CONCEPTUALIZING TORT LAW: THE CONTINUOUS (AND CONTINUING) STRUGGLE

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INTRODUCTION

Tort law emerged as a separate field in the 1870s. But it was a rocky start. In 1871, the young Oliver Wendell Holmes, Jr. asserted that "[t]orts is not a proper subject for a law book."[1] His reason for saying this was the absence of any "cohesion or legal relationship" among the topics grouped under the heading of "torts."[2] Holmes soon changed his mind,[3] and within a decade had famously organized tort liability around the standards of conduct that governed different torts. Today all tort lawyers, scholars, and teachers following Holmes (whether they know it or not) understand that there are three bases of liability in tort: intent, negligence, and strict liability.[4] That is ordinarily how we think about tort liability, and how we organize tort law in our thinking.

But that way of thinking actually does not capture, and has never captured, all of tort law. This may be one of the reasons Holmes originally had doubts about the viability of tort law as a legal subject. A quick look at any of the Restatements of Torts, or at the leading treatises and casebooks, reveals that his tripartite division is only partly reflected in their organizational structure. Many torts typically are treated in piecemeal, atomistic fashion, as if they fall outside of this tripartite structure of organization altogether. In addition, very different matters are addressed under the three divisions: sometimes full-blown torts (such as battery) are discussed, but sometimes only the nature of an abstract standard of conduct (such as negligence) is the focus.[5] Something else, or something

1. Oliver Wendell Holmes, Jr., *Book Notices*, 5 AM. L. REV. 337, 341 (1871). The review was unsigned; Mark DeWolf Howe attributed it to Holmes after finding a copy of the review in Holmes's papers. *See* 2 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882 (1963). Holmes was born in March of 1841, so he was at most thirty years old when he wrote the quoted passage.

2. Holmes, *supra* note 1, at 341.

3. Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 659–60 (1873) (concluding that enumerating actions that were successful and ones that failed might be sufficient to give the subject of torts an identity). Howe also attributes this unsigned article to Holmes. *See* HOWE, *supra* note 1, at 64.

4. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS xvi–xxviii (2000) (dividing liability for interference with person or property into intended, negligent, and innocent interference); KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 2 (5th ed. 2017) (dividing all of tort law based on the standard of care into liability for intention, negligence, and strict liability).

5. *See, e.g.*, RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 923–1227 (12th ed. 2020) (treating defamation, privacy, misrepresentation, inducement of breach of contract, and unfair competition in this manner); DOBBS, *supra* note 4, at 1117–405 (treating defamation, privacy, misusing and denying judicial process, interference with family relationships, interference with contract and economic opportunity, harms to intangibles and unfair competition, nuisance, misrepresentation and nondisclosure, and lawyer malpractice in this

additional, is going on in tort law, but exactly what is not clear, and never becomes clear.

The kernel of truth in what Holmes first thought about torts is that tort law is not the coherent field it is sometimes thought to be. In fact, the untidy, fragmented organizational structure of tort law is the legacy of a lost history that not only helps to explain tort law's puzzling organization, but also to reveal the underlying disordered character of tort law itself. It is difficult to order something that is essentially disordered.

Recent experience confirms this. The American Law Institute ("ALI") has been preparing the *Restatement (Third) of Torts*, in a series of separate projects, for nearly thirty years now.[6] The latest individual project is entitled "Intentional Torts to Persons."[7] The project is an apt example of the puzzling organization of tort law. The project covers only battery, assault, and false imprisonment.[8] Why are the torts covered by the "intentional torts to persons" project not the *only* intentional torts to persons? What about fraud, invasion of privacy, and intentional infliction of emotional distress, for example?

In addition, what do battery, assault, and false imprisonment have sufficiently in common to warrant putting those torts together in a category by themselves? As if to underscore this question, the Reporters for the project recently noted that comparing the torts of battery, assault, and false imprisonment "is sometimes akin to comparing apples and oranges, because these torts protect a varied set of interests or protect them in varying ways."[9] More than a decade earlier, writing about whether an intentional torts project should be undertaken at all, one of these (future) Reporters had already recognized this apples-and-oranges problem.[10] So there is a legitimate question whether those torts belong together, and if they do, why.

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manner); RESTATEMENT (SECOND) OF TORTS §§ 525–869 (AM. LAW INST. 1977 and 1979) (treating a long series of separate torts in this manner).

6. Thus far the final, published projects, which were years in the making, are RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (AM. LAW INST. 1998); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (AM. LAW INST. 2000); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. LAW INST. 2010); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. LAW INST. 2012); and RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM (AM. LAW INST. 2018).

7. The project at this point has been the subject of over two-dozen drafts. *See Restatement of the Law Third, Torts: Intentional Torts to Persons*, AM. LAW INST. (2020), https://www.ali.org/projects/show/torts-intentional-torts-persons/#_drafts.

8. *See id.*

9. Kenneth W. Simons & W. Jonathan Cardi, *Restating the Intentional Tort to Persons: Seeing the Forest and the Trees*, 10 J. TORT L. 1, 2 (2018).

10. Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1080 (2006).

Despite the legitimacy of this question, however, we do not object to the placement of those torts together, generally or in the Third Restatement. For reasons we will describe, a good case can be made that they belong together. More importantly, however, virtually any classification that puts more than one tort in the same category is liable to create an apples-and-oranges problem. In tort law, we will argue, for 150 years now the choice has inevitably been between engaging in classification that generates an apples-and-oranges problem and not classifying, but reproducing "chaos with an index."[11]

In this Article, we uncover the ways in which the history and the very nature of tort liability have combined to defeat repeated efforts at coherent conceptualization of this body of law. Part I examines the challenge that the treatise and casebook writers faced late in the nineteenth and early twentieth centuries as they attempted to organize and classify the different features of the new subject of tort law after the ancient, procedure-based "forms of action" and the writ system they accompanied were abolished.[12] This Part identifies and analyzes the different ways those scholars struggled, and, with the exception of the shallow approach that we call "interest" analysis, largely failed to develop categories which satisfactorily transcended the forms of action.

Part II ventures into the archives of the ALI, in which the now-obscure evolution of the First Restatement of Torts is recorded, as that project first attempted, but then largely abandoned, an effort to develop a new, coherent organization of tort law.[13] The intentional torts are a key to this story, though not because they are especially important in themselves. Rather, they happened to be the first torts that the first draft of the First Restatement addressed. That first draft revealed an incipient vision of tort law's structure which appeared to be developing, but that vision sputtered and then disappeared, both from future drafts and from conventional histories of tort law. What ultimately took the place of that vision was the puzzling and fragmented organization of tort law that has come down to us today, all the way from that First Restatement.

We then turn to the modern period. Part III shows the ways in which the organization adopted by the First Restatement has persisted and been replicated, with treatises, casebooks, and both the Second and Third

11. Oliver Wendell Holmes, Jr., *Book Notices*, 5 AM. L. REV. 110, 114 (1870) ("[T]he old-fashioned English lawyer's idea of a satisfactory body of law was a chaos with a full index."). It is perhaps ironic, given his first thoughts about the propriety of treating torts as a separate subject, that this phrase has sometimes been attributed to Holmes. *See, e.g.*, JOHN WITTE, JR, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 225 (2d ed. 2005).

12. *See infra* Part I.

13. *See infra* Part II.

Restatements largely accepting and adopting the organization of tort law that found its way into the First Restatement.[14]

Finally, Part IV explains why that organization has not been replaced.[15] One reason is that no one has produced a satisfactory alternative. This is because there is no consensus on any comprehensive underlying purpose of tort law, and because a more coherent organization of the subject would have little usefulness to the practicing bar. But the main reason lies in the inevitable character of tort law as a series of independent causes of action. Ironically, the same imperatives that generated the ancient forms of action continue to dictate the fragmented structure of tort law today.

I. CONCEPTUALIZING TORT LAW: THE LATE NINETEENTH AND EARLY TWENTIETH CENTURY CHALLENGE

For more than half a millennium, the medieval writ system and its accompanying "forms of action"—the technical procedural pigeon-holes into which lawsuits were required to fit—governed civil actions at common law.[16] Then, beginning in the middle of the nineteenth century, that system began to break down and was replaced by the "unitary" civil action as we now know it. The abolition of the forms of action meant that substantive law now took conceptual precedence over the ancient procedures. As a result, the field of tort law emerged, finally discernible independently of procedure.

Legal scholars in the ensuing half-century then faced the challenge of describing the constituent parts of this new body of law. Those torts scholars conceptualized tort law in different ways, employing different organizational approaches. But none ever successfully introduced a coherent conceptualization of the field, in part because of the very nature of the subject, and in part because of the difficulty of escaping the lingering legacy of the forms of action. Early in the twentieth century, tort law was still conceptually fragmented. This Part tells how that fragmentation came to be.

A. The Forms of Action

From medieval times onward, instituting a civil suit required a "writ," which was available only for a distinct and limited number of "forms of

14. *See infra* Part III.

15. *See infra* Part IV.

