollars would be too great to be a nominal damage award).

35. *Schreiber*, 579 N.W.2d at 735.

therapy if one therapy was not proving to be as effective as had originally been hoped. Because "a competent adult patient has the right to decline any and all forms of medical intervention, including lifesaving or life-prolonging treatment,"[36] a competent refusal of further treatment would mean that the treatment would have to stop. Continuing the treatment despite an informed, competent request for its cessation would constitute a battery.[37] A fortiori, if a patient is treated notwithstanding her having initially and repeatedly expressed an informed, competent desire not to have that treatment, a battery will have been committed.[38] As the Supreme Court of Oklahoma made clear, "If treatment is completely unauthorized and performed without any consent at all, there has been a battery."[39]

A physician will not be allowed to escape a charge of battery merely because the treatment that he chose comported with good medical practice, if that treatment was contrary to the express wishes of the patient.[40] Further, the physician may be liable for performing a

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36. *Rosebush*, 491 N.W.2d at 635-36.

37. *See* Paula Walter, *The Doctrine of Informed Consent: To Inform or Not to Inform?*, 71 ST. JOHN'S L. REV. 543, 546 (1997) ("In the medical context, the concept of autonomy translates into an understanding that the individual has an unfettered right to choose the course of medical treatment, including the right not to pursue treatment and to desist from any treatment where such medical protocol has already been initiated.").

38. *See* Winters v. Miller, 446 F.2d 65, 68 (2d Cir. 1971) ("[Where] an ordinary patient [is] suffering from a physical ailment, the hospital authorities . . . have no right to impose compulsory medical treatment against the patient's will and indeed, . . . to do so would constitute a common law assault and battery."); *see also* Bouvia v. Superior Court, 225 Cal. Rptr. 297, 301 (Ct. App. 1986) ("[W]here a doctor performs treatment in the absence of an informed consent, there is an actionable battery.").

39. Scott v. Bradford, 606 P.2d 554, 557 (Okla. 1979) (citations omitted).

40. *See* Kinikin v. Heupel, 305 N.W.2d 589, 593 (Minn. 1981). The court stated:

> It is undisputed that, after the biopsy, Mrs. Kinikin refused breast removal, a mastectomy, in the absence of proof of cancer. Yet what she received was, substantially, breast removal. . . .
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> . . . .
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> . . . Here, while there was evidence that good practice dictated removal of the fibrocystic diseased tissue, such disease was not then endangering the plaintiff's life or health. Immediate removal of virtually all breast tissue was not necessary.

Id. Additionally the court declared,

> In this medical malpractice case the jury found the defendant surgeon was not negligent in the care and treatment of plaintiff, but that the doctor was liable for battery and negligent nondisclosure of surgical risks. Damages of $600,000 were awarded.

Id. at 591. The court affirmed the judgment, including that there was a basis for battery damages in particular. *See id.* at 594-96.

medically approved procedure even if her technique met or exceeded professional standards.[41] As the Supreme Court of Colorado made clear, "A physician who operates on a patient's body without the patient's consent, or who performs an operation different from that to which the patient consented, commits a battery and is liable for damages resulting therefrom, notwithstanding the exercise of reasonable care in performing the operative procedure."[42]

Consider *Tabor v. Scobee*,[43] a case in which a minor's fallopian tubes were removed when the doctor had only been given permission to remove her appendix.[44] The action was in accord with acceptable medical practice,[45] in that the "evidence indicated that removal of the tubes probably would be necessary soon [and] that their remaining in the body in their swollen and infected condition was dangerous."[46] Indeed, "delay in their removal might have proved harmful, even fatal."[47] Nonetheless, because "there still was time to give the parent and the patient the opportunity to weigh the fateful question,"[48] the physician was liable for battery damages.[49]

Where there has been a battery, there will be no need to establish harm in addition to the battery itself in order to collect damages.[50] In *Caudle v. Betts*,[51] the Supreme Court of Louisiana explained that because the "element of personal indignity involved always has been given considerable weight,"[52] the "[battery] defendant is liable not only for contacts that do actual physical harm, but also for those relatively trivial

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41. *See infra* notes 43-49 and accompanying text.

42. Bloskas v. Murray, 646 P.2d 907, 914 (Colo. 1982); *see* McCoid, *supra* note 15, at 392. McCoid stated:

> The fact that the medical treatment to which there is no consent is not seriously harmful, or is in fact beneficial to the patient, does not excuse the doctor. Further, the fact that treatment is conducted in accordance with the dictates of good surgery or medicine and is done in a skillful and careful manner does not constitute an excuse.

Id.

43. 254 S.W.2d 474 (Ky. 1951).

44. *See id.* at 475.

45. *See id.*

46. *Id.* at 476.

47. *Id.* at 477.

48. *Id.*

49. *See id.*; *see also* Wells v. Van Nort, 125 N.E. 910, 910-11 (Ohio 1919) (holding physician subject to battery damages after removing fallopian tubes when the patient had only consented to the removal of her appendix).

50. *See* McCoid, *supra* note 15, at 384 ("In a battery action there is no need to show any actual physical injury, the mere invasion of the plaintiff's right to be free from unwarranted touching being sufficient to establish damages.").

51. 512 So. 2d 389 (La. 1987).

52. *Id.* at 391.

ones which are merely offensive and insulting."[53] The harm is not merely the untoward consequences of such an invasion, but the invasion itself.[54] Indeed, the Supreme Court of Pennsylvania pointed out that a patient might have a cause of action even if that patient had *benefited* from the unauthorized treatment at issue. Thus, the unauthorized "surgery could have been done perfectly, and could even have had a beneficial effect on the patient, yet a cause of action could still exist; for it is the very conduct of the unauthorized procedure which constitutes the tort."[55] Since battery involves an intentional tort,[56] punitive damages may sometimes be imposed in the absence of any physical damage.[57] For example, in *Grant v. Petroff*,[58] an Illinois appellate court held that the plaintiff could seek punitive damages for the defendant's allegedly unauthorized tubal ligation.[59]

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53. *Id.* (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 9 (5th ed. 1984); Harrigan v. Rosich, 173 So. 2d 880 (La. Ct. App. 1965)); *see* Perna v. Pirozzi, 457 A.2d 431, 438 (N.J. 1983) ("Under a battery theory, proof of an unauthorized invasion of the plaintiff's person, even if harmless, entitles him to nominal damages."); Butler v. Molinski, 277 S.W.2d 448, 452 (Tenn. 1955) ("While the facts show that Mrs. Butler derived no benefit from the professional services rendered, it likewise shows that she received no injury as a result of such services. In these circumstances there is no basis for a recovery of other than nominal damages."); Lounsbury v. Capel, 836 P.2d 188, 192-93 (Utah Ct. App. 1992) ("Common law battery does not require that the nonconsensual contact be injurious. Rather, proof of an unauthorized invasion of the plaintiff's person, even if harmless, entitles him to at least nominal damages.").

54. *See* Wall v. Brim, 138 F.2d 478, 481 (5th Cir. 1943) ("The law is well settled that an operation cannot be performed without the patient's consent and that one performed without consent, express or implied, is a technical battery or trespass for which the operator is liable.") (footnote omitted); Shetter v. Rochelle, 409 P.2d 74, 82-83 (Ariz. 1965) ("If the consent given to the operation in question was ineffectual, every phase of this operation, from initial anesthesia to final suture, was a continuing battery for which recovery should be allowed, *even if the operation had been successful.* The operation itself, under such circumstance, is the wrong."); *see also* Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941) ("We think there can be no doubt that a surgical operation is a technical battery, regardless of its results, and is excusable only when there is express or implied consent by the patient; or, stated somewhat differently, the surgeon is liable in damages if the operation is unauthorized.").

55. Moure v. Raeuchle, 604 A.2d 1003, 1008 (Pa. 1992).

56. *See Perna*, 457 A.2d at 438 ("[B]ecause battery connotes an intentional invasion of another's rights, punitive damages may be assessed in an appropriate case.").

57. *See id.* at 439 ("A nonconsensual operation remains a battery even if performed skillfully and to the benefit of the patient.").

58. 684 N.E.2d 1020 (Ill. App. Ct. 1997).

59. *See id.* at 1020-21, 1027; *see also* Cacdac v. West, 705 N.E.2d 506, 510-12 (Ind. Ct. App. 1999) (allowing plaintiff to seek punitive damages in connection with neurosurgeon's alleged battery).

C. *Current Versus Past Treatment Refusals*

Many states have recognized that patients can bring a battery action for treatment performed without their consent.[60] Yet, when one discusses unauthorized treatment, one might only have in mind a treatment that the patient is *currently* refusing or, in addition, one that the patient *previously* indicated was unacceptable. If tort law merely made physicians liable for refusing to abide by a patient's *currently* expressed wishes, then anytime that a patient was not able to manifest her wishes, for example, because she was under general anesthesia, the physician would be immune from liability for competently performing a medically appropriate procedure. This would be true even if the patient had previously expressly stated that she did not want that treatment performed.[61]

As *Schloendorff v. Society of New York Hospital*[62] illustrates, tort law does not merely protect patients from invasions that they currently refuse.[63] However, even *Schloendorff* left open the possibility that an emergency situation would preclude the imposition of liability for unauthorized treatment.[64] Such a position is sensible, since in many situations the patient who is currently unable to consent to the procedure would have authorized the emergency treatment if able to do so. The emergency exception should not be understood, however, to permit treatment whenever a patient's life is endangered. If there were blanket immunity for any medical procedure competently performed under emergency conditions, "a physician could circumvent the express wishes of a terminal patient by waiting to act until the patient was comatose and critical."[65] Such a policy would effectively eliminate the right to refuse treatment in many cases, and thus is unacceptable.[66]

Yet, not all courts have been sensitive to the possibility that requiring a contemporaneous refusal could effectively nullify the right to determine one's own medical treatment. For example, in *Werth v. Taylor*,[67] a Michigan appellate court suggested that a blood transfusion

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60. *See* Estate of Leach v. Shapiro, 469 N.E.2d 1047, 1052 (Ohio Ct. App. 1984) ("[A] patient may recover for battery if his refusal is ignored."); *see also* Cobbs v. Grant, 502 P.2d 1, 8 (Cal. 1972); Moser v. Stallings, 387 N.W.2d 599, 601-02 (Iowa 1986); Baltzell v. Van Buskirk, 752 S.W.2d 902, 906 (Mo. Ct. App. 1988); Physicians' and Dentists' Bus. Bureau v. Dray, 111 P.2d 568, 569 (Wash. 1941).

61. *See infra* notes 81-83 and accompanying text.

62. 105 N.E.2d 92 (N.Y. 1914).

63. *See supra* notes 9-19 and accompanying text.

64. *See supra* note 15 and accompanying text.

65. *Leach*, 469 N.E.2d at 1053.

66. *Cf. id.* ("We conclude that a patient has the right to refuse treatment, and that this refusal may not be overcome by the doctrine of implied consent.").

