

February 2015

The Forgotten Role of Consent in Defamation and Employment Reference Cases

Alex B. Long

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Alex B. Long, *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, 66 Fla. L. Rev. 719 (2015).

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THE FORGOTTEN ROLE OF CONSENT IN DEFAMATION AND
EMPLOYMENT REFERENCE CASES

*Alex B. Long**

Abstract

As has been well documented, the fear of defamation suits and related claims lead many employers to refuse to provide meaningful employment references. However, an employer who provides a negative reference concerning an employee enjoys a privilege in an ensuing defamation action if the employee has consented to the release of information concerning the employee's job performance. Thus, many attorneys now advise prospective employers to have applicants sign consent agreements, permitting the prospective employer to conduct an investigation into the applicant's work history and releasing from liability anyone who provides information about the employee's work history. The *Restatement (Second) of Torts* has been highly influential in shaping the development of the defense of consent in the defamation context. This Article looks at the consent defense within the context of employment reference cases. Specifically, this Article examines the consent defense as described in the *Restatement* from a historical perspective and argues that the authors fundamentally misstated the law in a manner that has had negative consequence for employees who have been the victims of defamatory references.

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INTRODUCTION

It is almost an article of faith among those who advise employers that it is simply too risky to provide another employer a detailed employment reference of a former employee.¹ The fear of defamation suits and related claims leads many employers to refuse to provide meaningful information about a past employee's job performance in response to a reference request.² Indeed, most employers are unwilling to provide any information beyond an employee's job title and dates of employment.³

If there is a silver bullet to a defamation claim, however, it is the defense of consent, or "*volenti non fit injuria* ('to the willing no injury is done')."⁴ An employer who provides a negative reference concerning an employee enjoys a privilege in an ensuing defamation action if the employee has consented to the release of information concerning the employee's job performance.⁵ Thus, many attorneys now advise prospective employers to have applicants sign consent agreements, permitting the prospective employer to conduct an investigation into the applicant's work history and releasing from liability anyone who provides information about the employee's work history.⁶

The use of waiver agreements involves some difficult questions about the extent to which an employee's consent should shield a responding employer from liability. Consider the following hypotheticals. For each, assume that when applying for a new job, the applicant or employee signs a consent form authorizing any former employer to release information concerning the individual's job history and releasing the former employer from all liability for the disclosure:

Hypothetical 1

Employer tells Employee he is being fired for failing to generate sufficient revenue. Employee disputes this reason

1. See J. Hoult Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 135 (1998) (explaining that providing a negative reference "creates a risk of defamation liability while offering few clear benefits to the referring employer").

2. Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent but Irrelevant*, 11 CORNELL J.L. & PUB. POL'Y 1, 3 (2002).

3. Compare *id.* (stating that limiting job references to information such as job title and dates of employment are "now the standards for many businesses"), with Matthew W. Finkin & Kenneth G. Dau-Schmidt, *Solving the Employee Reference Problem: Lessons from the German Experience*, 57 AM. J. COMP. L. 387, 390 (2009) (stating that in 2004, 53% of employers refused to provide any information on a former employee due to fear of litigation).

4. Wash. Metro. Area Transit Auth. v. Johnson, 726 A.2d 172, 176 (D.C. 1999).

5. See RESTATEMENT (SECOND) OF TORTS § 583 (1977).

6. See *infra* notes 39–41 and accompanying text.

at the time of his firing. Employee applies for a new job. Employer falsely informs the prospective employer that Employee was fired for padding his expense report. Employee sues Employer on a defamation theory. Employer defends on the grounds that Employee consented to the release of the negative information.

Hypothetical 2

Employer fires Employee but refuses to provide Employee with any explanation as to Employer's reasons. Employee applies for a new job. Employer falsely informs the prospective employer that Employee was fired due to his "criminal lifestyle." Employee sues Employer on a defamation theory. Employer defends on the grounds that Employee consented to the release of the negative information.

Hypothetical 3

Prospective Employer hires Third Party to conduct a background check on Applicant. Third Party is grossly negligent in conducting the check and mistakenly informs Prospective Employer that Applicant had been convicted of two felonies. Although mistaken about Applicant's history, Third Party honestly believes the information conveyed is true. Applicant sues Third Party on a defamation theory. Third Party defends on the grounds that Applicant consented to the release of the negative information.

As this Article discusses, there is a good chance that the defendants will prevail in each of these hypothetical cases.⁷ Employment reference cases have received significant attention from legal scholars over the past two decades.⁸ State legislatures have also focused attention on the

7. Each hypothetical is based (at least loosely) on real cases discussed in this Article. See *infra* notes 145–52, 169–77, 187–92 and accompanying text.

8. E.g., Deborah A. Ballam, *Employment References—Speak No Evil, Hear No Evil: A Proposal for Meaningful Reform*, 39 AM. BUS. L.J. 445 (2002); Frank J. Cavico, *Defamation in the Private Sector: The Libelous and Slandorous Employer*, 24 U. DAYTON L. REV. 405 (1999); Cooper, *supra* note 2; Finkin & Dau-Schmidt, *supra* note 3; Terry Ann Halbert & Lewis Maltby, *Reference Check Gridlock: A Proposal for Escape*, 2 EMP. RTS. & EMP. POL'Y J. 395 (1998); Ramona L. Paetzold & Steven L. Willborn, *Employer (Irr)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (1992); Connie Swemba, "To Tell the Truth, the Whole Truth, and Nothing but the Truth:" *Employment References and Tort Liability*, 33 U. TOL. L. REV. 847 (2002); Verkerke, *supra* note 1; John Ashby, Note, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117 (2004).

issue during that time.⁹ Despite the attention devoted to the general subject of employment references, one issue that has received relatively little discussion is the issue of consent and the extent to which consent is and should be a defense in defamation cases.

Indeed, it appears that few people have noticed (or at least addressed in any detail) one important fact: The rules regarding the defense of consent in the defamation context are radically different than the normal rules regarding consent in other intentional tort cases. And, at least as they are often applied in practice, these rules tend to benefit defendants and dramatically expand the boundaries of the consent defense. As a result, by relying upon consent agreements that release employers from liability for providing negative references, employers are frequently able to avoid liability in the employment reference context when application of the traditional rules regarding the consent defense might not bar recovery. This Article focuses on this phenomenon.

Part I provides background on the employment reference scenario and employers' use of waiver agreements to reduce their risk of liability. Part II discusses the consent defense in intentional tort cases and how the *Restatement (Second) of Torts* defines the consent defense differently in defamation cases. Part III examines how courts—often relying upon the *Restatement (Second) of Torts*—have dealt specifically with the consent defense in employment reference cases. Part IV examines the historical origins of the special consent rules and argues that the *Restatement* approach to the consent defense is contrary to the historical treatment of the defense and the justifications underlying it. In addition, it argues that traditional notions of consent have little application in the employment reference context given the lack of any meaningful choice on an employee's part as to whether to consent to the release of information. Accordingly, Part V offers a restatement of the rules regarding consent in the defamation and employment reference contexts.

I. THE EMPLOYER REFERENCE PROBLEM

The employer reference problem is simple enough to understand. When hiring new employees, prospective employers hope to obtain references from former employers in order to hire quality employees and avoid the liability that may ensue from hiring an incompetent or potentially dangerous employee.¹⁰ However, former employers are

9. See Cooper, *supra* note 2, at 11 (noting the rise of state statutes addressing this issue in the 1990s and that by 2000, thirty-six states had such statutes in place).

10. See Katherine A. Peebles, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, 53 WM. & MARY L. REV. 1397, 1399–400 (2012) (noting employers' potential liability for failing to conduct adequate background checks when hiring individuals with dangerous proclivities).

reluctant to provide meaningful references for fear of liability, most notably defamation claims.¹¹ As a result, many employers have adopted a policy of confirming only the fact that the applicant once worked for the employer and the dates of employment.¹² This Part examines the legal rules governing employment references, including the role of consent and release agreements.

A. *The Reference Gridlock*

The number of lawsuits stemming from negative references is relatively small.¹³ In addition, plaintiffs have had only limited success in bringing such suits.¹⁴ Despite this, employers are highly reluctant to provide more than limited information in response to a request for an employment reference.¹⁵ In fact, a 2004 survey of human resources professionals found that 53% of respondents refused to provide *any* information regarding a former employee.¹⁶

Prospective employers are unable to make fully informed hiring decisions when they cannot obtain meaningful information about potential hires.¹⁷ The unwillingness of responding employers to provide detailed information about an applicant's work history results in something of a mixed bag for applicants. Good employees may potentially suffer because responding employers do not provide the kind of favorable opinions and detailed information about an employee's work performance that might make a difference in the hiring process.¹⁸ Incompetent employees are shielded from the types of disclosures that might dissuade a prospective employer from hiring the employee.¹⁹ Ultimately, society as a whole suffers as employers frequently make inefficient decisions because they receive incomplete information.²⁰

11. *See supra* notes 1–3 and accompanying text.

12. *See supra* note 3 and accompanying text.

13. *See* Finkin & Dau-Schmidt, *supra* note 3 (stating that “the incidence of litigation remains a minuscule two percent or less”); *see also, e.g.*, Swemba, *supra* note 8, at 859–60 (noting that as of 2001, there were only eight reported defamation cases in Ohio stemming from employment references).

14. *See* Paetzold & Willborn, *supra* note 8, at 136–37 (summarizing employment-related defamation case law and concluding that the number of successful defamation claims based on negative references is relatively small and has likely not increased over time).

15. Cooper, *supra* note 2, at 3.

16. Finkin & Dau-Schmidt, *supra* note 3, at 390.

17. *See* Halbert & Maltby, *supra* note 8, at 395.

18. *See* Swemba, *supra* note 8, at 847 (suggesting that employees who are able to produce references are at an advantage over those who cannot).

19. *See, e.g.*, Finkin & Dau-Schmidt, *supra* note 3, at 388–89 (“[I]t has been reported that forty percent of applicant resumes have discrepancies in educational or employment history . . .”).

20. *See* Verkerke, *supra* note 1, at 133 (noting the problem of mismatching between employers and employees that occurs when employers must make employment decisions based

In an effort to break the information gridlock surrounding employer references, the clear majority of states have enacted reference immunity statutes.²¹ Although the details vary, the statutes provide employers with at least qualified or conditional immunity from liability when they respond to a request for an employment reference.²² Typically, this immunity may be lost upon a showing that the employer knowingly or recklessly provided false information to the requesting employer or otherwise acted in bad faith.²³

The primary legal concern for responding employers in a reference situation is a defamation lawsuit.²⁴ A false and defamatory reference—even one framed in the form of an opinion²⁵—may potentially subject a responding employer to liability.²⁶ By providing responding employers with qualified or conditional immunity, the statutes seek to alleviate this concern.²⁷ However, employers have long enjoyed a qualified privilege at common law when providing an employment reference. This privilege is based on the societal interest in the free flow of information in the reference context.²⁸ Thus, in most states, the reference immunity statutes simply track common law rules and provide little if any additional protection for responding employers.²⁹

Moreover, the existence of a conditional privilege often hinges on the fact-specific question of whether the responding employer knew the information provided was false, acted in reckless disregard of the truth or falsity of the reference, or otherwise acted in bad faith.³⁰ As a result,

on inadequate information). Compare Swemba, *supra* note 8, at 850 (“[E]mployment references provide employers with necessary information so they can effectively hire the right person for the job.”), with Halbert & Maltby, *supra* note 8, at 403 (discussing the societal and economic harm flowing from the reference gridlock, in which employees cannot show how qualified they are for positions and employers cannot efficiently identify suitable applicants for positions).

21. See *supra* note 9.

22. Cooper, *supra* note 2, at 15–16.

23. *Id.* at 16. Some states employ a “clear and convincing” standard rather than the traditional preponderance of the evidence standard when it comes to the loss of the privilege. See FLA. STAT. ANN. § 768.095 (West, Westlaw through 2013 Reg. Sess. of the 23rd Legis.).

24. See Verkerke, *supra* note 1, at 135.

25. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 1, 21 (1990) (holding that there is no constitutional privilege for statements of opinion in defamation actions).

26. See RESTATEMENT (SECOND) OF TORTS § 558 (1977) (listing elements of a defamation claim).

27. See Cooper, *supra* note 2, at 15–16.

28. Compare *Calero v. Del Chem. Corp.*, 228 N.W.2d 737, 744 (Wis. 1975) (recognizing the societal utility in encouraging the free flow of information between an applicant’s former and prospective employers), with Cooper, *supra* note 2, at 9 (noting that employers enjoy a conditional or qualified privilege under common law).

29. Verkerke, *supra* note 1, at 132; see, e.g., *Kevorkian v. Glass*, 913 A.2d 1043, 1048 (R.I. 2007).

30. See *supra* note 23 and accompanying text.

some cases are not easily resolvable on pretrial motions.³¹ Even when employers prevail on privilege questions, they have still been forced to incur the costs of defending the lawsuit while receiving no benefit from providing the reference in the first place.³² Seeing only risk and little benefit in providing detailed information, most employers have retained their policy of providing only limited information when responding to a reference request.³³ Indeed, despite the proliferation of employment reference statutes in recent years, the evidence suggests that employers are now even less likely than before to provide detailed information in response to a reference request.³⁴

B. *The Use of Waiver Agreements in Reference Cases*

Perhaps the safest route for an employer to avoid liability for providing a negative employment reference is to obtain the employee's consent in advance. Although some courts have held that an employee's consent provides a responding employer with only a qualified or conditional privilege,³⁵ consent is typically recognized as an absolute privilege in a defamation action.³⁶ Therefore, obtaining an employee's prior consent to the release of information may help an employer avoid the problems associated with trying to preserve a conditional privilege.

An employee can enter into a valid consent agreement with either the prospective employer or the responding employer. If the employee enters into an agreement with the prospective employer, the employee

31. Cooper, *supra* note 2, at 9–10 (noting that abuse of the immunity privilege is a question of fact that generally requires jury resolution).

32. Ballam, *supra* note 8, at 447 (“Rather than fearing losing, employers fear the legal expenses associated even with lawsuits they successfully defend.”); Finkin & Dau-Schmidt, *supra* note 3, at 402 (noting that most appellate decisions concerning references are decided in favor of employers on summary judgment and “[c]onsequently, the costs that cause employers to shrink from providing references are the . . . the costs of appearing in court at all: not the prospect of failing to persuade in a motion for summary judgment, but the cost of making the motion”).

33. See Kenneth Glenn Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 16 (2001) (arguing that the reference gridlock is driven by the fact that responding employers bear the risks associated with references but receive none of the benefits).

34. Finkin & Dau-Schmidt, *supra* note 3, at 390.

35. *Miron v. Univ. of New Haven Police Dept.*, 931 A.2d 847, 854 (Conn. 2007) (recognizing a qualified or conditional privilege for employment references solicited with the employee's consent); *Dellorusso v. Monteiro*, 714 N.E.2d 362, 365 (Mass. App. Ct. 1999) (stating that “limit of the privilege is a good faith belief by the person who published the defamatory material that it was true”); see, e.g., *McClesky v. Vericon Res., Inc.*, 589 S.E.2d 854, 856 (Ga. Ct. App. 2003) (concluding that the employee's agreement to release the employer from any liability resulting from a background check was binding absent evidence of gross negligence or willful misconduct).

36. RESTATEMENT (SECOND) OF TORTS § 583 (1977).

can agree to release a responding employer from liability for its provision of a reference.³⁷ As is the case with the consent defense outside the defamation context, some courts have held that an agreement between the employee and a prospective employer effectively shields the responding employer even if the responding employer is not aware of the agreement.³⁸

As a result of these advantages, those who advise employers are increasingly advising their clients to obtain a written release from a job applicant prior to conducting an investigation into the employee's background.³⁹ It is now common for prospective employers to require applicants to sign forms authorizing the release of job information by former employers and releasing former employers from liability.⁴⁰ Indeed, one recent employment practitioner newsletter speculated that "it won't be surprising if many employers make written consent to the collection of expanded employment reference information a condition of the application process."⁴¹ Thus, consent agreements are likely to take on increased importance as employers seek to break the reference gridlock and obtain relevant information concerning job applicants.

Some employers seek to take advantage of the consent defense simply by having applicants indicate on an employment application that

37. *E.g.*, *Smith v. Holley*, 827 S.W.2d 433, 436 (Tex. 1992).

38. *E.g.*, *Woodfield v. Providence Hosp.*, 779 A.2d 933, 937 (D.C. 2001). This is also the general rule outside the defamation context. *See* RESTATEMENT (SECOND) OF TORTS § 892 cmt. b, illus. 1 (1979) (concluding that *A*'s statement to *B* that any of *B*'s neighbors are welcome to use *A*'s pool gives *C*, a neighbor, consent to use the pool even though *C* was not aware of *A*'s statement).

39. *E.g.*, Boyd A. Byers, *Keep Imposters Out of Your Workplace*, 18 KAN. EMP. L. LETTER, no. 7, Oct. 2011 ("Make applicants sign a waiver that authorizes educational institutions and former employers to release information about them and allows you to verify the information."); Jillian Dearing, *Employment References Release*, ALLBUSINESS, <http://www.allbusiness.com/human-resources/workplace-health-safety/3876513-1.html> (last visited Apr. 7, 2014) (advising employers to obtain in advance release forms from employees authoring employers to disclose information); Halbert & Maltby, *supra* note 8, at 414 (noting that it is "common for employers (or their agents) to have prospective employees sign releases"); Susan Hartmus Hiser, *Growing Your Business: The Dos and Don'ts of Hiring, Part 3*, 22 MICH. EMP. L. LETTER, no. 10, Dec. 2011 (recommending that employers have job applicants sign a release during the application process); Matthew L. Mac Kelly, *Employer Liability for Employment References*, 81 WIS. LAW., Apr. 2008, at 8, 54–55 (advising employers to obtain a release prior to providing a reference); Linnea B. McCord, *Defamation vs. Negligent Referral*, 2 GRAZIADIO BUS. REV., no. 2, 1999, available at <http://gbr.pepperdine.edu/2010/08/defamation-vs-negligent-referral> ("Whenever possible, obtain a written release from the former employee that authorizes providing references before doing so.").

40. *Cf.* DAVID J. WALSH, *EMPLOYMENT LAW FOR HUMAN RESOURCE PRACTICE* 153 (2013) (stating that most prospective employers ask applicants to sign releases of information on their job applications).

