Title

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Author

Simons, Kenneth W

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Kenneth W. Simons*

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Abstract: This essay explores the issue of generality and tort law from two directions. First, when common law judges offer justifications of tort doctrine, what is the appropriate level of generality or specificity of those justifying principles and policies? Second, when judges identify and refine tort doctrines, what is the appropriate level of generality or specificity of the doctrines themselves? With respect to the first issue, Stephen A. Smith has argued that judges ordinarily do, and should, invoke only "intermediate" justifications for their decisions (such as dignity, fairness, or reasonableness), rather than "foundational" ones (such as utilitarianism or corrective justice). Smith's argument has some purchase: intermediate principles indeed do and should play a prominent role in common law decision-making. However, foundational principles can legitimately play a more significant role than Smith suggests, especially if they are pluralistic. And intermediate principles are sometimes too vacuous to operate as genuine justifications. With respect to the second issue, Stephen D. Sugarman and Caitlin Boucher have proposed that numerous torts that might be characterized as "dignitary" torts should be merged into a single "unifying" tort, the tort of wrongfully harming another's dignity in a highly offensive way. The authors plausibly argue that courts have not paid sufficient attention to gaps and arbitrary distinctions between these torts. However, their more radical claim that one uber-tort should replace all "dignitary" torts is not persuasive. Torts as distinct as battery, false imprisonment, intrusion into a private place, and malicious prosecution reflect distinct wrongs and should not be supplanted by a single tort prohibiting wrongful and highly offensive conduct. The analysis offered in this essay is informed by many examples from the Restatement Third, Torts: Intentional Torts to Persons, for which I have served as co-Reporter or Reporter.

***Corresponding author: Kenneth W. Simons**, Chancellor's Professor of Law and Philosophy, University of California, Irvine School of Law, Irvine, CA 92697, USA,
E-mail: ksimons@law.uci.edu

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1 Introduction

This brief essay explores the issue of generality and tort law from two directions. First, when common law judges offer justifications of tort doctrine, what is the appropriate level of generality or specificity of those justifying principles and policies? Second, when judges identify and refine tort doctrines, what is the appropriate level of generality or specificity of the doctrines themselves? With respect to the first issue, Stephen A. Smith has recently argued that judges ordinarily do, and should, invoke only "intermediate" justifications for their decisions, rather than "foundational" ones.[1] My response is partial but not complete agreement: intermediate principles indeed do and should play a prominent role in common law decision-making, but foundational principles can legitimately play a more significant role than Smith suggests, especially if they are pluralistic. With respect to the second issue, Stephen D. Sugarman and Caitlin Boucher have recently proposed that numerous torts that (they believe) fall within the wide umbrella of "dignitary" torts—including battery, false imprisonment, intrusion into a private place, and malicious prosecution—should be merged into a single "unifying" tort, the tort of wrongfully harming another's dignity in a highly offensive way.[2] Although I share their view that courts have not paid sufficient attention to gaps and arbitrary distinctions between these torts, I find unpersuasive their more radical claim that one uber-tort should replace them.

The analysis in this essay is informed by my experience, since 2012, as co-Reporter or Chief Reporter for the Restatement Third, Torts: Intentional Torts to Persons.[3] The project is in its concluding phase. Now is thus an opportune time to reflect about the relationship of this project to some important ongoing debates in tort theory.

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1 Stephen A. Smith, *Intermediate and Comprehensive Justifications for Legal Rules*, in Justifying Private Rights 63–84 (Simone Degeling et al. eds., 2020).

2 Stephen D. Sugarman & Caitlin Boucher, *Re-Imagining the Dignitary Torts*, 14 J. Tort L. 101 (2021).

3 I was co-Reporter from 2012 to 2014, and Chief Reporter from 2014 to present. Jonathan Cardi has been Associate Reporter since 2015, and Ellen Pryor was co-Reporter or Associate Reporter from 2012 to 2014.

2 The Optimal Generality or Specificity of Judicial Justifications of Tort Law[4]

If a common law court is undertaking to explain why it has chosen to maintain, revise, or reject an existing tort doctrine, how general or specific should the justifications be? The answer to this question depends, of course, on what counts as a persuasive and legitimate justification. If "whatever the individual judge subjectively intuits is the right result" is a sufficient and legitimate justification, then the answer is: "The justification is highly specific." And if the precise brand of cereal that the judge ate for breakfast is an adequate justification, then again, the justification is highly specific (although clearly illegitimate!). By contrast, if "common sense" or "public policy," without further elaboration, is an appropriate justification, then the answer is a very high level of generality.

Few would endorse either of these extremes. The genuine debate is over two principal issues. First, should courts endorse *foundational* justifications such as economic efficiency, utilitarianism, corrective or distributive justice, or civil recourse? Second, and closely related, should courts endorse justifications that are controversial or not widely shared?[5]

2.1 Foundational and Intermediate Justifications for Legal Doctrine

Addressing both issues, Professor Stephen A. Smith has recently offered a powerful negative answer: Courts typically do, and should, restrict themselves to "intermediate" justifications for legal rules and should abjure foundational ones, such as utilitarianism or Kantian theories.[6] "Examples of intermediate principles," according to Smith, "include fairness, honesty, dignity, reasonableness, keeping one's word, proportionality, clarity, stability and predictability."[7]

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4 I use the term "optimal" with some hesitation, given its strong association with economic or cost-benefit analysis. *Cf.* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983). I do not intend that association, because economic or efficiency arguments are not the only legitimate forms of common law reasoning.

5 For purposes of this paper, I do not distinguish controversial principles from principles that are not widely shared, but these ideas, while related, are distinct. A principle can be controversial, in the sense of provoking disagreement or strong reactions from a few, without being widely shared. And a principle can be endorsed by only a few without being controversial.

6 Smith, *supra* note 1.

7 *Id.* at 63.

This judicial practice of framing the justification for their decisions at an intermediate level is defensible, Smith argues, for both prudential and principled reasons. As a matter of prudence, it is advisable to appeal to citizens (and to other judges) on narrower, less controversial grounds that almost all people can endorse. People with quite different foundational views can nevertheless agree at the level of intermediate reasons. Moreover, Smith believes that this is an accurate description of how judges actually reason:

> If intermediate justifications were only partial justifications, we would expect judges to go beyond them, or at least to try to explain … why they are not going beyond them. It is implausible to suppose that judges are involved in a massive conspiracy to misrepresent what they are doing, or that they are in the grip of an unseen force that compels them unwittingly to avoid comprehensive views.[8]

And as a matter of principle, Smith continues, legal decisionmakers should respect the plurality of views that reasonable citizens hold. But, if justifications for legal rules are to be acceptable to reasonable people despite these differences, if they are to be legitimate, the justifications must be intermediate rather than foundational principles. Law is a coercive political institution that must be justifiable to those it coerces.