16. *See generally* F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW (A.H. Chaytor & W.J. Whitaker eds., 1909).

action."[17] There were two forms of action employed in cases involving bodily injury or property damage not arising out of breach of contract.[18] The first was "trespass," which required that injury to a person or damage to property had been direct and by force. In fact, when trespass was brought for causing bodily injury, it was denominated trespass *vi et armis*—"by force and arms"—even if weapons had nothing to do with it.[19] Early on, the availability of a damage remedy in the common law courts for conduct that met the trespass requirements seems to have signaled that the conduct was socially disapproved of (conduct that precipitated actions in trespass was ritualistically described as a "breach of the King's peace"), and that a damage remedy was being employed as a preferable alternative to a violent reprisal by the injured party.[20] Those historical features of trespass slowly faded away even while it was still in force, but they were part of its origins and influenced its development.

Thus, trespass was available only in a limited number of situations. Bodily injury and property damage that did not occur directly, and other forms of loss, did not fall within its scope. Another form of action, termed "trespass on the case" or just "case" for short, became available in a residual category of situations, originally involving indirectly caused physical harm.[21] Eventually trespass on the case was the form of action also employed for slander, libel, deceit, and certain forms of negligence.[22] Another form of action, "assumpsit," which was available for certain other forms of misfeasance, grew out of trespass on the case.[23]

Because of the differences among them, the choice of a form of action could be dispositive:

> [T]o a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we

17. *Id*. at viii.

18. Early on such actions were very commonly not brought, largely because other nonlegal remedies existed and because choosing such remedies seems to have been socially favored. George E. Woodbine, *The Origins of the Action of Trespass*, 34 YALE L.J. 343, 368–69 (1925). Over time trespass would spawn a number of other forms of action, including assumpsit, often employed for contract actions, and ejectment, used for certain invasions of land. *See generally* A. W. B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT (1975); A. W. B. SIMPSON, A HISTORY OF THE LAND LAW 145–55 (2d ed. 1986).

19. Woodbine, *supra* note 18, at 369–70.

20. R. C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL: STUDIES IN THE EARLY HISTORY OF THE COMMON LAW 240–44 (1959).

21. MAITLAND, *supra* note 16, at 42.

22. *Id*.

23. *Id*. at x; J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 6–63 (4th ed. 2002).

> may argue from what is found in one to what will probably be found in another; each has its own precedents . . . . The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen . . . . Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.[24]

Some of the forms of action imposed what amounted to strict liability, while others did not. For example, proof of intent to cause harm was not required in trespass actions.[25] Since battery, assault, and false imprisonment were actionable in trespass,[26] it follows that these "intentional torts" were not intentional at common law, although they frequently would have been accompanied by intent to cause harm.[27] Over time, the fact that the actions brought in trespass often involved some purposive conduct on the part of defendants, and that those brought in case involved conduct that typically was accidental or inadvertent, would be emphasized by scholars conceptualizing and organizing the law of torts in treatises and casebooks. But even at the end of the era during which the forms of action governed, there was no established classification of different forms of tort liability based on varying standards of conduct.[28] In fact, there was no established classification of tort law at all.[29]

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24. MAITLAND, *supra* note 16, at 4–5.

25. *See* Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 450–52 (1990) (citing JOSEPH A. KOFFLER & ALISON REPPY, HANDBOOK OF COMMON LAW PLEADING 64, 153, 174 (1969); Woodbine, *supra* note 18; George F. Deiser, *The Development of Principle in Trespass*, 27 YALE L.J. 220, 221 (1917); and 2 FREDERICK POLLOCK & F.W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 526 (1968)).

26. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 118–21 (1768).

27. One study has discovered a number of nineteenth-century trespass actions in which intent was not required. *See* Vandevelde, *supra* note 25, at 452–53 (citing Higginson v. York, 5 Mass. 341 (1809) (holding defendant who mistakenly took wood from another's land, believing it to be owned by a third party, subject to liability); Dexter v. Cole, 6 Wisc. 319 (1858) (holding defendant who mistakenly slaughtered sheep belonging to another after the sheep became mixed up with a flock of the defendant's sheep subject to liability); and Ricker v. Freeman, 50 N.H. 420 (1870) (holding defendant who pushed a second schoolboy in play, causing that boy to collide with a third boy, who retaliated by pushing the second boy into a wall, subject to liability to the second boy)).

28. The dispute in the famous dog-fight case, Brown v. Kendall, 60 Mass. 292 (1850), is an example of the confusion that the procedural features of the forms of action produced regarding substantive issues such as the standard of care and burden of proof.

29. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 13–14 (2d ed. 2003); S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 254–56, 269–70, 346–51 (1969).

B. Abolition of the Forms of Action and the Emergence of "Tort" Liability

There was increasing dissatisfaction with the forms of action as the nineteenth century proceeded. This dissatisfaction stemmed from the forms' tendency to privilege procedural technicalities over substantive rules and principles. Speaking of this tendency in one of the more striking images in the history of legal scholarship, Sir Henry Maine observed that the forms of action were so dominant in the early years of the common law that "substantive law has at first the look of being gradually secreted in the interstices of procedure."[30]

Francis Hilliard, who published the first American torts treatise in 1859, wrote in his preface to that work that "[b]y a singular process of inversion . . . , *remedies* [the procedural requirements of the writs and forms of action] have been substituted for *wrongs* [the substantive elements of tort actions]."[31] "[T]o inquire for what injuries a particular action may be brought, instead of explaining the injuries themselves," he felt, "seems to me to reverse the natural order of things."[32]

Similarly, as we noted above, Holmes initially concluded that "Torts is not a proper subject for a law book" because its various causes of action lacked "cohesion" or a proper "legal relationship."[33] He attributed that in part to the failings of the forms of action, which did not "embod[y] in a practical shape a classification of the law, with a form of action to correspond to every substantial duty," but were "in fact so arbitrary in character, and owe their origin to such purely historical causes, that nothing keeps them but our respect for the sources of our jurisprudence."[34] And Nicholas St. John Green, in his preface to an 1870 abridged edition of Charles G. Addison's 1860 English treatise, THE LAW OF TORTS, which Green used in his torts course at Harvard, noted that torts was "usually treated of under the titles of the various forms of action which lie for the infringement of . . . rights which avail against other persons generally, or against all mankind."[35] Such an emphasis, he felt, tended "to confuse those

30. HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM: CHIEFLY SELECTED FROM LECTURES DELIVERED AT OXFORD 389 (1883).

31. 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS v–vi (1859).

32. *Id.* at vii.

33. *See* Holmes, *Book Notices*, *supra* note 1, at 341.

34. *Id.* at 359.

35. Nicholas St. John Green, *Preface* to CHARLES ADDISON, WRONGS AND REMEDIES, ABRIDGED FOR USE IN THE LAW SCHOOL OF HARVARD UNIVERSITY, iii (Nicholas St. John Green ed. 1870).

fundamental principles which should be kept distinct in the mind of the student."[36]

Another factor contributing to support for abolition of the forms of action was the changing nature of the bar as the nation grew, demographically and geographically. The American population and the territory of the United States expanded dramatically in the three decades beginning in the 1830s, with an increased number of immigrants from Europe coming to America, and the United States acquiring a vast amount of territory west of the Mississippi.[37] Developments in transportation, including the emergence of canals and railroads, facilitated the movement of populations westward and resulted in many new states entering the Union as their populations reached sufficient numbers.[38] Those states needed lawyers, and the bars of those states welcomed them. In many new states in the 1830s, 1840s, and 1850s, it was not necessary for an applicant to the bar to have graduated from a law school or to have served as an apprentice to a law office.[39] The result was an influx of new lawyers in new states whose training was rudimentary. In that setting, few lawyers could be expected to know the intricacies of the forms of action and writ pleading; they probably were often ignored.

At the same time, a movement emerged in some states to "codify" the law. This meant replacing the common law with a state-enacted comprehensive code, modeled on those of European nations that had established civil law systems. The expectation was that codes would have far more detailed doctrinal rules than those supplied by judges in deciding common law cases. This would result in ordinary people having a better understanding of their legal rights and responsibilities, and in the reduction of judicial discretion to make law. Proponents of codification also expressed dissatisfaction with the dominance of English common law doctrines in the United States and with the technicalities of the forms of action.[40]

When the 1848 Field Code in New York was the first to abolish the forms of action and substitute a unitary civil action, it became available as a

36. *Id.*

37. *See* G. EDWARD WHITE, LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 248–60, 271–78 (2012).

38. *Id.* at 292.

39. *See id.* at 285–87; *see also* Jack Nortrup, *The Education of a Western Lawyer*, 12 AM. J. LEGAL HIST. 294, 294 (1968).

40. On the nineteenth-century codification movement in America *see* CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981); Robert W. Gordon, *Book Review: The American Codification Movement, A Study of Antebellum Legal Reform*, 36 VAND. L. REV. 431, 445 (1983).

template for procedural reform.[41] California abolished the forms of action three years later.[42] In all, twenty-four states or territories adopted versions of the Field Code in the two and a half decades after 1848, fourteen of which being states that entered the Union in 1850 or later.[43] Additional states followed thereafter.[44] The forms of action were disappearing. The question was: What was taking, or would take, their place?

C. The Search for Conceptual Order

Abolition of the forms of action moved substance to the foreground. But this posed a problem. Previously, procedure was the dominant means of providing a semblance of conceptual order to the law governing civil actions. That would not now suffice; indeed, it would be misleading. A half-century of intellectual struggle to provide conceptual substance ensued, through scholarly efforts to identify what the law of torts consisted of, and then to classify the constituent parts of that body of law. Classification was thus the central preoccupation of the torts scholars who worked after the forms of action were abolished.