41. Mark M. Schorr, *'Employer Reference Immunity' Bill Advances Unanimously*, 17 NEB. EMP. L. LETTER, no. 6, Apr. 2012, at 1.

it is permissible for the prospective employer to contact current or former employers for a reference.⁴² Others have applicants sign a form authorizing past employers and others to release information related to the employee's job performance and releasing these parties from all forms of liability if they do.⁴³ Some consent agreements are more specific still, limiting the scope of consent to where the employer provides information in good faith and without malice based on a reasonable belief that the information contained is true.⁴⁴

Given the wealth of information that is potentially available concerning a prospective hire and the difficulty employers experience in obtaining references from other employers, some employers hire third parties to conduct background checks into the histories of their applicants.⁴⁵ The actions of these third-party investigators are subject to a number of legal restrictions, including potential liability for defamation.⁴⁶ As a result, some consent agreements entered into by prospective employees are written broadly enough to cover the actions of these third-party investigators, thereby raising a question as to whether these parties may claim an absolute privilege in a subsequent defamation claim.⁴⁷

II. THE ROLE OF CONSENT IN DEFAMATION CASES

The basic contours of the consent defense in tort law are well established. However, tort law has devoted significantly less attention to the concept of consent than has contract law, where the intention of the parties is fundamental.⁴⁸ As a result, there are fewer rules dealing with

42. *E.g.*, *Miron v. Univ. of New Haven Police Dept.*, 931 A.2d 847, 849 n.3 (Conn. 2007); *Gengler v. Phelps*, 589 P.2d 1056, 1057 (N.M. Ct. App. 1978).

43. *E.g.*, *Cox v. Nasche*, 70 F.3d 1030, 1031 (9th Cir. 1995) ("I Release any individual, including records custodians, from all liability for damages that may result to me on account of compliance or any attempts to comply with this authorization." (quoting Federal Aviation Administration release)).

44. *E.g.*, *Nigro v. St. Joseph Med. Ctr.*, 371 S.W.3d 808, 813 (Mo. Ct. App. 2012) (involving a clause in a consent agreement that limited release from liability to disclosures provided in good faith).

45. Verkerke, *supra* note 1, at 130.

46. *See Cruz v. Behnke*, No. 3:04CV1119, 2006 WL 860104, at *1-2 (D. Conn. Mar. 31, 2006) (involving a defamation claim stemming from a third party's background check). The Fair Credit Reporting Act governs the use of third parties to conduct background checks and requires, inter alia, that an employee or applicant gives consent to a credit check before the background check is conducted. 15 U.S.C. § 1681m(d)(1)(D) (2012). However, civil actions are not available for failure to comply with this requirement. *Id.* § 1681m(h)(8)(A).

47. *But see Cruz*, 2006 WL 860104, at *2 n.1 (noting that the existence of a release authorizing a background check and releasing defendants from resulting liability did not absolve defendants from defamation from disseminating inaccurate information).

48. Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17, 36 (2010). *See generally* Kenneth W. Simons,

the concept of consent in tort law than in contract law.⁴⁹ Moreover, the rules that do exist are considerably ambiguous. The following section explores the general rules that apply to the defense of consent and how those rules conflict with the special rules associated with the defense of consent in defamation cases.

A. *The Defense of Consent Generally*

Consent is ordinarily treated as an absolute defense in intentional tort cases.⁵⁰ Consent may be actual or apparent in nature; either can be effective to bar liability. Actual consent exists when an individual is willing for the conduct to occur and manifests this willingness.⁵¹ Apparent consent exists when the defendant reasonably understands the plaintiff's words or actions to convey a willingness to permit the conduct in question.⁵² Therefore, apparent consent may exist even where the defendant is mistaken about the plaintiff's willingness for conduct to occur, provided the defendant is justified in the belief.⁵³ The question of whether a plaintiff consented to the defendant's conduct is typically reserved for a jury.⁵⁴ For consent to be effective, an individual must consent in advance to the particular conduct that occurs or to conduct that is substantially the same.⁵⁵ If the defendant exceeds the scope of consent, consent is no longer effective for the exceeding conduct.⁵⁶

1. Consent to the Particular Conduct or Substantially the Same Conduct

For consent to be effective, the plaintiff must consent in advance to the particular wrongful conduct that occurs or to substantially the same conduct. Minor differences between the conduct consented to and that which actually occurs do not prevent the plaintiff's consent from being

Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U. L. REV. 213 (1987) (noting that the concept of consent in tort law is ill-defined and proposing a new theory of full preference for consent and assumption of risk in tort law).

49. Bell, *supra* note 48, at 36.

50. *E.g.*, Edgcomb v. Lower Valley Power and Light, Inc., 922 P.2d 850, 859 (Wyo. 1996) (stating that "consent of the possessor . . . is an absolute defense to trespass" (quoting Salisbury Livestock Co. v. Colo. Cent. Credit Union, 793 P.2d 470, 475 (Wyo. 1990)); *see also*, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 13 cmt. d (1965) (stating that a plaintiff's consent to a harmful or offensive contact will defeat a battery claim).

51. RESTATEMENT (SECOND) OF TORTS § 892(1) (1979).

52. *Id.* § 892(2).

53. *Id.* § 892 cmt. c.

54. Lewis v. LeGrow, 670 N.W.2d 675, 688 (Mich. Ct. App. 2003).

55. RESTATEMENT (SECOND) OF TORTS § 892A(2)(b).

56. *Id.* § 892(4).

effective.⁵⁷ However, a party's consent to a fistfight is not consent to being stabbed in the fight.⁵⁸ A party's consent to permit a neighbor to "dump a few stones" on the party's land is not consent to cover the land with large boulders.⁵⁹

The requirement that an individual consent to the particular conduct of the defendant helps ensure that the plaintiff appreciated the risks involved. Like the defense of assumption of the risk in negligence cases, appreciation of the risks involved is central to the concept of consent.⁶⁰ For example, the *Restatement (Second) of Torts* implies that an individual lacks the capacity to consent when the individual is incapable of "appreciating the nature, extent and probable consequences of the conduct consented to."⁶¹ As one court explained, "The doctrine of 'volenti non fit injuria' presupposes a knowledge of the facts so that the actor has a choice."⁶² Thus, the judicial choice to recognize consent as an absolute defense has been defended as an efficient means of promoting autonomy.⁶³

An individual need not have perfect foresight for consent to be effective; absolute certainty with respect to the defendant's future actions is not required.⁶⁴ Similarly, the fact that the consequences of the defendant's actions turned out to be more severe than the plaintiff predicted does not prevent consent from being effective.⁶⁵ However, the

57. *Id.* (stating that consent is effective when the defendant's wrongful conduct is substantially the same as the conduct to which the plaintiff consented).

58. *Teolis v. Moscatelli*, 119 A. 161, 162 (R.I. 1923); RESTATEMENT (SECOND) OF TORTS § 892A cmt. c.

59. RESTATEMENT (SECOND) OF TORTS § 892A cmt. c., illus. 1.

60. *See Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 13 (Wash. 1992) (en banc) (explaining that "[i]mplied primary assumption of risk arises where a plaintiff has impliedly consented . . . to relieve defendant of a duty to plaintiff regarding specific known and appreciated risks").

61. *See* RESTATEMENT (SECOND) OF TORTS § 892A cmt. b; *see also Cardwell v. Bechtol*, 724 S.W.2d 739, 746 (Tenn. 1987) (applying the Restatement standard).

62. *Brown v. Lundell*, 344 S.W.2d 863, 870 (Tex. 1961).

63. *See Vera Bergelson, The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 169 (2007) ("The ability to consent is recognized in moral philosophy as a central manifestation of personhood and individual autonomy."); Mark A. Geistfeld, *The Value of Consumer Choice in Products Liability*, 74 BROOK. L. REV. 781, 781 (2009) ("The role of consent within tort law derives from the value of individual autonomy or self-determination."); Gary T. Scwhartz, *Reality in Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 401 n.120 (1994) (stating that "the goal of informed consent [in the doctor-patient scenario] is not improved patient safety but rather improved patient autonomy").

64. *Pan E. Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1129 (5th Cir. 1988).

65. The *Restatement (Second) of Torts* provides as an example the situation in which *A* consents to *B* punching *A* in the chest, but unbeknownst to either party, *A* has a heart condition and dies as a result of the punch. *A*'s consent to *B*'s particular conduct would still be effective. RESTATEMENT (SECOND) OF TORTS § 892A cmt. e, illus. 5.

plaintiff still must recognize the otherwise wrongful nature of the defendant's conduct so that the plaintiff can appreciate the risks involved. As the *Restatement (Second) of Torts* explains, consent is "confined to conduct that the plaintiff knows the other is engaging in with the intent of invading the plaintiff's interests."⁶⁶ Thus, consent to eating candy offered by the defendant is not consent to eating poisoned candy,⁶⁷ not simply because the defendant's conduct was of a substantially different nature, but because the plaintiff lacked the knowledge regarding the candy, which was necessary to allow the plaintiff to make a meaningful choice with respect to the risks involved.

This focus on the plaintiff's appreciation of the risks involved in consent also helps explain the exceptions to the general rule of consent. An individual's consent is ineffective when the consent was induced as a result of a substantial mistake on the individual's part concerning the nature of the invasion or the extent of its harm, and the defendant knew of the mistake or induced it through a misrepresentation.⁶⁸ In these situations, the plaintiff's choice to submit to the defendant's conduct is based on an inaccurate assessment of the risks involved. It would be unfair to the defendant in this scenario to deny him the defense of consent if the defendant were unaware of the plaintiff's mistake. But if the defendant should recognize that the plaintiff would not have consented but for the mistake, the plaintiff's failure to appreciate the true risks involved should vitiate the consent.⁶⁹

2. Exceeding the Scope of Consent

Closely related to the idea that an individual must consent to the particular conduct at issue is the question of whether the defendant has exceeded the scope of consent. Sometimes the boundaries of the defendant's conduct to which the plaintiff has consented may not be clear. This lack of clarity is often present when the plaintiff's consent is apparent in nature and arises from silence or inaction.⁷⁰

The task of determining the scope of consent may be easier where the plaintiff has actually expressed willingness to the defendant for particular conduct to occur, especially where the parties have entered into a formal agreement regarding the plaintiff's consent that releases

66. *Id.* § 892A cmt. a.

67. *Id.* § 53 cmt. a, illus. 1.

68. *Id.* § 892B(2).

69. *See id.* § 892B(2) cmt. f (explaining that for a mistake to render consent ineffective, the mistake must be substantial, meaning that it is "of such a character that the actor is not justified in assuming that the other would have given his consent if he had had knowledge of it").

70. *See generally id.* § 892 cmt. c (noting that apparent consent may arise from silence or inaction).

the defendant from liability.⁷¹ The *Restatement (Second) of Contracts* actually adopts the rule that a contractual term releasing a party from tort liability for intentional or reckless conduct is unenforceable on public policy grounds.⁷² A handful of courts have adopted this approach and refused to enforce such provisions.⁷³ However, under the *Restatement (Second) of Torts*, an agreement releasing a party from liability for intentional wrongdoing is enforceable, subject to a number of limitations.⁷⁴ An individual may expressly assume the risk of harm flowing from another's conduct through consent in a written release or waiver from liability.⁷⁵ However, the *Restatement (Second) of Torts* makes clear that broadly worded agreements—particularly those drafted by the defendant—are unlikely to be effective to relieve the defendant of liability. The terms of such an agreement “must . . . [be] brought home to [the plaintiff] and understood by him, before it can be found that he has accepted them.”⁷⁶ This means that “general clauses exempting the defendant from all liability for loss or damage will not be construed to include loss or damage resulting from his intentional . . . misconduct, unless the circumstances clearly indicate that such was the plaintiff’s understanding and intention.”⁷⁷

As is the case in contract law, tort law views consent from an objective viewpoint, with the scope of consent determined by the

71. Often, when a plaintiff consents to otherwise wrongful conduct, there is no explicit agreement that the plaintiff is also releasing the defendant from any ensuing liability. The plaintiff’s consent in such a case would be still effective to prevent liability in accordance with the rules discussed throughout this Article. However, the terms “waiver” and “release” necessarily imply an agreement that the plaintiff consents to the defendant’s conduct and releases the defendant from any ensuing liability. See Simons, *supra* note 48, at 224–25 (discussing this idea).

72. RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981).

73. See Edward R. Horkan, Note, *Contracting Around the Law of Defamation and Employment References*, 79 VA. L. REV. 517, 533–34 (1993) (discussing *Elmer v. Coplin*, 485 So. 2d 171, 177 (La. Ct. App. 1986) and *Kellums v. Fright Sales Ctrs., Inc.*, 667 So. 2d 816, 817 (Fla. Dist. Ct. App. 1985)).

74. See, e.g., RESTATEMENT (SECOND) OF TORTS § 496B (1965) (discussing the effect and limits of express assumption of risk).

75. See *Day v. Snowmass Stables, Inc.*, 810 F. Supp. 289, 294 (D. Colo. 1993) (treating an exculpatory agreement as a contract); *Phelps v. Firebird Raceway, Inc.*, 111 P.3d 1003, 1013 (Ariz. 2005) (en banc) (referring to a release agreement as a form of contractual assumption of risk); see also RESTATEMENT (SECOND) OF TORTS § 496B cmt. b (referencing section dealing with consent and providing that “the parties may agree that the defendant shall not be liable even for conduct intended to invade the plaintiff’s interests”); Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to “Nerf®” Tiddlywinks*, 53 OHIO ST. L.J. 683, 696–97 (1992) (discussing the validity of exculpatory agreements in youth sports dealing with intentional wrongs).

76. RESTATEMENT (SECOND) OF TORTS § 496B cmt. c.

77. *Id.* § 496B cmt. d.

circumstances.⁷⁸ Ambiguity in the case of a written agreement releasing a defendant from liability is construed against the drafter.⁷⁹ Where a release amounts to a contract, general rules of contract interpretation should apply. Thus, for example, an implied duty of good faith and fair dealing exists in a release as it does in all contracts.⁸⁰ At a minimum, good faith requires honesty in the performance of the contract.⁸¹ But “bad faith” may include other forms of conduct, such as “evasion of the spirit of the bargain,” “willful rendering of imperfect performance, [and] abuse of a power to specify terms.”⁸²

Ambiguity as to the scope of consent is more likely to exist where the plaintiff’s consent is apparent in nature. Without an express agreement between the parties or at least the plaintiff’s expressed willingness to allow particular conduct to occur, courts and juries may be forced to sift through the parties’ conflicting subjective understandings and desires to arrive at a conclusion as to what the defendant reasonably could have believed.⁸³ Therefore, courts tend to be more circumspect in their willingness to find that a plaintiff consented to particular conduct when the consent is apparent in nature as opposed to express.⁸⁴

B. *The Defense of Consent in Defamation Cases*

In addition to the general sections on the role of consent in tort cases, § 583 of the *Restatement (Second) of Torts* is devoted specifically to the role of consent in defamation cases.⁸⁵ Courts have frequently relied upon § 583 when deciding issues of consent in defamation cases.⁸⁶ A comment to § 583 provides that the section is a specific application of the general rules regarding consent discussed above (in reference to § 892 of the *Restatement (Second) of Torts*).⁸⁷ This is not true. On their

78. See Bell, *supra* note 48, at 24; see also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 304 (1986) (discussing consent in terms of an objective manifestation of a party’s intent to alienate rights).

79. See RESTATEMENT (SECOND) OF TORTS § 496B cmt. d.

80. See SEC v. Warren, 534 F.3d 1368, 1369–70 (11th Cir. 2008) (recognizing the existence of a duty in a consent agreement); *Braidfoot v. William Carey Coll.*, 793 So. 2d 642, 651 (Miss. Ct. App. 2001) (considering the plaintiff’s claim of breach of duty of good faith and fair dealing in performance of a settlement agreement); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

81. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a, d.

82. *Id.*

83. See Simons, *supra* note 48, at 252 (discussing the subjectivity involved in determining whether apparent consent existed).

84. See Bell, *supra* note 48, at 19.

85. RESTATEMENT (SECOND) OF TORTS § 583 (1977).

86. See, e.g., *infra* notes 128–33, 152–64 and accompanying text.

87. RESTATEMENT (SECOND) OF TORTS § 583 cmt. b.

face, the comments to § 583 articulate an entirely different standard for determining whether an individual has consented to a defamatory publication.

1. Section 583's Departure from the General Rules of Consent
 - a. Application of the General Consent Standard to Defamation Cases

Section 583 of the *Restatement (Second) of Torts* alters the more general rules regarding consent by eliminating the requirement that a plaintiff consent to the particular conduct or to substantially the same conduct. In addition, the section alters the rules regarding the scope of consent. If one were to apply the general rules contained in the *Restatement (Second) of Torts* for determining whether express consent exists in the case of a defamatory statement, the analogue would be something like the following illustrations:

Illustration 1: *A*, knowing that his personnel file from the time he worked at *B* Company contains notations of unexcused absences from work, tells *B* Company that it may disclose information related to his job performance while at *B* Company to *C*, a prospective employer. *B* informs *C* of the instances of *A*'s unexcused absences. *A* has consented to this conduct.

A expressly consented to the particular conduct of *B*'s publication of facts related to *A*'s attendance. Knowing the defamatory information contained in the personnel file, *A* appreciated the risk that *B* would disclose this information. *B*, by disclosing only what *A* consented to, did not exceed the scope of the consent given. Therefore, *A*'s consent would be effective and would render *B*'s publication absolutely privileged. The belt-and-suspenders lawyer representing *B* would probably insist that the consent be in writing and that it expressly release *B* from all forms of liability, including defamation. But *A*'s statement, standing alone, should probably suffice to shield *B* from liability.

Illustration 2: The same facts as in Illustration 1, except that *B* maliciously and falsely informs *C* that *A* had stolen company property while employed at *A* Company. *A* has not consented to this conduct.

The conduct that occurred in Illustration 2—lying about *A*'s job performance—was substantially different than that to which *A* consented: *A*'s consent to the publication of one type of defamatory statement is not consent to the publication of a completely different type

of defamatory statement.⁸⁸ *A* consented to *B*'s responding in good faith to a reference request. Any dishonest conduct on *B*'s part would be substantially different in nature. In this case, lying about *A*'s job performance would be the equivalent of *B* stabbing *A* after *A* had consented to a fistfight, or *B* covering *A*'s property with boulders after *A* had consented to *B*'s dumping a few stones on *A*'s property.⁸⁹ Nor would the doctrine of apparent consent protect *B*. *B* might be justified in believing that *A* agreed to *B*'s disclosure of truthful but defamatory information about his job performance, but *B* could not reasonably believe that *A* agreed to allow *B* to deliberately lie about his job performance. While *A*'s silence as to the exact nature of permissible disclosure might be understood as manifesting consent to a range of defamatory publications, it cannot reasonably be understood as manifesting consent to a false and defamatory publication. Therefore, *B*'s conduct would not be the particular conduct or substantially similar conduct to which *A* may have apparently consented.⁹⁰

b. Section 583's "Reason to Know" Standard

As it turns out, if the special consent rules for defamation are applied as they appear in § 583 of the *Restatement (Second) of Torts*, the defendant in Illustration 2 would actually prevail, despite the general rules that typically apply in other intentional tort cases. Comment d to § 583 contains the following language:

It is not necessary that the other know that the matter to the publication of which he consents is defamatory in character. It is enough that he knows the exact language of the publication or that he has reason to know that it may be defamatory. In such a case, by consent to its publication, he takes the risk that it may be defamatory.⁹¹

On its face, this language changes the general consent standard in several meaningful ways.