67. 475 N.W.2d 426 (Mich. Ct. App. 1991).

was permissible, despite the fact that the physician who had just operated on the patient told the anesthesiologist ordering the transfusion that transfusing the patient would deeply offend her religious beliefs.[68] The *Werth* appellate court suggested that because the patient's refusals were "not contemporaneous or informed,"[69] the "record could not be developed regarding Cindy's refusal which would leave open an issue upon which reasonable minds could differ,"[70] implying that it was irrelevant that the patient's husband could attest to his wife's wishes not to be transfused.[71] The appellate court claimed to offer a "narrow" holding, since it was *merely* holding that without "contemporaneous refusal of treatment by a fully informed, competent adult patient, no action lies for battery."[72] Yet, such a holding might have very broad and unsettling implications.

The difficulty with the *Werth* decision was not that it had upheld the permissibility of a treatment that had contravened the patient's express (but possibly uninformed) wishes.[73] The *Werth* trial court had held that it was not clear that the patient would have refused the transfusion had she been aware of the life-threatening nature of her condition,[74] and the appellate court might merely be understood to have been deferring to the trial court's factual determination that it was unclear what the patient would have wanted in the actual circumstances. The appellate court explained:

> It [was] undisputed that [the patient] was unconscious when the critical decision regarding the blood transfusion to avoid her death was being made. Her prior refusals had not been made when her life was hanging in the balance or when it

68. *See id.* at 427 ("[Dr. Taylor] ordered the transfusion of packed red blood cells, but before the transfusion was given, Dr. Parsons informed him that Cindy was a Jehovah's Witness.").
69. *Id.* at 430.
70. *Id.*
71. *See id.*
72. *Id.*
73. *See id.* at 429 (noting that the patient had previously signed a "Refusal to Permit Blood Transfusion" form).
74. *See id.* The court declared:

> Here, the trial court determined that Cindy's refusals were made when she was contemplating merely routine elective surgery and not when life-threatening circumstances[] were present[,] and concluded that it could not be said that she made the decision to refuse a blood transfusion while in a competent state and while fully aware that death would result from such refusal.

Id.

appeared that death might be a possibility if a transfusion were not given.[75]

On this reading, the physician's having implied to the patient that there was no real possibility of serious harm vitiated the patient's refusal of treatment.[76]

The appellate court's holding might at least have been understandable had it offered a different rationale for its decision, for example, had it reasoned that the patient should be transfused because the state's interest in the protection of innocent third parties, namely, the patient's newborn twins,[77] outweighed her right to self-determination.[78] While such a holding would not have been in accord with the majority position—many states will allow a patient to refuse treatment as long as young children would not thereby be orphaned[79]—such a ruling would have enjoyed a more solid foundation than the broad rationale that the appellate court offered.[80]

The appellate court's suggestion "that it is the patient's fully informed, contemporaneous decision which alone is sufficient to override evidence of medical necessity"[81] could, if followed, seriously undermine the patient's right to bodily autonomy in the medical treatment context. It is precisely this kind of doctrine that would allow a physician to simply wait until after the patient had lost consciousness, and then transfuse without fear that he would be subject to liability for damages, clarity of the patient's expressed wishes notwithstanding.[82] Given the variety of circumstances in which an individual could not give a contemporaneous refusal of treatment, the *Werth* holding (unless properly limited)[83] would

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75. *Id.* at 430.

76. *See id.* at 429-30.

77. *See id.* at 427 ("Cindy gave birth to her twins on the evening of May 8, 1986.").

78. *See, e.g., In re* President and Dirs. of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir. 1964) (holding that a mother was not permitted to refuse treatment, at least in part, because she had to care for a seven-month-old child).

79. *See, e.g.*, Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989) ("[T]he state's interest in maintaining a home with two parents for the minor children does not override Mrs. Wons' constitutional rights of privacy and religion."); Norwood Hosp. v. Munoz, 564 N.E.2d 1017, 1025 (Mass. 1991) ("[T]he State does not have an interest in maintaining a two-parent household in the absence of compelling evidence that the child will be abandoned if he is left under the care of a one-parent household."); *see also* Mark Strasser, *Assisted Suicide and the Competent Terminally Ill: On Ordinary Treatments and Extraordinary Policies*, 74 OR. L. REV. 539, 555 (1995) [hereinafter Strasser, *Assisted Suicide*] ("A parent might not be permitted to refuse treatment if her refusal would result in orphaning her children, although an individual would likely be allowed to refuse treatment if her refusal would leave her children with only one parent.").

80. *See* Strasser, *Assisted Suicide*, *supra* note 79, at 554-55 & nn.81-83.

81. *Werth*, 475 N.W.2d at 430.

82. *See id.* at 428 (rejecting plaintiffs' contention that "defendant's decision to perform that procedure with knowledge of this express refusal resulted in a battery").

83. *See* Rosebush v. Oakland County Prosecutor, 491 N.W.2d 633, 635 (Mich. Ct.

not only severely limit the kinds of situations in which an action for medical battery would be possible, but also might seriously undermine the trust between doctor and patient.

D. The Requisite Intent for a Battery

In many of the cases involving an alleged battery, the medical personnel have the best of intentions and motivations.[84] It thus becomes important to establish the requisite intent for a battery. A requirement that the defendant intend to harm the plaintiff in order for the unwanted touching to be actionable as an intentional tort would significantly narrow the kinds of circumstances in the medical context in which such an action might be brought. Regrettably, the language commonly used to describe the necessary intent is open to misinterpretation.[85]

In *Moser v. Stallings*,[86] the Iowa Supreme Court offered the standard characterization of the required intent for a battery,[87] suggesting that the "requisite elements of battery are met by showing the wrongdoer intended to inflict a harmful or offensive contact upon the body of the

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App. 1992) ("The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, the right to refuse medical treatment and procedures.") (citing *Werth*, 475 N.W.2d at 428). However, the court also suggested that the "right to refuse lifesaving medical treatment is not lost because of the incompetence or the youth of the patient." *Id.* at 636 (citing *In re* L.H.R., 321 S.E.2d 716, 722 (Ga. 1984)).

84. *But see* People *ex rel.* Burke v. Steinberg, 73 N.Y.S.2d 475, 476-77 (Magis. Ct. 1947). In that case,

> The defendant, allegedly a practical nurse, injected five hundred persons with [a] syringe containing water while she professed to inject the subjects with vaccine serum. . . . She later admitted to the officer that she was using merely water for inoculating purposes and not any serum whatever. She made the further statement that she had had no purpose other than wanting to impress her boy friend with her efficiency as a nurse; they had had some disagreement and she felt, to use her words, "that she would make a hit with him."

Id.

85. *See* Spinosa v. Weinstein, 571 N.Y.S.2d 747, 753 (App. Div. 1991) ("[Plaintiff] concedes that the defendants did not intend to harm her, and thus, even assuming that her consent was invalid, her claim for assault and battery must fail."). *But see* White v. University of Idaho, 797 P.2d 108, 111 n.3 (Idaho 1990) (rejecting that the intent to harm is a necessary element of battery); England v. S & M Foods, Inc, 511 So. 2d 1313, 1314 (La. Ct. App. 1987) (affirming judgment notwithstanding defendant's contention that "no battery was committed because [defendant] did not intend to inflict bodily harm upon plaintiff").

86. 387 N.W.2d 599 (Iowa 1986).

87. For a discussion of the Restatement position, see *infra* notes 92-96 and accompanying text.

plaintiff."[88] However, appearances to the contrary notwithstanding,[89] this does not mean that the perpetrator must intend to injure the victim. It will suffice if the perpetrator knows that the contact is unwelcome.[90] Thus, many jurisdictions define the requisite intent for a battery in terms of whether there was an intent to make an unauthorized bodily contact rather than an intent to bring about injury.[91]

The Restatement (Second) of Torts ("Restatement (Second)") suggests that an actor will be liable for battery if: (1) "he acts intending to cause a harmful or offensive contact with the person of the other or a third person,"[92] and (2) a harmful contact results.[93] However, the comments to the Restatement (Second) make clear that "it is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure

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88. *Moser*, 387 N.W.2d at 601-02 (citing 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 3.3, at 216 (1st ed. 1956)).

89. *See White*, 797 P.2d at 111 n.3 (suggesting that this formulation is ambiguous).

90. *See* Brzoska v. Olson, 668 A.2d 1355, 1360 (Del. 1995), which stated:

> In essence, the tort of battery is the intentional, unpermitted contact upon the person of another which is harmful or offensive. Lack of consent is thus an essential element of battery. The intent necessary for battery is the intent to make contact with the person, not the intent to cause harm.

Id. (citations omitted); *see* 2 MEISEL, *supra* note 26, at 354 ("[W]hen a patient (or surrogate) has put the physician on notice that he does not want a particular treatment, then the subsequent rendition of that treatment to the patient is offensive, and the doctor knows with substantial certainty that the treatment will be *offensive*, because it is unwanted.").

91. *See, e.g.*, Singer v. Marx, 301 P.2d 440, 442 (Cal. Ct. App. 1956) (suggesting that a person "who forcibly invades the person of another is liable for a battery regardless of an intent to inflict injury; the only intent which is necessary is that of doing the particular act in question"); Frey v. Kouf, 484 N.W.2d 864, 868 (S.D. 1992). In *Frey*,

> The jury was instructed that, to find [defendant] liable, it must find [defendant] had a specific design to cause the injury to [plaintiff]. That was an incorrect statement of the law. Instead, the jury should have been instructed that, to find [defendant] liable, it need only find that [defendant] acted with substantial certainty that bodily contact with [plaintiff] would occur—that [plaintiff] would be struck with the glass.

Id. In *Garratt v. Dailey*, 279 P.2d 1091, 1094 (Wash. 1955), the court said:

> A battery would be established if, in addition to plaintiff's fall, it was proved that, when [defendant] moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been.... The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge.

Id. (citing Mercer v. Corbin, 20 N.E. 132 (Ind. 1889)); *see* Soares v. City of Oakland, 12 Cal. Rptr. 2d 405, 407 (Ct. App. 1992) (distinguishing between the intent necessary to commit a common law tortious battery—intent to do the act—and the intent necessary to commit a battery for purposes of being able to sue employer rather than have the injuries covered by Workers' Compensation—the intent must be to cause injury).

92. RESTATEMENT (SECOND) OF TORTS § 13(a) (1965).

93. *See id.* § 13(b).

him."[94] Thus, the individual who plays a practical joke on someone else will not be immune from liability because he intended no harm.[95] The Restatement (Second) specifically addresses the issue of concern here, stating that "a surgeon who performs an operation upon a patient who has refused to submit to it is not relieved from liability by the fact that he honestly and, indeed, justifiably believes that the operation is necessary to save the patient's life."[96]

Not all states follow the above rule that an individual intentionally touching someone else without permission constitutes a battery. For example, in *Spivey v. Battaglia*,[97]

> Respondent . . . intentionally put his arm around petitioner and pulled her head toward him. Immediately after this "friendly unsolicited hug," petitioner suffered a sharp pain in the back of her neck and ear, and sharp pains into the base of her skull. As a result, petitioner was paralyzed on the left side of her face and mouth.[98]

The question presented before the *Spivey* court was whether a friendly, nonconsented-to hug resulting in paralysis should be classified as a battery.