Two surprisingly different products emerged. Treatises on the new subject of torts published in the second half of the nineteenth century took on the challenge of classification. They attempted simultaneously to transcend the now-abolished forms of action and to paint a picture of tort law as it stood at that time. What they offered bore the imprints of their efforts, but they were not terribly successful in producing coherent portraits of tort law. In contrast, for reasons we will indicate, casebooks—sometimes written by the same author who had published a treatise—stayed much more anchored to the forms of action that had dominated the past.

1. The Impetus for Classification

The opinion of the scholars who began working on tort law after abolition of the forms of action was that the forms had been an obstacle to understanding tort law on the basis of substantive principles. Holmes suggested, for example, that, had the forms of action that were employed in tort actions corresponded to "every substantial duty" in the field, a

41. Charles E. Clark, *History, Systems, and Functions of Pleading*, 11 VA. L. REV. 517, 533 (1925); CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 114, 124 (1897).

42. Civil Practice Act of 1851, CAL. CODE CIV. PROC. § 307 (providing that ""[t]here shall be in this State but one form of civil actions, for the enforcement or protection of private rights, and the redress or prevention of private wrongs"").

43. Clark, *supra* note 41, at 534.

44. *Id.*

"practical" "classification" of tort law would have been accomplished.[45] If such a correspondence had been achieved, he intimated, the forms of action would have been the equivalent of substantive doctrinal categories. But they were not: they were "arbitrary," sometimes owing their existence to "purely historical causes" rather than efforts to match them up with the particular doctrinal requirements of individual torts.[46]

It was not as if prominent torts scholars such as Hilliard, Holmes, and Green did not know the sort of conduct that was actionable in tort. Many forms of tort liability were of ancient origin: assault, battery, false imprisonment, trespass to real and personal property, slander, libel, and deceit had been actionable for centuries. Moreover, those actions were perceived as qualitatively different from actions in contract and actions affecting real or personal property: they were brought under the distinctive forms of action of trespass and case. Hilliard and the others could readily have listed the actions available for civil wrongs not arising out of contract. But the grouping of tort actions around the forms of action employed to make them actionable rendered uncertain what they had in common, or what their subject matter identity was composed of, except for being civil "wrongs."

For this reason, a common goal of torts treatises in the late nineteenth century was to classify tort causes of action based on their substance rather than on the basis of the now-abolished forms of action. But why did some form of conceptual ordering of the field of torts, based on some general understanding of what tort actions were, what they had in common, and how they were distinguished from other common law actions, seem an imperative for late nineteenth-century scholars? The answer, we think, is that this was a period when American intellectuals were embarking on an epistemological search for order, seeking to organize and classify fields of knowledge on the basis of common, foundational principles.[47] The search-for-order impulse has been linked to two phenomena that defined the experience of many post-Civil War Americans: (1) the collapse of religious-based explanations for the course of human events in the wake of pressure from secular-based explanations such as Darwinian theories of natural selection and (2) the enthusiasm for "scientific" organization of fields of knowledge along the lines of the natural sciences, which had begun to

45. Holmes, *Book Notices*, *supra* note 1, at 359.

46. *Id.*

47. *See* GEORGE FREDRICKSON, THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION (1965); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967).

feature the classification of fields on the basis of common characteristics and governing principles.[48]

This was a preoccupation in law as much as in other fields. When Christopher Columbus Langdell published the first casebook on contract law in 1871, its preface urged students "to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of . . . essential doctrines."[49] Thus, the idea of arranging and classifying common law subjects around their fundamental principles was not merely a response to the fact that any conceptual order the forms of action had supplied for those fields could not be expected to survive their replacement by the unitary civil action. It was also part of a general interest in finding or fashioning conceptual order within fields of knowledge. And of all the common law subjects, tort law posed the greatest organizational and conceptual challenges. This was because the field appeared to be something of a default category, a set of private wrongs that were not crimes, and did not arise out of contract, but had little else in common.

The matter was further complicated by the fact that the principal function of trespass and trespass on the case had been to distinguish actions involving injuries "directly" caused by "force" from other alleged civil wrongs.[50] Holmes eventually concluded that those distinguishing characteristics, when added to an enumeration of actions that were successful and ones that failed, might be sufficient to give the subject of torts an identity.[51] But that was still quite far from revealing what principles tort actions had in common.

2. The Challenges of Classification: Treatises

For this reason, late nineteenth-century torts scholars wanted to go further. They aspired to show, in the words of Francis Hilliard, that tort law "involve[ed] principles of great comprehensiveness."[52] However, those scholars turned out to have enormous difficulty achieving this goal. They had to arrive at an organization of tort law that was not based on the forms of action but that revealed a coherent set of substantive principles. What they were actually able to produce was not coherent; it was a fragmented organization, if it can be called an organization at all.

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48. *See* FREDRICKSON, *supra* note 47, at 199–216; WIEBE, *supra* note 47, at 140–48; LAURENCE VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 21–56 (1965).

49. C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vii (1871).

50. *See* MAITLAND, *supra* note 16, at 42.

51. *See* Holmes, *The Theory of Torts*, *supra* note 3, at 659–60.

52. HILLIARD, *supra* note 31, at viii.

Hilliard's 1859 treatise was the first significant work published on torts after abolition of the forms of action had begun ten years earlier. He indicated that although he had "entire confidence" that the fundamental principles of tort law could be identified, he had "equal diffidence as to the *execution*."[53] By "execution" Hilliard very likely meant offering an arrangement or classification of tort law that would reveal the "principles of great comprehensiveness" which supposedly characterized the field.[54]

He was right to be diffident. The two volumes of his treatise addressed a grab-bag of subjects, including some that would not today be included in tort law at all.[55] Some chapters were devoted to individual tort actions such as assault and battery, which were combined in a chapter entitled "Torts to the Person."[56] That was at least a start at conceptual classification. But other causes of action which would subsequently come to be thought of as "intentional" torts, such as false imprisonment, malicious prosecution, and conversion, were covered in separate chapters.[57] Still other chapters were not about causes of action at all, but the *duties* of categories of individuals or entities, including husbands, wives, parents, corporations, and railroads.[58] And although there was a chapter on nuisance, and one on "Injuries to Property,"[59] there was none on negligence, despite Hilliard's having chapters about other duties. For some reason Hilliard seems not to have recognized that although trespass on the case no longer existed, the types of negligence liability that had been subsumed under that form of action still did.

The core of the problem that Hilliard and subsequent scholars faced was explaining not only what tort liability there was, but why liability was not imposed when it could conceivably have been. The common law of the time had a term for conduct that caused harm but was not actionable—*damnum absque injuria*—which roughly translates as loss without a legal remedy.[60] Hilliard referred to the term in his treatise, as did other late nineteenth-century commentators on tort law.[61] In discussing the doctrine of *damnum absque injuria* in treatises and casebooks in the 1870s, several

53. *Id*. at x.

54. *Id.* at viii.

55. Illustrations include chapters on bailments, patents, and copyrights, and in a chapter on slander, evidence and damages. *See id*. at viii, xx, 1, 87.

56. *Id.* at xiii.

57. *Id.* at xiii–xix.

58. *Id.* at ii–vii.

59. *Id.* at xv.

60. *See* EDWARD P. WEEKS, THE DOCTRINE OF DAMNUM ABSQUE INJURIA CONSIDERED IN RELATION TO THE LAW OF TORTS (1879).

61. *See* HILLIARD, *supra* note 31, at 82–87.

commentators gave explanations for it that appear circular. Charles Addison maintained that when an injury was the result of "a lawful act, done in a lawful manner," there was "no legal injury" and hence "no tort giving rise to an action for damages."[62] Thomas Shearman and Amasa Redfield, who published a treatise on negligence in 1869, stated that as long as someone was "engaged in a lawful business," they were not "responsible for an injury caused purely by inevitable accident."[63] And Thomas Cooley, in his 1879 treatise on tort law, maintained that actors who did what was "right and lawful for one man to do" could not be accountable if their actions injured others, because what they were doing was a "proper exercise . . . of [their] rights" and thus could not inflict legal wrongs.[64]

All of those explanations, however, begged the question of what was "right and lawful." Saying that there was no liability because no right had been violated was circular in the same way as saying, twenty years earlier, that there was no liability because no form of action was available under the circumstances. The notion of *damnum absque injuria* was simply a placeholder for the reason, whatever it was, that there was no liability. Only Holmes seems to have advanced a substantive, non-circular reason why many acts that injured others did not give rise to tort liability: it was that "[t]he general principle of our law is that loss from accident must lie where it falls"[65] because it was expensive and time consuming to enlist the cumbersome machinery of the state in the effort.

But for scholars who did not simply accept Holmes' explanation, some other organizational principle was necessary. Late nineteenth-century torts scholars experimented with two thematic organizations, one substantive but circular, and the other merely taxonomic. The first centered on efforts to identify "rights" which, when "invaded" by certain conduct, resulted in the imposition of tort liability for the harm that resulted. The other was based on the standards of conduct associated with tort liability. Neither produced more than a semblance of conceptual clarification.

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62. ADDISON, *supra* note 35 at 2, 43.

63. 1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 3 (1869).

64. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 81 (1879).