Smith's argument is very much in the spirit of John Rawls' later work, especially Political Liberalism,[9] and the argument has considerable explanatory and persuasive power. Nevertheless, I want to raise four questions or concerns about the argument.

A first question is about its descriptive adequacy. Some judges undoubtedly reason in the manner that Smith suggests at least some of the time, consciously selecting intermediate rather than foundational levels of justification for the practical and principled reasons that Smith so elegantly elucidates. But many legal decisions are overdetermined, and indeed multiply overdetermined: reasons of precedent, fairness, stability, and clarity might all point in the same direction, and the judge might treat some of these reasons as independently sufficient to justify the result (especially when a judge is merely applying an existing rule without reconsidering its scope). And judges, especially at the trial level, are often too busy to devote much time to rationalizing the results that they reach.

However, sometimes judges are indeed highly focused on justifying a decision and on selecting the most persuasive reasons for the decision. This is especially the case when judges are modifying or radically revising common law

8 *Id*. at 78.

9 John Rawls, Political Liberalism (2d ed. 2005).

doctrine.[10] If the highest court of a jurisdiction decides to expand the duties of therapists or landowners, or to subject product manufacturers to a stricter form of liability than negligence, or, on the other hand, to limit or altogether deny the duty of a homeowner to prevent a social guest from driving home while intoxicated, the court will offer explicit justifications for doing so. And I agree that the type of justification offered is more likely to be an intermediate rather than a foundational one. The judge is more likely to appeal to "fairness" than to a Scanlonian duty of what we owe to one another or a Rawlsian "veil of ignorance" egalitarian justification, and more likely to invoke "deterrence of accidents" or prevention of violence than an explicitly utilitarian criterion of maximizing social welfare.

But I am less certain than Smith that such appeals to intermediate concepts are invariably attempts to respect the diversity of foundational principles. Sometimes judges rely upon intermediate concepts because the concepts are rhetorically attractive yet sufficiently open-ended that they permit the judge considerable freedom in how to decide the case. "Reasonableness" and "fairness" are good examples. Who would object to the "accusation" of making a reasonable or fair decision? Yet these terms have little determinate content and can carry dramatically different meaning, depending on the context.[11] Judges are comfortable employing such categories because of their positive connotations and wide usage, but in some instances, judges use them to avoid controversy and to preserve the appearance of objectivity—even though the judge, if honest, would not characterize the intermediate principle as a substantial argument in favor of the decision at hand. Call this *the avoidance strategy*.

I do not wish to overstate the point. When judges decline to formulate a clear rule and instead employ a relatively opaque intermediate concept, the reason is often commendable. This approach might, for example, reflect a principled form of judicial modesty, a reluctance to expand or contract liability absent greater confidence that there is sufficient empirical or normative reason to do so.

A second question is related to the first. When judges employ vague or indeterminate concepts, sometimes they actually apply those concepts in a more determinate manner, a manner that reveals that an underlying foundational principle is performing the justificatory work after all. When judges require a

10 Whether Smith's account is descriptively accurate in the context of judicial review of statutes and constitutional provisions is less certain, but I do not have space to explore the question here.

11 For some concerns about the elasticity of "reasonableness" and "the reasonable person" in tort law, see Kenneth W. Simons, *The Hegemony of the Reasonable Person in Anglo-American Tort Law*, in 1 Oxford Studies in Private Law Theory 45–79 (Paul B. Miller & John Oberdiek eds., 2d ed. 2021).

defendant to act with "reasonable" care, some cash that concept out in terms of economic efficiency,[12] while others treat it as a requirement of mutual respect or equal consideration, and still others understand it as a procedural (and democracy-reinforcing) injunction to leave almost all cases to the judgment of jurors as members of the community. The simple fact that the judge invoked the rhetoric of reasonableness should not deceive us into thinking that the intermediate concept was the operative reason for the judge's decision. Call this *the foundational guidance strategy*. And this strategy seems inconsistent with Smith's thesis.

Smith might reply that if an intermediate principle is just a smokescreen for a foundational principle, then the judge's decision remains illegitimate. But I would demur: whether this conclusion follows depends on whether ordinary citizens can see through the smoke. If they cannot, if they believe that their own preferred foundational theory can explain the decision even though they reject the judge's actual foundational theory, then they will still perceive the decision to be legitimate. In such a case, to be sure, *genuine* legitimacy is lacking. But *apparent* legitimacy is still valuable for many of the reasons that Smith emphasizes, including instilling faith in legal institutions and avoiding social division.

The possibility of a foundational guidance strategy provokes a third question: Do such concepts as reasonableness, fairness, and stability have sufficient independent content to actually perform the work of justifying legal decisions? Call this *the vacuity objection*. If these concepts are merely empty shells, simply labels for alternative justifications that judges would prefer not to articulate, then they arguably cannot achieve the legitimating function that Smith attributes to them. However, this complaint, as just articulated, is overstated. Reasonableness means something: it is often contrasted, for example, with a purely subjective criterion, at least when it is a component of the reasonable person test. Fairness means something: it reflects such qualities as desert, equality, and proportionality, and it is often contrasted with aggregate welfare.

An instructive example is the principle of loss-spreading, which American courts have frequently emphasized in product liability cases. This is indeed a distinctive principle, one rarely invoked in ordinary negligence cases. Under this principle, courts conclude that it is more justifiable to award compensation, and to distribute the cost of that compensation to those who benefit from the activity in question (such as using a consumer product or transporting highly flammable cargo on a highway), than to leave the loss on the victim. Loss-spreading is indeed

12 *See, e.g.*, Davis v. Consol. Rail Corp., 788 F.2d 1260, 1263–64 (7th Cir. 1986) (Posner, J.); Wassell v. Adams, 865 F.2d 849, 855–56 (7th Cir. 1989) (Posner, J.); Loomis v. Amazon.com LLC, 63 Cal.App. 5th 466 (2021) (Wiley, J., concurring).

an intermediate principle. But it can be justified by the foundational principle of distributive justice but also by the foundational principle of promoting aggregate welfare. Loss-spreading satisfies distributive justice if this is understood as requiring all who benefit from an activity to pay for its costs, including the accidents that the activity predictably causes. And it arguably satisfies a welfarist utilitarian principle because, if a concentrated loss to the victim is not compensated, the victim suffers a loss of welfare that exceeds the aggregate cost to the beneficiaries of the activity, each of whom suffers an insignificant loss of welfare.[13]