The Supreme Court of Florida made clear in *Spivey* that the required intent "is not necessarily a hostile intent, or a desire to do harm. Where a reasonable man would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he had intended it."[99] Nonetheless, because it could not "be said that a reasonable man in this defendant's position would believe that the bizarre results herein were 'substantially certain' to follow,"[100] the court held that no battery had taken place.[101]

The Florida court *seemed* to be reflecting the Restatement (Second) position. The court correctly suggested that there need be no subjective desire to harm in order for a battery to take place.[102] The court also reflected the Restatement (Second)'s definition of intent.[103] Yet, the

94. *Id.* § 13 cmt. c.
95. *See id.*
96. *Id.*
97. 258 So. 2d 815 (Fla. 1972).
98. *Id.* at 816.
99. *Id.* at 816-17.
100. *Id.* at 817.
101. *See id.*
102. *See id.* at 816-17; *see also supra* note 94 and accompanying text (noting RESTATEMENT (SECOND) position).
103. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965) ("The word 'intent' is used

court's analysis obviously did not capture the Restatement (Second) position when suggesting that a battery occurs *only* where harm was intended or where a reasonable person would believe that a particular result was substantially certain to follow. Such an interpretation would mean that neither an individual playing a practical joke nor a surgeon performing surgery notwithstanding her patient's express wishes to the contrary would be liable for a resulting injury, as long as that injury was neither intended nor substantially certain to result.[104]

On its face, the *Spivey* ruling is difficult to understand,[105] as it undermines the principle that "responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent or is not at fault."[106] At the very least, this ruling so severely limits the kinds of acts that would be included within those classified as "intentionally wrongful" that the principle simply would not apply in countless cases in which it would apply in other states. The impetus behind the *Spivey* decision becomes clearer, however, when it is understood that the statute of limitations had run for the potential battery claim in that case.[107] By holding that this was a case of negligence rather than battery, the Florida Supreme Court assured that the plaintiff would not be time-barred from collecting damages.[103] Indeed, the court cautioned that its refusing to classify this act as a battery "does not mean that [the alleged tortfeasor] does not become liable for such unanticipated results, however. The settled law is that a defendant becomes liable for reasonably foreseeable consequences, though the exact results and damages were not contemplated."[109] Thus, because some harm might have been anticipated from an unsolicited hug, even if the harm that actually occurred might not be, the court implied that the plaintiff could be treated as an eggshell skull plaintiff[110] and collect damages. The court's holding that these

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throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

104. *But see supra* notes 95-96 and accompanying text (suggesting that both would be liable according to the RESTATEMENT (SECOND) position).

105. *See* Thomas v. Wyatt, 405 So. 2d 1369, 1370 (Fla. Dist. Ct. App. 1981) ("[W]e have some difficulty with the rationale of the *Spivey* decision . . . .").

106. RESTATEMENT (SECOND) OF TORTS § 435B cmt. a. (1965).

107. *See Spivey*, 258 So. 2d at 816; *see also* McCoid, *supra* note 15, at 384 (pointing out that "the plaintiff whose case is characterized as one for battery may find himself subjected to a much shorter period of limitations than is applied to an action for negligent malpractice").

108. *See Spivey*, 258 So. 2d at 817 (remanding for jury determination with appropriate instructions regarding elements of negligence).

109. *Id.*

110. *See* Woodhams v. Moore, 840 F. Supp. 517, 519-20 (S.D. Ohio 1994) (discussing "the 'eggshell skull' plaintiff theory"); *see also* Silva v. Stein, 527 So. 2d

results were not substantially certain to follow, and thus that the act was not intentional,[111] helped the plaintiff. A byproduct of the decision, however, was that the relevant jurisprudence was thereby muddied.[112]

The Florida court focussed on whether the *paralysis* was intended, rather than on whether the *unauthorized touching* was intended. Most courts would look at the latter to determine whether a battery had occurred.[113] The latter position is more defensible, since the former position so sharply limits what constitutes a battery that the social benefits accrued from severely punishing intentional medical torts would be lost in all but the most extreme cases. Consider *Garcia v. Psychiatric Institutes of America, Inc.*,[114] a Florida case in which drugs were administered to a boy while he was under a doctor's care, "directly contrary to [the plaintiff's] express written directions."[115] Notwithstanding that there was no testimony that the doctors had intended to injure the boy or that any harm was substantially certain to result, this contravention of the mother's expressed wishes was nonetheless characterized as a battery.[116] Had the *Garcia* appellate court

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943, 943-44 (Fla. Dist. Ct. App. 1988), where the court stated:

> [F]oreseeability and proximate cause principles are applicable only in the determination of the defendant's liability for the initial adverse contact with the plaintiff. They have no pertinence to the issue of whether, once that contact has occurred, the defendant is responsible for whatever adverse consequences the plaintiff suffers—whether they are "foreseeable" or not. It is the familiar but accurate doctrine that "the tort feasor takes the plaintiff as he finds him" which is instead controlling.

Id.

111. *See Spivey*, 258 So. 2d at 816. The plaintiff might have been precluded from arguing that the behavior at issue was both intentionally tortious and merely negligent, since the *Spivey* court seemed to feel that it had to choose between them. *See id.* ("The question presented for our determination is whether petitioner's action could be maintained on the negligence count, or whether respondent's conduct amounted to an assault and battery as a matter of law . . . ."); *see also* Waters v. Blackshear, 591 N.E.2d 184, 185 (Mass. 1992) ("We start with the established principle that intentional conduct cannot be negligent conduct and that negligent conduct cannot be intentional conduct.") (citing Sabatinelli v. Butler, 296 N.E.2d 190, 192 (Mass. 1973)); Baltzell v. Van Buskirk, 752 S.W.2d 902, 906 (Mo. Ct. App. 1988) ("A battery is an intentional tort which, by definition, is not a cause of action for negligence."); *cf.* Thomas v. Wyatt, 405 So. 2d 1369, 1370 (Fla. Dist. Ct. App. 1981) ("No attack is made upon the negligence theory, and no objection is raised as to the plaintiff's reliance upon three separate and possibly inconsistent or duplicitous theories of liability.").

112. *See Thomas*, 405 So. 2d at 1370.

113. *See supra* note 91 and accompanying text.

114. 638 So. 2d 567 (Fla. Dist. Ct. App. 1994).

115. *Id.*

116. *See id.*

followed *Spivey*, it would have held that although the drugs were intentionally administered without consent, there was neither evidence of an intent to injure nor evidence that harm was substantially certain to result, and thus that the action could not constitute a battery. Ironically, if the *Garcia* court had applied the *Spivey* analysis and held that negligence rather than battery was at issue, the plaintiff's cause of action would have been time-barred.[117]

In *England v. S & M Foods, Inc.*,[118] the plaintiff sued for damages for her humiliation and embarrassment after being hit by a hamburger that the defendant threw at her.[119] The defendant denied intending to hit her and denied intending to hurt her.[120] When examining whether the results were "substantially certain to follow,"[121] the court examined whether the physical contact (the hamburger hitting her) rather than the humiliation or embarrassment was substantially certain to result. Finding that the contact was substantially certain (whether or not the emotional harms were), the court held that a battery had taken place and that intentional tort damages could be awarded.[122]

In most states, an individual accomplishes a battery when that individual intentionally commits an unauthorized touching of another, even if there was no intent to injure and even if the injury was not substantially certain to result. Indeed, one of the classic examples of a battery, *Schloendorff v. Society of New York Hospital*,[123] would not have been a battery according to the Florida Supreme Court's definition of that term, even accepting the *Schloendorff* plaintiff's version of the facts.[124] The most sensible definition of a battery, at least in the context of medical torts, will include cases in which the defendant committed an unauthorized touching, even when the defendant lacked an intent to injure and even when the injury was not substantially certain to result. Any other definition would be too destructive to patient autonomy.

E. Damages

Suppose that in fact it can be established that a battery has been committed. A variety of kinds of damages might at least potentially be awarded. There might be not only damages for physical harms, but also

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117. *See id.*
118. 511 So. 2d 1313 (La. Ct. App. 1987)
119. *See id.* at 1314.
120. *See id.*
121. *Id.*
122. *See id.* at 1315.
123. 105 N.E. 92 (N.Y. 1914). For a discussion of *Schloendorff*, see *supra* notes 9-10, 12-14, 18-19 and accompanying text.
124. *See supra* note 12 and accompanying text.

damages for pain and suffering,[125] humiliation,[126] and other harms.[127] The Oregon Supreme Court suggested that it "is very doubtful that plaintiff should ever be limited to nominal damages where he has been subjected to an operation without his consent."[128]

The damages that would be compensable for a battery might include those that would be difficult to anticipate. For example, in *White v. University of Idaho*,[129] the plaintiff was suing for "unexpectedly harmful injuries,"[130] resulting from a "movement later described as one a pianist would make in striking and lifting the fingers from a keyboard."[131] The injuries were sufficiently serious that a nerve was scarred and a rib had to be removed.[132] The issue before the court was *not* whether it was foreseeable that the defendant's contact with the plaintiff would result in the necessary removal of one of her ribs, but merely whether the University of Idaho would also be liable for the damages resulting from the defendant's battery.[133] Because "under Idaho law the intent required for the commission of a battery is simply the intent to cause an unpermitted contact not an intent that the contact be harmful or offensive,"[134] and because as a general matter the University would not be liable for the intentional torts (such as battery) committed by its employees, the University was held to be immune from liability in this

125. *See* Pratt v. Davis, 79 N.E. 562, 565 (Ill. 1906) ("The law infers pain and suffering from personal injury.").

126. *Cf.* Glickstein v. Setzer, 78 So. 2d 374, 374-75 (Fla. 1956) (awarding husband and wife each $5000 damages for battery where the "humiliation and bruised feelings were perhaps the worst indignities the patient suffered"); Johnson v. Ramsey County, 424 N.W.2d 800, 804 (Minn. Ct. App. 1988) (holding plaintiff "suffered emotional distress and embarrassment as a result of [a] kiss" and awarding $75,000).

127. *See* Smith v. Hubbard, 91 N.W.2d 756, 764 (Minn. 1958) (awarding plaintiff $1000 for battery resulting in no physical harm but resulting in kidding and his job having been made more difficult and unpleasant); Lounsbury v. Capel, 836 P.2d 188, 196 (Utah Ct. App.) ("Damages for pain, suffering, 'psychological problems' and the like, however, may of course be recovered only to the extent that Lounsbury proves they were a proximate result of his undergoing the surgery to which he did not consent, rather than a result of his original injury.").

128. Hively v. Higgs, 253 P. 363, 365 (Or. 1927).

129. 797 P.2d 108 (Idaho 1990).

130. *Id.* at 109 (quoting White v. University of Idaho, 768 P.2d 827, 828 (Idaho Ct. App. 1989)).

131. *Id.*

132. *See id.*

133. *See id.* at 111 (affirming grant of partial summary judgment in favor of University).

134. *Id.* at 109.

case.[135] Given the finding that a battery was involved, the liability of the tortfeasor seemed to be accepted without discussion.[136]

In *Caudle v. Betts*,[137] the Supreme Court of Louisiana explained that

> [t]he defendant's liability for the resulting harm [from a battery] extends, as in most other cases of intentional torts, to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim.[138]

The *Caudle* court further explained that the "original purpose of the courts in providing the action for battery undoubtedly was to keep the peace by affording a substitute for private retribution."[139] By making compensable those damages that were not even reasonably foreseeable,[140] it would be less likely that individuals would take it upon themselves to decide what damages were due and then to collect them.