First, comment d's "reason to know" standard does not track the rules for either actual or apparent consent as described in the general

88. See *supra* note 56 and accompanying text.

89. See *supra* notes 58–59 and accompanying text.

90. Alternatively, one could argue that *A*'s consent is ineffective because it was induced through a substantial mistake of which *B* was aware: *A* mistakenly assumed *B* would act in good faith in responding to a reference request and *B* almost certainly knew that this was *A*'s assumption. Regardless of how one reaches the conclusion, the conclusion must be that *A*'s consent is ineffective in this illustration.

91. RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (footnote omitted). The same language originally appeared in the first *Restatement of Torts* and was repeated verbatim in the *Restatement (Second) of Torts*. RESTATEMENT OF TORTS § 583 cmt. d (1938).

sections on consent.⁹² Instead, it creates an entirely different standard based on whether the plaintiff had “reason to know” that the defendant “may” say something defamatory about the plaintiff. Comment d’s observation that the plaintiff’s consent to a defamatory publication is effective where the plaintiff “knows the exact language of the publication” roughly tracks the general standard for express consent. In this situation, the plaintiff expresses willingness for the defendant to use particular words. Therefore, he has consented to the particular conduct that occurs. This scenario describes actual consent as that term is usually defined.⁹³ As one court stated, “Actual consent requires actual knowledge of the risk assumed by the injured party.”⁹⁴

But that is clearly something different than having “reason to know” that a defendant “may” make *some* type of defamatory publication. Section 583’s “reason to know” standard sounds suspiciously like an objective reasonableness standard. In contrast, consent and assumption of the risk decisions in other contexts typically require that a plaintiff subjectively comprehend the specific risk involved or that the risk be obvious.⁹⁵ Occasionally, a court may say that the defenses of consent or assumption of the risk apply when a plaintiff knew or *should have known* of the particular risk.⁹⁶ But even this “should have known” language is narrower than § 583’s “reason to know” standard.⁹⁷ The focus in most actual consent cases is on whether the plaintiff consented to the particular conduct in question and appreciated the risks of that

92. See *supra* notes 50–84 and accompanying text.

93. See *supra* note 51 and accompanying text.

94. McGraw v. R & R Invs., Ltd., 877 So. 2d 886, 891 (Fla. Dist. Ct. App. 2004); see also John H. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 31–32 (1961) (stating that consent exists when “the plaintiff was willing that a certain event occur” and believes that an invasion of an otherwise protected interest “is substantially certain to follow the event”).

95. See *Turcotte v. Fell*, 502 N.E.2d 964, 968 (N.Y. 1986); see also, e.g., *Thomas v. Panco Mgmt., L.L.C.*, 31 A.3d 583, 591 (Md. 2011); *Parness v. Econ. Lab., Inc.*, 170 N.W.2d 554, 557 (Minn. 1969); *Wever v. Hick*, 228 N.E.2d 315, 318 (Ohio 1967).

96. *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318, 320 (Fla. Dist. Ct. App. 1984).

97. To the extent courts reference a “reason to know” standard outside the defamation context, it is typically to point out that a plaintiff’s consent is not effective when the plaintiff knew what the defendant’s conduct would be, but had no reason to appreciate a specific risk posed by the conduct. See, e.g., *Brown v. Lundell*, 344 S.W.2d 863, 869 (Tex. 1961) (stating that the *volenti non fit injuria*, or consent, doctrine did not apply since there was no showing that the plaintiff “had reason to know or to be aware” that the defendant’s conduct would probably cause a particular result); *Simpson v. May*, 486 P.2d 336, 338 (Wash. Ct. App. 1971) (stating the consent doctrine “does not apply in cases where the injury to plaintiff results from an *extraordinary* risk of which plaintiff could not have knowledge or appreciation” (emphasis added)). This appears to simply be another way of saying that for the consent defense to apply, the “plaintiff must have voluntarily exposed himself to a known and appreciated danger.” *Regan v. City of Seattle*, 458 P.2d 12, 16 (Wash. 1969).

conduct.⁹⁸ Comment d’s “reason to know” standard also does not correspond with the general conception of apparent consent. In general, the concept of apparent consent focuses on what the *defendant* reasonably believes, not what the *plaintiff* might anticipate.⁹⁹

In addition, comment d’s observation that consent exists where the plaintiff has reason to know that the publication may be defamatory does not include the qualifier that the plaintiff must be able to foresee that the publication would be defamatory in any specific manner. Read literally, the defendant’s defamatory publication would be absolutely privileged if the plaintiff had reason to believe that the defendant would say *something* defamatory, even if the particular nature of the defamatory statement was entirely unforeseeable. This literal reading contrasts the typical requirement—outlined elsewhere in the *Restatement (Second) of Torts*—that “the plaintiff was willing that a *certain* event occur.”¹⁰⁰

Dean William Prosser likens a plaintiff’s consent in the situation in which the plaintiff has reason to know that the defendant may convey *something* defamatory (but is unsure about the exact nature of the statement) to the defense of assumption of the risk in the negligence context.¹⁰¹ But only in the most general sense can Dean Prosser’s observation be accepted as true.¹⁰² First, the *Restatement (Second) of Torts* makes clear that the defense of assumption of the risk involves a subjective standard.¹⁰³ It is not enough that a reasonable person would have known the risk involved; the plaintiff must have subjectively known of the risk.¹⁰⁴ In contrast, § 583 employs something like an objective standard, focusing on whether an individual had “reason to know” that a publication might be defamatory. In addition, for the assumption of the risk defense to apply, the plaintiff must fully understand the risks of harm present in the defendant’s conduct.¹⁰⁵ The plaintiff must appreciate “the nature, character, and extent” of the danger.¹⁰⁶ This necessarily means that the plaintiff appreciates the *specific* risks inherent in the activity.¹⁰⁷ Thus, the plaintiff who walks in

98. *E.g.*, *McGraw*, 877 So. 2d at 891 (“Actual consent requires actual knowledge of the risk assumed by the injured party.”).

99. *See* RESTATEMENT (SECOND) OF TORTS § 892(2) (1979).

100. *Mansfield*, *supra* note 94, at 31 (emphasis added).

101. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 114, at 823 n.95 (5th ed. 1984).

102. The British case that Dean Prosser cites, *Chapman v. Ellesmere*, [1932] 2 K.B. 431 (Eng.), provides only limited support for his statement. *See infra* Subsection IV.A.3.

103. RESTATEMENT (SECOND) OF TORTS § 496D cmt. c (1965).

104. *Berkebile v. Brantley Helicopter Corp.*, 337 A.2d 893, 901 (Pa. 1975).

105. RESTATEMENT (SECOND) OF TORTS § 496C(1).

106. *Id.* § 496D cmt. b.

107. *See Berman v. Radnor Rolls, Inc.*, 542 A.2d 525, 532 (Pa. Super. Ct. 1988); *Scott v.*

front of a golfer about to drive the ball may assume the risk of the golfer's negligence in failing to look before he swings. It can be presumed that the plaintiff knew of the risks associated with the defendant's particular conduct. But the same plaintiff does not assume the risk that a golfer standing over a putter on the green will draw back and hit the ball with such force as to injure the plaintiff when the plaintiff walks in front of the other golfer.¹⁰⁸ The plaintiff almost certainly did not know of the risk that the defendant would engage in this particular conduct and, therefore, could not have assumed the risks associated with that conduct.

In contrast, comment d to § 583 does not require a plaintiff to consent to the particular defamatory statement in question before consent is effective. Therefore, contrary to Prosser's assertion, comment d to § 583 changes the parties' respective burdens when it comes to consent in defamation cases. Instead of requiring the defendant to conform his particular conduct to that which the plaintiff intended to allow or that which the defendant reasonably believes the plaintiff intended to allow, comment d requires the *plaintiff* to anticipate the full range of the defendant's potential actions. And if it is foreseeable that the defendant will defame the plaintiff in *some* manner, the plaintiff is made to bear the costs of the defendant's actions. The result is to provide defendants with greater latitude when it comes to defamatory publications.

For example, in Illustration 2 above, *A* knew (or at least had reason to know) that *B* might say something defamatory about *A*'s work performance related to his attendance. *A* appreciated this risk. However, he did not know, nor was the risk obvious, that *B* would make *false* and defamatory statements about his work performance. The concepts of "falsity" and "defamatory" are separate under defamation law. A statement is defamatory where it would tend to damage the reputation of an individual "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."¹⁰⁹ Both true and false statements may have this effect. Thus, a statement may be true but still defamatory.¹¹⁰ In Illustration 2, *A* appreciated the risk that an

Pac. W. Mountain Resort, 834 P.2d 6, 13 (Wash. 1992) (en banc). The same rule applies in products liability cases in which a defendant relies upon the defense of assumption of the risk. See, e.g., *Berkebile*, 337 A.2d at 901 (stating that a plaintiff is "precluded from recovery only if he knows of the specific defect eventually causing his injury and voluntarily proceeds to use the product with knowledge of the danger caused by the defect").

108. *Tavernier v. Maes*, 51 Cal. Rptr. 575, 583 (Cal. Ct. App. 1966) (quoting *Strand v. Conner*, 20 Cal. Rptr. 584, 586 (Cal. Ct. App. 1962)).

109. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

110. See RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (noting "the normal requirement that the communication be false as well as defamatory"); see also Carol Rice Andrews, Jones v. Clinton: *A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU

ensuing reference could be defamatory, but did not appreciate the risk that it would be false and defamatory or that it would be made maliciously. Under the general standard outlined elsewhere in the *Restatement (Second) of Torts*,¹¹¹ this would render the consent ineffective because *A* did not consent to the particular conduct that occurred or to substantially the same conduct. But what matters under § 583, if that section is read literally, is whether the plaintiff had reason to know that the ensuing publication might somehow be *defamatory*. The fact that the publication in Illustration 2 was defamatory in a way *A* could not foresee—namely, a false and malicious way—would be irrelevant since *A* could nonetheless foresee that he would be defamed in some way. Therefore, the fact that *B* lied would not prevent consent from being effective.

Importantly, it would be beyond dispute that a defendant could not escape liability in a battery or trespass action by relying on the consent defense in similar circumstances. Consider the following illustration as proof:

Illustration 3: *A* knows that *B* needs to reach the street in front of *A*'s house to catch a bus. The most direct route for *B* to take would be through *A*'s backyard. *A* tells *B* that it is permissible for *B* to cross *A*'s yard to reach the street. *B* then drives his motorcycle through *A*'s backyard to reach the bus stop.

B could almost certainly not escape liability for trespass on the basis of consent. *A* could reasonably foresee that *B* might trespass; indeed, *A* consented to at least some form of trespass. However, *A* almost certainly was not willing to allow *B* to drive his motorcycle through *A*'s backyard, nor could *B* reasonably believe that *A* was so willing. *A* consented to one type of trespass, not all possible kinds.¹¹² The comments and illustrations included in the general section on consent in the *Restatement (Second) of Torts* confirm this conclusion.¹¹³

L. REV. 1, 77, 77–78 n.320 (recognizing the distinction).

111. RESTATEMENT (SECOND) OF TORTS § 892A(2)(b) (1979).

112. See RESTATEMENT (SECOND) OF TORTS § 892A cmt. e (“Consent to an invasion by particular conduct is not consent to the same invasion by entirely different conduct.”).

113. *E.g., id.* (“Thus one who consents that another may walk across his land does not, without more, consent that the other may drive an automobile across it or camp on the land while in transit, or that a third person may walk across it along with the other.”); *id.* § 892A cmt. c (“Thus consent to a fight with fists is not consent to an act of a very different character, such as biting off a finger, stabbing with a knife, or using brass knuckles.”).

c. Invited Defamation and § 583's Illustration

At first glance, it may seem hard to believe that the *Restatement* authors intended such different results in the case of defamation. Indeed, such a reading would conflict with nearly all of the law more generally on the subject of consent. However, this seems to be how Dean Prosser, the reporter of the *Restatement (Second) of Torts*, viewed § 583.¹¹⁴ Moreover, the illustration accompanying comment d supports the conclusion that the *Restatement* authors intended to create an exceptionally broad standard for consent.

The illustration involves a teacher who is “summarily discharged” and then demands that the employer publish the reason for the firing, and the employer complies.¹¹⁵ According to the authors, the teacher “has consented to the publication though it turns out to be defamatory.”¹¹⁶ The authors did not explain this conclusion, but the teacher arguably had reason to know that any justification the employer might give for the firing could damage her reputation—employers do not usually fire employees for no reason and usually at least claim to have good cause for the firing.¹¹⁷ If comment d is read literally, the teacher’s consent to the publication would shield the defendant from liability.¹¹⁸

Courts frequently cite this illustration as an example of a situation in which a plaintiff has invited or procured a defamatory publication and therefore consented to it.¹¹⁹ But note that there is no suggestion in the illustration that the teacher actually knew (or even suspected) in advance the specific reason why she was being fired. Indeed, the fact that the teacher was “summarily discharged” and then demanded publication of the reason for the discharge might lead one to believe that

114. *Prosser & Keeton on Torts* is clear that the rule articulated in § 583 should apply when the plaintiff has reason to believe that the defendant may say *something* defamatory but is unsure exactly what the defendant will say. KEETON ET AL., *supra* note 101, § 114.

115. RESTATEMENT (SECOND) OF TORTS § 583 cmt. d, illus. 2.

116. *Id.*

117. Indeed, in the case of a schoolteacher or an employee covered under a collective bargaining agreement (CBA), the employee is employed pursuant to an employment contract that probably lists the specific reasons that justify the employer in taking adverse action against an employee. See *Helleesen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341, 342–43, 345–47 (Mo. 1963) (applying the *Restatement*’s rule in the case of an employee covered by a CBA that listed grounds for discipline). Therefore, an employee who is fired might have reason to know that the employer’s reason for the discharge will at least be one of the grounds listed in the contract.

118. Some courts decide these cases on the grounds that there was no publication of a defamatory statement under these circumstances, rather than on the grounds of consent. *E.g.*, *Williams v. Sch. Dist. of Springfield*, 447 S.W.2d 256, 268 (Mo. 1969); *Beck v. Tribert*, 711 A.2d 951, 959 (N.J. Super. Ct. App. Div. 1998). The *Restatement (Second) of Torts* rejects this approach. RESTATEMENT (SECOND) OF TORTS § 577 cmt. e.

119. See, e.g., *Charles v. State Dept. of Children and Families Dist. Nine*, 914 So. 2d 1, 3 (Fla. Dist. Ct. App. 2005).

the teacher did not know the specific reason why she had been fired or what the employer would say. Moreover, there is no explicit mention of the fact that the teacher had reason to believe the employer's response would be defamatory. Perhaps the teacher thought she was being fired due to budgetary concerns or for some other nondefamatory reason. Again, the teacher may arguably have had reason to know that the response would be defamatory, but this is not entirely clear from the sparse facts presented. Therefore, on its face, the illustration articulates a rule under which an individual gives consent to a defamatory publication simply by asking for an explanation of an unfavorable decision, regardless of whether the individual had reason to believe that the explanation itself would be unfavorable, let alone unfavorable in a particular manner.

Finally, there is not even any suggestion in the illustration that the employer's stated reason was actually truthful or that the employer believed in the accuracy of the stated reasons. Instead, according to comment d, the teacher invited the defamatory publication by demanding publication of the reasons for the firing.¹²⁰ Therefore, she assumed the risk not only that the publication might be defamatory but also that the particular reason the employer gave might be false or completely unexpected.¹²¹

2. Fair and Honest Investigations

The *Restatement (Second) of Torts* is also internally inconsistent on the subject of consent in defamation cases. Comment d to § 583 notes that, as is the case with consent in other situations, the plaintiff's consent is an absolute defense in a defamation action.¹²² Yet comment d

120. Section 583 does not specifically reference the concept of "inviting or procuring" a defamatory publication, but it is nonetheless frequently cited in support of this concept. *See, e.g., id.*

121. *See supra* note 101 and accompanying text; *see also* RESTATEMENT (SECOND) OF TORTS § 583 cmt. d (stating that one who agrees to a publication under such circumstances "takes the risk that it may be defamatory"). Admittedly, this is not the only interpretation of the comment and illustration. Most public school teachers are employed pursuant to an employment contract that probably lists the specific reasons why the employer may fire the teacher. *See Williams*, 447 S.W.2d at 259 (noting reasons for discharge listed in employee's contract). The same might be true for any employee who is employed pursuant to an employment contract or CBA. *See Hellesen*, 370 S.W.2d at 342–43, 345–47 (applying the *Restatement's* rule in the case of an employee covered by a CBA that listed grounds for discipline). Therefore, an employee employed pursuant to such a contract might have reason to know that the employer's reason for the discharge will at least be one of the grounds listed in the contract. Perhaps the authors of the *Restatement (Second) of Torts* expected readers to understand this fact. Perhaps the authors also expected readers to presume that the rule stated in comment b only applies when the plaintiff has reason to know of the specific nature of the defamatory comment. If so, the authors expected a great deal from readers.

122. RESTATEMENT (SECOND) OF TORTS § 892A cmt. f.

also notes that “one who agrees to submit his conduct to investigation knowing that its results will be published, consents to the publication of the *honest* findings of the investigators.”¹²³ The illustration provides the example of an investigator who “upon a fair and honest investigation” into a particular event publishes his findings.¹²⁴ Thus, not only must the findings themselves be honest, the underlying investigation itself must have been fair and honest. The comment’s focus on fairness and honesty is fundamentally at odds with the idea of an absolute privilege.¹²⁵ The fact that a defendant acts in bad faith or knows that a defamatory statement is false is irrelevant where an absolute privilege is said to exist.¹²⁶

Beyond this inconsistency, the *Restatement* authors’ inclusion of this language still raises a number of questions. Did the authors really mean to limit the existence of an absolute privilege to the publication of the results of a fair and honest investigation, or was the inclusion of the “fair and honest” language merely surplusage? If the inclusion of the “fair and honest” language was purposeful, did the authors intend to limit the scope of their rule solely to the investigation situation? If so, why is the “fair and honest” condition precedent so limited? Why does the same rule not apply to any situation in which the defendant provides information for use by a third person? It certainly seems reasonable to conclude that an individual who consents to the publication of the results of an investigation should not be barred from recovering where the investigation turns out to have been unfair or dishonest. But why shouldn’t the same rule apply whenever an individual consents to the release of any information that is later established to have been published by the defendant in bad faith or with knowledge of its falsity?