Another important example is the intermediate principle of deterrence. The idea of using the law to incentivize behavior is usually associated with utilitarian theories. But it is more accurately understood as an aspect of any moral or legal theory that considers consequences relevant. And such a theory need not be utilitarian. The idea that the law (including the common law) should, among other things, attempt to deter wrongful behavior by imposing liability for such behavior is surely a widely shared view, even if people differ about what constitutes "wrongful" behavior. Some, for example, treat it as behavior that violates the plaintiff's rights, others as conduct that displays the defendant's culpability, and still others as conduct that is less likely to promote social welfare than alternatives that were available to the agent.[14]

So the vacuity objection is overstated. But the objection remains potent in some cases—for example, cases in which the judge is using the intermediate concept merely as window dressing for a justification that the judge prefers not to state or that the judge cannot even articulate. In such instances, the vacuous concept is not a foundational principle in disguise. Instead, use of the concept is simply an illegitimate evasion of the responsibility to justify the decision at hand.

The analysis thus far leaves a lingering question. How can we be sure that whatever distinctive meaning these intermediate principles possess can be endorsed by different foundational theories? The proof must be in the pudding. And when we examine how the dessert is prepared, it might turn out that there is no standard recipe, and thus little or nothing in common between what a Kantian and a Benthamite means by reasonableness, loss-spreading, deterrence, or similar principles.

This line of thought suggests a fourth question about Smith's thesis—while also planting the seeds of a solution. Smith appears to assume that foundational

13 However, courts have not always adequately explained when it is and is not justifiable to employ loss-spreading as a justification for tort liability.

14 For a discussion of the distinction between using cost-benefit analysis to identify conduct that is negligent and to describe the deterrent function of legal rules to increase social welfare, see Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 Loy. L.A. L. Rev. 1171 (2008).

theories themselves are not—or even cannot be—pluralistic. But is this assumption correct?[15] Most judges (and ordinary lay people) are *not* absolutists or monists, even with respect to their foundational beliefs and principles. More likely, they are utilitarians who recognize deontological and distributive justice constraints, or deontologists who acknowledge utilitarian overrides once a threshold of social harm has been exceeded. One prominent example is H.L.A. Hart's famous mixed theory of criminal law justifications, according to which deterrence is the general justifying aim of punishment while retribution is a side constraint that creates proportionality limits on the "distribution" of punishment.[16] In my own writing, I have argued against both unqualified consequentialist views of tort law that rely on overly simplified cost–benefit analysis and unqualified deontological views that reject all tradeoffs between values.[17] This fourth strategy, then, is *foundational pluralism*.

If judges actually endorse foundational theories that are pluralist in this way, combining distinct foundational principles or values, then it is quite possible that over a significant range of cases, judges with different (but pluralistic) foundational theories can endorse the same intermediate principles. A utilitarian theory constrained by rights and a theory of rights that can be overridden by sufficient utility might endorse very similar principles of fairness, desert, precedent, or proportionality. And if this is so, we need not accept the pessimistic conclusion that intermediate principles are too empty of content to justify actual legal decisions.[18]

I have identified two major concerns that Smith's thoughtful model provokes—descriptive inadequacy and the vacuity objection. But I have also outlined several possible strategies for addressing those concerns—including avoidance, modesty, foundational guidance, and foundational pluralism. It should be emphasized that these concerns and strategies are questions of degree. Intermediate concepts are not descriptively completely useless, nor entirely vacuous, nor fully explicable by foundational principles, whether monistic or pluralistic.

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15 Smith, *supra* note 1, at 71 ("Comprehensive moral views are mutually exclusive: one cannot be both a Kantian and a utilitarian.").

16 H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (1968). Gary Schwartz developed a similar "mixed" theory of tort law, drawing on Hart, in *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801 (1997).

17 Simons, *supra* note 14.

18 But I do not wish to overstate the point. Derek Parfit, in his final book, famously argued that the three major normative moral theories—Kantian, consequentialist, and contractualist—can be fully reconciled. The best versions of each theory, he believed, converge on the same results. Derek Parfit, On What Matters (2011). Notwithstanding the rigor and insights of the book, few philosophers have been persuaded by Parfit's Triple Theory.

2.2 Some Examples

Let me now illustrate these relatively abstract points with some specific examples, many of which are drawn from my experience as a Reporter for the Restatement Third of Intentional Torts (hereafter, "R3IT").

First, it is fair to say that the multiple Restatement Third of Torts projects ordinarily frame the justifications for particular doctrinal rules and standards at an intermediate level of generality, as Smith's analysis predicts. The Products Liability restatement repeatedly invokes principles of deterrence, fairness, and loss-spreading.[19] The Restatement of Third, Torts: Liability for Physical and Emotional Harm discusses fairness, justice, deterrence, and incentives.[20] And R3IT refers frequently to fairness, autonomy, and incentive rationales.[21]

One reason why the ALI's Restatement projects greatly emphasize intermediate justifications is somewhat orthogonal to Smith's thesis: Restatements are drafted with an acute awareness that they should be suitable for adoption or for guidance by any of the 50 states, the U.S. territories, or federal common law (such as admiralty law). Given the different legal traditions in different states, the different modes of selecting judges, and the status of Restatements as recommendations of a private entity (rather than rules with the force of law),

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19 Restatement (Third) of Torts: Products Liability § 2 cmt. a (Am. L. Inst. 1998) (identifying a number of rationales for strict liability for manufacturing defects: "the instrumental function of creating safety incentives," "discourag[ing] the consumption of defective products," "reduc[ing] the transaction costs involved in litigating that issue," and "several important fairness concerns," including "allowing deserving plaintiffs to succeed notwithstanding what would otherwise be difficult or insuperable problems of proof [of negligence]," "disappoint[ing] reasonable expectations of product performance," the deliberate choice by manufacturers to "invest in quality control at consciously chosen levels," and the belief that "consumers who benefit from products without suffering harm should share, through increases in the prices charged for those products, the burden of unavoidable injury costs that result from manufacturing defects").

20 *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 1 cmt. a (Am. L. Inst. 2010) (referring to fairness and deterrence); *id.* § 6 cmt. d (referring to corrective justice and "incentives to engage in safe conduct"). Although the reference to corrective justice might appear to invoke a foundational rather than intermediate theory, the fuller context clarifies that corrective justice is here understood in a utilitarian sense:

An actor who permits conduct to impose a risk of physical harm on others that exceeds the burden the actor would bear in avoiding that risk impermissibly ranks personal interests ahead of the interests of others. This, in turn, violates an ethical norm of equal consideration when imposing risks on others.