The Ohio Supreme Court has also suggested that damages for intentional torts may include harms not reasonably foreseen. In *Baker v. Shymkiv*,[141] the court had to decide which damages resulting from a trespass to land were compensable. The Bakers had come home one evening to discover that a trench had been dug across their driveway so that water from one neighbor's property could drain through the trench onto the property of another neighbor.[142] Mrs. Baker went to call the police.[143] Upon returning three minutes later, she found her husband on the ground.[144] He had become quite upset[145] and had suffered some sort of attack,[146] presumably because he had taken great pride in the appearance of their house and yard.[147] He was pronounced dead later that night.[148]

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135. *See id.* at 108.

136. *See id.* at 111-12 (Bistline, J., dissenting) (expressing view that classifying the act at issue as a battery seemed unfair because it would make the state immune from liability for the acts of its employees in too many cases).

137. 512 So. 2d 389 (La. 1987).

138. *Id.* at 392.

139. *Id.* at 391 (citing F. STONE, LOUISIANA CIVIL LAW TREATISE, TORT DOCTRINE § 125 (1977)).

140. *Cf.* Morgan v. Olds, 417 N.W.2d 232, 236 (Iowa Ct. App. 1987) ("When a doctor implements a course of treatment without obtaining the patient's consent, he breaches his duty and is liable to the patient for *any* resultant damages.") (emphasis added) (citing Moser v. Stallings, 387 N.W.2d 599, 601-02 (Iowa 1986)).

141. 451 N.E.2d 811 (Ohio 1983).

142. *See id.* at 812.

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.* at 815 (Holmes, J., concurring) (discussing the emotional stress that the husband had suffered).

147. *See id.* at 812.

148. *See id.*

At issue was whether the tortfeasors were only liable for those damages that were reasonably foreseeable.[149] Explaining that "[i]ntentional trespassers are within that class of less-favored wrongdoers,"[150] the Ohio Supreme Court held that "damages caused by an intentional trespasser need not be foreseeable to be compensable."[151] The court thus was willing to expand those harms for which an intentional tortfeasor might be responsible to include those not even foreseeable, and thus which might not be compensable were this merely a case of negligence.[152]

In *Jacque v. Steenberg Homes, Inc.*,[153] the defendant delivered a mobile home by plowing a path across the plaintiff's snow-covered field,[154] notwithstanding the plaintiff's express refusal to allow the defendant to do so.[155] No damages to the land were established at trial.[156] The Jacques were awarded one dollar in nominal damages and one hundred thousand dollars in punitive damages, awards the Wisconsin Supreme Court upheld on appeal.[157]

In *Jacque*, the Wisconsin court agreed with the plaintiff that "both the individual and society have significant interests in deterring intentional trespass to land, regardless of the lack of measurable harm that results."[158] The court explained,

> Society has an interest in preserving the integrity of the legal system. . . . When landowners have confidence in the legal system, they are less likely to resort to "self-help" remedies. . . .
>
> People expect wrongdoers to be appropriately punished. Punitive damages have the effect of bringing to punishment types of conduct that, though oppressive and hurtful to the individual, almost invariably go unpunished by the

149. *See id.* at 813.
150. *Id.*
151. *Id.* at 815.
152. *See id.*; *see also* Mary Donovan, *Is the Injury Requirement Obsolete in a Claim for Fear of Future Consequences?*, 41 UCLA L. REV. 1337, 1376 (1994) ("[T]he standard of reasonable foreseeability determines the scope of the plaintiff's recoverable damages by defining which injuries are the proximate or reasonably foreseeable consequence of the defendant's negligence.").
153. 563 N.W.2d 154 (Wis. 1997).
154. *See id.* at 156.
155. *See id.* at 157.
156. *See id.* at 156.
157. *See id.*; *see also* Sanchez v. Clayton, 877 P.2d 567, 573 (N.M. 1994) ("In such cases, the jury may award nominal damages to acknowledge that the cause of action was established and punitive damages to punish the wrongdoer for violating the rights of the victim.").
158. *Jacque*, 563 N.W.2d at 159.

public prosecutor.[159]

The Wisconsin Supreme Court worried that any other holding would send a very bad message to trespassers. "It implicitly tells them that they are free to go where they please, regardless of the landowner's wishes. As long as they cause no compensable harm, the only deterrent intentional trespassers face is the nominal damage award of [one dollar]."[160] Yet, the court's reasoning would have applied equally well had the issue of concern involved a trespass to a person rather than to land. The societal interest in the integrity of the legal system also must be promoted when individuals are subjected to nonconsensual invasions. For example, in cases involving medical batteries, individual victims (and their families) must be dissuaded from taking the law into their own hands, especially if prosecutors are unlikely to prosecute. Just as society does not wish to tell trespassers to land that they can do as they please as long as they do not cause compensable harm, society does not wish to send an analogous message to trespassers to persons (i.e., to individuals who commit battery). This is especially important to consider because torts involving battery involve harms that may not always be readily "measurable in money."[161] Society would be sending a very bad message indeed if it suggested that trespass to property was more offensive than trespass to persons.[162]

The Supreme Court of New Jersey explained that, in early English common law, "[t]respass . . . was considered quasi-criminal in nature and was the remedy for forcible, direct, and immediate injuries to persons or property."[163] In part because "[p]eople should not be able with impunity to trench willfully upon a right,"[164] the court held that "punitive damages may be assessed in an action for an intentional tort involving egregious conduct whether or not compensatory damages are awarded, at least where some injury, loss, or detriment to the plaintiff has occurred,"[165] as, for example, where a battery has occurred.[166] Both trespass to land and trespass to persons are the kinds of torts traditionally disfavored in the law. If trespass to land is potentially severely

159. *Id.* at 160-61.
160. *Id.* at 161.
161. Nappe v. Anschelewitz, Barr, Ansell & Bonello, 477 A.2d 1224, 1234 (N.J. 1984) (O'Hern, J., concurring).
162. *Cf.* Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 344 (1996) ("Personal property, although not as central as bodily integrity to persons' capacity to shape their own lives, is nonetheless an essential social condition for the efficacious pursuit of a conception of the good.").
163. *Nappe*, 477 A.2d at 1228.
164. *Id.* at 1231.
165. *Id.* at 1232.
166. *See id.* at 1234 (O'Hern, J., concurring).

punished, then trespass to persons should be as well.

III. WRONGFUL LIVING

A wrongful living action involves a claim in tort for damages resulting from a negligent or intentional interference with one's right to refuse treatment.[167] The unwanted extension of life resulting from such unwanted treatment might force one to endure months of pain or, instead, to "live" in an insensate state for an unlimited period.[168] The courts have had some difficulty in determining what damages, if any, are compensable when an individual who has received unwanted treatment has thereby had his life extended, even when a clear battery was involved.

A. Wrongful Living Versus Wrongful Life

In *Anderson v. St. Francis-St. George Hospital, Inc.*,[169] the Ohio Supreme Court wrote that "[f]or purposes of a 'wrongful living' cause of action, the event or loss for which the plaintiff seeks damages is neither death nor life, but *the prolongation of life*."[170] The court thus distinguished this action both from a wrongful death action[171] and from a wrongful life action.[172]

The Ohio court was correct to distinguish between a "wrongful living" action and a "wrongful life" action.[173] In the latter, a child, who would

167. *See* John Donohue, Comment, *"Wrongful Living": Recovery for a Physician's Infringement on an Individual's Right to Die*, 14 J. CONTEMP. HEALTH L. & POL'Y 391, 392 (1998) ("'Wrongful living' is a relatively new cause of action that seeks to redress a medical professional's intentional or negligent interference with an individual's right to refuse medical treatment.").

168. *See* 2 MEISEL, *supra* note 26, at 384-90 (discussing these possibilities); *see also* S. Elizabeth Wilborn Malloy, *Beyond Misguided Paternalism: Resuscitating the Right to Refuse Medical Treatment*, 33 WAKE FOREST L. REV. 1035, 1040 (1998) ("Physicians can sustain life, sometimes for months or even years, for people who are near death (or horribly diseased), sedated into near oblivion, and connected to dozens of machines that do most of the individual's 'living.'").

169. 671 N.E.2d 225 (Ohio 1996).

170. *Id.* at 227; *see* A. Samuel Oddi, *The Tort of Interference with the Right to Die: The Wrongful Living Cause of Action*, 75 GEO. L.J. 625, 638 (1986).

171. *Cf.* Payne v. Marion Gen. Hosp., 549 N.E.2d 1043 (Ind. Ct. App. 1990) (patient's estate sued doctor for failing to treat without having gotten consent from arguably competent patient).

172. *See infra* notes 174-75 and accompanying text.

173. *See Anderson*, 671 N.E.2d at 227 ("In a claim for 'wrongful living,' which is the basis for recovery in this case, the plaintiff does not assert a claim based on a life

not be living but for someone else's fault, sues for damages because, for example, she must now endure great pain for her entire life.[174] The child basically is asserting in such an action that it would have been better never to have lived at all than to have been forced to live in her condition.[175]

Some courts have rejected the wrongful life cause of action, believing that "[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians."[176] However, the courts have not adopted a similar attitude with respect to individuals choosing to die rather than living in their current medical conditions,[177] perhaps because the latter decision is probably constitutionally protected.[178]

There are important differences between wrongful life and wrongful living cases. In the paradigmatic wrongful living case, the victim herself has expressly refused treatment,[179] perhaps because she knew that she would die soon and did not wish to spend her last extra days or weeks in great pain or, perhaps, because she knew that if she received certain treatment, she would live for an indefinite period in great pain.[180] Insofar as states are reluctant to recognize a wrongful life claim because, in these claims, victims are unable to make an informed, competent

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coming into being.").

174. For a discussion of wrongful life, see generally Mark Strasser, *Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?* 64 MO. L. REV. 29 (1999) [hereinafter Strasser, *Wrongful Life*].

175. *See* Garrison v. Medical Ctr. of Del., Inc., 581 A.2d 288, 294 (Del. 1989); Becker v. Schwartz, 386 N.E.2d 807, 812 (N.Y. 1978).

176. *Becker*, 386 N.E.2d at 812.

177. A separate question is whether the claims are more analogous than courts seem willing to accept. *See* Strasser, *Wrongful Life*, *supra* note 174, at 58.

178. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.").

179. *See* William C. Knapp & Fred Hamilton, *"Wrongful Living": Resuscitation as Tortious Interference with a Patient's Right to Give Informed Refusal*, 19 N. KY. L. REV. 253, 258 (1992), where the authors stated:

> In contrast to the "wrongful life" concept, the "wrongful living" plaintiff does not assert a right to make a retrospective decision about whether to be born, that is, to speculate about what decision the plaintiff would have made had the future been known to the plaintiff prior to conception or *in utero*. The "wrongful living" plaintiff weighs the effects of his medical therapy and his prognosis with and without the therapy, against the desirability of remaining alive.

Id. (footnotes omitted)).

180. It is precisely because this situation might occur even when the patient is not terminally ill that it is not helpful to suggest that in such cases the philosophical question is whether "the therapy [is] really prolonging life or, in fact, just prolonging death." *Id.* at 263.

decision regarding treatment, the state would not have an analogous reason to refuse to recognize a wrongful living claim.