65. The state, Holmes suggested, "might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members . . . . As between individuals it might adopt the mutual insurance principle . . . and divide damages when both were in fault . . . or it might throw all loss upon the actor irrespective of fault." "The state does not of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*. State interference is an evil, where it cannot be shown to be a good." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 88 (Harvard Univ. Press ed. 2009).

a. Organization Based on Invasions of "Rights"

Thomas P. Cooley's 1879 treatise on tort law succeeded in transcending the forms of action.[66] The writ of trespass on the case was not even an entry in the index to Cooley's treatise. In addition, Cooley made a concerted, but not entirely successful, effort to get beyond Hilliard's grab-bag listing of tort actions. The principal device Cooley employed to achieve conceptual ordering was borrowed from Blackstone, who had identified civil "wrongs" that were invasions of "rights."[67] Cooley placed assault, battery, and false imprisonment in a category of "wrongs affecting personal security," which also included malicious prosecution.[68] This organization suggested that Cooley was attempting to classify torts based on the rights they invaded.[69]

Such an approach had been foreshadowed by Hilliard's treatment of assault and battery as "Torts to the Person."[70] Cooley's was the first sustained effort by an American torts scholar to invoke what we call an "interest" analysis, a classification of tort actions in terms of the rights or interests of the plaintiff that have been invaded or interfered with by the defendant's conduct. As we will see, efforts to organize tort law around the invasion of interests would become more frequent in the early twentieth century, as commentators became more convinced that a central function of tort law was identifying interests worthy of protection and determining under what circumstances they should be protected. Other late nineteenth and early twentieth-century torts treatise writers thereafter adopted versions of Cooley's organizational emphasis on the invasion of "rights" whose invasion produced civil wrongs.[71]

But Cooley's effort to classify different tort causes of action based on the "rights" against whose invasion they provided protected did not extend much beyond his "wrongs affecting personal security" category. Although

66. He devoted very little attention to them. There was only one mention of the writ of trespass in Cooley's treatise, where he sought to fashion a distinction between suits in tort and those in contract. COOLEY, *supra* note 64, at 110.

67. Blackstone had characterized some wrongs as "injuries to personal security," others as "injuries to the limbs and body," and still others as "injuries to personal liberty." BLACKSTONE, *supra* note 26, at 115, 130–48.

68. COOLEY, *supra* note 64, at vii.

69. Professors Goldberg and Zipursky describe this as a rights and wrongs approach. *See* John CP Goldberg & Benjamin C Zipursky, *Thomas McIntyre Cooley (1824-1898) and Oliver Wendell Holmes (1841-1935): The Arc of American Tort Theory*, in SCHOLARS OF TORT LAW 48–53 (James Goudkamp & Donal Nolan eds. 2019).

70. HILLIARD, *supra* note 31, at xiii.

71. *See, e.g.*, FRANCIS M. BURDICK, THE LAW OF TORTS xiii–xiv (1905) (referring to "[t]he Right Invaded by an Assault," "[t]he Right Invaded by Battery," and "[t]he Right Invaded by Defamation").

he included chapters on "injuries to family rights," "wrongs in respect to civil and political rights," and "invasion of rights in real property,"[72] each of which pointed in the direction of "interest" analysis, his treatise also contained chapters that made no explicit reference to rights. Those included slander and libel, fraud, nuisance, master and servant, "wrongs from non-performance of conventional and statutory duties," and "injuries by animals."[73] Whereas Hilliard had not addressed negligence at all, Cooley included negligence in the chapter on wrongs arising from non-performance of duties.[74] Cooley also mirrored Hilliard by including some "wrongs" that would not now be placed within the field of tort law. Those included violations of "civil and political rights," such as religious liberty, the right to an education, and "[r]ights in the learned professions," violations of patents, copyrights, and trademarks, and unauthorized bailments.[75] Like Hilliard, then, Cooley was not only attempting to conceptualize the constituent parts of tort law; he was also struggling to define its boundaries and scope.

b. Organization Based on Standards of Conduct

Other scholars moved in a different organizational direction. Some of their names are more familiar—Holmes, Pollock, Wigmore—partly because their approach ultimately became more widely adopted. But we should not think that its ultimate success reflects immediate acceptance. How to conceptualize and organize tort liability was very much open to debate in the late nineteenth and early twentieth centuries. Four important writers on tort law explored the possibility of a tripartite organization of the field based on standards of conduct.

Holmes. In 1873, Holmes had concluded that certain activities, such as allowing damned water or animals to escape, subjected those who had engaged in them to liability at their peril; other conduct, such as fraud and assault, appeared to require culpability; and still other conduct exposed defendants only when its social utility was outweighed by the serious risks it posed to others, a judgment based on "motives of policy . . . kept purposely indefinite."[76] Holmes called this last category tort liability based on "modern negligence," by which he meant conduct that was socially

72. COOLEY, *supra* note 64, at viii–ix.
73. *Id.* at vii–x, xiv–xv.
74. *Id.* at xv.
75. *Id.* at ix–x, xiv.
76. Holmes, *The Theory of Torts*, *supra* note 3, at 659.

useful but posed risks to "all the world," as opposed to the special "duties" of certain parties, like common carriers, to designated classes of persons.[77]

Holmes wanted to show that tort liability, even when it exposed defendants to liability at their peril, had almost always been based on "fault" of some sort, either of the intentional or negligent variety, and that in the great mass of modern torts cases, negligence cases, "fault" was a legal rather than a moral concept.[78] Of the common law tort actions, however, only malicious prosecution, abuse of process, and possibly conspiracy had required culpability, in the form of "malice." The other actions brought under trespass or growing out of trespass on the case—assault, battery, false imprisonment, deceit, slander and libel, and trespass to real and personal property—had not embodied a culpability requirement.

Holmes dealt with this difficulty for his theory by limiting his discussion of "intentional torts" to deceit, defamation, malicious prosecution, and conspiracy[79] and equating "intent" with malice.[80] In so doing, Holmes created a category of tort actions that differed from actions resting on act-at-peril liability or negligence.[81] He was content to classify the intentional torts as a subcategory of "fault" actions, lumping them together under a somewhat contrived culpability standard. However, Holmes had not shown what more the torts based on "fraud, malice, and intent" had in common, and he had conveniently omitted from his classification the long-established torts of assault, battery, and false imprisonment, because they had not required intent when the forms of action were in force.[82] What he had done was suggest that a salient organizing principle for tort actions was their standard of conduct.

Bigelow. In 1878, Melville Bigelow published a torts treatise that began with the insight

> that "torts spring, not from a common centre, but from a series of different centres. . . . Each [tort action] has its own peculiar rules of law, . . . and the same is true of all other branches of the general subject. There is, then, no such thing as a typical tort."[83] A scholar holding this point of view—correct though it may have been—was bound to face challenges in organizing a treatise.

77. *Id.* at 653, 660.

78. G. Edward White, *Introduction* to HOLMES, THE COMMON LAW, *supra* note 65, at xvi–xvii.

79. HOLMES, THE COMMON LAW, *supra* note 65, at 120.

80. *Id.* at 118.

81. Holmes argued that "trespass was originally confined to intentional wrongs." *Id.* at 93. As we have seen, that statement was incorrect.

82. *Id.* at 120.

83. MELVILLE M. BIGELOW, ELEMENTS OF THE LAW OF TORTS iv–v (1878).

The organization that followed was based partly on a classification of duties.[84] Bigelow acknowledged that this organization was repetitive in that most of the topics he was addressing fell into one division. At the same time, however, Bigelow identified another way of classifying tort causes of action. That was to classify causes of action based on a "peculiar *animus* (intent) . . . essential to a right of redress for the alleged breach of duty;" actions in which "the existence or non-existence of the *animus* is immaterial;" and actions where "the breach of duty consists in damage caused by a failure to conform to the care or diligence or skill observed by prudent men."[85] Although all the causes of action arose from breaches of general or specific "duties," what distinguished them was the standard of conduct that applied.

Bigelow then grouped causes of action into those three divisions. He placed deceit, slander and libel, malicious prosecution, and conspiracy in a group requiring "animus" to make out a successful action.[86] He placed nearly all the remaining torts—assault, battery, false imprisonment, trespasses to real or personal property, infringement of patents and copyrights, violation of water rights, nuisance, damage by animals, escape of dangerous elements or substances, and enticement and seduction—in a group in which a showing of "animus" was immaterial because "the law conclusively presum[ed] that the act complained of, if proved, was intended";[87] and he placed negligence in the third group.[88]

That organization, which would somewhat resemble Holmes' in *The Common Law*, had some obvious difficulties. Slander and libel were described as torts requiring a showing of intent to be actionable, which was clearly not the case. Although assault, battery, false imprisonment, and trespass to real and personal property would subsequently come to be characterized as "intentional" torts, they had certainly not been, historically, actions in which "intent" was immaterial because "the law [had] conclusively presum[ed]" it.[89] And there was every indication that nuisances, actions involving damage by animals, and *Rylands v. Fletcher*-

84. This included "duties, which govern the relations of individuals to each other (1) as mere members of the State; or (2) as occupying some special situation towards each other not produced by agreement . . . ; or (3) as occupying some special situation of agreement *inter sese* which affords occasion for breaches of duty between them that need not be treated as breaches of contract." *Id.* at 3.

85. *Id.* at 5–6.