The authors of the *Restatement (Second) of Torts* offered no answer to these questions or to the more general question of why they adopted a standard for consent in the defamation context so seemingly at odds with the rest of the corpus of tort law.

III. THE ROLE OF CONSENT IN EMPLOYMENT REFERENCE CASES

Many courts have relied upon § 583 when dealing with issues of consent concerning defamatory publications. However, there is

123. *Id.* § 892A cmt. d (emphasis added).

124. *Id.* § 892A cmt. d, illus. 3.

125. *Baker v. Lafayette Coll.*, 504 A.2d 247, 250 (Pa. Super. Ct. 1986) (stating that the application of comment d’s fairness and honesty limit “would have the effect of converting the consent privilege from an absolute privilege to a conditional one”), *aff’d*, 532 A.2d 399 (Pa. 1987).

126. *See Correllas v. Viveiros*, 572 N.E.2d 7, 10 (Mass. 1991) (stating that the presence of malice or bad faith does not defeat an absolute privilege); *Matthis v. Kennedy*, 67 N.W.2d 413, 416 (Minn. 1954) (stating that even intentionally false statements do not defeat an absolute privilege); *see also Horkan*, *supra* note 73, at 532 (noting the conflict in the *Restatement*’s language).

considerable divergence among courts regarding how to apply the rule outlined in § 583. The following Part examines some of the special problems posed by the consent defense in the employment reference context.

A. Section 583's Application in the Typical Employment Reference Case

On its face, comment d to § 583 appears to change the standard rules regarding the consent defense in terms of the expectations of the party giving consent. At a minimum, the comment contains ambiguity. Courts have taken several approaches when dealing with situations covered by this comment.

1. Decisions Concluding that Consent to Publication Equals Consent to Defamation

While citing § 583, some courts pay virtually no attention to the question of whether the plaintiff had reason to believe that an employment reference would be defamatory. Instead, these courts simply observe that when an employee consents to the release of information concerning the employee's job performance, the responding employer enjoys an absolute privilege in a subsequent defamation action.¹²⁷ As a result, there is no inquiry into the question of what information the employee reasonably believed might be disclosed. Instead, an employee's consent to the publication of information about her job history is necessarily consent to the publication of any defamatory statements, thereby barring the plaintiff's claim. As a result, these decisions establish a standard that is even broader than that contained in § 583.

Gengler v. Phelps,¹²⁸ a New Mexico case, is typical of these types of decisions. In *Gengler*, the plaintiff, a nurse, was told that her employment would be terminated soon. In the interim, the plaintiff applied for a job. The application form asked when the prospective employer could contact the plaintiff's current employer for a reference. The plaintiff replied "anytime."¹²⁹ When contacted by the prospective employer, a doctor at the plaintiff's workplace commented that the plaintiff lacked professional competence. The plaintiff was not hired for the new position and sued her employer based on the negative reference.¹³⁰ The court made quick work of the plaintiff's defamation

127. See *Cox v. Nasche*, 70 F.3d 1030, 1031 (9th Cir. 1995) (involving a signed release); *Patane v. Broadmoor Hotel, Inc.*, 708 P.2d 473, 474, 476 (Colo. App. 1985) (involving allegation that plaintiff was a thief).

128. 589 P.2d 1056 (N.M. Ct. App. 1978).

129. *Id.* at 1057.

130. *Id.*

claim. By indicating on the job application that the prospective employer could contact her current employer, the court concluded that the plaintiff had consented to the negative reference that followed.¹³¹ The court then cited § 583 for the principle that consent is an absolute defense in a defamation action.¹³² The court reasoned that because “Plaintiff knew, when she signed the application, that Veterans Administration personnel would ask her former employer about her work record,” she had consented to the publication.¹³³

This is the sum and substance of the court’s opinion. By indicating on the application form that the prospective employer could contact her present employer, the employee had consented to the ensuing defamatory publication and was therefore barred from recovery. The *Restatement (Second) of Torts* explains that even when an individual signed a release provided by the defendant, the court should not infer lightly that the individual intended to release the defendant from all forms of liability for intentional wrongdoing.¹³⁴ Yet in *Gengler*, the authorization form the plaintiff signed failed to mention anything about releasing responding employers from liability, let alone liability for defamation. The only thing the plaintiff expressly agreed to was allowing the prospective employer to immediately contact her current employer. The court also did not consider whether the employee knew or had any reason to know that the responding doctor would question her competence. Indeed, it did not consider whether the plaintiff had any reason to know that a response would contain *any* type of defamatory statement, let alone that particular statement. Of course, it is entirely possible that the plaintiff had strong reason to suspect that the responding doctor would say exactly what he said. But the court never considered this relevant point of inquiry. Instead, by simply indicating that the prospective employer could contact her present employer, the plaintiff had waived any ability to succeed on a defamation claim according to the court.

Some courts have adopted a similar approach in cases in which employees had signed written releases. In *Woodfield v. Providence Hospital*,¹³⁵ the plaintiff signed a form when she applied for a new job, releasing from liability any employers who provided information about her work record.¹³⁶ When the prospective employer contacted the plaintiff’s former employer, a former supervisor informed the prospective employer that the plaintiff had not received a promotion due

131. *Id.* at 1058.

132. *Id.* at 1057.

133. *Id.* at 1058.

134. *See supra* notes 76–77 and accompanying text.

135. 779 A.2d 933 (D.C. 2001).

136. *Id.* at 936.

to her poor performance.¹³⁷ In fact, the plaintiff had never applied for a promotion, thus making the supervisor's statement potentially misleading. Nor had the plaintiff ever been disciplined or reprimanded. Moreover, when the plaintiff first began work for her former employer, she was given an employee manual that specifically advised employees that the employer would only release employment dates and the title of the last position held.¹³⁸ These facts suggest that the plaintiff was justified in assuming that her former employer would not make defamatory statements about her prior work history. However, the opinion from the D.C. Circuit Court of Appeals never mentions any of this in its reasoning. Instead, the court quickly concluded that the release was valid and therefore acted as consent to bar the plaintiff's defamation claim.¹³⁹

In contrast, some courts have adopted an approach more consistent with § 583. In this approach, there is at least some inquiry into whether the plaintiff had reason to know that a reference might be defamatory.¹⁴⁰ However, also consistent with § 583, there is little to no inquiry into whether the plaintiff had reason to know that the resulting reference would contain the particular defamatory statements it did or statements that were substantially similar. It is enough in these cases that the plaintiff had reason to know that a reference would be negative as a general matter.¹⁴¹

Still other courts tend to apply the more traditional consent rules and, in contrast with § 583, thus inquire into whether an employee had reason to believe that a reference might be defamatory in a particular manner or in a substantially similar manner.¹⁴² Thus, when an employee

137. *Id.*

138. *Id.* at 935.

139. *Id.* at 938.

140. *See, e.g.,* *Fuhrman v. EDS Nanston, Inc.*, 483 S.E.2d 648, 649 (Ga. Ct. App. 1997) (“Plaintiff’s argument that she was entitled to expect any statement to a potential employer to reflect the high rating she received in a formal evaluation only a few weeks prior to her termination is disingenuous in view of the wealth of evidence as to the events which had transpired afterwards, culminating in her termination.”); *Eitler v. St. Joseph Reg’l Med. Ctr. South-Bend Campus, Inc.*, 789 N.E.2d 497, 501 (Ind. Ct. App. 2003) (citing § 583 and concluding that plaintiff had reason to know that former supervisor’s reference would be negative in light of the plaintiff’s past conflicts with her supervisor).

141. *Fuhrman*, 483 S.E.2d at 649; *Eitler*, 789 N.E.2d at 501.

142. *See, e.g.,* *Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1555, 1560 (11th Cir. 1984) (concluding that the plaintiff had reason to know that his former employer would make defamatory statements about the plaintiff’s business practices in light of the fact that the former employer had told the plaintiff upon firing that the plaintiff had “very serious financial problems”); *Oliphint v. Richards*, 167 S.W.3d 513, 516 (Tex. App. 2005) (concluding that the plaintiff had reason to expect his former employer would contradict his version of his separation from employment because the plaintiff knew employer had already done so with another prospective employer).

is told why he is being fired and the employer then repeats those reasons to a prospective employer, the employee's consent to the release of any information concerning his former employment is effective, even if the employee disputes the accuracy of the underlying facts.¹⁴³ When, however, an employee is only aware of a former employer's *general* unhappiness with the employee's job performance but is unaware of any *specific* concerns or suspicions the employer may have that are later repeated to another, some courts have concluded that the employee has not necessarily consented to the defamatory publication.¹⁴⁴

For example, Hypothetical 1 in the Introduction is based on *Frank B. Hall & Co., Inc. v. Buck*, a Texas case.¹⁴⁵ There, the employee was told that he was being fired because he had failed to generate sufficient business, a fact he disputed.¹⁴⁶ Later, when contacted by a prospective employer,¹⁴⁷ the former employer launched into a string of defamatory statements, including calling the employee "a zero" and "a Jekyll and Hyde person" who had padded his expense accounts.¹⁴⁸ A Texas appellate court upheld a jury verdict in the employee's favor, concluding that the jury was entitled to conclude that the employee lacked sufficient knowledge concerning what the employer would say to a subsequent employer.¹⁴⁹

143. See *Bagwell v. Peninsula Reg'l Med. Ctr.*, 665 A.2d 297, 305, 316 (Md. Ct. Spec. App. 1995) (involving an employee who was provided a written statement explaining the reason for his discharge); see also *Harrell v. City of Gastonia*, 392 Fed. App'x 197, 201, 207 (4th Cir. 2010) (involving an employee who agreed to release of "all information" concerning his employment, knowing that his personnel file contained the negative memorandum that was provided to the prospective employer).

144. See, e.g., *Exxon Corp., USA v. Schoene*, 508 A.2d 142, 147 (Md. Ct. Spec. App. 1986) (rejecting a consent defense where employer had expressed unhappiness about cash shortages but had never accused the employee of theft); see also *McDermott v. Hughley*, 561 A.2d 1038, 1046 (Md. 1989) (concluding that a jury question on the consent issue existed where a supervisor told his employee that he believed the employee's medical condition was real but then later told another he believed the employee was faking); *Free v. Am. Home Assurance Co.*, 902 S.W.2d 51, 54–55 (Tex. App. 1995) (concluding that a jury question existed where plaintiff had resigned after a disagreement with his former supervisor). Interestingly, at least one decision has questioned whether the plaintiff had reason to know that individuals who were known to harbor negative feelings toward the plaintiff would answer a request for information. *Marcoux-Norton v. Kmart Corp.*, 907 F. Supp. 766, 781 (D. Vt. 1993).

145. 678 S.W.2d 612 (Tex. App. 1984).

146. *Id.* at 618.

147. Actually, the "prospective employer" was an investigator hired by the plaintiff in an effort to determine what the former employer was telling prospective employers when the plaintiff applied for jobs. *Id.* at 617.

148. *Id.*

149. *Id.* at 617–18. The court actually seemed to be applying a knowledge standard, rather than a "reason to know" standard. See *id.*; see also *Ramos v. Henry C. Beck Co.*, 711 S.W.2d 331, 336 (Tex. App. 1986) (stating that the plaintiff must have known the defendant would defame him before he could be deemed to have consented).

2. Decisions Adopting a Broad Conception of When an Employee Has Reason to Know that a Reference May Be Defamatory

In keeping with the general view concerning consent, some courts have been willing to conclude that it is ordinarily for the jury to decide whether a plaintiff had reason to believe a former employer would defame the plaintiff when the employee consented to a publication.¹⁵⁰ However, some courts are quick to conclude as a matter of law that an employee had reason to know that the publication might be defamatory. The leading case in this respect is *Smith v. Holley*,¹⁵¹ another Texas case.

In *Holley*, the employee in question, a police officer, had received negative performance evaluations. Ultimately, the city's chief of police, Smith, informed Holley that her employment would be terminated. Holley challenged the contents of one of the evaluations and appealed the firing decision.¹⁵² Rather than firing Holley, the city entered into an agreement with her, under which she could resign instead of being fired.¹⁵³ In exchange, the city was to "purge from its personnel records all references to the involuntary termination, and would mark each page of her personnel file with a notice limiting the information available to anyone asking about Holley's employment record."¹⁵⁴ Specifically, the notice instructed a reader that anyone inquiring about Holley's employment history was to be told the dates of her employment, that she had resigned voluntarily, and that company policy prohibited the disclosure of any additional information. The notice concluded by warning a reader (in all caps and italics) that "ABSOLUTELY NOTHING BUT THE ABOVE INFORMATION WILL BE RELEASED TO ANYONE BY ANYBODY."¹⁵⁵ The agreement itself repeated the point (again, in italics) that this was to be "the *only* information" provided to a prospective employer "either officially or unofficially by anyone connected" with the employer.¹⁵⁶

When Holley applied for a new job, she signed a release authorizing former employers and others to release information concerning her

150. See, e.g., *Free*, 902 S.W.2d at 54–55 (reversing summary judgment for the employer on the consent issue where the plaintiff and his former supervisor who subsequently defamed the plaintiff had previously gotten into "a squabble"); *Ramos*, 711 S.W.2d at 336 (concluding that a jury question existed as to whether the plaintiff knew his employer would defame him when the plaintiff asked why he was being fired).

151. 827 S.W.2d 433 (Tex. App. 1992).

152. *Id.* at 435.

153. *Id.*

154. *Id.*

155. *Id.* at 435 n.3.

156. *Id.*

employment to the prospective employer and releasing these individuals from any and all liability.¹⁵⁷ Despite Holley's agreement with the city prohibiting the release of information, Smith, the chief of police, provided detailed and damaging information about Holley's employment.¹⁵⁸ This information included documents from Holley's personnel file, to which Smith still had access. As a result, Holley was not hired for the new position. She successfully sued the chief on a defamation theory.¹⁵⁹

On appeal, a Texas appellate court held that the release signed by Holley when she applied for the new job immunized the defendant from liability on the grounds of consent.¹⁶⁰ In assessing the plaintiff's claim, the court noted that comment d to § 583 of the *Restatement (Second) of Torts* provides that consent serves as a defense when the plaintiff has reason to know that the publication might be defamatory.¹⁶¹ Here, the court reasoned, Holley had reason to know that someone at the police department might make defamatory statements about her "because it is undisputed that she knew that Smith and others at the Big Spring Police Department held unfavorable opinions about her performance there."¹⁶² According to the court, the fact that Holley had bargained to limit the information that could be disclosed was of no import because Smith was not a party to that agreement and because the subsequent release signed by Holley unambiguously authorized the disclosure of information.¹⁶³

The fact that the city had promised, as part of a binding contract,¹⁶⁴ not to disclose the negative information makes the case particularly interesting. Several employer reference statutes contemplate this scenario and specifically provide that an employer who provides a reference in violation of the type of nondisclosure agreement at issue in *Holley* cannot claim the statutory privilege that would normally apply.¹⁶⁵ The employee in *Holley* obviously consented to the release of information knowing that Smith had negative views toward her and that there was negative information in her personnel files; however, she consented with the knowledge that the former employer was contractually obligated not to disclose this information and to make clear to its employees that they were not to discuss her employment

157. *Id.*

158. *Id.* at 435–36.

159. *Id.* at 436.

160. *Id.*

161. *Id.* at 440.

162. *Id.*

163. *Id.*

164. In addition to the defamation claim against Smith, Holley also sued the city for breach of contract. *Id.* at 436.

165. *E.g.*, GA. CODE ANN. § 34-1-4(b) (West, Westlaw through 2012 Reg. Sess.); S.D. CODIFIED LAWS § 60-4-12(2) (West, Westlaw through 2014 Reg. Sess. and Sup. Ct. R. 13-12).

with a prospective employer. Holly bargained for this concession from the former employer with this kind of scenario in mind, knowing full well that someday a prospective employer would ask the city for a reference. Therefore, it seems odd for a court to conclude as a matter of law that the plaintiff was not justified in believing that any disclosure to prospective employers would be limited to the terms of the agreement. It seems especially odd in light of the fact that Smith, the police chief who provided the information, was at the center of the initial dispute and was undoubtedly aware of the nondisclosure agreement and the circumstances surrounding it.

For employees, the takeaway from *Holley* is fairly daunting. If an employee knows that there is anyone remaining at a former place of employment who harbors ill-will toward the employee and who may be contacted by a prospective employer, the employee has reason to know, for purposes of the consent analysis, that the individual may defame her. This is true despite the existence of any preexisting contract prohibiting the release of such information. It is also true despite the generally applicable rule in other situations that a broadly worded release should not prohibit liability unless it is clear that the plaintiff clearly intended to allow the wrongful conduct and to release the defendant from liability.¹⁶⁶

B. *Invited or Procured Defamation*

An employee's consent may also bar a defamation claim when a court concludes that the employee invited or procured the defamatory publication. This may occur in several ways. First, consistent with an illustration contained in § 583, an employee may “invite” a defamatory publication by inquiring, in the presence of others, why the employee was fired.¹⁶⁷

An example of this scenario is seen in *Charles v. State Department of Children and Families District Nine*,¹⁶⁸ the facts of which loosely form the basis of Hypothetical 2 in the Introduction. They are also strikingly similar to the illustration in § 583 involving the teacher who is summarily discharged.¹⁶⁹ The plaintiff in *Charles* was told that his employment was being terminated. When he attended the formal dismissal meeting, he asked, in the presence of others, why he was being fired. A human resources employee informed the plaintiff that he

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

167. See *supra* note 115 and accompanying text; see, e.g., *Johnson v. City of Buckner*, 610 S.W.2d 406, 408, 411 (Mo. Ct. App. 1980) (involving employee who asked why he was being fired).

168. 914 So. 2d 1, 3 (Fla. Dist. Ct. App. 2005).

169. See *supra* notes 115–16 and accompanying text.

was being fired due to his “criminal lifestyle.”¹⁷⁰ The plaintiff sued, alleging that the speaker knew the statement was false and acted maliciously or with an improper purpose.¹⁷¹

Citing § 583, the court concluded that the plaintiff had invited the defamatory statement by asking for the reason for his termination.¹⁷² Accordingly, his defamation claim failed.¹⁷³ Since the plaintiff was being fired, one could argue that he had reason to know that any reason given for his firing could have been defamatory. However, unless the plaintiff did actually lead a criminal lifestyle or knew that his employer believed he led a criminal lifestyle, it is hard to see how he had any reason to think that the employer would state that reason for his firing. But, as is the case with the illustration in the *Restatement (Second) of Torts* involving the teacher who demands an explanation for why she has been fired, all of that is irrelevant under the court’s analysis.¹⁷⁴ All that mattered to the court is that the plaintiff asked the question, thereby consenting to whatever defamatory response the speaker might give.