The claim here is not that wrongful life actions should not be recognized. They arguably should be.[181] A few states in fact have already recognized that cause of action.[182] The claim here is merely that even a state not recognizing wrongful life actions might nonetheless have good reason to recognize wrongful living actions.[183]

B. Wrongful Living and Harm

The *Anderson* court suggested that in a wrongful living claim "the event or loss for which the plaintiff seeks damages is neither death nor life, but *the prolongation of life*."[184] Yet, the court was incorrect to imply that the plaintiff in such an action is *solely* seeking damages for a wrongful extension of life. The event for which the plaintiff seeks damages would be the wrongful imposition of treatment, and that treatment resulted in a prolongation of life, among other things. The losses would include the dignitary harm involved in the violation of the individual's autonomy, as well as the pain and the suffering, the medical bills, and other items. These separate costs are neither reducible to the violation of the individual's autonomy, for example, an intentional interference with the patient's rights,[185] nor to the prolongation of life itself. A separate question is whether the prolongation of life was itself a harm. Even if a court was unwilling to hold that it was a compensable

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181. *See generally* Strasser, *Wrongful Life*, *supra* note 174, at 29.

182. The supreme courts of California, New Jersey, and Washington have recognized wrongful life actions. *See* Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982); Procanik v. Cillo, 478 A.2d 755, 757 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486 (Wash. 1983).

183. Ironically, in *Benoy v. Simons*, 831 P.2d 167 (Wash. Ct. App. 1992), the court refused to recognize a wrongful prolongation of life action, *Harbeson* notwithstanding. *See id.* at 170.

184. *Anderson*, 671 N.E.2d at 227; *see* Oddi, *supra* note 170, at 638.

185. *See* Tricia Jonas Hackleman, Comment, *Violation of an Individual's Right to Die: The Need for a Wrongful Living Cause of Action*, 64 U. CIN. L. REV. 1355, 1370 (1996). In a case involving an intentional interference, damages might include

> consequential survival damages for pain and suffering due to the prolongation of life, dignitary damages based on mental distress suffered for defiling the patient's express convictions, punitive damages that may be so factually based as to be left to the judgment of a jury, and extraordinary and unnecessary medical expenses stemming from the nonconsen[s]ual treatment.

Id.

injury,[186] however, the court should nonetheless be willing to recognize some of the other, traditionally recognized damages that might result from a wrongful imposition of treatment, for example, medical expenses and other extraordinary costs.[187]

In *Anderson*, the patient had been resuscitated, notwithstanding an express order not to do so.[188] Nonetheless, it might have been argued that it was not necessary for the Ohio Supreme Court to address whether the state would recognize a cause of action for "wrongful living"[189] in that case, since the patient may have "condoned" the resuscitation when he later thanked the nurse.[190] This condonation might have been used to support the claim that the treatment was not in fact against his will[191] or, perhaps, that the patient (or the administrator of his estate)[192] should have been estopped from asserting that the treatment constituted a battery.

The claim of condonation or consent at issue here should be distinguished from what was at issue in *Werth v. Taylor*.[193] Here, the claim is not that patients *in general* should be assumed to desire resuscitation notwithstanding their previously expressed wishes to the contrary. The claim is merely that a patient who had left directions not to be resuscitated might later nonetheless validate or condone the resuscitation that in fact occurred, previous expressed wishes to the

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186. *See* Knapp & Hamilton, *supra* note 179, at 266 ("By far the most difficult element of a 'wrongful living' claim is the concept of continued life as a compensable injury."); *see also* Donohue, *supra* note 167, at 400 ("The real difficulty plaintiffs encounter in wrongful living suits lies in convincing courts that the prolonging of an individual's life is an injury meriting damages.").

187. *See* Donohue, *supra* note 167, at 413 ("A possible solution to mitigate the courts' reluctance or inability to award general damages for the violation of the right to refuse medical treatment would be to allow only special damages for the medical expenses and extraordinary costs incident to the plaintiff's continued living.") (footnotes omitted). This would mirror the approach that some courts have taken in wrongful birth cases. *See* Adam A. Milani, *Better Off Dead than Disabled?: Should Courts Recognize a "Wrongful Living" Cause of Action when Doctors Fail to Honor Patients' Advance Directives?*, 54 WASH. & LEE L. REV. 149, 225 (1997) ("Such a holding is consistent with the majority of wrongful birth cases, which allow parents to recover for the extraordinary medical and other expenses related to raising a child with a disability, but do not provide compensation for living.").

188. *See Anderson*, 671 N.E.2d at 226.

189. *Id.* at 227.

190. *See id.* at 226 ("Upon regaining consciousness, [decedent] expressed his gratitude to the nurse for saving his life.").

191. After once mentioning that decedent expressed his gratitude, *see id.*, the court neither explained its legal significance nor even referred to it again.

192. *See id.* ("Before his death, [decedent] initiated this action against the hospital for damages resulting from the hospital's failure to obey the 'No Code Blue' order. After [decedent] died, appellee Keith W. Anderson, administrator of [decedent's] estate, amended the complaint to substitute himself as plaintiff.").

193. 475 N.W.2d 426 (Mich. Ct. App. 1991). For a discussion of *Werth*, see *supra* notes 67-83 and accompanying text.

contrary notwithstanding.[194]

The *Anderson* court recognized that

> in a "wrongful living" action, the plaintiff is asserting a liberty interest in refusing unwanted medical treatment. It is the denial of this liberty interest, when the medical professional either negligently or intentionally disregards the express wishes of a patient, that gives rise to the wrongful living cause of action.[195]

The court thus did not seem to have difficulty in deciding that a harm would in fact be perpetrated by resuscitating someone against that person's express wishes. Nonetheless, the court suggested that "[i]t is the defining of the harm *giving rise to damages* that is uniquely difficult in a claim of 'wrongful living.'"[196]

C. Causation

When bringing a wrongful living action, the plaintiff must establish that the tortious act caused the harm. In *Anderson*, the patient was defibrillated, but there was no evidence that the defibrillation itself caused the difficulties subsequently experienced by the plaintiff.[197] Because there was no such evidence, the Ohio Supreme Court held that the defendant could not be held liable for later injuries, notwithstanding the reasonable foreseeability that the patient would suffer a stroke were he resuscitated.[198]

Presumably, the court refused to allow an award for subsequent harms, at least in part, out of a fear that it would be too difficult to articulate a principle that would limit the later damages for which the tortfeasor might be held responsible.[199] Consider the standard test for causation in establishing the damages for which a tortfeasor might be liable.[200] As the *Anderson* court explained, "The standard test for

194. Such a validation would have to be done freely and competently in order to have legal effect. *Cf. In re* Estate of McNichols v. State, 580 N.E.2d 978, 982 n.8 (Ind. Ct. App. 1991) (discussing conditions under which the validity of a will might be contested).

195. *Anderson*, 671 N.E.2d at 227.

196. *Id.* (emphasis added).

197. *See id.* at 228 ("[T]he record is devoid of any evidence that the administering of the resuscitative measures caused the stroke.").

198. *See id.* ("The record indicates that a stroke was reasonably foreseeable if [decedent] survived the ventricular tachycardia he suffered on May 28, 1988.").

199. *See id.*

200. There are additional limits on the consequences for which the tortfeasor might be held responsible. *See infra* notes 203-24 and accompanying text.

establishing causation is the *sine qua non* or 'but for' test. Thus, a defendant's conduct is a cause of the event (or harm) if the event (or harm) would not have occurred *but for* that conduct . . . ."[201]

The difficulty here is that in a case in which a physician wrongfully prevents an individual's death, *every* harm eventually befalling that individual would not have occurred but for the physician's tortious act.[202] Because it might seem unfair to blame the physician for a harm occurring years later that had nothing to do with the unauthorized treatment, the standard test for establishing causation might seem overinclusive.

Yet, this difficulty is more apparent than real, since the definition for causation is less inclusive than the *Anderson* court's explanation might seem to imply.[203] While it is true that "once it is established that but for the conduct of the medical professional, death would have resulted, the causation element of a 'wrongful living' claim is satisfied,"[204] it is not true that therefore *any* harms befalling the individual after that time would therefore be attributed to the tortfeasor.

The *Anderson* intermediate appellate court explained that "[i]n intentional torts, such as battery, the defendant is liable for all harms that are proximately caused by the wrongful act."[205] The court explained that harms are proximately caused if: (1) "they are part of a natural unbroken sequence resulting from the act,"[206] and (2) they have not been caused by a "superseding event."[207] A latter event may be held to be superseding if it is not reasonably foreseeable.[208]

The appellate court's discussion reflected a standard way to limit the consequences for which a tortfeasor may be responsible.[209] The Ohio Supreme Court had already indicated that reasonable foreseeability does not expose *negligent* tortfeasors to limitless liability:

> [T]he connection between the defendant's negligence as a proximate cause of an injury is not broken, if an intervening event is one which might in the natural

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201. *Anderson*, 671 N.E.2d at 227 (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 266 (5th ed. 1984)).

202. *Cf.* Daniel Pollack et al., Anderson v. St. Francis-St. George Hospital: *Wrongful Living from an American and Jewish Legal Perspective*, 45 CLEV. ST. L. REV. 621, 625 (1997) ("The *Anderson* court . . . . invoked the specter of 'infinite liability' . . . .").

203. *See id.* ("[N]ot all later events will be considered caused by the original act.").

204. *Anderson*, 671 N.E.2d at 227.

205. Anderson v. St. Francis-St. George Hosp., Inc. 614 N.E.2d 841, 845 (Ohio Ct. App. 1992) (citing Allstate Fire Ins. Co. v. Singler, 236 N.E.2d 79, 81 (Ohio 1968)).

206. *Id.* (citing Strother v. Hutchinson, 423 N.E.2d 467, 469 (Ohio 1981)).

207. *Id.* (citing Cascone v. Herb Kay Co., 451 N.E.2d 815, 819 n.1 (Ohio 1983)).

208. *See id.*

209. *But see supra* notes 129-52 and accompanying text (discussing limitations on damages for intentional tortfeasors).

> and ordinary course of things be anticipated as reasonably probable, and the defendant's negligence remains an important link in the chain of causation.[210]

One therefore would expect that the standard applied to intentional tortfeasors would be no less forgiving.