86. *Id.* at 5.

87. *Id.* at 5–6.

88. *Id.* at 6.

89. *Id.* at 5.

type actions (involving harm caused by nonnatural uses of land),[90] were act-at-peril torts in which neither intent nor negligence was required. So perhaps the most that can be said for Bigelow's organization was that it unconsciously served to demonstrate the accuracy of his opening insight that there was no such thing as a typical tort.

Pollock and Wigmore. Over the next fifteen years, two other important scholars concluded that organizing tort law based on the tripartite standards of conduct would be fruitful. In 1887, the English torts scholar Frederick Pollock made it a basis for organizing his torts treatise.[91] In the introduction to the 1887 edition of his torts treatise, Pollock stated that now that the English common law was "independent of forms of action," it "would seem . . . that a rational exposition of the law of torts" based on "general principles of duty and liability" might be possible.[92]

Pollock's "rational exposition" of tort law would end up being based on a tripartite division of tort actions based on standards of conduct. Pollock first placed assault, battery, and false imprisonment in a category of wrongs he labeled "Personal Wrongs," to which he added deceit, libel and slander, malicious prosecution, seduction enticing away of servants, and conspiracy.[93] He then placed trespass to land and goods, conversion, and invasions of patents and copyrights in a category of "Wrongs to Property."[94] His third category, which he called "Wrongs to Person, Estate, and Property generally," consisted of nuisance, negligence, and "[b]reach of absolute duties . . . attached to the occupation of fixed property," the "ownership and custody of dangerous things," and "the exercise of certain public callings."[95]

Those categories were not crisply formulated. But Pollock next associated each of the categories with "distinctive characters with reference to the nature of the act or omission itself."[96] In the "personal wrongs" category "the wrong is willful or wanton. Either the act is intended to do harm, or . . . done with reckless indifference to what may befall by reason of it."[97] In the "wrongs to property" category "the intention . . . is not . . . necessary to constitute the wrong of trespass as regards either land

90. L.R. 3 H.L. 330 (1868).

91. FREDERICK POLLOCK, THE LAW OF TORTS (1887). For a discussion of Pollock's adoption of the tripartite approach, *see* Robert Stevens, *Professor Sir Frederick Pollock (1845-1937): Jurist as Mayfly*, in SCHOLARS OF TORT LAW, *supra* note 69, at 75–102.

92. *See* POLLOCK, *supra* note 91, at 4, 11–12.

93. *Id.* at 5.

94. *Id.*

95. *Id*. at 6.

96. *Id.*

97. *Id*. at 6–7.

or goods," because "the law expects me at my peril to know what is my neighbour's in every case."[98] And in the third category "the acts or omissions complained of . . . are not as a rule willfully or wantonly harmful; but neither are they morally indifferent."[99] Liability for such conduct stemmed from "some shortcoming in the care and caution to which . . . we deem ourselves entitled at the hands of our fellow-men."[100] Pollock had organized categories of tort actions around standards of liability: intent, act-at-peril, and negligence. Pollock's organization would end up being congenial to other scholars seeking to classify the law of torts in two respects. It emphasized that most of the ancient tort actions, whether originally brought in trespass or in case, required some showing of "intent." Because many of those actions were the result of intentional or reckless conduct, and the requirements of the forms of action, such as "direct" or "indirect" injury, were no longer relevant, placing most of the ancient actions in the category of "intentional torts" seemed to make intuitive sense. And Pollock's classification scheme significantly narrowed the category of act-at-peril torts, resulting in either intent or "fault" being a prerequisite for recovery for most tort actions. Pollock's scheme suggested that the most relevant feature of tort actions was not the "rights" they invaded or the "duties" whose violation they were based on, but the standard of conduct with which they were identified.

The other important scholar to adopt the tripartite conceptualization did not do so in a treatise, but he is sufficiently important in his own right to warrant mention. John Henry Wigmore was the foremost evidence scholar of his time, but he also was an important torts scholar, who would publish a prominent torts casebook as well.[101] Wigmore published four articles on tort law in the *Harvard Law Review* in the single year of 1894.[102] In one of those, commenting on the "general analysis of a Tort," he noted that tort liability may be based on conduct taken "designedly. . . negligently . . . [or] at peril" and elaborated on the point.[103] In this he obviously was aligning himself with Holmes, Bigelow, and Pollock. Together with those scholars, Wigmore helped to establish the organization of tort law based on the

98. *Id.* at 7–8.

99. *Id.* at 8.

100. *Id.* at 8–9.

101. JOHN HENRY WIGMORE, SELECT CASES ON THE LAW OF TORTS (1912).

102. John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894); John H. Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 HARV. L. REV. 383 (1894); John H. Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 HARV. L. REV. 441 (1894); John H. Wigmore, *The Tripartite Division of Torts*, 8 HARV. L. REV. 200 (1894).

103. Wigmore, *The Tripartite Division of Torts*, *supra* note 102, at 200, 206.

tripartite standards of conduct as one of the principal possible bases for conceptualizing the field.

3. The Challenges of Classification: Casebooks

The legacy of the treatise writers was to make available two distinct schemes for classifying tort actions, one emphasizing rights—in what respect the plaintiff was adversely affected by particular forms of conduct—and the other emphasizing the standards of conduct to which tort defendants were held. Taken together, the two schemes revealed that classifications of tort actions around the forms of action were no longer necessary. But a difficulty remained for the late nineteenth-century scholars, and their early twentieth-century successors, in the production of casebooks on tort law. This was the very limited amount of the necessary raw material for a casebook in the new era—cases decided after the abolition of the forms of action.

a. The Problem Posed by the Absence of Post-Abolition Case Law

By the last decades of the nineteenth century the forms of action may have ceased to be a feature of modern tort actions and may not have been perceived as helpful classification devices. Nonetheless, as a practical matter, most collections of tort cases still would have had to include a majority of cases employing the forms of action, because little else was available. Suits in tort had for centuries been brought into court under trespass and case. Only in the most recent decades had tort suits not been brought in this manner. There simply had not been enough time yet for post-abolition appellate cases addressing the myriad of different issues that arise in tort cases to accumulate. Consequently, in whatever way a casebook author might wish to conceptualize the subject of torts—around substantive principles, rights, or standards of conduct—most of the cases that could be included in the casebook would have been decided in the era of the forms of action. A case would therefore begin with reference to the form of action under which it was brought, and might be decided in language making reference to issues associated with that form of action. The result was that it was more awkward to organize a casebook based on rights or standards of conduct than to organize a treatise around the forms of action. Casebook authors in the late nineteenth and early twentieth centuries thus did not emphasize the approaches to organizing tort law that were appearing in torts treatises in that time period.

The first casebook on tort law to be published in the United States was James Barr Ames' *A Selection of Cases on the Law of Torts*, which

appeared in 1874.[104] It was closely followed by Bigelow's casebook the next year.[105] An additional casebook was published by Francis M. Burdick of the Columbia law faculty in 1891,[106] and had gone through three editions by 1905. Between 1892 and 1915 nine more casebooks on tort law had been published.[107]

None of those casebooks organized the presentation of cases around invasions of rights or standards of conduct. Rather, each employed an organization that combined classifying tort actions in connection with the forms of action and miscellaneous presentation of cases representing different torts but decided under the forms of action. Escaping the gravitational pull of the forms of action was obviously more difficult to do than might otherwise have been expected.

We can only wonder how confused late nineteenth-century law students must have been in torts courses that used those casebooks. The casebooks were anchored in and at least partly organized by reference to the forms of action, which had been abolished decades earlier. But torts treatises, to the extent students consulted them, were organized partly thematically, by reference to rights, standards of conduct, or both, along with discussions of atomistically-presented miscellaneous torts. To the law student, and subsequently to the lawyer embarking on a career in practice between roughly 1870 and the early decades of the twentieth century, all this would have given the appearance of enormous conceptual confusion, with little means of clarification available. Law students and lawyers would have had no reason to suppose that tort law was anything other than a disorganized, fragmented, not-very-coherent field.

b. Bohlen's 1915 Casebook

This situation did not improve as the twentieth century proceeded. In 1915, for example, Francis Bohlen published a torts casebook.[108] Bohlen's casebook is important for our purposes in two respects. First, Bohlen was a

104. JAMES BARR AMES, A SELECTION OF CASES ON THE LAW OF TORTS (1874). In the 1893 and 1905 editions of Ames' casebook Jeremiah Smith was a co-author. *See e.g.*, JAMES BARR AMES & JEREMIAH SMITH, A SELECTION OF CASES ON THE LAW OF TORTS (1893).

105. MELVILLE M. BIGELOW, LEADING CASES ON THE LAW OF TORTS (1875).

106. FRANCIS M. BURDICK, CASES ON TORTS SELECTED AND ARRANGED FOR THE USE OF LAW STUDENTS IN CONNECTION WITH POLLOCK ON TORTS (1891).

107. GEORGE CHASE, LEADING CASES UPON THE LAW OF TORTS (1892); JAMES PAIGE, ILLUSTRATIVE CASES IN TORTS (1896); FRANK A. ERWIN, CASES ON TORTS (1900); FRANK LESLIE SIMPSON, CASES ON TORTS (1908); WM. DRAPER LEWIS & MIRIAM MCCONNELL, EQUITY JURISDICTION, TORTS: A COLLECTION OF CASES WITH NOTES (1908); WIGMORE, *supra* note 101; RICHARD D. CURRIER & OSCAR M. BATE, CASES ON TORTS (1914); CHARLES M. HEPBURN, CASES ON THE LAW OF TORTS (1915); CHARLES A. KEIGWIN, CASES ON TORTS (1915).