21 *See, e.g.*, Restatement (Third) of Torts: Intentional Torts to Persons § 1 cmt. b (Am. L. Inst., Tentative Draft No. 4, 2019) (identifying autonomy, dignity, and physical and emotional security as justifications for battery liability); *id.* § 7 cmt. b (identifying freedom of movement, an aspect of autonomy or the freedom of choice, as "the essence of the wrong" of false imprisonment).

Restatements must be as persuasive as possible. The Restatements of Torts are perhaps the most influential of all the ALI Restatements. Reporters and ALI members are therefore careful to provide the most appealing possible justifications for the Restatement rules that the ALI adopts. It is quite common for the Torts Restatements to adduce multiple principles and policies, such as ensuring fairness or creating incentives to avoid harm, in support of a doctrinal rule, without strongly favoring one principle over the others. These distinctive features of Restatements are not inconsistent with Smith's thesis, however. Indeed, they buttress Smith's argument that the justifications for private law rules that courts offer in decided opinions should not rest on highly contentious premises.

Second, consider the doctrinal category "implied consent." This is a problematic intermediate category of justification. As a matter of rhetoric, the category is alluring: if plaintiff consented, whether expressly or "impliedly," surely plaintiff should not be able to recover tort damages. Unfortunately, this is an exemplar of the vacuity objection discussed above: courts employ the category in order to encompass a wide range of cases in which they believe plaintiffs should not recover even though the plaintiff has satisfied the prima facie elements of the relevant intentional tort (such as battery, assault, or false imprisonment). R3IT rejects this promiscuous and unhelpfully broad category. Instead, it identifies distinct subcategories of consent (as well as a distinct "no duty" rule in a narrow subset of battery cases[22]), each of which is independently justifiable and has a defined but limited scope. Thus, the core definition of consent is "actual consent," willingness for the defendant's otherwise tortious conduct to occur.[23] A second category, apparent consent, is essentially a defense of lack of fault as to actual consent: even if plaintiff did not actually consent, defendant is not liable if defendant reasonably believed that plaintiff gave actual consent.[24] A third category, the emergency doctrine, provides that in narrow circumstances, to prevent or reduce a risk to life or health, an actor may engage in otherwise tortious conduct, but only if the actor has no reason to believe that the plaintiff would not have actually consented if the opportunity to do so had existed.[25] And a fourth category, presumed consent, is a generalization of the emergency doctrine: it provides that defendant is not liable if he is justified in engaging in the relevant conduct in the

22 Restatement (Third) of Torts: Intentional Torts to Persons § 1 cmt. h provides: "In a small number of cases, an actor satisfies the usual elements of battery, but tort liability would be inappropriate because the minor intentional contact is clearly socially justifiable." An example is a bus passenger who insists that other passengers not touch him even though this is necessary in order to permit new passengers to board the bus. *Id*. illus. 7.

23 *Id*. § 13.

24 *Id*. § 16(a).

25 *Id*. § 17.

absence of the plaintiff's actual or apparent consent and if the defendant has no reason to believe that the plaintiff would not have actually consented if asked.[26] These separate consent categories have distinct rationales, rationales that the almost-vacuous term "implied" consent obscures.

Here are some examples. If D walks up to her old roommate P at a college reunion and hugs her, D can ordinarily rely on actual consent to preclude battery liability. But even if it turns out that P finds D's conduct objectionable, D can probably rely on apparent consent, because it would be reasonable for D to believe that P actually consented (assuming that P expressed no objection). Now imagine that P2 faints and needs immediate medical care. The emergency doctrine permits medical personnel to give her appropriate treatment, even though she had no actual opportunity either to express or to deny actual consent. Lastly, suppose P3, a member of the high school basketball team, makes a difficult layup. D runs up behind P3 and gives her a pat on the buttocks, which is customary conduct on the team. The presumed consent doctrine is likely to insulate D from liability unless D has reason to believe that P would have objected, if she had had the opportunity to do so.[27] But it is critical to differentiate and carefully define these distinct categories of consent. Actual consent is sufficient to preclude liability, but it is not the only consent category with this effect. Apparent consent requires that defendant's mistaken belief that actual consent exists was a reasonable mistake. Presumed consent must be limited to circumstances in which (a) an actor is justified, under prevailing social norms, in engaging in otherwise tortious conduct and (b) the actor has no reason to believe that the plaintiff would not have actually consented if asked. Absent these limitations, an actor would be protected from liability based merely on her or his assumption that the plaintiff *would* consent to otherwise tortious conduct if asked, even though plaintiff did not actually or apparently consent, and even when it would be very easy for the actor to request consent. If the law always treated such hypothetical consent as precluding liability, the scope of the rights protected by tort law would drastically shrink.

Third, although intermediate justifications such as consent and autonomy are potentially vague, they are hardly bereft of meaning. Suitably clarified, they help explain more specific legal rules such as the scope of different consent categories, as we have just seen. Moreover, "autonomy" is a broader concept than consent. Courts often invoke autonomy to justify the elements of an intentional tort. Battery protects the right to decide if and when another may physically touch one's body; false imprisonment, the right to decide if and when another may interfere with one's right of movement; and the privacy torts, the right to decide if

26 *Id*. § 16(b).

27 *See id*. § 16, illus. 7.

and when another may intrude upon one's seclusion or otherwise disappoint one's expectation of privacy. Thus, R3IT frequently refers to autonomy as a rationale for the specific torts that R3IT embraces. But those references do not adduce more foundational theories such as utilitarianism or Kantian respect for rights. Here again, I agree with Smith that judicial reliance on more foundational theories would often be problematic. For example, thoroughgoing utilitarians would likely treat autonomy as only instrumentally valuable, as worth protecting only if recognizing the legal right to choose in the particular context at hand would create additional social welfare. But under this utilitarian foundational theory, it would be difficult to justify the strong autonomy right that patients possess with respect both to receiving and to refusing medical treatment: doctors and other medical practitioners must respect this right even if the patient's reason for exercising the right is an idiosyncratic preference or value, and even if a paternalistic override of the right would improve the patient's welfare.