Charles is not, strictly speaking, an employment reference case.¹⁷⁵ However, the case has implications for the reference scenario. At some point, an employee who applies for a new job may be required to tell the prospective employer why she was fired. At this point, the employee has to choose between lying—knowing full well that the prospective employer may contact the former employer to confirm the employee’s story—and revealing the former employer’s stated reasons and trying to explain the employee’s side of the story.¹⁷⁶ The general rule is that an employee who “self-publishes” the defamatory statements under these circumstances may not recover on a defamation claim.¹⁷⁷ Thus, if the

170. *Charles*, 914 So. 2d at 2.

171. *Id.* at 1–2.

172. *Id.* at 3.

173. *Id.* at 1, 3.

174. The *Charles* court actually referenced this illustration and some of the relevant cases. *Id.* at 3.

175. Similarly, courts have also referenced the invited defamation rule when an employee files an internal grievance concerning an adverse employment action and the employer makes a defamatory statement about the employee to a union representative acting on behalf of the employee. *E.g.*, *Peterson v. Mountain States Tel. & Tel. Co.*, 349 F.2d 934, 935–36, 938 (9th Cir. 1965); *Brockman v. Detroit Diesel Allison Div. of Gen. Motors Corp.*, 366 N.E.2d 1201, 1202, 1204–05 (Ind. Ct. App. 1977).

176. *See Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 888 (Minn. 1986) (discussing the choice employees face in this scenario); Markita D. Cooper, *Between a Rock and a Hard Place: Time for a New Doctrine of Compelled Self-Publication*, 72 NOTRE DAME L. REV. 373, 431 (1997) (explaining that an applicant in this situation could either lie or attempt to explain what happened).

177. *See Cweklinsky v. Mobil Chem. Co.*, 837 A.2d 759, 764–65 (Conn. 2003) (“[M]ost jurisdictions have yet to recognize compelled self-publication defamation or have expressly rejected it.” (quoting *Cweklinsky v. Mobil Chem. Co.*, 297 F.3d 154, 159 (2d Cir. 2002))).

employee gives a truthful response and is not hired, the employee could not recover against the employer for making the defamatory statement in the first instance, nor could he recover when he was not hired for repeating the defamatory statement.

The “invited or procured” scenario may arise in other ways. In some instances, courts have invoked the “invited or procured” idea in the typical employment reference scenario when an employee authorizes a prospective employer to contact a former employer.¹⁷⁸ More commonly, courts have invoked the rule when an employee has employed a friend or other agent to contact a former employer and pose as a prospective employer in an attempt to determine what the employer would say (or perhaps has been saying) to prospective employers.¹⁷⁹ In these situations, courts often conclude that there can be no recovery since the employee invited or procured the resulting defamatory publication.¹⁸⁰ But, again, there is typically no analysis in these cases as to the question of whether the employee knew or had reason to know in advance the particular nature of the employer’s defamatory publication.¹⁸¹ Instead, the mere fact that the employee’s agent contacted the employer posing as a prospective employer is enough to defeat the claim.¹⁸²

178. *E.g.*, *Litman v. Massachusetts Mut. Life Ins. Co.*, 739 F.2d 1549, 1560 (11th Cir. 1984).

179. *E.g.*, *Kelewae v. Jim Meagher Chevrolet, Inc.*, 952 F.2d 1052, 1055 (8th Cir. 1992) (applying Missouri law); *Martinez v. New England Med. Ctr. Hosps., Inc.*, 307 F. Supp. 2d 257, 269 (D. Mass. 2004) (applying Massachusetts law); *Burns v. Barry*, 228 N.E.2d 728, 731 (Mass. 1967); *Beck v. Tribert*, 711 A.2d 951, 959 (N.J. Super. Ct. App. Div. 1998); *Frank B. Hall & Co., Inc. v. Buck*, 678 S.W.2d 612, 617 (Tex. App. 1984); *see also Eggleston v. Klemp*, No. CV 06-218-N-EJL, 2007 WL 1468686, at *2, *3 (D. Idaho May 18, 2007) (involving defamation claim brought against business competitor stemming from defamatory statements made to the plaintiffs’ agents posing as potential patients), *aff’d*, 295 Fed. App’x 233 (9th Cir. 2008); *LeBreton v. Weiss*, 680 N.Y.S.2d 532, 532 (N.Y. App. Div. 1998) (involving a defamation claim brought against a former landlord stemming from defamatory statements that the landlord made to the plaintiff’s agents posing as potential landlords).

180. *See, e.g.*, *Kelewae*, 952 F.2d at 1055; *Martinez*, 307 F. Supp. 2d at 269.

181. *See, e.g.*, *Kelewae*, 952 F.2d at 1055; *Martinez*, 307 F. Supp. 2d at 269. It bears emphasizing that it is entirely possible that some of the plaintiffs in these scenarios may have known with reasonable certainty or suspected what the employer would say in response to an inquiry. In *Kelewae*, for example, the employee had been fired for poor performance and this was the reason the employer gave to the employee’s agents posing as prospective employers. 952 F.2d at 1054. The point is that courts typically do not even make this inquiry once they conclude that the plaintiff invited the employer to respond to the inquiry.

182. In the “invited or procured” cases, it is not always clear on what bases the courts denied recovery. *See Hellesen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341, 345–46 (Mo. 1963) (citing the *Restatement’s* consent rule but also stating that there is no publication when the plaintiff or his agent invited or procured the defamatory publication). In some cases, courts appear to have used consent to justify denying recovery. *Peterson v. Mountain States Tel. & Tel. Co.*, 349 F.2d 934, 938 (9th Cir. 1965); *Frank B. Hall & Co.*, 678 S.W.2d at 617–18; *LeBreton*, 680 N.Y.S.2d at 532. Some decisions are based on the idea that there had been no publication to a third party. *Beck*, 711 A.2d at 959. In others, courts stated that the defamatory publication was

C. “Fair and Honest” Investigations into an Employee’s Background

Courts have also been called upon to determine the extent to which an individual who agrees to submit his conduct to investigation consents to any resulting defamatory publication of the investigator’s findings. In addressing this issue, courts have had to interpret § 583’s internally inconsistent observation that an absolute privilege applies in these cases except when the investigation is dishonest or conducted in bad faith, or the findings of the investigation are dishonest.¹⁸³ This issue has arisen in numerous contexts, such as the tenure evaluation process,¹⁸⁴ when an employer conducts a performance evaluation of an employee,¹⁸⁵ and as part of an employer’s internal grievance procedure.¹⁸⁶ However, the issue has also arisen in the reference context.

Hypothetical 3 in the Introduction is loosely based on *Cruz v. Behnke*,¹⁸⁷ a decision from a Connecticut federal court. In *Cruz*, the plaintiff applied for a managerial position and, during the application process, authorized the employer to conduct a criminal background check. The employer hired a third party, BTi (now known as ChoicePoint), to conduct the investigation. BTi mistakenly informed the employer that the plaintiff had been convicted of two felonies, which caused a supervisor for the employer to repeat this misinformation in front of others.¹⁸⁸ The court rejected the argument that by authorizing the investigation into his background the plaintiff had consented to the defamatory publication that resulted. The court explained, “Although [the plaintiff] consented to dissemination and

privileged, see *Martinez*, 307 F. Supp. 2d at 269, though some limited the privilege to a qualified privilege. See *Burns*, 228 N.E.2d at 731 (stating that such publications are privileged provided no actual malice is shown). In others, the courts seemed to adopt a general rule that one who invites or procures a defamatory publication may not recover. See *Kelewae*, 952 F.2d at 1055. The historical treatment of these kinds of cases is discussed *infra* in Subsection IV.A.2.

183. See *supra* notes 123–24 and accompanying text.

184. *E.g.*, *Bloch v. Temple Univ.*, 939 F. Supp. 387, 389, 391, 397 (E.D. Pa. 1996); *Lester v. Powers*, 596 A.2d 65, 67 (Me. 1991); see also *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1071, 1073–74 (8th Cir. 1996) (involving defamatory statements made as part of a medical residency program); *Kraft v. William Alanson White Psychiatric Found.*, 498 A.2d 1145, 1149–50 (D.C. 1985) (involving defamatory statements made as part of a post-graduate education program).

185. *E.g.*, *Farrington v. Bureau of Nat’l Affairs*, 596 A.2d 58, 58–59 (D.C. 1991).

186. *E.g.*, *Mandelblatt v. Perelman*, 683 F. Supp. 379, 380–82, 383–84 (S.D.N.Y. 1988); *Ernst v. Ind. Bell Tel. Co.*, 475 N.E.2d 351, 355 (Ind. Ct. App. 1985); *Rouch v. Continental Airlines, Inc.*, 70 S.W.3d 170, 172–73 (Tex. App. 2001). The issue has also arisen under facts like those presented in § 583’s illustrations, where an individual is a member of an organization and, as part of the terms of membership, agrees to submit his conduct to an investigation by the organization. *Rosenberg v. Am. Bowling Cong.*, 589 F. Supp. 547, 551–52 (M.D. Fla. 1984).

187. No. 3:04CV1119 (DJS), 2006 WL 860104 (D. Conn. Mar. 31, 2006).

188. *Id.* at *1.

discussion of his criminal history within appropriate limits, he did not consent to the dissemination of indisputably inaccurate information to the public.”¹⁸⁹

Cruz is unusual in its decision that the plaintiff’s consent to an investigation did not constitute an absolute bar to a defamation claim. Most courts have concluded that the plaintiff’s consent to an investigation or evaluation imposes an absolute bar to recovery.¹⁹⁰ Thus, the fact that an investigation was performed in a slipshod or dishonest manner or contained knowingly false statements of fact would be irrelevant. Some of these courts have expressly cited comment d and its illustration to support their conclusions.¹⁹¹ Like *Cruz*, a few courts have been unwilling to assume that an individual impliedly consented to the publication of all types of defamatory material following an investigation or evaluation absent a clear indication of such intent.¹⁹² Interestingly, at least one decision has cited § 583 in support of its conclusion that a qualified, rather than absolute, privilege applies in these situations.¹⁹³

IV. SEEKING JUSTIFICATIONS FOR THE DIFFERENT TREATMENT OF CONSENT IN DEFAMATION AND EMPLOYMENT REFERENCE CASES

As the foregoing illustrates, defamation law is at odds with the rest of tort law in terms of its treatment of consent. Some courts are quick to find that an individual’s mere consent to an investigation or the disclosure of information is a bar to a subsequent defamation claim, no matter the nature of the defamatory publication at issue. Even those courts that apply § 583 according to its terms are applying a test that

189. *Id.* at *2 n.1. Interestingly, the court did not reference § 583’s rule to the effect that one who publishes the honest results of an investigation in these circumstances enjoys a privilege. However, on its face, comment d to § 583 might have applied. The words “fair” and “honest” might imply the existence of a good-faith belief in the factual accuracy of a statement. Thus, it is possible that BTi and the employer were mistaken about the facts associated with the investigation, but their mistake was an honest one. However, by inquiring into the honesty of a defendant, courts would potentially be limiting the reach of the consent defense and—at least in this type of scenario—transforming consent from an absolute privilege into a conditional one. *See supra* notes 126–27 and accompanying text.

190. *E.g.*, *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1074 (8th Cir. 1996); *Bloch v. Temple Univ.*, 939 F. Supp. 387, 397 (E.D. Pa. 1996); *Rosenberg*, 589 F. Supp. at 552; *Farrington*, 596 A.2d at 59–60; *Kraft v. William Alanson White Psychiatric Found.*, 498 A.2d 1145, 1150 (D.C. 1985); *Ernst*, 475 N.E.2d at 355; *Rouch*, 70 S.W.3d at 173.

191. *E.g.*, *Rosenberg*, 589 F. Supp. at 552; *see, e.g.*, *Rouch*, 70 S.W.3d at 173.

192. *See, e.g.*, *Mandelblatt v. Perelman*, 683 F. Supp. 379, 383–84 (S.D.N.Y. 1988); *Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991); *see also* *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 881–82 (D.C. 1998) (stating that in the absence of a contract or of some affirmative act of consent, the defendants’ allegedly defamatory communications were protected by a qualified privilege only).

193. *Mandelblatt*, 683 F. Supp. at 383.

takes a far more expansive approach to the concept of consent than the rest of tort law. All of this is at odds with traditional tort law, which typically presumes the absence of consent when the defendant invades the rights of another.¹⁹⁴ These differences are only highlighted in the specific case of defamation claims stemming from an employment reference. The question then becomes whether there is something special enough about defamation claims or employment reference cases—in terms of either the historical development of the law in these areas or the policy values implicated—that justifies this approach.

A. *The Historical Origins of § 583*

Section 583 of the *Restatement (Second) of Torts* and its comments repeat virtually verbatim the same section and comments from the first *Restatement of Torts*.¹⁹⁵ The Reporter's Note accompanying § 583 of the *Restatement (Second) of Torts* first lists seventeen decisions that supposedly support the rule contained in the section. To put it mildly, this is something of an overstatement. Some of the decisions cited provide limited support for some of the rules contained in the main section and its comments.¹⁹⁶ However, others provide little, if any, support for those rules. Some of decisions cited actually contradict those rules.

1. Section 583's "Reason to Know" Standard

First, none of the cases cited provide much, if any, support for the notion that a plaintiff need not appreciate the risk that a publication will be defamatory in a particular manner or even in general for consent to be effective, provided the plaintiff had *reason to know* that the publication might be defamatory. In several of the cited decisions, the plaintiffs actually knew in advance what the substance of the defamatory publication would be.¹⁹⁷ But none of the decisions reference

194. See Bell, *supra* note 48, at 35 (“Absent an expression to the contrary, tort law typically assumes that the violation of a right—such as battery of a person or conversion of goods—evokes the victim’s unconsent.” (footnote omitted)).

195. RESTATEMENT OF TORTS § 583 (1938).

196. For example, the authors cited *Connors v. Collier*, 119 N.Y.S. 513, 515 (N.Y. Spec. Term 1909), a decision that concluded that the plaintiff’s consent to a defamatory publication is an absolute defense. The text of § 583 repeats this rule. RESTATEMENT (SECOND) OF TORTS § 583 (1976). But, beyond this, the decision has little relevance for the rules stated in the comments. The authors also cited *Louisville Times Co. v. Lancaster*, 133 S.W. 1155, 1156, 1158 (Ky. 1911), a case in which the plaintiff released one defendant from liability for a defamatory publication appearing in a newspaper as part of a retraction of an earlier story. Like *Connors*, the case is relevant for the idea that a plaintiff’s consent renders a defamatory publication absolutely privileged, but little else.

197. See, e.g., *Joftes v. Kaufman*, 324 F. Supp. 660, 661 (D.D.C. 1971); *DeLuca v. Reader*, 323 A.2d 309, 311 (Pa. Super. Ct. 1974).

a “reason to know” standard. In a few of the decisions cited, the plaintiffs might have had reason to know in advance that the defendant would defame them.¹⁹⁸ However, none of the decisions even mention this fact, let alone rely upon it as a basis for their reasoning.

The case cited that is closest to being on point is *Borden, Inc. v. Wallace*,¹⁹⁹ a Texas case in which an employee consented to the administration of a polygraph test based on the employer’s suspicions of theft and misconduct. The court observed that, in consenting to the polygraph, the employee “must have known” that the employer would tell the operator of the polygraph the reasons why the employee was taking the test; thus, the employee consented to the defamatory publication.²⁰⁰ Obviously, a “must have known” standard is quite different than a “reason to know” standard. Moreover, given the circumstances, the employee in this case must have known the exact nature of the anticipated defamatory publication, not simply the fact that any statements to the operator would be defamatory in general.

Finally, *Borden, Inc.* was decided in 1978, well after the original *Restatement* articulated the “reason to know” standard. If other defamation decisions decided prior to the publication of the original *Restatement* relied upon a “reason to know” standard, those decisions appeared only infrequently at best. Instead, the idea that a plaintiff can give effective consent to a defamatory publication without knowing in advance the particular nature of the publication only began to appear regularly in the decisional law *after* the original *Restatement* and the *Restatement (Second) of Torts* announced this to be the rule. In many of those decisions, the courts actually cite § 583 in support of that statement of the law.²⁰¹ It is perhaps overly harsh to suggest that the authors of the *Restatement* created the “reason to know” rule out of whole cloth. But there is little evidence that the authors of the original *Restatement* were actually restating the law when they announced the “reason to know” standard.

2. Invited or Procured Defamation

There is some support in the pre-*Restatement* case law for the

198. Several of the cited cases involve situations in which an employee was fired and sought to determine the reasons for the firing. *See, e.g.*, *Beeler v. Jackson*, 2 A. 916, 916–17 (Md. 1886); *Christopher v. Akin*, 101 N.E. 971, 971 (Mass. 1913). The employees, by virtue of the fact that they had been fired, might have had reason to know that any statements made by the employer as to the reasons for the firing would be defamatory, even if the employees did not know what the stated reasons would be.

199. 570 S.W.2d 445 (Tex. Civ. App. 1978).

200. *Id.* at 448.

201. *See, e.g.*, *Christensen v. Marvin*, 539 P.2d 1082, 1083–84 (Or. 1975) (en banc); *Baker v. Lafayette Coll.*, 504 A.2d 247, 268 (Pa. Super. Ct. 1986).

general idea stated in comment d to § 583 that one cannot recover when one has invited or procured a defamatory publication. However, with § 583, the authors of the *Restatements* took an area of the law in which there was already disagreement and completely recharacterized it, thereby creating more confusion.