108. FRANCIS H. BOHLEN, CASES ON THE LAW OF TORTS (1915).

prominent torts scholar on the faculty of the University of Pennsylvania Law School, who would eight years later be named by the newly-formed American Law Institute as the Reporter for the Restatement of Torts. In that capacity, he would make an attempt to reconceptualize the field.

Second, Bohlen's casebook, and the dilemma it reflected, was representative of the state of the field at that time. Bohlen began the preface to his casebook by stating that "[t]he preparation of a collection of cases on the law of Torts has certain difficulties peculiar to itself" because "[i]n perhaps no other important branch of the law is there so little agreement as to . . . how [the subject] should be classified and arranged."[109] Bohlen then introduced his own approach to classification by noting that "the method used by the older text writers was to adopt a purely procedural classification[,]" emphasizing "the form of action appropriate for the redress of particular wrongs."[110] Because that approach treated "[p]rinciples[] which determined the liability in a particular form of tort action . . . as though distinct from those applicable to any other form of tort action," it made "little or no effort to ascertain the fundamental principles underlying the law of Torts as a whole."[111]

Bohlen maintained that "[t]his method, still used by many able text writers," was "entirely opposed to the trend and spirit of the modern study of law," which was concerned with classifying legal subjects around their fundamental principles.[112] The reader of those passages would have been justified in thinking that Bohlen was going to introduce the "fundamental principles underlying tort law" and adopt an approach consistent with the "trend and spirit of the study of modern law." But that is not at all what his casebook did.

Abandoning the old method altogether posed difficulties, Bohlen said. One was that "among even modern students of the law of Tort there is little or no unanimity as to the proper way of arranging the subject so as to best present to the student its underlying principles and philosophy."[113] Each writer on tort law needed to "adopt his own arrangement."[114] The other difficulty was that "while classification solely in accordance with the forms of action is undoubtedly unscientific and unsatisfactory," it was still embedded in "the mind of the legal profession."[115] For this reason, Bohlen

109. *Id.* at iii.
110. *Id.*
111. *Id.*
112. *Id.* at iv.
113. *Id.*
114. *Id.*
115. *Id.*

believed, casebook editors had to reckon with the fact that they were preparing students for law practice, where they would be encountering senior members of the bar and judges in courts, all of whom had been taught and continued to understand tort law through an emphasis on the forms of action. Bohlen felt that a "law teacher . . . [who] commits himself to teaching the student any revolutionary view of his subject or adopts any personal arrangement of it entirely contrary to that adopted by the profession . . . must be very sure of his ground."[116] And apparently Bohlen was not.

Consequently, Bohlen explained, he was not planning any "revolutionary" or even "novel" framing of the cases he had collected.[117] He retained the "old division into actions . . . whenever helpful to explain the historical development of general principles, or whenever the subject matter is so distinct" that an emphasis on the forms of action served to illuminate controlling doctrines.[118] Of the three "Books" into which his casebook was divided, Book I was "devoted to a rather elaborate scrutiny of the various formed actions of Trespass" and of "the writ of Disseisin and . . . the action of Trover, closely akin in scope and content to trespass to real and personal property."[119] This "cleared" the "way" for Book II, by far the largest in the casebook, in which Bohlen took up negligence cases as well as handful of cases "which show a survival of the primitive idea that one doing harm must make it good, though free from personal fault," and "a persistence of the equally primitive idea that no actual harm is required if the plaintiff's principal interests are directly and intentionally offended."[120]

Bohlen did observe that "the tolerance of harmful acts because of their social convenience" was an emerging "principle," which he labeled "modern."[121] That new rationale for refraining from imposing liability for some harmful acts, Bohlen thought, "reflects a change in philosophic thought, a revolt from . . . extreme individualism."[122] Indeed, as early as 1911, Bohlen had employed the term "interest" in discussing whether the strict liability principle of *Rylands v. Fletcher* should be limited in a society whose increasingly industrialized and urbanized character had resulted in numerous socially useful but dangerous activities being part of the

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at vi.
120. *Id.* at vi–vii.
121. *Id.* at vii.
122. *Id.*

experience of modern Americans.[123] By 1915, then, Bohlen seems to have been poised to advance a conception of tort law as evolving from a series of actions designed to protect individuals from being injured to one emphasizing the social "interests" at stake in tort cases, interests that went beyond the rights and duties of individuals in an action in tort.

But Bohlen did not take the next step and adopt that approach in his casebook. Either he felt that his audience was not ready for it, or his thinking had not developed to the point at which that approach could be the basis for his reorganizing all of tort law. Instead, Bohlen's organization was nominally based on the forms of action. But then midway into the material even that organization broke down, with separate chapters on particular causes of action (such as deceit and defamation),[124] particular duties (such as those of landowners, manufacturers, and suppliers of chattels),[125] and particular tort doctrines, such as contributory negligence and assumption of risk.[126] In many respects Bohlen's 1915 casebook did not look very different from those published by Ames in 1874 and Bigelow in 1875.[127]

* * *

The principal impression we derive from our examination of the late nineteenth and early twentieth-century treatises and casebooks is of the absence of any consensus during this period regarding the proper way to think about the law of torts. There was recognition that the now-abolished forms of action were an inappropriate basis for organizing the subject, though the fact is that most scholars still could not completely transcend them. There were halting but incomplete and unsuccessful efforts (such as Cooley's) to organize tort law on the basis of rights or interests protected. And there were a few prominent figures who had talked about tort law differently—in terms of the three standards of conduct. But neither Holmes nor Wigmore had written an entire treatise; Pollock had done so but was English; and the tripartite division was not then the dominant framework that it would become a half-century later. Rather, tort law was only partly

123. Francis H. Bohlen, *The Rule in* Rylands v. Fletcher, in FRANCIS H. BOHLEN, STUDIES IN THE LAW OF TORTS 366–67 (1926). In that essay Bohlen maintained that "[t]he most important function of modern tort law" was "to apply fundamental and traditional conceptions of justice to the solution of new social and economic problems," in which "the interests of one person or class conflict with the interests of another person or class." *Id.* at 367–68.

124. BOHLEN, *supra* note 108, at xii, xiv.

125. *Id.* at xi–xiii.

126. *Id.* at xv.

127. A glance at the Table of Contents of AMES, CASES ON THE LAW OF TORTS, *supra* note 104 and BIGELOW, LEADING CASES ON THE LAW OF TORTS, *supra* note 105, reveal that the organization of both of those casebooks were also a combination of writ-based and miscellaneous classifications of tort actions.

organized, treatises and casebooks employing various combinations of the forms of action, rights-based analysis, and division by reference to standards of conduct. And whatever combination was employed, the presentation invariably included a miscellany of freestanding torts that seemed to have little in common. The field was conceptually unorganized.

It would not be surprising, then, that a Restatement of Torts, which would begin preparation in 1923, while seeking to surmount the organizational difficulties that had challenged torts scholars for the past fifty years, would end up reflecting those difficulties. As the next Part shows, try as he might, Reporter Bohlen would find that he could not easily escape the gravitational pull of the past.

II. THE FIRST RESTATEMENT AND THE CHALLENGE OF CONCEPTUALIZATION

The American Law Institute was founded in 1923, with the aim of organizing and improving the law. The immediate method of doing so was to prepare "restatements" of the law, which were to "present an orderly statement of the general common law."[128] The need for such an effort was recognition of the "increasing volume of . . . decisions . . . and the numerous instances in which the decisions are irreconcilable," which were "rapidly increasing the law's uncertainty and lack of clarity."[129] The first Restatements that the ALI undertook were Contracts, Torts, and Conflicts of Law.[130] There soon followed Agency, Business Associations, Property, and Trusts.[131]

A. The Awkward Fit of Torts into the Restatement Paradigm

It is obvious from the ALI's stated aims that its founders thought that these subjects were susceptible to "orderly statement," and that their "uncertainty" and "lack of clarity" could be remedied.[132] Whatever was the case for the other subjects of the first restatements, torts posed a special problem. As Part I demonstrated, what we now call tort law had until recently been a set of largely procedural pigeon-holes embedded in the forms of action and the writ system.[133] Tort law became a distinct subject only in the second half of the nineteenth century, after the forms of action

128. RESTATEMENT (FIRST) OF TORTS viii (AM. LAW INST. 1934). *See also "The Story of ALI*, ALI," https://www.ali.org/about-ali/story-line/ (last visited Jan. 23, 2021).

129. RESTATEMENT (FIRST) OF TORTS ix (AM. LAW INST. 1934).

130. *Id.* at x.

131. *Id.*

132. *Id.* at viii–ix.