Fourth, consider a doctrinal issue addressed in R3IT that provoked serious controversy—whether the American Law Institute should endorse liability for offensive battery beyond cases in which a physical contact is "offensive to a reasonable sense of dignity." The Reporters recommended extending liability to cases in which the defendant knows that the plaintiff will be highly offended, even if the fact-finder is not prepared to characterize the plaintiff's sense of dignity as "reasonable." The Reporters suggested employing this "knowledge" prong to permit liability in such cases as the following: a caterer serves pork to a wedding guest, knowing that the guest has a religious objection to eating pork; a person kisses a romantic partner, knowing that she objects to kissing or greater intimacy until she has agreed to marry the other; or a person places a butterfly on the skin of the plaintiff, knowing that the plaintiff has an intense phobia of butterflies. After two lengthy debates on the issue, the Institute endorsed a narrower version of the Reporters' proposal, extending liability to cases in which "the actor knows that the contact is highly offensive to the other's sense of personal dignity, and the actor contacts the other *with the primary purpose* that the contact will be highly offensive" (emphasis added).[28] The Reporters believed that it would be more persuasive and intellectually honest to explain liability in the caterer and sexual consent examples as illustrations of the category "known sensitivity to offense." However, ALI members were more comfortable employing a very flexible reasonable person test to explain why liability should be imposed in these examples, and they did not support imposing liability in the butterfly example unless the defendant had the very purpose to cause offense. Reasonableness tests

28 Restatement (Third) of Torts: Intentional Torts to Persons § 3(b) (Am. L. Inst., Tentative Draft No. 4, 2019).

are omnipresent in the law, especially tort law, and it is understandable that many ALI members would prefer to use this familiar criterion rather than to experiment with a novel formulation such as the Reporters' suggested extension of liability to actors who know that the plaintiff will be highly offended.

So what are we to make of the ALI's ultimate resolution of this debate? One could characterize it uncharitably, as an example of avoiding controversy by concealing the problem within an opaque reasonableness standard, or more charitably, as a defensible reluctance to expand liability beyond offensive battery's traditional contours in the face of potentially serious negative consequences. Over time, it is possible that these reasonableness criteria will crystallize into rules similar to the "known extrasensitivity" rule advocated by the Reporters. Or perhaps experience will teach an entirely different lesson that we cannot readily contemplate.

Similar issues arise when tort criteria incorporate or defer to contemporary social norms. Consider two examples from R3IT. Section 16 provides that "[p]resumed consent exists if … under prevailing social norms, the actor is justified in engaging in the conduct in the absence of the other person's actual or apparent consent."[29] Another example is § 18, which, roughly speaking, endorses the view that "no means no" for purposes of consent to sexual conduct, but declines to take a position on whether "only yes means yes." This difference in treatment is defended, in part, on the ground that current social norms clearly treat as nonconsensual an actor's proceeding with a sexual contact despite the plaintiff's expression of unwillingness, while those norms give less certain guidance with respect to whether affirmative consent is always required.[30] But the deeper questions, which the Restatement does not explore, are which social norms matter and why they matter. Foundational theories might well offer different answers to these questions. For example, a utilitarian theory that measures utility by the satisfaction of personal preferences will focus on how widespread the social norms are, while a deontological theory might pay more attention to whether the social norms in question reflect what members of a community do and should fairly expect of one another or whether, in some other fashion, the norms properly ground interpersonal rights and duties.

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29 *Id.* § 16(b). The Restatement Second of Torts, by its frequent invocation of "community" values, presented similar problems. For discussion, see Cristina Tilley, *Tort Law Inside Out*, 126 Yale L.J. 1321 (2017), and Martha Chamallas, *How Important is Community to Tort Law?*, JOTWELL (June 6, 2017) (reviewing Tilley's article), https://torts.jotwell.com/how-important-is-community-to-tort-law/.

30 Restatement (Third) of Torts: Intentional Torts to Persons § 18 cmts. k & l (Am. L. Inst., Tentative Draft No. 6, 2021).

Fifth and finally, consider the role of an actor's fault or culpability in the intentional torts. Is it appropriate to view fault as an intermediate concept in Smith's sense? Perhaps it is, insofar as courts frequently refer to an actor's fault as a justification for more specific doctrinal rules yet do not explicitly connect fault to underlying foundational principles. For example, plaintiff's negligence is ordinarily ignored when defendant has committed an intentional tort, but courts and legislatures treat this as a self-evident proposition that simply follows from the much greater fault of the defendant.[31] However, it is also worth noting that courts often pay considerable attention to the precise type of fault that is relevant. They do not treat "degree of fault" as a single continuous variable, because "fault" is much too crude a category to explain the subtle differences between distinct intentional torts, and even between fault elements within a single intentional tort.[32] The different intentional torts have different intent requirements: battery requires an intent to cause a physical contact (and, in some jurisdictions, an additional intent to harm or offend), assault an intent to cause anticipation of a harmful or offensive contact, and false imprisonment an intent to confine. But for all three torts, a separate fault question arises: whether the actor must know that the plaintiff does not consent, must only be negligent with respect to lack of consent, or need not display either form of fault.[33]

The "intentional" qualities of intentional torts are therefore a complex matter. Is this a context in which foundational theories best explain the details or complexity of doctrine? To some extent, yes; and to that extent, Smith's thesis is less persuasive. Specifically, utilitarian and deterrence-oriented theories cannot readily explain the culpability requirements that are essential ingredients of the various intentional torts. Many intentional torts involve conduct that is impulsive or unthinking, or defendant who lack sufficient assets to pay a tort judgment or whose insurance policies do not cover intentional torts. It is therefore not plausible that ordinary people decide whether or not to batter or assault another because of the high or low prospect of tort liability. And criminal law sanctions are also typically available and are usually a much stronger deterrent. Thus, intentional tort liability is, in most cases, more readily explicable by a fairness rationale that is in turn informed by a right-based foundational theory: no one should be subjected

31 *See id.* § 50(a).

32 *See* Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 Ariz. L. Rev. 1061 (2006).

33 The apparent consent doctrine, as defined in Restatement (Third) of Torts: Intentional Torts to Persons § 16 (Am. L. Inst., Tentative Draft No. 4, 2019), precludes liability when the defendant makes a reasonable mistake about the plaintiff's consent. In effect, then, the doctrine requires that the actor, to be liable, must be negligent, but not knowing, with respect to the plaintiff's lack of consent.

to the wrongful aggression of another, and such a wrongdoer should owe a duty to compensate the victim.[34]

2.3 Summing up

What, then, is the optimal generality or specificity of justifications for common law doctrines? Should judges systematically avoid relying on deeper and more fundamental justifications that tend to be more controversial? We have seen that there is no simple answer. Intermediate justifications are often desirable, but they are sometimes descriptively inadequate to explain judicial outcomes or too vacuous to function as meaningful constraints. Foundational justifications are not always objectionable, especially if those justifications are pluralistic rather than monistic. And when judges are developing the common law, they are often justified in proceeding cautiously when revising or rejecting extant doctrine. Such judicial modesty can help preserve the institutional legitimacy of the common law process.