In *Anderson*, the Ohio Supreme Court suggested that "the difficult issue is what damages flow from the 'harm' caused the plaintiff."[211] Yet, the established jurisprudence makes this "difficult" issue rather easy, at least in the case before the court. Whether one used the standard applicable for intentional or negligent torts,[212] the unauthorized treatment was a "but-for" condition of the reasonably foreseeable consequences.[213]

Perhaps it would seem that the patient's having suffered a stroke after the unauthorized treatment was not really reasonably foreseeable, the court's admission to the contrary notwithstanding.[214] Such a claim, however, is not plausible in light of the consequences that have been counted as reasonably foreseeable in other contexts. For example, in *State v. Glenn*,[215] an individual was attacked by several others.[216] To avoid them, he jumped into a lake, where he drowned.[217] The question at issue was whether this flight was "reasonably foreseeable."[218] The court concluded that it was,[219] notwithstanding that the leap into the lake was arguably a rash, independent act.[220]

In *Blackwell v. American Film Co.*,[221] a man's leg was broken due to the negligence of one of the defendant's employees.[222] The victim died as a result of a later operation to enable him to walk. Notwithstanding that the original injury was not life-threatening and that the victim was expected to live indefinitely after that injury,[223] the defendant was held

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210. Taylor v. Webster, 231 N.E.2d 870, 873 (Ohio 1967) (citations omitted).
211. *Anderson*, 671 N.E.2d at 228.
212. *See supra* notes 200-10 and accompanying text.
213. *See Anderson*, 671 N.E.2d at 228 ("[A] stroke was reasonably foreseeable if [decedent] survived.").
214. *See id.*
215. 526 N.W.2d 752 (Wis. Ct. App. 1994).
216. *See id.* at 753.
217. *See id.*
218. *Id.* at 757. Further, in a criminal case, one would expect "reasonably foreseeable" to be even more narrowly defined than in a civil case.
219. *See id.* ("When one person batters another, he or she reasonably foresees that the victim may flee.").
220. *See id.*
221. 209 P. 999 (Cal. 1922).
222. *See id.* at 1000.
223. *See id.* at 1001 (noting evidence that suggested that the decedent would have

liable for the victim's death. Further, in *Blackwell*, there was no claim that the original wrongdoing was intentional.[224] If, indeed, the above are sufficiently foreseeable for the perpetrators to be held legally responsible, then the harms at issue in *Anderson* should be thought sufficiently foreseeable as well.

D. Wrongful Living Damages Versus Battery Damages

In *Anderson*, the Ohio Supreme Court was deciding at least two different issues: (1) whether to allow a new cause of action—wrongful living, and (2) what damages should be allowed for the battery. Yet, the court at times seemed to conflate the issues, although there was no need to do so.

Consider the tack taken by the *Anderson* intermediate appellate court, which rejected the cause of action for wrongful living,[225] but nonetheless remanded the case to determine the possible battery or negligence damages.[226] On the second round of appeals, the intermediate appellate court reaffirmed that the state did not recognize a cause of action for wrongful life,[227] but nonetheless reasoned "that a patient may recover damages based upon the torts of negligence or battery for all the foreseeable consequences of the therapy, including the pain, suffering, and emotional distress beyond that which he normally would have suffered had the therapy not been initiated."[228]

The Ohio Supreme Court criticized the intermediate appellate court's theory of recovery because it seemed "identical to the theory of recovery underlying a claim of 'wrongful living.'"[229] Thus, because the patient would have died had he not received the unauthorized treatment,[230] and because the harms to the victim were reasonably foreseeable,[231] the intermediate court's reasoning would establish that the plaintiff might be entitled to the very damages to which he might have been entitled had the tort of wrongful living been recognized.

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lived indefinitely had he not undergone the second operation).

224. *See id.* (stating defendant was merely negligent).

225. *See* Anderson v. St. Francis-St. George Hosp., Inc., 614 N.E.2d 841, 845 (Ohio Ct. App. 1992).

226. *See id.* at 847.

227. *See* Anderson v. St. Francis-St. George Hosp., No. C-930819, 1995 WL 109128, at *3 (Ohio Ct. App. Mar. 15, 1995); *rev'd* 671 N.E.2d 225 (Ohio 1996).

228. *Anderson*, 671 N.E.2d at 228 (emphasis omitted) (discussing second intermediate appellate opinion).

229. *Id.*

230. *See id.* ("The record clearly indicates that [decedent] would have died on May 30, 1988, without the defibrillation and, consequently, would not have suffered any subsequent medical conditions.").

231. *See id.*

Perhaps believing that the intermediate appellate court had recognized the wrongful living cause of action sub silentio, the Ohio Supreme Court reversed, holding that "damages, if any, must be based strictly on the theories of negligence or battery."[232] Yet, as the intermediate appellate court had pointed out, the plaintiff-appellant had "advanced alternative, nonexclusive legal theories: battery, negligence, and 'wrongful living.'"[233] Even had the wrongful living legal theory never been advanced, either of the other two theories (battery or negligence) might have sufficed to support a claim for the damages sought. The intermediate appellate court was not recognizing a wrongful living claim sub silentio but, instead, was simply applying standard tort law. Because *Anderson* was precisely the kind of case in which a separate tort for wrongful living was unnecessary,[234] the damages awarded might be the same whether or not the state recognized a cause of action for wrongful living.

E. Damages Concept or Separate Cause of Action?

One of the confusing aspects of the *Anderson* opinion was that it was not clear whether the Ohio Supreme Court viewed wrongful living as a separate cause of action or as something else. The court explained, "In reality, a claim of wrongful living is a *damages* concept, just as a claim for 'wrongful whiplash' or 'wrongful broken arm,' and must necessarily involve an underlying claim of negligence or battery."[235] The court

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232. *Id.*

233. Anderson v. St. Francis-St. George Hosp., Inc., 614 N.E.2d 841, 843 (Ohio Ct. App. 1992).

234. *Cf.* 2 MEISEL, *supra* note 26, § 17.17, at 401 ("The dismissal of this novel cause of action should work no hardship on the plaintiff in terms of establishing liability because the alleged facts state a cause of action for battery, negligence, or both.")

235. *Anderson*, 671 N.E.2d at 227. *See* Knapp & Hamilton, *supra* note 179, at 261, which stated:

> In addition to the recognition of a cause of action for wrongful living when an individual's liberty interest in the right to die is thwarted, it is also necessary for attorneys and judges confronted with a wrongful living case to understand that "wrongful living" is, in reality, a damages concept. There is no more a "cause of action" for "wrongful living" than there is a cause of action for a "wrongful broken leg" or a "wrongful whiplash." In every such case there must be some underlying tort. Every "wrongful living" case must involve underlying negligence or battery.

Id.; *see* Donohue, *supra* note 167, at 399 ("In actuality, wrongful living is a damages concept, and like a claim for 'wrongful whiplash' or a 'wrongful broken arm,' it is an action which necessarily involves an underlying claim of negligence or battery.").

framed the damage question to be: "Where a medical provider administers a life-prolonging treatment or procedure to a patient against the patient's instructions, is the medical provider liable for all foreseeable consequential damages resulting from the treatment or procedure?"[236] By framing the question this way, the court seemed to be characterizing the issue as a fairly standard medical tort. The court thus seemed to be asking, "Where a medical provider commits a battery, is that provider liable for all foreseeable consequential damages resulting from that battery?"

Yet, the court then restated the issue in the following way: "In its simplest form, the question becomes: Is 'continued living' a compensable injury?"[237] However, in its restatement of the question before it, the court did not reduce the damages question into its simplest form, but merely changed it.[238] Thus, suppose that wrongful living was never mentioned and that the plaintiff did not seek damages for his life having been prolonged, but instead sought damages for the unnecessary pain and suffering, medical expenses, and other losses that he incurred.[239] Those would have been compensable given the way the issue was originally stated, but would not have been compensable given the way the question was restated.

The *Anderson* court refused to include the pain, medical expenses, and other losses within the causally related harms, having decided that the "only damages that appellee may recover are those damages suffered by [decedent] due directly to the battery."[240] The court stated that "[w]here the battery was physically harmless, . . . the plaintiff is entitled to nominal damages only,"[241] notwithstanding that the medical expenses, for example, were due directly to the battery both in the "but-for" and in the "reasonably foreseeable" senses.[242]

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236. *Anderson*, 671 N.E.2d at 226.

237. *Id.* at 227; *see* Oddi, *supra* note 170, at 638. Oddi stated:

> If, however, the life of the person asserting the right to die is prolonged even briefly, the loss is that prolongation. There would be a causal connection between the interference of defendant and that loss, as the prolongation of life would not have occurred but for the conduct of defendant.

Id. (emphasis omitted).

238. *See Anderson*, 671 N.E.2d at 230 (Pfeifer, J., dissenting) ("Contrary to the assertion of the majority opinion, the plaintiff was not seeking to recover because [decedent's] life was prolonged.").

239. *See, e.g.*, Milani, *supra* note 187, at 224 n.353 ("The damages resulting from the battery when a patient has specifically asked not to be resuscitated necessarily include all future medical expenses: If the patient had not been resuscitated, he would not be alive to incur these expenses.").

240. *Anderson*, 671 N.E.2d at 229.

241. *Id.*

242. *See* Pollack et al., *supra* note 202, at 625.

> The *Anderson* court clearly acknowledged that [decedent] would have

The patient had been forced to endure physical and emotional pain and to incur various medical and other financial expenses as a result of the unwanted treatment[243] and deserved to be compensated for those harms.[244] As a District of Columbia appellate court pointed out, "Once liability is established for intentional torts such as . . . battery, a plaintiff is entitled at least to nominal damages, as well as to compensation for *'mental suffering . . . .'*"[245]

The point here is not to contest the court's conclusion that the defibrillation had not caused the decedent's later stroke, since no evidence had been presented to support such a contention.[246] Rather, the point is that the court used an inappropriately narrow view of which harms might be attributed to the unwanted treatment.[247] Here, because the patient suffered no damages as a result of the defibrillation of his heart, that is, "no tissue burns or broken bones,"[248] the court concluded that there were no compensable harms. Yet, such an analysis is not consistent with the holdings in other cases. In cases involving negligence, the defendants have been held responsible for foreseeable harms, even if the direct harm brought about by the defendant—for example, breaking the plaintiff's leg—did not bring about the harm at issue, namely, death.[249] In cases involving trespass, the defendants have

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> died without the defibrillation, and that, therefore, the stroke and other medical problems would not have occurred "but for" the defibrillation. It even acknowledged that the occurrence of a stroke might have been reasonably foreseeable, given [decedent's] medical problems at the time he was resuscitated.

Id. (citation omitted).

243. *See Anderson*, 614 N.E.2d at 843.

244. *See* 2 MEISEL, *supra* note 26, at 401 ("The *Anderson* court overturned the grant of summary judgment on the battery and negligence claims, but upheld the judgment dismissing the 'wrongful living' claim on the ground that added life, which resulted from the defendants' actions, 'is not a compensable harm.'") (citation omitted).

245. Marshall v. District of Columbia, 391 A.2d 1374, 1380 (D.C. 1978) (emphasis added) (quoting Neisner Bros., Inc. v. Ramos, 326 A.2d 239, 240 (D.C. 1974)).

246. *See Anderson*, 671 N.E.2d at 229 ("The record supports our conclusion. [Plaintiff] never presented any evidence that the defibrillation itself caused or contributed to [decedent's] suffering a stroke in any way *other than by simply prolonging his life.*").

247. *See* Pollack et al., *supra* note 202, at 626 ("By adopting such an unwarranted and narrow view of causation, the court emasculated the use of a traditional tort concept of battery to obtain damages from a health care provider who interferes with a patient's legal right to refuse life-sustaining treatment.").

248. *Anderson*, 671 N.E.2d at 229.

249. *See supra* notes 221-24 and accompanying text.

been held liable for harms that were not even reasonably foreseeable.[250]

The Ohio Supreme Court criticized the intermediate appellate court because the latter court would have been willing to award the same damages as would have been awarded had a wrongful living action been recognized.[251] Yet, rather than establish that the lower court's analysis was incorrect, the fact that the same damages would have been awarded either way suggests that the wrongful living damages concept was simply doing no work in that case. It would be as if *zero* damages were being awarded for the wrongful prolongation of life, which presumably is exactly what the Ohio Supreme Court thought appropriate.