Prior to the publication of § 583 of the original *Restatement* in 1938, there were numerous statements of the law to the effect that a defamatory publication that was procured or invited by the defendant is not actionable.²⁰² In some of the cases the plaintiff demanded, in the presence of others, that the defendant explain why the plaintiff had been fired,²⁰³ or otherwise demanded that the defendant repeat a previous defamatory statement.²⁰⁴ In others, the plaintiff enlisted a third party to inquire of an employer why the plaintiff had been fired,²⁰⁵ to persuade the employer to reconsider the decision or assist the plaintiff in challenging an adverse decision,²⁰⁶ or to provide support as the plaintiff confronted the defendant about some matter.²⁰⁷

These cases were typically decided on one of two grounds. First,

202. *E.g.*, *Shinglemeyer v. Wright*, 82 N.W. 887, 891 (Mich. 1900) (concluding that there was no remedy for defamation where the plaintiff solicited the defamatory statement in the presence of another); *Irish-Am. Bank v. Bader*, 61 N.W. 328, 328 (Minn. 1894) (concluding that a defamatory statement induced by the plaintiff is not actionable); *Ely v. Borck*, 39 Ohio C.C. 277, 278 (Ohio Ct. App. 1916) (stating that “the great preponderance of authority, as well as reason, is in favor of the proposition that an action of slander will not lie [when it has been invited or procured by the plaintiff]”); 17 RULING CASE LAW § 61, at 320 (William M. McKinney & Burdett A. Rich eds., 1917) (“It is generally held that the publication of a libel or slander invited or procured by the plaintiff is not sufficient to support an action for defamation.”). There were also numerous statements to the effect that a defamatory publication invited or procured by the plaintiff in an attempt to manufacture a defamation claim is not actionable. *See, e.g.*, *Howland v. George F. Blake Mfg. Co.*, 31 N.E. 656, 658 (Mass. 1892); *Nott v. Stoddard*, 38 Vt. 25, 31 (1865). The authors of the *Restatement (Second) of Torts* actually cited several of these decisions—for example, *Richardson v. Gunby*, 127 P. 533, 536 (Kan. 1912) and *Howland*, 31 N.E. at 658—but recharacterized them as standing for the proposition that “[t]he plaintiff’s consent is a defense even though he procures the publication for the purpose of decoying the defendant into a lawsuit.” RESTATEMENT (SECOND) OF TORTS § 583 Reporter’s Note (1977).

203. *E.g.*, *Beeler*, 2 A. at 917; *Christopher*, 101 N.E. at 971, 972.

204. *E.g.*, *Shinglemeyer*, 82 N.W. at 890; *see also* *Haynes v. Leland*, 29 Me. 233, 233–34 (1848) (involving lawyer who, on behalf of his client, invited an individual to lawyer’s office and had the individual repeat a defamatory statement about the client that the individual had previously made).

205. *E.g.*, *Mims v. Metro. Life Ins. Co.*, 200 F.2d 800, 801, 802 (5th Cir.1952).

206. *E.g.*, *Taylor v. McDaniels*, 281 P. 967, 972, 973 (Okla. 1929); *see also* *Kan. City, M. & B. R. Co. v. Delaney*, 52 S.W. 151, 152–53 (Tenn. 1899) (involving an employee who enlisted a friend to contact his employer in an attempt to convince the employer to provide the employee with a reference for a new job).

207. *E.g.*, *Billings v. Fairbanks*, 136 Mass. 177, 178 (1883); *Ely*, 39 Ohio C.C. at 278; *Nott*, 38 Vt. at 31; *see also* *Warr v. Jolly* (1834) 172 Eng. Rep. 1336; 6 Car. & P. 497 (involving friend who accompanied plaintiff and assisted plaintiff in asking questions of defendant).

some courts held that there was no publication to begin with in these kinds of situations.²⁰⁸ To make out a prima facie case of defamation, a plaintiff must establish that there was a publication of defamatory material to at least one person other than the plaintiff.²⁰⁹ The decisions taking the position that there had been no publication under these circumstances reasoned that when the plaintiff himself invited or demanded an explanation, the plaintiff had, for all intents and purposes, made the publication himself.²¹⁰ When the defendant made the defamatory statement to, or in the presence of, a third party enlisted by the plaintiff, these courts treated the third party as an agent or alter ego of the plaintiff and reasoned that there was no publication to a third party.²¹¹ Thus, some courts treated these situations as involving self-publication, which typically does not satisfy the publication requirement.²¹²

Other courts accepted the idea that a defendant's defamatory statements under these circumstances could amount to a publication, but held that the defendant's statements were conditionally privileged.²¹³ Under this approach, the defendant's statements were privileged provided they were "given in truth, honesty, and fairness"²¹⁴ or were not made out of malice.²¹⁵ Interestingly, the authors of the *Restatement (Second) of Torts* cited some of these qualified privilege cases to support their rule establishing an absolute privilege.²¹⁶

Notably, courts currently use these two approaches in cases involving intracompany communications. Where, for example, one

208. See, e.g., *Delaney*, 52 S.W. at 153; *Taylor*, 281 P. at 970.

209. RESTATEMENT (SECOND) OF TORTS § 577 (1977).

210. See, e.g., *Shinglemeyer v. Wright*, 82 N.W. 887, 891 (Mich. 1900) ("There is no difference in principle between reading a letter to another and soliciting a person to make a similar verbal statement."); see also *Fonville v. M'Nease*, 23 S.C.L. 303, 311 (Dud. 1838) ("If the plaintiff afterwards makes public the charge, the defendant is not answerable for the consequences—for the act of publication is not his.").

211. See, e.g., *Delaney*, 52 S.W. at 153 (stating that delivery of a defamatory letter to the plaintiff's agent was not a publication); *Taylor*, 281 P. at 972 (concluding that there "was no publication" under these circumstances because the communications "were of the same effect as though made to the plaintiff himself").

212. See RESTATEMENT (SECOND) OF TORTS § 577 cmt. m ("One who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person if there are no other circumstances."); see also *Starr v. Pearle Vision, Inc.*, 54 F.3d 1548, 1554 (10th Cir. 1995) (refusing to recognize a claim based on the plaintiff's self-publication of defamatory material).

213. E.g., *Switzer v. Am. Ry. Express Co.*, 112 S.E. 110, 116 (S.C. 1922); see also *Beeler v. Jackson*, 2 A. 916, 917 (Md. 1886); *Christopher v. Akin*, 101 N.E. 971, 972 (Mass. 1913); *Warr v. Jolly* (1834) 172 Eng. Rep. 1336; 6 Car. & P. 497.

214. *Beeler*, 2 A. at 917.

215. *Christopher*, 101 N.E. at 972; *Warr*, 172 Eng. Rep. at 1336.

216. RESTATEMENT (SECOND) OF TORTS § 583 Reporter's Note (1977) (citing *Beeler*, 2 A. 916, *Christopher*, 101 N.E. 971, and *Warr*, 172 Eng. Rep. 1336).

supervisor makes a defamatory statement about an employee to another supervisor within the same company, some jurisdictions conclude that this is, in effect, the employer speaking to itself; thus, there has been no publication to a third party.²¹⁷ Other courts conclude that there is a publication under these circumstances, but that the publication is conditionally privileged because the speaker and recipient share a common interest.²¹⁸ The *Restatement (Second) of Torts* takes the latter position.²¹⁹

Where, however, the defamatory communication is between the defendant and the plaintiff or the plaintiff's agent, the *Restatement (Second) of Torts* articulates a different rule and concludes that the publication is absolutely privileged on the basis of the plaintiff's consent.²²⁰ This is inconsistent with the bulk of the case law decided before the publication of the original *Restatement*. A few of the older decisions involving these scenarios mention the concept of consent,²²¹ and in rare instances courts decided the cases on these grounds.²²² However, the cases were far more commonly decided on the grounds of publication or conditional privilege than consent.²²³ Despite this, the authors of the original *Restatement* chose to treat these kinds of cases as consent cases that conferred upon defendants an absolute privilege.

Following the publication of the original *Restatement* and the *Restatement (Second) of Torts*, courts began to more frequently invoke the concept of consent in such cases.²²⁴ Indeed, some decisions specifically referenced the *Restatements* to support the idea that the consent defense controlled the outcomes of the cases.²²⁵ Thus, it seems clear that the *Restatements* influenced the development of the law in this area. Rather than "restating" the existing law, however, the authors, without explanation, took a situation that had largely been dealt with as a question of publication or conditional privilege and recharacterized it as one of consent.

Interestingly, one of the decisions cited by the authors in a different part of the Reporter's Note actually ridicules the *Restatements'* position

217. *E.g.*, *Dixon v. Econ. Co.*, 477 So. 2d 353, 354 (Ala. 1985).

218. *E.g.*, *Bals v. Verduzco*, 600 N.E.2d 1353, 1356 (Ind. 1992).

219. *See* RESTATEMENT (SECOND) OF TORTS § 577 cmt. e (1976).

220. RESTATEMENT (SECOND) OF TORTS § 583 (1977).

221. *See, e.g.*, *Shinglemeyer v. Wright*, 82 N.W. 887, 891 (Mich. 1900).

222. *See, e.g.*, *Heller v. Howard*, 11 Ill. App. 554, 559–60, (Ill. App. Ct. 1882); *Sutton v. Smith*, 13 Mo. 120, 121–22 (1850).

223. *See* cases cited *supra* notes 208–16.

224. The Reporter's Note to § 583 of the *Restatement (Second) of Torts* cites several cases decided after the publication of the original *Restatement* that either reference the consent concept or decide the case on those grounds. *See, e.g.*, *Peterson v. Mountain States Tel. & Tel. Co.*, 349 F.2d 934, 938 (9th Cir. 1965); *Williams v. Sch. Dist. of Springfield R-12*, 447 S.W.2d 256, 268 (Mo. 1969).

225. *E.g.*, *Peterson*, 349 F.2d at 938; *Williams*, 447 S.W.2d at 268–69.

on the subject of invited or procured defamatory statements. In *Luzenberg v. O'Malley*,²²⁶ a 1906 opinion from Louisiana, the defendant publicly expressed the opinion that, for “reasons too numerous to mention,” the plaintiff was unfit to be district attorney or even practice law.²²⁷ The plaintiff then challenged the defendant to list some of those reasons too numerous to mention. The defendant responded by publicly making false and defamatory statements about the plaintiff.²²⁸ After the plaintiff sued, the defendant defended on the grounds that by inviting the defendant to publish the reasons behind its opinion that the plaintiff was unfit to be district attorney, the plaintiff had consented to the ensuing defamatory publication. The Louisiana Supreme Court stated this argument “would not be taken seriously by us if it were not being insisted upon with apparent seriousness.”²²⁹ The court thought it obvious that “when plaintiff challenged defendant to name the ‘reasons too numerous to mention’ why he was unfit to be district attorney, or even to practice law, he did not request defendant to publish malicious falsehoods about him.”²³⁰

3. Consent to Investigation

Finally, the authors chose to create a special (and internally inconsistent) rule for the situation in which an individual consents to an investigation and agrees to the publication of the findings of the investigation. In doing so, they chose to rely on a poorly reasoned British case that is rarely invoked by British courts for the principle cited in the *Restatement (Second) of Torts*.

As discussed, comment d to § 583 contains the doctrinally inconsistent observation that the absolute privilege of consent applies when a plaintiff “agrees to submit his conduct to investigation knowing that its results will be published,” provided the investigators conduct a “fair and honest” investigation and publish their “honest findings.”²³¹ The authors included the following illustration of that principle:

A, a horse trainer, holds a license granted by the B Racing Association, a rule of which empowers the stewards of the club to suspend licenses, to inquire into and deal with matters concerning racing, and to publish the result in a racing magazine. The stewards, upon a fair and honest investigation of a particular race, publish their findings in

226. 41 So. 41 (La. 1906).

227. *Id.* at 42.

228. *Id.*

229. *Id.* at 44.

230. *Id.*

231. RESTATEMENT (SECOND) OF TORTS § 583 & cmt. d (1977); *e.g.*, *id.* § 583 cmt. d, illus.

the racing magazine, stating that the horse that A trained had been drugged and that A's license has been withdrawn. A has consented to the publication.²³²

The illustration is based on the British case of *Chapman v. Lord Ellesmere*.²³³ In *Chapman*, the publication that appeared in the racing magazine reported that an investigation revealed that a horse ("Don Pat") had been drugged and that his trainer had been suspended.²³⁴ As written, the statement could reasonably be read as implying that the trainer himself had drugged the horse and this is why he had been suspended. However, this is not what the stewards had concluded. Instead, the stewards concluded that someone had drugged the horse and that the trainer, being directly responsible for the care of the horse, was negligent in failing to prevent the drugging.²³⁵ According to Lord Slesser, the doctrine of *volenti non fit injuria* resolved the matter—by assenting to the publication of the findings of the investigation, the plaintiff consented to the resulting defamatory publication.²³⁶

There are several ways of viewing the decision in *Chapman*. One is simply that the case is something of a relic. The decision hinges on the arcane defamation concept of innuendo,²³⁷ and the court's conclusion that the report that appeared in the magazine was, in fact, a true report of the stewards' findings. A modern jury could easily conclude that the publication was misleading enough to be treated as a false and inaccurate statement of the stewards' findings. Lord Slesser himself acknowledged that if the report did not accurately reflect the stewards' findings, the defense of consent would not apply.²³⁸ As the plaintiff's lawyer argued, in that instance, the resulting publication (an inaccurate account of the findings) would have been substantially different than to which the plaintiff actually consented (an accurate account of the findings).²³⁹

Second, Lord Slesser's contention that the defense of consent even applied to the case is merely dicta and highly suspect dicta at that. According to Lord Slesser, by agreeing to the report of the decision, the plaintiff assumed the risk that the report, while perhaps literally true,

232. *Id.* § 583 cmt. d, illus. 3.

233. [1932] 2 K.B. 431 (Eng).

234. *Id.* at 460.

235. *Id.* at 459.

236. *Id.* at 463.

237. This involves the situation in which "the defamatory meaning, or innuendo, is not apparent on the face of the publication but must be made out by proof of extrinsic facts." William L. Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629, 1630 (1966).

238. *Chapman*, 2 K.B. at 463–64.

239. *See id.* at 463 (summarizing the plaintiff's argument).

would be presented in such a way as to be materially misleading.²⁴⁰ This is too much to swallow. One could perhaps conclude that the plaintiff assumed the risk that the stewards would investigate the facts and incorrectly (but in good faith) conclude that the plaintiff had drugged Don Pat. The plaintiff did not know what the results of the investigation would be in that regard, but he did know the particular subject matter that they would involve (the rules of the racing association). Thus, the ultimate findings of the stewards would be a “known unknown.” In this respect, the case would be roughly analogous to the special rules regarding consent in the context of athletic competitions. By consenting to play a game of football, for example, an individual consents to what would otherwise amount to unlawful batteries, provided the batteries occur within the rules of the game or occur outside the rules but in a manner foreseeable in the sense of being connected to the essence of the game.²⁴¹ The fact that the individual cannot predict exactly when or how the contact will occur does not prevent the consent from being effective.

But it is hard to see how the plaintiff in *Chapman* could be said to have assumed the risk that the author of the report would have such little facility with language that he would misstate the findings of the stewards in such a dramatic fashion. This risk would be an “unknown unknown.” Finding consent under these facts would be roughly equivalent to concluding that a football player consented to a hit by another player that had no competitive purpose, or to being run over on the sidelines by a cart driven recklessly by an employee of the stadium. In each of these instances, the resulting invasion was unforeseeable in any meaningful sense and the plaintiff could not be said to have assumed the risk of their occurrences. Thus, Lord Slessor’s decision in *Chapman* seems a slim reed upon which to base the rules governing consent in the defamation context.²⁴²

240. *Id.* at 464.

241. See *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 393, 394 (Cal. 2006) (concluding that the plaintiff assumed the risk of being hit by a pitch intentionally thrown at him by the pitcher because such conduct was not “totally outside the range of ordinary activity involved in the sport” and was an accepted custom of the game); *Turcotte v. Fell*, 502 N.E.2d 964, 969–70, 971 (N.Y. 1986) (discussing assumption of the risk and contrasting inherent dangers assumed with “flagrant infractions unrelated to the normal method of playing the game and done without any competitive purpose”); Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another; Why Can’t Participants Be Required to Be Reasonable?*, 5 SETON HALL J. SPORT L. 253, 256 (1995) (stating that the “prevailing view is that although participation in an athletic contest involves manifestation of consent to those bodily contacts which are permitted by the rules of the game and foreseeable, an intentional act causing injury, which goes beyond what is ordinarily permissible in an unforeseeable way, is an assault and battery for which recovery may be had”).

242. Interestingly, this aspect of the *Chapman* decision perhaps explains the origins of the *Restatements*’ “reason to know” standard. Dean Prosser cites the case for the idea that one

Instead, the case was perhaps better decided in the manner presented by the two other judges in the case: conditional privilege. The relevant holdings in the case actually involve the concept of conditional privilege. For example, Lord Romer reasoned that the parties involved (the stewards, the plaintiff, and those interested in racing) shared a common interest in the investigation and that the publication was therefore privileged absent malice on the defendants' part.²⁴³ Likewise, Lord Hanforth viewed the case as involving a question of qualified privilege.²⁴⁴ In fact, British courts have most commonly cited *Chapman* for the issue of privilege presented by the facts of the case.²⁴⁵ Thus, there is some irony that Lord Slusser's poorly reasoned dicta continues to influence defamation law in the United States when it has had little influence in its native country.

B. Seeking a Policy-Based Justification for the Consent Rule in Defamation Cases

In the absence of historical support for the rules articulated in § 583, another approach would be to inquire whether there are any policy-based justifications for the rule. The traditional justifications for recognizing consent as a defense in tort cases provide little support for the rules.²⁴⁶ For example, one of the most common justifications is that when an individual consents to what would otherwise be a wrongful act, the defendant is no longer a wrongdoer.²⁴⁷ Obviously, this justification carries little weight when the individual does not know in advance the particular wrong that is to be inflicted and the wrongdoer does not reasonably believe that the individual consents to the particular conduct.

consents to a defamatory publication when one is unsure what a defendant will say but has reason to know that it may be defamatory. KEETON ET AL., *supra* note 101.

243. *Chapman*, 2 K.B. at 473–74.

244. *Id.* at 448–49.

245. See, e.g., *GKR Karate (UK) Ltd. v. Yorkshire Post Newspapers Ltd. (No.2)* [2000] E.M.L.R. 410 (Q.B.), at 416–17 (Eng.); *Watts v. Times Newspapers Ltd.*, [1997] Q.B. 650 at 655 (Eng.); *Seaga v. Harper*, [2008] UKPC 9 [5]–[6], [2009] A.C. 1 (P.C.) at 6–7 (appeal taken from Jam.); *Baigent v. McCulloch*, (1997) Rep. L.R. 107, 109 (Scot.).

246. Professor Kenneth W. Simons catalogued the following justifications:

[P]laintiff should not obtain the benefits of a choice without incurring the expected risks; sometimes defendant has not acted tortiously by offering such a choice; sometimes defendant relies upon plaintiff's choice; plaintiff is the "co-author of his own harm;" individual choice will be undermined if it is not enforced against the later wishes of the chooser; and recognizing autonomous choice increases social wealth.

Simons, *supra* note 48, at 218–19.