3 The Optimal Generality or Specificity of Tort Law Doctrines

The question of generality or specificity has another important dimension. In an ideal tort system, how many doctrinal categories should exist? In contemporary Anglo-American tort law, dozens of distinct torts are recognized. But are there really only three master torts—for example, intentional, negligence, and strict liability? Or should courts draw a different tripartite division, according to whether the tortious conduct causes physical, emotional, or economic harm? And, relatedly, should the distinct torts, or the distinct doctrinal categories, themselves be relatively general and abstract, or instead specific and concrete?

There is much to say about this topic.[35] For present purposes, I will focus on a recent article by Professor Stephen Sugarman and Caitlin Boucher, Re-imagining

34 Many scholars have raised doubts about the deterrent efficacy of tort liability rules. *See* W. Jonathan Cardi et al., *Does Tort Law Deter Individuals? A Behavioral Science Study*, 9 J. of Empirical Legal Stud. 567 (2012); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. Rev. 377, 423 (1994).

35 Some of my earlier thoughts on the topic can be found in Simons, *supra* note 32; Kenneth W. Simons and Jonathan Cardi, *Restating the Intentional Torts to Persons: Seeing the Forest and the Trees*, 10 J. Tort L. (2018); and Kenneth W. Simons, *Is Tort Law Hopelessly Fragmented?*, *JOTWELL* (July 27, 2020), https://torts.jotwell.com/is-tort-law-hopelessly-fragmented/ (reviewing Kenneth

the Dignitary Torts.[36] In this systematic, perceptive, and provocative article, the authors evaluate a wide range of what they call "dignitary" torts: offensive battery, assault, defamation, several privacy torts (intrusion, disclosure of private facts, and false light), nuisance causing emotional distress, malicious prosecution, misuse of civil proceedings, abuse of process, intentional infliction of emotional distress, and negligent infliction of emotional distress. They conclude that a radical simplification of these doctrines is in order. In lieu of these many distinct torts, the authors would substitute a single "unifying" dignitary tort: "tortfeasors should be liable when they wrongfully harm another person's dignity in a highly offensive way and cause more-than-trivial emotional injury".[37] Intent would not be a requirement; instead, they would require only that defendant should have known that his conduct would cause more than minor dignitary harm.[38] Plaintiffs would no longer need to prove intent rather than negligence, or to prove a confinement rather than a defamation of character. The authors' proposed ubertort is breathtakingly simple, at least on first impression.

In the course of their article, the authors point out numerous doctrinal differences between the dignitary torts, many of which, they claim, are indefensible. For example, they note that plaintiffs need not surmount a significant threshold of harm or injury in order to succeed in a claim for offensive battery or false imprisonment; by contrast, defamation requires harm to reputation (and not mere offense), privacy claims require that the defendant's conduct was "highly offensive," and IIED requires even more, that the conduct was extreme and outrageous. Moreover, the authors also make the sound point that the current legal landscape, in which a multiplicity of torts have developed independently of one another, leaves important gaps not addressed by any intentional tort. For example, repeated verbal sexual harassment that is highly offensive might not satisfy the IIED tort, but would satisfy their proposed new tort. The authors also note the confusion in the case law about whether merely *negligent* conduct that leads to one

S. Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 Md. L. Rev. 293 (2021)). I have also addressed the analogous set of questions about criminal law and the optimal number and specificity of crimes, in Kenneth W. Simons, *Is Complexity a Virtue? Reconsidering Theft Crimes: A Book Review of Stuart Green, Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age*, 47 New Eng. L. Rev. 927 (2013) (reviewing Stuart Green, Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age (2012)); Kenneth W. Simons, *Understanding the Topography of Moral and Criminal Law Norms*, *in* Phil. Founds. of Crim. L. 228 (R. A. Duff & Stuart P. Green eds., 2011) (discussing foundational pluralism and issues of incommensurability).

36 Sugarman & Boucher, *supra* note 2.

37 *Id. at 103*.

38 *Id. at 156*.

of the harms recognized by the distinct intentional torts (such as defamation, false imprisonment or privacy) is actionable, and about the multiple and varying fault or intent requirements for different torts.

The article is impressive in scope and quite insightful in its analysis. The authors emphasize, for example, that different torts have widely varying thresholds of wrongfulness and harm, with some torts (such as harmful battery and false imprisonment) imposing no threshold at all. Furthermore, some of these thresholds mark the difference between wrongful and acceptable behavior (as is the case with offensive battery), while others separate mildly wrongful from seriously wrongful conduct[39] (as when the privacy torts require that the conduct be "highly" offensive). Moreover, many of the article's prescriptions are sensible. Thus, it is indeed worth careful consideration whether negligently confining a person against their will should count as tortious (whether or not this falls within the traditional category of false imprisonment) and, more generally, whether the law should invariably draw such a sharp distinction between so-called "intentional" torts and torts of negligence. They are also correct that traditional tort law criteria might need to adapt to the new reality that people very frequently interact in the digital world rather than in person.[40]

In my own work as a Reporter on R3IT, I confronted several doctrinal issues that are relevant to the question of optimal generality and that provide concrete support for some of the authors' arguments. Consider the question whether intentional tort liability should attach when an actor has purpose to, and does, cause bodily harm but does not physically contact the plaintiff. Ordinarily, of course, when an actor desires to harm another, the means the actor employs will involve some form of physical contact, such as striking or shooting at the victim. But if a prison guard turns off the heat to an inmate's cell for the malicious purpose of making the inmate seriously ill, the guard is not liable for battery, because the guard has not physically contacted the inmate (even indirectly). Has the guard committed some other intentional tort? The answer under current law is unclear. Although the guard is certainly negligent, it seems more appropriate to characterize him as an intentional tortfeasor. With such examples in mind, R3IT recognizes a distinct tort of purposeful infliction of bodily harm, a tort that can be understood as closing a gap in battery doctrine.[41]

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39 *Id. at 135*.

40 Thus, they argue that battery's requirement of a physical touching and false imprisonment's requirement of a confinement are "particularly problematic in the digital age, when people often interact on the Internet rather than in person—making it more likely than ever that dignitary injury will not occur via a touch or confinement" *Id*. at 183.