F. The Value of Life

A different interpretation of the Ohio Supreme Court's *Anderson* opinion is that the court was implicitly adopting and applying the "Benefits Rule" discussed in the Restatement (Second), which reads, "When the defendant's tortious conduct has caused harm to the plaintiff . . . and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable."[252] The court's comments suggest that it was at least considering some of the benefits enjoyed as a result of the treatment, since the court expressly pointed out, "Although [decedent] remained partially paralyzed until his death in April 1990, he enjoyed numerous visits and outings with his family."[253] If in fact the court wished to have the benefits and the damages of the wrongful extension balanced against each other, however, then the court should have remanded the case with the appropriate instruction for the jury rather than have held that only the direct harms—for example, tissue burns or broken bones[254]—were compensable.[255]

Yet another interpretation of the *Anderson* opinion is that the court was suggesting that it is impossible to assign a dollar value to life itself—indeed, the court "recognized 'the impossibility of a jury placing a price tag' on the benefit of life."[256] However, the impossibility of placing a price tag on the value of life might have two different meanings, neither of which would provide a helpful explanation of what

250. *See supra* notes 129-52 and accompanying text.
251. *See Anderson*, 671 N.E.2d at 228.
252. RESTATEMENT (SECOND) OF TORTS § 920 (1979).
253. *Anderson*, 671 N.E.2d at 226.
254. *See supra* note 248 and accompanying text.
255. *See Anderson*, 671 N.E.2d at 229.
256. *Id.* at 228 (quoting Johnson v. University Hosps., 540 N.E.2d 1370, 1378 (Ohio 1989)).

the court in fact decided.

When suggesting that it is impossible to put a price tag on the value of life, the court might have been suggesting that life is something that is beyond valuing and literally cannot be priced—one must refuse to ascribe any *particular* value to it, either positive or negative. A different way of putting this would be to suggest that the interest in life is incommensurable, and thus should neither be used to offset nor to augment damages. However, insofar as the value of life is not even appropriately considered in the calculation of damages, it would be *as if* one would be assigning it a zero value.[257] This is because any other value would affect the calculation. Yet, this in effect is what the intermediate appellate court did and what the Ohio Supreme Court reversed.

The Restatement (Second) suggests that the Benefits Rule should be understood to mean "that the damages allowable for an interference with a particular interest be diminished by the amount to which the same interest has been benefited by the defendant's tortious conduct."[258] For example, in a case involving an unauthorized surgery that is painful but averts future pain, the benefit (the avoidance of future pain) should be considered when calculating the damages.[259] However,

> Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited. Thus one who has harmed another's reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefited from their publication . . . unless damages are claimed for harm to pecuniary interests . . . . Damages for pain and suffering are not diminished by showing that the earning capacity of the plaintiff has been increased by the defendant's act.[260]

One issue, then, will be whether the prolongation of life should be regarded as a possible offset for pain thereby caused. However, there might be counterintuitive implications of such an approach, for example, that a wrongful death award should be diminished by the worth of the (net) pain that the tortfeasor thereby prevented the victim from experiencing. Further, even if life and pain were viewed as potential offsets, increased life would seem to be a nonpecuniary interest, and thus

257. While this would not be to say that life itself is worthless, it would be to say that the "value" of life would not be an appropriate item on the relevant ledger.
258. RESTATEMENT (SECOND) OF TORTS § 920 cmt. a (1979).
259. *See id.* § 920 cmt. a, illus. 1.
260. *Id.* § 920 cmt. b.

not appropriately offsetting, for example, medical expenses.[261]

One of the confusing aspects of *Anderson* was that the Ohio Supreme Court would allow recovery for certain harms—burns or broken bones—but not others.[262] Yet, if the court's point was that life is of such immense value that everything else pales in comparison, then it does not seem that damages should be awarded for *anything*, even for burns or broken bones.

The court's suggesting that life has this incomparable value may have other implications which, at the very least, would be quite controversial. Consider those who object to having a blood transfusion because they believe that it is "a violation of the law of God,"[263] and "that ingestion of whole blood will deny [them] both resurrection and eternal salvation."[264] Were one to ask those people how much eternal salvation was worth or, perhaps, whether life was preferable to eternal salvation, one would realize that not all believe everything else pales in comparison to the value of life (in this world). Indeed, some refuse treatment precisely because they believe doing otherwise will cause them to lose eternal rewards[265]—for example, everlasting life.[266]

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261. *Cf.* Maggie J. Randall Robb, Comment, *Living Wills: The Right to Refuse Life Sustaining Medical Treatment—A Right Without a Remedy?*, 23 U. DAYTON L. REV. 169, 187 (1997). Robb declared:

> Health care providers should not receive economic compensation for unwanted medical services. A patient who is resuscitated against his or her wishes should be able to recover damages for all future medical expenses, costs of nursing home care, pain and suffering, and emotional distress related to the unwanted medical treatment.

Id.; *see* Willard H. Pedrick, *Arizona Tort Law and Dignified Death*, 22 ARIZ. ST. L.J. 63, 85-86 (1990). Pedrick stated:

> Refusing to pay for life-support systems supplied in defiance of the patient's instructions may be an even more effective sanction to vindicate patient autonomy. To the extent that the decedent's estate or their family is billed for medical expenses, they should decline to pay for life-support systems that were countermanded.

Id. But see Grace Plaza of Great Neck, Inc. v. Elbaum, 588 N.Y.S.2d 853, 854-55 (App. Div. 1992) (requiring family to pay for unwanted treatment of deceased).

262. *See supra* note 248 and accompanying text.

263. *In re* Estate of Brooks, 205 N.E.2d 435, 442 (Ill. 1965); *see* Werth v. Taylor, 475 N.W.2d 426, 427 (Mich. Ct. App. 1991) ("According to Cindy Werth's deposition testimony, one of the most deeply held of these tenets is the belief that it is a sin to receive blood transfusions.").

264. St. Mary's Hosp. v. Ramsey, 465 So. 2d 666, 668 (Fla. Dist. Ct. App. 1985).

265. *See In re* Osborne, 294 A.2d 372, 373 (D.C. 1972). The court said:

> When the petition was brought to Judge Bacon's home the night of the accident, the patient's wife, brother, and grandfather were present. They stated the views of the patient and agreed with them, explaining that those views are based on strong religious convictions. The grandfather explained that the patient "wants to live very much. . . . He wants to live in the Bible's promised new world where life will never end. A few hours here would nowhere compare to everlasting life." His wife stated, "He told me he did not want

If, indeed, it was universally accepted that continued life was preferable to non-life in all situations,[267] then one would expect that juries would refuse to award compensatory damages in cases involving unauthorized extensions of life.[268] However, it seems plausible to believe that the courts are refusing to allow juries to award damages in such cases precisely because juries would in fact award them.

In *Allore v. Flower Hospital*,[269] an Ohio appellate court considered a complaint in which "appellant asked for damages for unwanted medical care, unnecessary medical bills, the unnecessary conscious pain and suffering of the decedent, and the mental anguish and severe emotional distress suffered by [decedent] prior to his death."[270] The court held that "[t]hese damages all relate to the damages incurred due to the prolongation of [decedent's] life and are not recoverable,"[271] suggesting that the appellant would be limited to "damages arising from the act of intubation/ventilation itself [or] for nominal damages for the battery."[272]

The *Allore* court suggested that the appellant sought "damages for the

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blood—he did not care if he had to die."

Id.

266. *See* Randolph v. City of New York, 501 N.Y.S.2d 837, 838-39 (App. Div. 1986); *see also In re* McCauley, 565 N.E.2d 411, 412 (Mass. 1991) ("Michael and Zelia McCauley are Jehovah's Witnesses. . . . A principal tenet of their religion is a belief, based on interpretations of the Bible, that the act of receiving blood or blood products precludes an individual from resurrection and everlasting life after death."). Consideration of beliefs about what might happen in the hereafter might be confusing for additional reasons. For example, should there be offsets for allowing one to get one's eternal rewards earlier or, perhaps, for allowing one to avoid one's eternal punishment until later? *See* Strasser, *Wrongful Life*, *supra* note 174, at 67.

267. *But see* Greco v. United States, 893 P.2d 345, 354 (Nev. 1995) (Shearing, J., concurring in part and dissenting in part) (suggesting that the value of an impaired life does not always exceed the value of non-life).

268. *But see* Melvin I. Urofsky, *Leaving the Door Ajar: The Supreme Court and Assisted Suicide*, 32 U. RICH. L. REV. 313, 320 (1998), which states:

> In Michigan, a jury awarded Brenda Young and her family $16.5 million in a suit against Genesys St. Joseph Hospital for ignoring Ms. Young's directions that she not be put on a ventilator. After she suffered another in a series of seizures, the hospital and attending doctors put her on life-support, saving her life, but also leaving her in the kind of existence she had feared and had wanted to avoid. Ms. Young now needs round-the-clock attendance, is mentally incompetent, has little control over her bodily functions, and must be tied to the bed to prevent her from hurting herself.

Id. (citations omitted).

269. 699 N.E.2d 560 (Ohio Ct. App. 1997).

270. *Id.* at 565.

271. *Id.* (citing Anderson v. St. Francis-St. George Hosp., Inc., 671 N.E.2d 225, 228-29 (Ohio 1996)).

272. *Id.*

prolongation of life, a cause of action that does not exist in Ohio."[273] The court held that recovery would be "limited to those damages resulting from the alleged battery."[274] Yet, as was true in *Anderson*, unnecessary medical costs, pain, and other losses would all seem directly caused by the unwanted medical care, even if one brackets or disallows the claim that the prolonged living itself is an additional imposed cost.