247. Leo Katz, *Choice, Consent, and Cycling: The Hidden Limitations of Consent*, 104 MICH. L. REV. 627, 628 (2006).

Nor do autonomy and efficiency based justifications for absolving a defendant of liability under a consent theory apply with much force when an individual is forced to assume a risk she did not appreciate in advance.²⁴⁸ Instead, if the expansive conception of consent as outlined in the *Restatements* is inconsistent with the traditional justifications for recognizing consent as a defense in other intentional tort cases, perhaps there is something special about the nature of defamation that merits a special rule.

1. A Plaintiff's Reduced Reputational Interest

Perhaps a broader rule of consent is justified on the nature of the plaintiff's interest in defamation cases. Perhaps tort law considers damage to one's reputation to be of significantly less importance than damage to one's person or property.²⁴⁹ If this is so, the law should limit the number of defamation claims so as not to overburden the courts and unduly limit a defendant's countervailing free speech interests. A broad conception of consent would be consistent with the view of a plaintiff's reduced interest in his reputation. By making consent to a defamatory publication an absolute defense and one that is far easier for a defendant to assert than in other tort cases, a court can avoid messy questions involving the defendant's fault and bad faith. This view of the limited utility of defamation claims might also help to justify the incredibly complicated collection of common law and constitutional rules governing defamation claims, many of which make it more difficult for

248. The defense of assumption of the risk, which (where still recognized at least) is a defense to a negligence action, depends on the plaintiff's subjective awareness and appreciation of the risk encountered. *ADM P'ship v. Martin*, 702 A.2d 730, 734 (Md. 1997). The defenses of consent and assumption of the risk share much in common. *See Simons, supra* note 48, at 248 ("Assumption of risk is often casually described as the doctrine of consent applied to nonintentional torts, and especially to negligence."). Likewise, to the extent one justifies the defense of consent through resort to bargain or reliance theories—*see e.g.*, Marin Roger Scordato, *Innocent Threats, Concealed Consent, and the Necessary Presence of Strict Liability in Traditional Fault-Based Tort Law*, 37 PEPP. L. REV. 205, 219 (2010) (arguing that consent involves "two-party interaction between the plaintiff and the defendant," in which the defendant "claims that his otherwise tortious behavior was undertaken in response to and in reliance upon the plaintiff's consent to that behavior")—these justifications falter when the plaintiff does not know what he is bargaining for and the defendant does not reasonably believe the plaintiff has bargained for what he has received.

249. *See* Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 18 (1983) ("The social usefulness of providing legal redress for injury to one's reputation and psychological injury generally continues to be questioned."). *But see* Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 801 (1986) ("[R]eputation . . . is one of the bundle of property rights and liberty that all individuals enjoy."); Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1342 (2011) (noting property-based conceptions of one's reputational interest).

certain kinds of plaintiffs to prevail.²⁵⁰

There is, however, a strong strain in American culture that takes seriously reputational harms. Professor Daniel Solove states that “[t]hroughout most of western history, one’s reputation and character have been viewed as indispensable to self-identity and the ability to engage in public life. For centuries, the loss of social regard has had deleterious effects on one’s wealth, prosperity, and employment.”²⁵¹ When the Supreme Court first recognized that the First Amendment demands that public figures establish a high degree of fault on a defendant’s part in order to prevail on a defamation claim, the Court also noted that states were, in some other instances, free to adopt lower fault standards or even rely upon strict liability standards.²⁵² When given these options, state courts have overwhelmingly chosen to retain or adopt these lower thresholds for recovery.²⁵³ Indeed, the tort of defamation is rooted in strict liability.²⁵⁴ Professor Rodney Smolla argues that “American courts have frequently been of two minds in their solicitude for reputation, at times permitting harsh penalties for defamatory speech well out of proportion to the harm of the words or the culpability of the speaker, and at times permitting obviously damaging speech uttered with transparently dark motives to be spoken with complete impunity.”²⁵⁵ Thus, while an expansive conception of consent in the defamation context might be consistent with one school of thought among American courts regarding the value of defamation claims, it hardly reflects the sole or even dominant view of such claims.

2. The Nature of the Wrong in Defamation Actions

Another possible explanation for an expanded conception of consent in the defamation context lies in the manner in which slander or libel is accomplished. If *A* manifests willingness to allow *B* to walk through *A*’s yard, *B*’s range of action is circumscribed in a manner easily understood by both parties. If *B* rides his motorcycle onto *A*’s property or walks across the property with a gang of friends, *B* has exceeded the scope of consent.²⁵⁶ What’s more, there are only so many ways *B* can walk

250. See Smolla, *supra* note 249, at 48 (noting the distinctions defamation law draws between different plaintiffs and defendants and stating that “[t]he complexity inherent in these basic distinctions is indicative of the effect of imposing new constitutional standards in what had already been a confusing area of the law”).

251. Daniel A. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 551 (2006).

252. See Smolla, *supra* note 249, at 33–34.

253. *Id.* at 34–35.

254. See DAN B. DOBBS, *THE LAW OF TORTS* § 401, at 1120 (2000) (noting the history of defamation as a strict liability tort); Smolla, *supra* note 249, at 33 (noting that strict liability “remained the operative law” prior to a series of Supreme Court decisions).

255. Smolla, *supra* note 249, at 16.

256. See RESTATEMENT (SECOND) OF TORTS § 892A cmt. e (1977).

through *A*'s yard and still be deemed to have engaged in the particular conduct to which *A* consented. *A* can easily predict the manner in which *B* is likely to walk across the yard, and *B* probably has a clear understanding of what *A* considers permissible. *B* might walk briskly, he might walk slowly, he might walk with a limp, but it will be the unusual case in which *B* walks through *A*'s yard in a manner that places him outside the scope of *A*'s consent.²⁵⁷ But as anyone who ever played the telephone game as a child can attest, the words another individual will speak are much more difficult to predict. Language is a notoriously imprecise means of communication, and unless *A* and *B* have agreed in advance to the exact words *B* may use, it is likely that *B* will say *something* that *A* did not fully anticipate. *A* and *B* may think they understand the permissible bounds of *B*'s statements, but the exact words that *B* uses in good faith may be quite different than what *A* expected.

Perhaps, then, § 583's standard can be justified as a way of accommodating the imprecision of language. By allowing a defendant to claim the absolute defense of consent when the plaintiff had reason to know that the defendant's statement might be defamatory in the general sense, § 583 gives defendants the "breathing space" they need to communicate while giving full effect to the First Amendment concerns at issue.²⁵⁸ The same theory could also apply to § 583's rule regarding invited or procured defamation.

However, existing defamation rules already provide courts with a vehicle for dealing with these concerns that meshes nicely with the standard rules for consent. If a defendant's statements are true, there is of course no liability for defamation.²⁵⁹ But a statement need not be the literal, 100% truth to qualify as being "true" for purposes of defamation liability. It is enough that the gist or sting of the defamatory is true.²⁶⁰ In other words, substantial truth is enough for a statement to be "true."²⁶¹ This is actually quite similar to the traditional definition of consent. Consistent with the general consent standard in other contexts, a plaintiff's consent to a defamatory publication would be effective only where the plaintiff consented to the particular defamatory statement or

257. An obvious example would be if *B* walked across *A*'s yard carrying a sign protesting some action on the part of *A*. But a court would probably have little difficulty concluding that *B*'s actions were substantially different than that to which *A* consented.

258. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

259. *Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo.1996); RESTATEMENT (SECOND) OF TORTS § 581A (1977).

260. *Rouch v. Enquirer & News of Battle Creek Mich.*, 487 N.W.2d 205, 214 (Mich. 1992).

261. *Id.* at 214–15.

substantially the same statement.²⁶² This standard seems adequate to reflect the realities of human communication, while providing defendants with a reasonable amount of breathing space in terms of their communications.

Finally, the uncertain nature of the wrong involved in defamation cases actually cuts against the recognition of a true absolute privilege in cases like *Chapman*. Cases like *Chapman*, in which the defendant publishes the results of an investigation, at first glance seem to cry out for a special rule given the uncertainty of what the defendant will say. It is tempting to treat these cases as implicating the defense of consent. After all, the plaintiff *has* consented to the publication of the findings of the investigation. But even the authors of the *Restatements* seemed to recognize that, given the plaintiff's lack of certainty as to what the defendant might say, the plaintiff's consent could not be treated as a true absolute defense. Instead, the authors hedged on the consent issue and treated consent in this context as establishing a conditional privilege, while inexplicably insisting they were recognizing an absolute privilege.

3. Preventing Plaintiff Trickery

The primary concern underlying § 583's expanded conception of consent seems to have been preventing a plaintiff from baiting a defendant into making a defamatory statement for purposes of bringing a defamation claim. Similar concerns over allowing a plaintiff to profit by repeating a defamatory publication are also present in decisions concluding that there has been no publication when the plaintiff himself repeats the defendant's defamatory statements.²⁶³ The concern over a party "inviting or inducing indiscretion and thereby laying the foundation of a lawsuit for his own pecuniary gain"²⁶⁴ appears repeatedly in defamation cases, dating back well into the nineteenth century.²⁶⁵ The Reporter's Note to § 583 also lists this concern in

262. RESTATEMENT (SECOND) OF TORTS § 892A(2)(b) (1979).

263. See *Layne v. Builders Plumbing Supply Co.*, 569 N.E.2d 1104, 1111 (Ill. App. Ct. 1991) ("[T]he availability of increased damages might encourage publication of a defamatory statement by a plaintiff who reasonably could have avoided such republication or could have tried to explain to a prospective employer the true nature of the situation and to contradict the defamatory statement."); see also Pamela G. Posey, Note, *Employer Defamation: The Role of Qualified Privilege*, 30 WM. & MARY L. REV. 469, 483 (1989) (stating that recognizing the self-publication theory "is an open invitation for the discharged employee to create his own wrong, implicate the defendant of his choice, aggravate rather than mitigate damages, and collect for the self-inflicted injury").

264. *Royer v. Steinberg*, 90 Cal. App. 3d 490, 499 (Cal. Ct. App. 1979).

265. See, e.g., *Gordon v. Spencer*, 2 Blackf. 286, 288 (Ind. 1829); *Richardson v. Gunby*, 127 P. 533, 536 (Kan. 1912); *Howland v. George F. Blake Mfg. Co.*, 31 N.E. 656, 658 (Mass. 1892).

supporting the rule.²⁶⁶ One court has cited the prevention of such action as “[o]ne of the primary purposes of the doctrine of consent in defamation law.”²⁶⁷ Indeed, although there is little authority predating publication of the original *Restatement* in support of applying a consent theory in these cases, some of that very limited authority cites this concern as the justification for the rule.²⁶⁸

If plaintiff trickery is the primary concern in these cases, § 583’s expanded definition of consent is a woefully overly inclusive means of addressing the problem. Application of the rules in § 583 may preclude recovery in the numerous instances in which an individual, in good faith, seeks to discern the reasons behind a defendant’s adverse actions or opinions or enlists another in a similar effort. The rules cause such preclusion even when the defendant responds with a knowing falsehood and even though the individual may have little reason to suspect that the resulting publication will be defamatory in the manner it proved to be.

There are three possible alternatives to relying upon the strained and anomalous conception of consent outlined in § 583 that could address the trickery concern. The first would be to hold that there has been no publication when an individual invites or procures a defamatory publication. By eliminating the ability of a plaintiff to establish an element of her prima facie case, this approach would have the same practical effect as recognizing an absolute privilege of consent. It would also give relatively little weight to an individual’s reputational interests. The second approach would be to conclude that any invited or procured defamatory publication is subject to a conditional privilege. The third would be to allow a jury to inquire into whether it was the plaintiff’s purpose in inviting or procuring the defamatory publication to decoy the defendant into a defamation suit. If not, the plaintiff’s action would not be barred. Courts had utilized each of these approaches prior to the publication of the original *Restatement*.²⁶⁹ Thus, courts have other

266. RESTATEMENT (SECOND) OF TORTS § 583 Reporter’s Note (1977).

267. *Royer*, 90 Cal. App. 3d at 499; see also *Lee v. Paulsen*, 539 P.2d 1079, 1080 (Or. 1975) (“The reason for the imposition of the privilege when the plaintiff consents or requests the publication is based upon the unwillingness of the courts to let the plaintiff lay the foundation of a lawsuit for his own pecuniary gain.” (internal quotations marks omitted)).

268. *E.g.*, *Sutton v. Smith*, 13 Mo. 120, 123–24 (1850); see also *Slander—Privileged Communications—Publication Invited or Procured by Plaintiff*, 24 HARV. L. REV. 232, 242 (1911).

269. See *supra* notes 209–20 and accompanying text (discussing the older approaches to cases of invited or procured defamation). In *Nott v. Stoddard*, 38 Vt. 25, 31 (1865), the Vermont Supreme Court stated that “if the plaintiff caused the inquiry to be made as a trick, for the purpose of inducing the defendant to utter a slander against her, she could not make the words thus elicited a ground of action.” However, “[i]f the inquiry was made in good faith on the part of the plaintiff and [a third party], merely to ascertain whether the defendant had made such a charge, the words spoken on that occasion might be the ground of an action, as the defendant would have no right to avail himself of that occasion to reiterate the slander to gratify his ill-will

means to deal with plaintiff trickery, and deviating from the normal rules of consent in tort cases is unnecessary.

C. Do the Special Concerns Associated with Employment References Justify a Different Rule?

If the concerns over the special nature of defamation claims can be adequately addressed without resorting to a redefinition of traditional notions of consent, perhaps there are special concerns involving the employment reference scenario that justify the redefinition. If so, this would not be the first time courts have sought to define the concept of consent in light of the special concerns raised by a particular scenario. The two most obvious examples are the special rules that have developed regarding a patient's consent to potentially risky medical treatments and the special consent rules regarding participation in athletic events.²⁷⁰

In the case of employment references, it is easy to identify the special concerns that might justify a reformulation of the traditional rules regarding consent. An expanded conception of consent, combined with employers' willingness to rely upon express consent agreements and waivers, could encourage more employers to provide references. Prospective employers might benefit from this arrangement in terms of their ability to acquire the information necessary to make intelligent hiring decisions. Good employees might benefit in terms of their increased ability to land quality jobs due to the willingness of former employers to provide references. And society at large might benefit in terms of increased productivity and efficiency as a result of the better matching between employer and employee that can take place.²⁷¹

Militating against an expanded conception of consent is the reality that a defamatory job reference can have dramatic consequences for an

or malice toward the plaintiff.”

270. See Timothy Davis, *Avila v. Citrus Community College District: Shaping the Contours of Immunity and Primary Assumption of the Risk*, 17 MARQ. SPORTS L. REV. 259, 282 (2006) (discussing the concept of consent in sporting event cases); Margaret Z. Johns, *Informed Consent: Requiring Doctors to Disclose Off-Label Prescriptions and Conflicts of Interest*, 58 HASTINGS L.J. 967, 1008–12 (2007) (discussing evolving conceptions of informed consent in the case of medical treatment). The question of how consent should be defined has also arisen in the case of experimental procedures in which medical science is ignorant of all of the potential risks associated with a procedure. See Lars Noah, *Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361, 384 (2002) (noting that “some commentators have wondered whether it even makes sense to speak of ‘informed’ consent in the research setting” since investigators do not know all of the risks involved and are therefore unable to fully inform patients of the risks).

271. See Verkerke, *supra* note 1, at 133 (discussing references and arguing that “labor market efficiency depends to a great extent on matching workers to jobs for which they are well suited”).

employee's job prospects. There is also the reality that most employees do not consent to an employer's provision of a reference in the way we normally think of consent.²⁷² Prospective employees have little meaningful choice when it comes to consenting to a reference or background check;²⁷³ if an applicant wants a job, she will probably sign whatever form or check whatever box the prospective employer puts in front of her. While this reality, standing alone, is not necessarily a reason for invalidating the applicant's consent, it is hardly a reason that supports an expanded definition of consent in the reference context.²⁷⁴

In addition, there is the question of how much society truly benefits from an expansive conception of consent in the case of employment references.²⁷⁵ The willingness of courts to enforce broadly worded releases might increase the willingness of some employers to provide more detailed employment references. However, if history is any guide, many employers will still decline to do so simply because they are risk adverse and because they receive little benefit in providing references.²⁷⁶ Ultimately, there is at least some question as to what more the law can realistically do in terms of tweaking the rules regarding defamation to encourage the flow of employment references. In the meantime, some employees are forced to bear the cost of knowingly false and defamatory references—a result with no societal benefits.

Perhaps the strongest argument favoring an expansive definition of consent in the reference context is that for references to be useful, employers must have the freedom to provide honest opinions about an employee's work performance. The basic facts associated with an employee's former employment may be helpful to a prospective employer. But most prospective employers also want to hear subjective evaluations of an employee's work performance and collegiality, hence the common question from prospective employers: "Would you rehire this individual?"²⁷⁷ A negative opinion about an employee's work

272. See DOBBS, *supra* note 254, § 412, at 1156 ("There are elements of economic compulsion in some such cases . . .").

273. See Paetzold & Willborn, *supra* note 8, at 132 (noting that coercion is a concern in such cases).

274. See DOBBS, *supra* note 254, § 412, at 1156 (suggesting that consent in such cases "should not be interpreted to permit publication of a knowing or reckless falsehood").

275. See Finkin & Dau-Schmidt, *supra* note 3, at 399 (expressing skepticism that the law should "allow an employer to escape legal scrutiny altogether when, for example, it knowingly asserts a completely baseless accusation of malfeasance as the ground of discharge, uses the reference as a retaliatory device, or uses the threat of a malicious reference as a disciplinary cudgel").

276. See *supra* notes 33–34 and accompanying text (noting the high risk and low benefit to employers providing references and the resulting decline in the willingness of employers to provide detailed references despite the proliferation of reference immunity statutes).

277. See, e.g., *Eitler v. St. Joseph Reg'l Med. Ctr. South-Bend Campus, Inc.*, 789 N.E.2d 497, 499 (Ind. Ct. App. 2003) (involving a reference form asking this question as well as other

performance is far more likely to be damaging to the employee's job prospects than a misstatement of pure fact and thus more likely to result in a defamation claim. At the same time, it is more difficult for an employer to prove the "truth" of an opinion than it is the truth of an actual fact, thus potentially resulting in fewer pretrial decisions made as a matter of law.

If the primary justification for an expanded definition of consent is the need to preserve the ability of employers to provide honest opinions in their references, there are already measures in place in many jurisdictions that strive to do just that. First, despite the Supreme Court's conclusion that the First Amendment does not automatically shield statements of opinion from defamation actions,²⁷⁸ there are numerous rules that work to protect defendants who give their opinions.²⁷⁹ In the reference context, the most relevant would be that there can be no liability when the underlying facts forming the basis for that opinion are disclosed and are themselves accurate.²⁸⁰ Thus, as long as the employer explains the factual basis for an adverse opinion and does so in a truthful manner, there should be no liability.