41 *See* Restatement (Third) of Torts: Intentional Torts to Persons § 4 (Am. L. Inst., Tentative Draft No. 4, 2019).

Yet another example from R3IT is in the same spirit as, though less radical than, the authors' suggestion to rethink or even jettison consent doctrine.[42] Consider a standard example that courts and torts professors invoke to test the scope of battery and consent: defendant taps the shoulder of a stranger to get his attention. Defendant's conduct should not result in liability, even if the mild gesture surprisingly causes bodily harm. How does one explain this intuition? One standard answer is to treat the conduct as an instance of implied consent.[43] But the "implied consent" category is ill-formed, embracing several distinct categories of cases in which a plaintiff is precluded from recovery, as explained above. The shoulder tap example might not fit into the category of actual consent if, as it turns out, the plaintiff objects to this type of contact. But it also does not fit into the category of apparent consent, which precludes liability when an actor reasonably (even if mistakenly) believes that plaintiff actually consents. This category does not apply because, prior to being tapped on the shoulder, the plaintiff might have had no opportunity to consent, and the actor might have appreciated this fact. And yet it seems unjustifiable to burden the actor in this scenario with tort liability. To address this type of case, R3IT formulated the category of "presumed" consent (a generalization of the more widely recognized emergency doctrine). This underappreciated category helps explain many other cases, such as situations in which a person in a romantic relationship modestly increases the level of sexual intimacy without specifically requesting the other person's permission. In short, it is quite fruitful to rethink the categories of consent in order to explain results that are supported by widely shared intuitions.

Let me now address more directly the question whether the authors' innovative proposal would be a desirable change in tort doctrine. In answering this question, I will remove my Restatement Reporter hat and instead don the hat of a scholar critically examining potential reforms to tort doctrine. A Restatement cannot diverge too sharply from existing legal doctrine, especially if no court has explicitly espoused the new position under consideration. But the authors' proposal is intended to provoke a radical rethinking of tort doctrine, so it is worthwhile to address the proposal on its merits, even though no court has adopted it or is likely to adopt it in the near future.

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42 The authors go so far as to suggest that consent is a superfluous doctrine. Sugarman & Boucher, *supra* note 2, at 192 n. 337. The suggestion is consistent with Sugarman's view that courts should reject the doctrine of assumption of risk as a complete defense to negligence claims. Stephen Sugarman, *The Monsanto Lecture: Assumption of Risk*, 31 Val. U. L. Rev. 833 (1997).

43 *See* William L. Prosser, Handbook of the Law of Torts 37 (4th ed. 1971) ("Consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the should to attract attention, a friendly grasp of the arm, or a casual jostling to make a passage.") (footnotes omitted).

One of the most provocative and significant arguments in the article is the claim that the law treats the different "dignitary" torts in a very inconsistent manner, requiring merely "offensive" conduct (or something comparable) for some torts, "highly offensive" conduct for others, and "extreme and outrageous" conduct for IIED.[44] As a response to this inconsistency, the authors propose a uniform set of threshold, conduct, fault, and harm requirements.[45]

This broad perspective on the distinct "dignitary" torts is quite illuminating, and I agree that courts should give more thought to whether the distinct and varying requirements for different torts are warranted. Perhaps the authors are correct that merely "offensive" batteries should not be actionable; and conversely, perhaps IIED should encompass highly offensive conduct that does not qualify as extreme and outrageous. Nevertheless, the authors' ultimate proposal to replace all of these different torts with a single uber-tort is extremely problematic, because it conflates distinct wrongs.[46] The wrongs of invading privacy, confining a person, defaming a person, frightening a person with a threat of physical harm, or

44 For example, they plausibly object:

> [W]e struggle to find anything about the interest in avoiding wrongful touching that inherently suggests an "offensive" requirement or, by contrast, anything about the interest in privacy that inherently suggests a "highly offensive" requirement. To us, these thresholds seem less likely to have been carefully derived from the narrow interest at stake, and more likely to have resulted from the historical development of these torts in independent silos. Sugarman & Boucher, *supra* note 2, at 169.

45 The authors say by way of summary:

> (1) Conduct that currently gives rise to liability even though it is less than highly offensive would no longer be actionable; (2) IIED clams, which currently require more than highly offensive conduct, would now require that conduct only be highly offensive; (3) Those behaviors that today give rise to liability even when the resulting dignitary harm is merely minor would no longer be actionable; (4) IIED claims, which currently require a showing of severe emotional distress, would now be actionable if the harm is more than minor … *Id.* at 157.

46 The authors do note the possibility of a second-best solution: in lieu of replacing all of the "dignitary" torts with a single tort, the law might "retain[] separately named torts that describe specific ways a defendant may invade another person's dignity … We simply do not see why these categories should have different rules." *Id.* at 170. But the authors do not spell out what the criteria in the separate torts would look like. Moreover, they treat this option as a pragmatic solution in case courts and legislatures would be wary of their proposed radical solution. My own view, as explained in the text, is that principles as well as pragmatics support the preservation of the distinct torts.

maliciously bringing a civil complaint or criminal charges against a person are hardly identical. Indeed, even within a subcategory such as the privacy torts, the wrong of intruding upon the private affairs of a person is quite different from the wrong of publicly disclosing private facts about them or the wrong of placing them in a false light. Distinct criteria for the elements of these torts are necessary in order to ensure that the qualities that make the conduct wrongful are identified and that the fact-finder applies those differential criteria.

The authors are forthright about wanting to flatten and simplify tort doctrine. "At its core, the conduct described by each tort constitutes a wrongful affront to dignity."[47] Recall their actual proposal: impose liability for wrongfully harming another person's dignity in a highly offensive way and causing more-than-trivial emotional injury, through intentional or even negligent conduct. In making this proposal, the authors employ an extraordinarily broad conception of dignity, as respecting a person's intrinsic worth and a person's right to make decisions for themselves. Discussing false imprisonment, for example, they say: "By robbing you of your agency over your physical location, the defendant has interfered with your autonomy and thus dignity." It is not clear from this and similar passages whether the right to "dignity" is doing any justificatory work. To repeat a point from the previous section, the concept appears to be an empty vessel, merely shorthand for the right not to suffer any nonphysical injury from any conduct for which tort law should provide a remedy.

Moreover, the authors' proposal is vulnerable to a *reductio ad absurdum* objection. On their view, one might as well reduce all of tort law to a single rule: Actors should be liable if they wrongfully (and unjustifiably) harm another. Indeed, why stop there? Why not employ this or some similar criterion as the sole criterion of all of private law, including contract law, property law, and restitution, as well as tort law?