133. *See supra* Part I.

were abolished and substance took priority over procedure. Not only, however, was the subject of tort law new. In addition, and more importantly, what made it a distinct subject—aside from the fact that it involved civil liability but not for breach of contract—was not immediately clear. It certainly had not thus far been amenable to easy systemization.[134]

Yet, as it emerged, the Restatement paradigm involved not only stating the law so as to reduce its "uncertainty" and enhance its "clarity." To present an "orderly statement" also meant organizing, or conceptualizing, the field being restated. In each field there tended to be an overall organizing concept—in contracts the concept was promising. In property the concept was the nature of rights to or in a thing—about which there were rules to be restated, or around which a conceptual structure could be built. In contracts, for example, this meant setting out the core rules governing promising—contract formation, consideration, the rights of third parties, assignment, interpretation, breach, and remedies.[135] In property, this meant dividing up the subject of ownership into the law governing freehold estates, future interests, restrictions on the creation of property interests, and servitudes.[136]

In contrast, there was no analogous organizing concept available in tort law; the subject was not coherent in any obvious way. Notably, as Part I showed, after the forms of action were abolished, the late nineteenth and early twentieth-century treatise writers had struggled to find a coherent substantive basis or even several bases for organizing the law of torts.[137] Since then, generations of law students have simply learned that a tort is "[a] civil wrong not arising out of contract."[138] That may be good enough for the first day of law school, but it is not much of a concept, and certainly is not a basis for organizing the whole subject. Making a list of civil wrongs not arising out of contract is not the same as organizing or conceptualizing the wrongs that are on the list. The challenge for a torts restatement was how to do that.

It is impossible to review the drafts and final version of the First Restatement, and especially the material on intentional torts, without being simultaneously impressed and bemused by its effort to meet that challenge. The first draft was a heroic effort to organize tort law in a way that

134. At the time the early Restatements were published, there were a number of other criticisms that fall outside of our concerns in this Article, involving (among other things) the deceptive putative certainty associated with formulating black-letter rules. *See generally* G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 L. & HIST. REV. 1 (1997).

135. *See generally*, RESTATEMENT OF THE LAW OF CONTRACTS (AM. LAW INST. 1932).

136. *See generally*, RESTATEMENT OF THE LAW OF PROPERTY (AM. LAW INST. 1936).

137. *See supra* note 127 and accompanying text.

138. ABRAHAM, *supra* note 4, at 1.

improved on the efforts of the late nineteenth and early twentieth-century scholars to get beyond the now-abolished forms of action. But in retrospect, certain features of that first effort seem almost quaint. And the vision of a new structure that was reflected in the first draft quickly faded away. Subsequent material on negligence, other bases of liability, and other torts did not reflect this vision, and eventually even the later drafts on the intentional torts largely dropped the initial vision, without substituting a different, coherent one.

We previously noted that the Reporter for the Restatement was Professor Francis H. Bohlen, who had arranged his 1915 torts casebook by reference to the forms of action, noting that there was "no unanimity as to the proper way of arranging" the subject of torts, and that each author therefore had to "adopt his own arrangement."[139] Bohlen's thinking had evidently evolved during the ensuing ten years, for his initial draft for the Restatement departed dramatically from the organization of his casebook.

B. Tentative Draft No. 1

Bohlen clearly understood the challenge he faced. Speaking to the ALI's second Annual Meeting, at which a first draft[140]—addressing only battery, assault, and false imprisonment—was presented to the membership, he said that:

> [T]here seemed to be only two possible ways of going about it. One was to accept the classification, if it may be so called, that one finds in the earlier textbooks, and to deal with the various named torts themselves, which is usually nothing more than describing the content of some particular form of action . . . .
>
> As an alternative we have adopted a novel method of approach. First of all, we have dealt with the legal consequences of certain conduct. We have approached it primarily from the standpoint of the effect which the defendant's conduct has had upon the

139. *See* BOHLEN, *supra* note 108, at iv.

140. Torts: Restatement No. 1 (AM. LAW INST. 1925) [hereinafter "Tentative Draft No. 1"]. The early ALI nomenclature was not completely consistent, and it is complicated by the nomenclature used by HeinOnline, where the drafts are available. For the most part, during the years with which we are concerned, it appears from their title pages that drafts submitted to the Council—the Board of the ALI—tended to be termed "Tentative" drafts, and were sometimes simply identified by the abbreviation "T.D." followed by a number. Drafts submitted to the membership at the "Annual Meeting" tended to be referred to as "Preliminary Draft No. __." A statement on the title page of Tentative Draft No. 1 indicates that the same draft was submitted first to the Council and then to the Annual Meeting. This draft had neither the Tentative Draft nor Preliminary Draft designation on its title page. It is accessible in the HeinOnline American Law Institute Library directory "Restatement and Principles of the Law" > "Torts" > "Restatement of the Law Torts (1923-2020)" database as "Tentative Draft No. 1." That is how we will cite it. We will cite other drafts in the same manner simply by using the name that renders them accessible in the HeinOnline database.

> plaintiff. . . . Now, I agree that to the person not used to this method of approach there may be some difficulty in understanding exactly what we, the Reporter and his Advisers, are attempting to lay before you.[141]

The approach Bohlen described may have seemed "novel" to the lawyers at the ALI Annual Meeting, many of whom would have been educated during the first years after the forms of action were abolished. But the approach actually was not completely unprecedented. "[T]he effect which the defendant's conduct has had upon the plaintiff" to which Bohlen referred sounds a lot like what a number of the late nineteenth and early twentieth-century treatise writers had flirted with in focusing on the rights protected by some of the torts they discussed.[142]

The first, partial draft of the Restatement confirmed that this sort of rights analysis was precisely what Bohlen had in mind, although we think that he was probably thinking of "interests" even when he used the term "rights" in Tentative Draft No. 1.[143] The opening, general heading was "Conduct Violating Rights of Personality."[144] The rights of personality were listed as the rights to freedom from "bodily harm," from "offensive bodily touchings," from "apprehension of a harmful or offensive bodily touching," from "confinement," and from "disagreeable emotions" (though it turned out that there was almost no protection of this right).[145] Aside from this list of rights, however, what the "right of personality" consisted of

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141. PROCEEDINGS AT FOURTH ANNUAL MEETING: APPENDIX VOLUME IV 189–91 (AM. LAW INST. 1926) [hereinafter PROCEEDINGS AT FOURTH ANNUAL MEETING]. Although Bohlen's phrase "[f]irst of all," implies that he had a second point to make about his approach, he did not make it.

142. *Id.* at 190.

143. Although this first draft used the terms "right" and "rights," the final version substituted the terms "interest" and "interests." *See infra* notes 156–158 and accompanying text. At least as early as the publication of a collection of his previously published articles, BOHLEN, STUDIES IN THE LAW OF TORTS, *supra* note 123, Bohlen had said that "[t]erms such as 'right,' 'duty,' and "'wrong' were, at the time these articles were written, regarded as sufficiently accurate. Today . . . an attempt is made to find new and, it is to be hoped, more exact terms. Thus, what in the earlier articles is termed a 'right,' is in the latter articles called a 'legally protected interest.'" *Id*. at vi. Bohlen thought that the use of the term "interest" signified "a very distinct alteration in the judicial view as to the protection which should be given to various interests by the imposition of liability for acts which invaded them." *Id.* Perhaps the most visible proponent of "interest analysis" of this sort was Roscoe Pound, who coined the term "sociological jurisprudence" to emphasize that judicial decisions needed to be attentive to "social interests." Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 802, 940 (1923). Consequently, we think that Bohlen was probably thinking of "interests" even when he used the term "rights" in Tentative Draft No. 1, though we cannot explain why he did not substitute that term until the draft was revised. It may be that it took more time to persuade his advisors that it made sense to do so.

144. Tentative Draft No. 1, *supra* note 140, at 5. This was indicated to be "Part II," though there was no Part I. That was left open for a list of definitions, which eventually were included in the final draft. *See infra* note 161.

145. Tentative Draft No. 1, *supra* note 140, at 5.

was not specified. There was no description or account of what a "right of personality" was and it never appeared anywhere else in the first draft. Perhaps he intended to elaborate on the meaning of the notion in a later draft. But that never occurred.[146] Nor did Bohlen elaborate on what the phrase meant when he presented the draft to the Annual Meeting.[147]

The first subdivision of the material on rights of personality addressed "Conduct Violating the Right to Freedom from Bodily Harm."[148] This subdivision began with a Section (the ALI was not yet using the symbol "§") entitled "General Principles," which listed the bases of liability for violating the right to personality by causing bodily harm: acting "with the intention of bringing about bodily harm," acting under circumstances that "a reasonable man would recognize as creating" an undue probability of harm, acting in "breach of a duty" to protect another from bodily harm, and acting under circumstances that are "at the risk" of the actor.[149] All this material—basically referencing the different standards of conduct that could be breached and give rise to liability for bodily harm—preceded reference to any particular torts.

Only then did there follow what amounted to a sub-subdivision, on intentional violation of the right to freedom from bodily harm—battery. This sub-subdivision contained a number of sections and looked very much like the Restatements we recognize today.[150] Then, in due course, there

146. In an earlier document containing no black-letter material, submitted to his Advisors only, Bohlen had toyed with including other interests in the "Rights of Personality," including the "right to reputation" and the "right to privacy." Restatement T.D. No. 1 at 5 (1923) [accessible in HeinOnline as "[Preliminary] Draft 1 (December 23, 1923)" but bearing the initials "T.D." [Open as a pdf to see all the pages]. But there was no discussion of "personality" in this document either, and these references had dropped out when Bohlen's first draft was presented to the Annual Meeting.]