G. Emotional Distress

Some courts have been more willing than the *Anderson* and *Allore* courts to entertain intentional infliction of emotional distress claims in the context of unauthorized, life-extending treatment. The patient who was treated against her will might bring such claims, as might her family.[275] For example, in *Gragg v. Calandra*,[276] the patient had "sustained irreversible brain damage, remained nonresponsive, and could not survive without life support."[277] He had written a living will indicating that in such circumstances extraordinary treatment should be withheld.[278] Requests by the patient's family and regular physician to discontinue life support notwithstanding, the defendant doctors continued to administer that support.[279] The patient died a little over a week after first going to the hospital.[280]

The *Gragg* court made clear that operating on a patient without his consent and maintaining that patient on life support contrary to his and his family's express wishes are "the essence of the claim for battery"[281] and that a "defendant may be liable not only for contacts that do actual physical harm, but also for those relatively trivial ones that are merely offensive and insulting."[282] The court suggested that the defendants had engaged in conduct that a jury might find sufficiently outrageous to merit an award for intentional infliction of emotional distress.[283] Not only had the doctors refused to honor the living will and the patient's

273. *Id.* at 563.
274. *Id.*
275. *See* 2 MEISEL, *supra* note 26, § 17.5, at 363 ("[I]ntentional infliction of emotional distress may provide a form of recovery for damages for harm to third parties as well as to the patient.").
276. 696 N.E.2d 1282 (Ill. App. Ct. 1998).
277. *Id.* at 1285.
278. *See id.*
279. *See id.*
280. The patient entered the hospital on December 28, 1992, and died on January 5, 1993. *See id.* at 1284-85.
281. *Id.* at 1287.
282. *Id.* at 1286 (citing Cohen v. Smith, 648 N.E.2d 329, 333 (Ill. App. Ct. 1995)).
283. *See id.* at 1290 ("We agree with plaintiff that this conduct could be deemed outrageous by a jury.").

family's request for treatment to be discontinued, but they had repeatedly and publicly accused the plaintiff and her mother of trying to kill the patient by seeking to have treatment withdrawn.[284] The court rejected the defendants' defense that they were trying to save the patient's life, suggesting that "[a]lthough a defendant may reasonably believe that his objective is legitimate, it does not provide him with carte blanche to pursue that objective by outrageous means."[285]

The *Gragg* holding should not be understood to mean that whenever an individual claims to have been very upset by a doctor's failure to withdraw treatment, that individual will have an action for intentional infliction of emotional distress. In an unpublished California case, the wife of an incompetent had sought not to have "heroic" medical measures taken to extend the life of her husband.[286] The doctors ignored her request.[287] The wife did not seek to have the feeding tube removed and was held as a matter of law not to have suffered sufficiently to bring the action.[288] Nonetheless, the intentional infliction of emotional distress is a cause of action that, at least potentially, can offer compensation to

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284. *See id.* at 1289. According to the court,

> Plaintiff alleged that defendants "verbally abused" and "repeatedly insult[ed] and injure[d]" and "willfully and wantonly inflict[ed]" severe emotional distress on her and her mother by repeatedly accusing them in a public area in the presence of others of trying to kill [decedent]; by continuing life support without good cause, knowing that plaintiff and her mother were under emotional distress; by refusing to honor [decedent's] living will and family requests, knowing that their refusals were themselves causing plaintiff and her mother great emotional distress; and by refusing to perform an EEG test or to report the results of such a test, knowing that the test would likely confirm that there was no brain activity.

Id. (first three alterations in original). Additionally, Meisel stated that

> there need not be proof of actual intent—that it was the physician's *purpose* to cause severe emotional distress to the plaintiff. Intent may be established by showing that the defendant *knew* that the administration of treatment without authorization was substantially certain to cause serious emotional distress to the third party (constructive intent), or the defendant acted in *reckless disregard* of causing serious emotional distress to that person.

2 MEISEL, *supra* note 26, at 374-75.

285. *Gragg*, 696 N.E.2d at 1290 (citing McGrath v. Fahey, 533 N.E.2d 806, 810 (Ill. 1989)) (emphasis omitted).

286. *See* Westhart v. Mule, 261 Cal. Rptr. 640, 640-41 (Ct. App. 1989) (not officially published).

287. *See id.* at 642.

288. *See id.* at 645 ("[Defendant's] failure to take action to effect removal of the feeding tube, either directly or via court intervention, essentially forecloses her claim she suffered severe emotional distress as a result of the doctors' extreme and outrageous conduct.").

victims of intentional, nonconsensual invasions and to the families trying to prevent such invasions.

IV. CONCLUSION

No court has yet expressly recognized a cause of action for wrongful living.[289] In many cases, however, the remedies already recognized in the law could afford the victim the same damages that a wrongful living action would include. Certainly, as Justice Stevens made clear in his *Cruzan v. Director, Missouri Department of Health*[290] dissent, "the right to be free from unwanted life-sustaining medical treatment . . . . [is not] reducible to a protection against batteries undertaken in the name of treatment, or to a guarantee against the infliction of bodily discomfort."[291] Nonetheless, it adds insult to injury when the penalties currently permitted by law tend not to be imposed in wrongful living cases. It is simply a myth to claim that a battery action will provide sufficient disincentive[292] to deter unwanted treatment,[293] given the way the case law has been interpreted in this context.

In *Anderson v. St. Francis-St. George Hospital, Inc.*,[294] the Ohio Supreme Court denied that its holding would mean that doctors would have no disincentive to perform procedures which were contrary to the will of the patient. The court explained,

> Where a patient clearly delimits the medical measures he or she is willing to undergo, and a health care provider disregards such instructions, the consequences for that breach would include the damages arising from any battery inflicted on the patient, as well as appropriate licensing sanctions against the medical professionals.[295]

Yet, one wonders whether these disincentives would be adequate,

289. *See* Donohue, *supra* note 167, at 417 ("To date, no court in any American jurisdiction has recognized a claim for wrongful living: a suit that asserts a patient's life was wrongfully prolonged as a result of unwanted medical treatment.").

290. 497 U.S. 261 (1990).

291. *Id.* at 343 (Stevens, J., dissenting).

292. *See* Milani, *supra* note 187, at 216 (suggesting that battery actions already provide an adequate remedy); Rodriguez, *supra* note 2, at 12 ("Battery is the most straightforward and clearly applicable theory for recovery of money damages for the provision of unwanted life-sustaining medical treatment."); *see also* Mark Garwin, Commentary, *The Duty to Care—The Right to Refuse*, 19 J. LEGAL MED. 99, 99 (1998) ("[T]he common-law courts for some time have recognized a cause of action in battery against physicians who provide medical treatment without the consent of the patient.").

293. *See* Urofsky, *supra* note 268, at 320 (noting a spokesperson for the American Hospital Association suggested after a 16.5 million dollar verdict that it would take awhile for medical personnel to learn not to treat individuals whose lives are imperiled, even when those individuals have expressed their desire not to receive treatment).

294. 671 N.E.2d 225 (Ohio 1996).

295. *Id.* at 229.

especially considering that Justice Douglas in concurrence suggested that in his view "there could be no resulting damage for seeing to it that a life was preserved."[296] Further, if indeed the medical board shared Justice Douglas's view that nothing wrong had been done,[297] then it would seem quite unlikely that any sanctions would be imposed.

Other ways to deter unwanted treatment have been discussed. Some suggest, for example, making the perpetrator criminally liable, although that approach seems less preferable.[298] Unless some sort of sanction is at least potentially imposed,[299] however, it seems reasonable to believe that medical personnel will continue to act in the way that they believe best promotes the patient's interests,[300] express directions to the contrary notwithstanding.

Punitive damages are imposed in cases involving trespass to property and they seem quite appropriate in the context under discussion here.[301]

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296. *Id.* at 230 (Douglas, J., concurring).

297. *See id.* (Douglas, J., concurring) (rejecting that anyone had engaged in "tortious conduct").

298. *See* Robb, *supra* note 261, at 175. Robb declared:

> Criminal sanctions merely provide a deterrent for health care providers in future situations. They do not provide a mechanism to enforce a patient's wishes or a means for the patient to pay for unwanted medical treatment. Further, criminal sanctions may be strongly against public policy because they are contrary to the public's desire to encourage physicians to help people.

Id.

299. *See* Hackleman, *supra* note 185, at 1371-72.

> [T]he wrongful living cause of action serves the policy goal of deterring socially harmful conduct. If an individual is not allowed to recover for wrongful living, then the physician will never be required to 'pay' for his negligent acts. However, if a wrongful living cause of action is allowed, then the goal of deterrence will be met by forcing the physician fully to compensate the individual. The need to deter physicians and health care facilities from breaching the individual's right to refuse treatment should not be overlooked . . . .

Id. (footnotes omitted).

300. Hackleman further stated:

> Evidence suggests that physicians still consider it their responsibility to make treatment decisions in the best interest of the patient and believe that patient preferences should be ignored if they are inconsistent with the physician's view of the best interest of the patient. Thus, physicians often override patients' choices when they believe that respecting patients' preferences would not be in the patients' best interests.

Id. at 1357-58 (citation omitted).

301. *See* Pedrick, *supra* note 261, at 82. Pedrick stated:

> The physician who continues to treat the patient and who disregards the patient's instructions forbidding use of life-sustaining procedures is chargeable with a conscious, knowing disregard of the patient's legal right. Such knowing

When the defendants are rarely if ever prosecuted for their wrongful behavior, the imposition of punitive damages may be the only form of effective deterrent.[302] Indeed, unless punitive damages are awarded in these kinds of cases, victims may be limited to nominal damages for the nonconsensual bodily invasions to which they have been subjected.[303] This would mean that for all practical purposes, refusal of life-extending treatment jurisprudence would involve a right without a remedy.[304]

A cause of action for wrongful living *may* be important to recognize for cases involving the negligent provision of medical treatment.[305] Otherwise, a patient might be forced to incur great emotional and financial costs through the negligence of medical personnel, and it is not at all clear that the innocent patient and his family should be forced to bear those burdens. Of course, it may be that existing medical negligence jurisprudence already allows victims to be compensated for these sorts of damages. In that event, wrongful living would be important to recognize, not as a separate cause of action or even as a damages concept, but only as establishing that, for some individuals under some circumstances, an extension of life causes foreseeable and easily avoidable harms, the cost of which the victim should not be forced to bear.

Recognizing that imposing life-extending treatment against the will of the patient can cause a harm only reinforces the established jurisprudence in torts. Such a recognition would, at least potentially, lend great support to the rights of autonomy and bodily integrity, and to the principle that wrongdoers should bear the costs of the harms that they cause. The courts should welcome rather than shun the opportunity to support these rights and that principle when they can do so by simply following and applying the existing jurisprudence.

It may be that the courts are reluctant to recognize a wrongful living

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> disregard of the patient's legal right, whether for good motives or ill, cannot be tolerated. Punitive damages are appropriate in these cases, regardless of the health-care giver's motive in disregarding the patient's instructions.

Id.

302. *See* Gregory A. Williams, Note, Tuttle v. Raymond*: An Excessive Restriction upon Punitive Damages Awards in Motor Vehicle Tort Cases Involving Reckless Conduct*, 48 OHIO ST. L.J. 551, 557 (1987).

303. *See* Anderson v. St. Francis-St. George Hosp., Inc., 671 N.E.2d 225, 229 (Ohio 1996) ("[T]he plaintiff is entitled to nominal damages only.").

304. *See* Pollack et al., *supra* note 202, at 624 ("The [*Anderson*] court recognized a right, but failed to provide a remedy."); Rodriguez, *supra* note 2, at 50 ("[I]t makes little sense to have a common-law and constitutional right to refuse treatment which, if violated, affords no real redress, no damages.").

305. A new cause of action would be necessary if that would be the only way that unwanted, life-extending care administered because of someone's negligence would be held to involve harm when, for example, that treatment resulted in great pain or expense.

claim because they believe that recognition of such a claim would somehow imply that the life of a disabled person is without value.[306] Yet, that is not what is being claimed. Rather, it is that an individual's informed, voluntary decision to refuse treatment should be honored.[307] If indeed the wrong message is being sent by imposing liability for a tortfeasor's intentional or negligent violation of the right to bodily autonomy when that action results in possibly long-term unnecessary pain, then it is difficult to imagine what the right message is, and frightening to contemplate what the tort system would become when it has been "suitably" corrected.

306. *See* Milani, *supra* note 187, at 219 ("Judicial approval of a wrongful living tort, in which a court would declare a person to be better off dead than disabled, would mark a step back from this recognition that persons with disabilities can be valuable and productive members of society.").

307. *See* Malloy, *supra* note 168, at 1042 ("By failing to impose liability when a patient has decided to refuse treatment, the courts ignore a patient's autonomy interests and impose their own moral judgment on the situation, determining paternalistically that the choice to forgo treatment was incorrect or at least unworthy of respect by the legal system.").


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