However, at times, the authors suggest that their unifying tort can indeed accommodate the categories of, and the distinctions within, the traditional torts—but as relevant factors, not as decisive criteria. Consider their analysis of the known extra-sensitivity issue, which I discussed above. In their view, in determining whether conduct was highly offensive, a court could consider whether a defendant took advantage of the plaintiff's known extra-sensitivity:

> For example, a defendant who hugged a plaintiff coworker would not normally be considered to have acted offensively at all. However, a court might consider that conduct "highly offensive" if the defendant knew the plaintiff was hyper-sensitive to all touch due to prior trauma and hugged her with an aim to upset her mental stability. Likewise, locking someone in a bathroom for 5 min might become "highly offensive" and thus constitute false

47 *Id*. at 103.

> imprisonment if the defendant knew the victim to be claustrophobic. Or taking a photograph of someone might become "highly offensive" and thus an intrusion on seclusion if the defendant knew the subject to be hyper-sensitive to being captured on camera.[48]

Elsewhere, the authors state that lack of consent need not be identified as an element (nor consent identified as a defense) because consent's absence can simply be treated as relevant to whether the conduct was highly offensive. And with respect to defenses, they briefly argue that defenses such as privileges of self-defense or to detain a shopkeeper are simply aspects of the wrongfulness inquiry.[49] In all of these arguments, the authors want to have their cake and eat it too: they want to preserve justifiable distinctions that the law currently draws but at the same time demand that the fact-finder apply a highly general standard that makes absolutely no reference to those distinctions.[50]

Perhaps the authors' real position is that the usual criteria and distinctions employing in the different "dignitary" torts should be treated as factors relevant to the general standard that they endorse, rather than as necessary or sufficient conditions. Perhaps, in short, they advocate standards over rules. At several points, the authors seem to confirm this interpretation. Thus, they say that they are invoking a general standard of "wrongfulness" rather than "focus[ing] on particular fact patterns like touching and confinement."[51] They further explain: "Imagine a plaintiff who brings cases against two defendants, in one alleging that he has been touched in a socially unacceptable way and in the other, alleging that he has been verbally abused in a socially unacceptable way. We stipulate that society would find the behavior in the two cases to be equally wrongful."[52] The same standard, they claim, should apply to both defendants. But this argument assumes its own conclusion. "Wrongfulness," unless further clarified, is a very problematic criterion for a fact-finder to apply. But once clarified, it will become more rule-like, and might well approximate current legal standards.

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48 *Id*. at 162.

49 *Id*. at 189, 192 n. 337.

50 Another example is the authors' discussion of the argument that instances of offensive battery and false imprisonment are invariably significant wrongs. They reply: "[I]f wrongful touchings or confinements are never minor, then all offensive batteries and false imprisonments would automatically meet the highly offensive threshold requirement we propose." *Id*. at 174. And similarly, they are confident that inappropriate sexual contacts or intentional imprisonments would always be deemed wrongful and nontrivial under their test. *Id*. at 182. But this is ipse dixit. There is no guarantee that fact-finders would invariably apply the authors' vague "wrongfulness" standard in this manner.

51 *Id*. at 169.

52 *Id*.

In the end, I am unsure where the authors land on the spectrum from vague standards to precise rules. Standards are not always objectionable. After all, in the tort of negligence causing physical harm, the jury ordinarily applies a relatively imprecise standard of reasonable care under the circumstances, subject only to occasional rule-like exceptions such as negligence per se or customary criteria of care for professionals. And the authors discuss the general negligence standard with approval. Yet, as we have just seen, the authors also claim that when fact-finders interpret the scope of their unifying "wrongfulness" tort, they will invariably apply the rule-like criteria currently embedded within the various "dignitary" torts.

If the latter is their position, then the elements of current "dignitary" torts should at the very least be identified, in their uber-tort, as relevant factors for the jury to consider when applying the vague criteria of that general tort. And this solution is still extremely problematic. Are these factors that the jury *may* consider? *Must* consider?[53] And how does one ensure that different fact-finders, faced with identical factual scenarios, will reach similar conclusions? The authors are rightly concerned about the inconsistency in the doctrinal requirements under existing "dignitary" torts. But their proposal replaces that form of inconsistency with another. The authors assert that many of the traditional criteria employed within current doctrine are relevant to their unifying tort. But to assure that these criteria are indeed considered by fact-finders and judges, the criteria must be explicitly incorporated within their general standard. Yet once that is done, the radical simplicity that the authors seek to achieve seems unattainable.

I have focused in this section on the merits and the deficiencies of Sugarman and Boucher's thoughtful arguments. In other work, I have defended the view that legal reformers should be cautious about flattening the varied landscape of tort and criminal law doctrine, lest they obliterate the distinctions between discrete, and sometimes incommensurable, wrongs.[54] Reformers are naturally attracted to simplicity. That impulse is laudable. Traditional doctrines sometimes reflect historical accident and arbitrary path-dependence rather than justifiable principles and policies. But overly exuberant simplification is no more defensible than excessive complexity. Traditional intentional tort doctrines would indeed benefit from modest reforms, but the authors have not made a persuasive case for their dissolution.

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53 For example, the authors state: "a defendant's mental state can and should be considered in applying the wrongfulness requirement. But it need not be an independent element." *Id*. at 190. If it "should" be considered, why is it not an explicit element, a factor that the jury is instructed to consider?

54 *See* sources cited in note 35, *supra*.

4 Conclusion

This essay explores two dimensions of generality—the desirable generality or specificity of judicial rationales for tort doctrine and the desirable generality or specificity of tort doctrines themselves. Along the first dimension, I have suggested, Professor Stephen Smith's endorsement of intermediate rationales has much to recommend it, but I also have elucidated a number of ways in which that approach should be qualified. Along the second dimension, this essay discusses in detail a recent provocative proposal to replace the many "dignitary" intentional torts with a single unifying tort. The proposal, I conclude, raises justifiable concerns about inconsistencies and gaps among the distinct intentional torts, but the highly general solution that it proposes is an unjustifiable overreaction to those concerns. We ought to recognize that the different intentional torts respond to different ways in which an actor may wrong another, differences that indeed must be defended and rationalized but should not be erased.

Acknowledgments: I thank Jonathan Cardi for his very helpful comments. I would also like to acknowledge the insightful and creative scholarship of Stephen Sugarman, whose work has been an inspiration to me and to innumerable other scholars. Sadly, his recent death will end my ability, and the ability of other academics, to directly exchange ideas with him. But his influence will endure.