In addition, employer reference statutes may provide employers with qualified immunity for statements of opinion concerning an employee's job performance. Many reference statutes are written broadly enough to cover an employer's opinions concerning an employee's job performance,²⁸¹ including an employee's habits,²⁸² attitude and effort,²⁸³ ability or inability to perform job duties,²⁸⁴ and any performance evaluations that may have been conducted.²⁸⁵ A few reference statutes

subjective questions).

278. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

279. These include the idea that there is no liability when the statement of opinion does "not contain a provably false factual connotation," *id.* at 20, "cannot 'reasonably [be] interpreted as stating actual facts,'" *id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)), or consists merely of "rhetorical hyperbole." *Id.* at 17; see also Joseph W. King, *Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to Be Understood as Fact*, 2008 UTAH L. REV. 875, 878 (listing four bases for classifying a statement as protected opinion).

280. See RESTATEMENT (SECOND) OF TORTS § 566 (1977).

281. See, e.g., ARIZ. REV. STAT. ANN. § 23-1361(C) (West, Westlaw through 1st Reg. Sess., 51st Legis. 2013) (providing qualified immunity to an employer who provides information about the reason for an employee's termination or about job performance, professional conduct, or an evaluation); R.I. GEN. LAWS § 28-6.4-1(c) (West, Westlaw through ch. 491 of Jan. 2012 Sess.) (providing qualified immunity to an employer who provides "fair and unbiased" information about an employee's job performance); TENN. CODE ANN. § 50-1-105 (West, Westlaw through end of 2012 2d Reg. Sess.) (same).

282. COLO. REV. STAT. § 8-2-114(1)(b), (3) (West, Westlaw through ch. 1-4 & 6 of 1st Reg. Sess., Gen. Assemb. 2013).

283. S.C. CODE ANN. § 41-1-65(A)(5), (C)(4) (West, Westlaw through end of 2012).

284. GA. CODE ANN. § 34-1-4(b) (West, Westlaw through 2012 Reg. Sess.).

285. E.g., LA. REV. STAT. ANN. § 23:291(A) (West, Westlaw through 2012 Reg. Sess.);

even specifically provide qualified immunity to an employer who responds to a question concerning whether the employer would rehire the employee.²⁸⁶ Thus, to the extent there is concern that the threat of litigation may chill the willingness of employers to provide opinions about employees, narrowly tailored employer reference statutes may provide a means to address this concern.

V. A RESTATEMENT OF THE LAW REGARDING CONSENT IN THE DEFAMATION AND REFERENCE CONTEXTS

Defamation cases and employment reference cases involve a difficult balancing of interests. However, the special concerns present in defamation cases and employment reference cases can be addressed without drastically expanding the defense of consent. The following Part advances a restatement and clarification of the rules regarding consent in the defamation and employment reference contexts.

A. *The General Standard*

The general rule regarding consent that applies in all intentional tort cases should be the same rule that applies in defamation cases (including defamation cases stemming from negative references). Thus, consent should be an absolute defense in a defamation action when the plaintiff consented to the particular defamatory publication or to substantially the same publication.²⁸⁷ This would mean that an individual's consent would be ineffective where the defendant knowingly made a false statement or lacked a reasonable belief as to its truthfulness, unless the individual knew in advance that the defendant would make the particular statement. In such a case, the publication would be of a different nature than that to which the individual consented.²⁸⁸ This rule should be sufficient to cover most defamation cases.

In the reference scenario, employers could still take advantage of

S.C. CODE ANN. § 41-1-65(C)(4); UTAH CODE ANN. § 34-42-1 (West, Westlaw through 2012 Reg. Sess.).

286. *E.g.*, CAL. CIV. CODE § 47(c) (West, Westlaw through 2012 Reg. Sess.); COLO. REV. STAT. ANN § 8-2-114(1)(a), (3).

287. *Cf.* RESTATEMENT (SECOND) OF TORTS § 892A(2)(b) (1979) (stating that to be effective, consent must be “to the particular conduct, or to substantially the same conduct”).

288. Alternatively, one could treat consent in the defamation context as a conditional privilege, which may be lost upon a showing that the defendant knew the statement was false or lacked a reasonable basis for making the statement. A few courts have done this. *See supra* note 35 and accompanying text. However, in light of the fact that most courts treat consent as an absolute defense, the approach suggested here could be incorporated more easily into existing law in most jurisdictions. Another possibility would be to conclude that the consent given in such a case was based on the individual's substantial mistake, known to the defendant, that the defendant would tell the truth or at least act reasonably when speaking.

releases. However, they would be required to do so in a way that makes clear to the employee the risks involved in consenting to the release of information. Prospective employers could still require applicants to sign consent forms releasing them from liability. The forms would shield employers from liability, provided they listed the types of information the responding employer could provide to the prospective employer and the employee was aware of the factual information that was disclosed. In addition to job titles and dates of employment, this information could include such topics as whether the employee was voluntarily or involuntarily separated from employment and the given reasons for the separation, any performance evaluations that had previously been provided to the employee, and any instances of threatening or harassing conduct on the part of the employee.²⁸⁹ With each of these topics, an employee should already have knowledge as to any defamatory statements an employer might make. By listing each topic that can be addressed, the risks associated with the release are brought home to the employee. Consent under these circumstances would denote the employee's actual appreciation of the potential risks involved. To make clear the scope of consent, the agreement should also indicate that the employee's consent only extends to information the responding employer in good faith believes to be true after a reasonable investigation.²⁹⁰ To the extent this clarification also encourages current employers to negotiate similar agreements with or provide similar notice to their current employees concerning what the employer will say when asked for a reference, this would be an added bonus.²⁹¹

B. *Invited or Procured Defamation*

The general rule should be that unless a plaintiff has consented to a defamatory publication in accordance with the rule above, the fact that the plaintiff has invited or procured a defamatory publication should not, by itself, be an absolute bar to recovery. Thus, the fact that an employee, in the presence of others, demands to know why she was fired should not automatically pose an absolute bar to recovery. In the reference scenario, this would mean that the fact that an employee has solicited a former employer to provide a reference is likewise not, by itself, an absolute bar to recovery. The rule should be that if an agent of

289. Nebraska recently enacted a similar reference immunity statute. *See* NEB. REV. STAT. ANN. § 48-201(1)(a) (West, Westlaw through end of 2013 Reg. Sess.).

290. *See, e.g.,* Mandelblatt v. Perelman, 683 F. Supp. 379, 381, 383–84 (S.D.N.Y. 1988) (involving an agreement specifically premised upon a good-faith opinion based upon an investigation).

291. *See* Halbert & Maltby, *supra* note 8, at 411–12 (suggesting that employers and employees bargain over the information to be conveyed in a reference prior to an employee's departure from employment).

an employee contacts an employer in an attempt to learn why the employee was fired, tries to convince the employer to change its mind with respect to an adverse employment decision, or otherwise invites the employer to explain an adverse decision, the employee has not automatically consented to any resulting defamatory publication.

Instead, a plaintiff should be considered to have consented to a defamatory publication by inviting the defendant to speak only where the plaintiff knows with reasonable certainty in advance what the defendant will say. Thus, for example, the employee who employs an agent to pose as a prospective employer, and knows with reasonable certainty in advance what the employer will say, has consented to the ensuing defamatory publication. The doctrine of apparent consent would apply if the defendant reasonably believed that the plaintiff was consenting to a particular defamatory statement or to a substantially similar statement. Thus, the employer who reasonably believes that an employee already knows the reason she is being fired when she demands that the reason be made public could claim the defense of consent.

Absent consent in accordance with the general rule, employers and other defendants should enjoy a conditional privilege when invited to speak. The privilege should be lost upon a showing of whatever level of fault—negligence, actual malice, bad faith, etc.—a jurisdiction typically requires in the case of a conditional privilege. As discussed, courts historically handled these kinds of cases either by applying a conditional privilege or by concluding that there was no publication.²⁹² Some courts continue to treat these cases as involving a question of publication, concluding that there has been no publication to a third party in these cases.²⁹³ However, there are several reasons why treating these situations as involving publications subject to a conditional privilege is preferable.

First, treating these cases as involving publications would be more consistent with the traditional justifications for consent and human nature. When an employee asks a former employer to provide a reference or has a friend intervene on the employee's behalf, the reality is that the party ultimately responsible for making the ensuing defamatory statement is still the employer. The employee may have initiated the publication, but the employer can always choose to remain silent in these situations. Indeed, where the employer lacked a good-faith belief in what it said, it *should* have remained silent. Thus, a wrong has been done, and the wrongdoer remains the employer. Moreover, acknowledging the reality that there has, in fact, been a publication is

292. See *supra* notes 209–20 and accompanying text.

293. E.g., *Mims v. Metro. Life Ins. Co.*, 200 F.2d 800, 802 (5th Cir.1952).

consistent with human nature in many cases. It is simply unrealistic, for example, to expect an employee to remain in the dark as to the reasons behind the employee's termination or in a state of inertia after being fired. If an employee is caught off guard by a firing, she will seek an explanation, and if asking for an explanation in the presence of others or asking a friend to intervene is the only option available, she will probably pursue it. If an employee comes to suspect that an employer is defaming her to other employers, she may well enlist an agent to confirm her suspicions. The fact that that an employee took these actions does not change the fact that the employer chose to respond and that a third party received and understood the ensuing defamatory statements.

In the related scenario involving intracompany defamatory statements, contemporary decisions have recognized these same types of realities.²⁹⁴ In concluding that a publication occurs when one corporate officer defames an employee to another corporate officer, one court concluded that pretending that there was no publication between "individuals with distinct personalities and opinions" would ignore reality.²⁹⁵ Those opinions can be influenced just as easily as a publication between individuals in different companies and with the same adverse effects on the plaintiff.²⁹⁶ In the "invited or procured" scenario, the fact that the defamatory publication was made to an agent of the plaintiff may mean that damages are limited. However, it does not change the inescapable fact that publication occurred. Recognizing this reality would allow courts to abandon the difficult-to-defend legal fiction that the plaintiff has defamed himself.

The "invited or procured" scenario involves the type of situation in which the law typically recognizes a qualified privilege based on the special relationship of the parties or the public interest in the free flow of information.²⁹⁷ For example, courts typically hold that an employer is

294. See *DOBBS*, *supra* note 254, § 402, at 1126 (stating that the "contemporary view" is that a publication does occur when one member of the defaming organization makes a defamatory statement about the plaintiff to another member of the same organization).

295. *Pirre v. Printing Devs., Inc.*, 468 F. Supp. 1028, 1041–42 (S.D. N.Y. 1979), *aff'd*, 614 F.2d 1290 (2d Cir. 1979).

296. See *Luttrell v. United Tel. Sys., Inc.*, 683 P.2d 1292, 1294 (Kan. Ct. App. 1984) ("Certainly, damage to one's reputation within a corporate community may be just as devastating as that effected by defamation spread to the outside."), *aff'd*, 695 P.2d 1279 (Kan. 1985); *Pirre*, 468 F. Supp. at 1041 (stating that the opinions of corporate officers may be influenced by the defamatory statements of another officer just as surely as others); DAVID A. ELDER, *DEFAMATION: A LAWYER'S GUIDE* § 1:21 (2003) (citing cases and arguing in favor of recognizing that a publication has occurred in the case of intracompany defamation).

297. See *RESTATEMENT (SECOND) OF TORTS* § 596 (1977) (recognizing a qualified privilege where parties share a common interest in the subject matter); *id.* § 598 (recognizing a qualified privilege in the case of a communication to one who may act in the public interest).

conditionally privileged to inform its employees about the reasons behind another employee's termination.²⁹⁸ In addition to treating intracompany publications as being subject to a conditional privilege,²⁹⁹ the *Restatement (Second) of Torts* takes the position that a publication between an employer and the agent of an employee is conditionally privileged.³⁰⁰ Thus, treating the “invited or procured” scenario as involving a question of privilege rather than publication would be consistent with tort law's treatment of privilege more generally.

Ultimately, recognizing the existence of a conditional privilege when an employee invites or procures the defamatory publication represents the best means of balancing the competing interests present. Providing employers with a privilege ensures a level of protection for employers, which is maintained provided the employer acts in good faith. At the same time, this approach provides a measure of protection for employees' reputational interests while furthering society's interests in the transmittal of honest employment references.

1. Attempts to Lure a Defendant into a Defamation Claim

To the extent jurisdictions remain concerned about the potential for disgruntled employees to lure employers into making defamatory publications for purposes of bringing a lawsuit, they could—by judicial decision or legislative enactment—provide employers with an additional affirmative defense to deal with this concern. If an employer can establish that the employee or the employee's agent invited the employer to make a defamatory publication for the purpose of satisfying the publication element of a defamation claim, an absolute privilege would apply with respect to that statement. Thus, the employee could not use the employer's statement to the employee or the employee's agent as the basis for the claim. If instead the employee was engaged in

298. *E.g.*, *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1346 (Colo. 1988).

299. *See* RESTATEMENT (SECOND) OF TORTS § 577 cmt. i (stating that communication “by one agent to another agent of the same principal is a publication,” which may be subject to a privilege).

300. *See id.* § 577 cmt. e (stating that “[t]he fact that the defamatory matter is communicated to an agent of the defamer does not prevent it from being a publication sufficient to constitute actionable defamation,” but noting that the communication may be privileged). Section 584 adds a confusing addition to this idea. Section 584 provides that “[a]n honest inquiry or investigation by the person defamed to ascertain the existence, source, content or meaning of a defamatory publication is not a defense to an action for its republication by the defamer.” *Id.* § 584. At first glance, this rule would seem to create an exception to the idea that one who has invited or procured a defamatory publication has consented to the publication and may not recover. However, comment e to § 584 notes that consent remains a complete defense. *Id.* § 584 cmt. e. Thus, read in its entirety, § 584 suggests that a publication still occurs when a plaintiff or his agent makes an honest inquiry regarding a defamatory publication, but that the defendant may still invoke the defense of consent.

a good-faith attempt to determine what the employer would say or was saying to others, the claim would not be barred.

In addition to addressing the concerns over manufactured claims, this approach would enable employees and their agents to investigate the reasons behind their terminations and whether their employers are likely to defame them when asked for a reference. While there are certainly legitimate concerns about permitting an employee to lure an employer into making defamatory statements, there may be times when having an agent pose as a prospective employer is an efficient and acceptable means of rooting out unlawful and damaging behavior. This situation is somewhat analogous to the case of “housing testers” in the civil rights context. There, individuals posing as interested buyers or renters seek to uncover evidence of discrimination among realtors and landlords.³⁰¹ The same approach has been used in other contexts to uncover evidence of unlawful conduct.³⁰² Courts have typically been receptive to this type of evidence gathering, and have concluded that these testers have standing to sue.³⁰³ Provided the employee has not employed illegal means to gather the evidence, the practice does not seem sufficiently problematic to justify barring a plaintiff’s defamation claim in light of its ability to root out evidence of unlawful behavior that might otherwise go undetected.³⁰⁴

C. Fair and Honest Investigations

Finally, in the case of an individual who consents to the publication of the findings of an investigation, it is debatable whether there is a need for any type of special rule. The general consent rule and the standard rules regarding qualified privileges should be adequate in the vast majority of cases. Thus, the fact that one agrees to submit his conduct to investigation knowing that its results will be published does not necessarily mean that the individual has consented to a resulting

301. *E.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982) (involving the use of testers to uncover racial discrimination under the Fair Housing Act).

302. *E.g.*, *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1099 (9th Cir. 2004) (involving the use of testers to uncover disability discrimination under the Fair Housing Amendments Act); *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 292–93 (7th Cir. 2000) (involving the use of testers to uncover employment discrimination under Title VII).

303. *E.g.*, *Havens*, 455 U.S. at 373–74; *Pac. Props.*, 358 F.3d at 1104; *Kyles*, 222 F.3d at 297–98. *But see* Michael C. Duff, *Union Salts as Administrative Private Attorneys General*, 32 BERKELEY J. EMP. & LAB. L. 1, 16–17 (2011) (discussing the unwillingness of the National Labor Relations Board to apply these kinds of holdings to cases decided under the National Labor Relations Act).

304. *See* Nat Stern, *Implications of Libel Doctrine for Nondefamatory Falsehoods Under the First Amendment*, 10 FIRST AMEND. L. REV. 465, 492 (2012) (“It is not self-evident, for example, that a misrepresentation of identity in the course of investigative reporting is of such intrinsic ‘evil’ that no ‘case-by-case adjudication’ is needed before it is subject to sanction.”).

defamatory publication. In this instance, the individual may not know with any degree of certainty what the results of the investigation will be. If, however, the individual knows with reasonable certainty what the contents of the resulting report will be, or executes a valid release, then consent should be a defense. If the defense of consent does not apply, the defendant could still theoretically claim a qualified privilege if the defendant only discloses the results to those who share a common interest in the matter.

If jurisdictions feel the need to craft a separate consent rule to deal with this type of situation, then an individual should be treated as having consented only to the publication of the *honest* and accurate findings of a good-faith investigation conducted in a reasonable manner. This is already essentially the rule contained in § 583 of the *Restatement (Second) of Torts*. However, it eliminates the confusion caused by the *Restatement's* illogical conclusion that an absolute privilege applies in such cases. The rule is also consistent with the purposes underlying the consent defense and the expectations of most individuals when they submit their conduct to investigation. An individual who submits his conduct to investigation is unlikely to know in advance the outcome; however, he may reasonably believe that the potential benefits associated with allowing the results to be published outweigh the risks. If the investigation is being conducted pursuant to a contractual arrangement, the individual has a contractual right to expect good faith on the part of the investigators. Even if no formal contract exists, an individual still has a right to expect that the investigation will be conducted in good faith—which would include being conducted in a reasonable manner—and that its results will be reported accurately and in good faith.

CONCLUSION

Whether the result of conscious design or sloppy scholarship, the authors of the *Restatement (Second) of Torts* crafted a series of rules governing the defense of consent in defamation cases that are at odds with the rest of tort law. The rules are also confusing and poorly explained. All too often, the result has been that plaintiffs with potentially valid defamation claims have lost at the pretrial stage or seen jury verdicts overturned as courts rely on these flawed rules.

The employment reference scenario poses special problems for policymakers. Despite the best efforts of courts and legislatures to provide protection for honest references, employers remain unwilling to provide meaningful information in response to reference requests. The reality very well may be that any reasonable attempt to balance the competing interests of employers and employees will still be insufficient to prompt employers to provide more information.

However, by restating the rules regarding consent in the defamation context, courts and legislatures may provide a greater measure of fairness in what is likely to be a growing area of concern. In addition, by clarifying these same rules, courts may provide employers with a greater understanding of the important role and protection that the defense of consent can provide in this context.