147. The absence of explanation or elaboration probably foreshadowed the difficulty Bohlen later faced in extending interest analysis to the remainder of tort law. *See* PROCEEDINGS AT FOURTH ANNUAL MEETING, *supra* note 141, at 192.

148. Tentative Draft No. 1, *supra* note 140, at 5.

149. *Id.* at 6.

150. *Id*. at 8. We quote these sections below, so that the reader may appreciate the way in which the draft treated battery as a sub-subdivision of the more general right to personality, and of its subdivision, the right to freedom from bodily harm:

> Part II.
> CONDUCT VIOLATING RIGHTS OF
> PERSONALITY.
> The rights of personality are:
> 1. Right to freedom from bodily harm;
> 2. Right to freedom from offensive bodily touchings;
> 3. Right to freedom from apprehension of a harmful or offensive bodily touching;
> 4. Right to freedom from confinement;
> 5. Right to freedom from disagreeable emotions.

were two separate series of sections on "Conduct Violating the Right to Freedom from Apprehension of a Harmful or Offensive Bodily Touching [Assault]"[151] and "Contact Violating the Right to Freedom from Confinement [False Imprisonment]."[152] There was no equivalent to Section 1—"General Principles," setting out the different bases of liability for causing bodily harm (intent, negligence, etc.)—at the beginning of the material addressing assault and false imprisonment, however, for the obvious reason that there was (and is) no liability in negligence, or strict liability, for those harms.[153]

Clearly, then, Bohlen was presenting the material on the intentional torts as part of what would be a larger body of material on the protection of the general right of personality and as part of a sub-right of the right of personality to freedom from bodily injury, the latter through the imposition of liability for intentionally, negligently, or non-negligently causing bodily injury. Battery, assault, and false imprisonment were not presented as freestanding torts; they were nested within this structure, first by reference to the interest ("right") they protected, and only then by reference to the standard of care that triggered liability under these particular torts—the intent to cause harm.

The logic of this organization—and its only possible purpose, really—would have been to signal that there were rights other than the right to personality that were protected by other torts and bases of liability; that when it came to the right of personality, there were other torts and bases of liability that protected the right of personality and its sub-right to protection against bodily harm; that some of those other torts were actionable without

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> Chapter I.
> CONDUCT VIOLATING THE RIGHT TO FREEDOM FROM BODILY HARM.
> . . . .
> SUB-CHAPTER I.—GENERAL PRINCIPLES.
> Section 1. Causing bodily harm to another, unless privileged, subjects the one causing it to a liability to the other, if:
> [Here the four bases of liability are specified: intent, negligence, strict liability, and breach of duty.]
> . . . .
> SUB-CHAPTER II.—THE INTENTIONAL VIOLATION OF THE RIGHT TO FREEDOM FROM BODILY HARM. [BATTERY.]
> [Here the elements of battery are stated.]

Id. at 5–8.

151. *Id.* ch. III, at 30–42.

152. *Id.* ch. IV, at 43–59.

153. However, the initial assault and false imprisonment sections did each reference breach of duty to protect another from such harm, apart from negligence, as a basis of liability. *See id.* at 30; *id.* at 43.

intent to cause harm (and indeed without negligence**),** though battery, assault, and false imprisonment were actionable only on proof of intent to cause harm; and that the law governing the other forms and other bases of liability for violation of the right to personality, and of other rights to be specified, was to be addressed within this overall structure in later drafts. If all of this were not the case, then it would have sufficed to present battery, assault, and false imprisonment, not as having the particular place within this overall structure that they had been given, but simply as three torts that had in common the requirement of intent to cause bodily harm or a bodily effect—that is, the way those three torts are presented by the current Intentional Harms to Persons project.

Thus, it appears that Bohlen was thinking of organizing the Restatement in terms of (1) the nature of each right a tort protected, and only then (2) subdividing based on the standard of conduct that applied to that tort. That is why the right to freedom from bodily harm, whether caused intentionally, negligently, or without fault, was addressed in a framing section (Sub-Chapter I, "General Principles") before taking up battery—intentionally caused bodily injury—in the sub-subdivision that followed. The remainder of the Restatement, if this basis were followed, would have been organized through an analogous set of sections next addressing negligently-caused interference with the right to freedom from bodily harm, and strict liability for it, which would follow down the road. Then, having completed the material on the right to freedom from bodily harm, there could have been Sections addressing other rights or interests—first identified, and then subdivided into material addressing intentional, negligently-caused, and strict liability causes of action, to the extent that they were available.

Bohlen was off to what must have seemed to be a good start on what he had told the Annual Meeting: the Restatement would be organized from "the standpoint of the effect which the defendant's conduct has had upon the plaintiff."[154]

C. The Fragmented Structure of Tort Law in Subsequent Drafts

But it did not turn out that way. Little of the material that Bohlen subsequently prepared followed the rights-based approach that seemed to dominate the first draft. An entire volume's worth of material on negligence that came next completely ignored rights-based analysis. And when the first draft's material on the intentional torts was eventually revised, "rights" were called "interests," and interests-based analysis now

154. PROCEEDINGS AT FOURTH ANNUAL MEETING, *supra* note 141, at 190.

took a distinctly back seat even in that material. Finally, a whole series of other torts were treated as freestanding causes of action that were not linked to any other torts protecting the same interest, and in most instances there was no reference at all to the interest they each protected individually. The apparently unified vision of tort law foreshadowed by the first draft had given way to fragmentation.

1. The First Material on Negligence

After completing drafts on the intentional torts, Bohlen turned to negligence. Like the material on bodily harm in Tentative Draft No. 1, his earliest draft on negligence also began with a heading labelled "General Principles."[155] But in contrast to what Tentative Draft No. 1 had done for battery and presaged for negligently-caused bodily injury, the negligence material made no reference, in the General Principles or in any subsequent Section, to the right of personality, to the right to freedom from bodily injury, or to the interest or interests protected by liability for negligence.[156]

The initial material in the draft was about the nature of negligence, not the rights that liability for negligence protects. Nor did anything in the final version of the negligence material, which occupied the entirety of Volume II, make reference to any interest protected, until the eighteenth of nineteen chapters, on "Negligent Invasions of Interests in the Physical Condition of Land and Chattels."[157] Even here the reference appears to be to the notion of ownership "interests," such as fee simples and easements, rather than to substantive interests such as an interest in enjoyment or use of property. The entire structure that the first draft adopted had disappeared, as if it had never existed.

2. The Revised Material on the Intentional Torts

Not only did the entire volume on negligence ignore rights analysis, the next time the material on battery, assault, and false imprisonment was presented, the rights analysis it previously contained had been sharply reduced. This was when the material came before the 1934 Annual Meeting for final approval in revised form. In the revision there was still brief reference to the protection of interests—in fact, for the terms "right" and "rights" that had been used in Tentative Draft No. 1, "interest" and "interests" had been expressly substituted.[158]

155. Preliminary Draft No. 20 at 7 (AM. LAW. INST. May 18, 1928).

156. *Id.* at 7–51.

157. 2 RESTATEMENT OF TORTS ch. 18, at 1287 (AM. LAW. INST. 1934).

158. For discussion of this change in terminology, see *supra* note 143.

But the interest analysis that remained was a pale shadow of the interest-based organization that had dominated Tentative Draft No. 1. No longer was there an opening umbrella heading referencing the general right to protection against conduct violating rights or interests of personality. No longer was there a separate framing section (what had been "General Principles") referencing the three standards of conduct as the possible bases for protecting the right of or interest in freedom from bodily harm. Rather, there was merely a brief mention in an "Introductory Note" that the interest in freedom from bodily harm was also sometimes protected against negligent invasion and against invasions caused without negligence.[159] There followed a heading entitled "Intentional Invasions of Legally Protected Interests in Personality and Property."[160] The material straightforwardly addressed the three intentional torts, as well as trespass to land and chattels, indicating which interest each protected.

In presenting this material to the 1934 Annual Meeting, Bohlen said that

> Chapter 2 of this division [Chapter 1 now contained definitions], . . . which deals with intentional invasions of interests of personality and includes actions of trespass for assault, battery, and false imprisonment, is really a condensation of Tentative Draft No. I [1925]. . . . Here again there is so far as the first Restatement goes substantially no material change.[161]

Bohlen's statement was literally true. There had been "substantially no material change" in the material that expressly addressed battery, assault, and false imprisonment. There had, however, been a substantial, though subtle, change in the framing and apparent conceptualization of that material. The intentional torts were no longer part of a larger heading under which all invasions of the interest in personality, or in which all freedom from bodily harm or effect, were or would be addressed. The intentional torts now simply stood on their own, rather than being part of any larger category. And there would be nothing in the remainder of the Restatement labeled anything like "Nonintentional Invasions of Interests in Personality." In fact, the interest in personality was never again mentioned.

Whether Bohlen really believed that the change in the headings and framing of the intentional torts that he presented in 1934 was not a substantial change from his first draft we cannot say. He had spent the

159. *Id.* That is how the final product read as well. 1 RESTATEMENT OF TORTS, ch. 2, at 25 (AM. LAW. INST. 1934).

160. Proposed Final Draft No. 1, div. III, pt. II, at 41 (AM. LAW. INST. 1934).

161. Francis H. Bohlen, *Discussion of the Restatement of Torts, Proposed Final Draft No. 1*, 11 A.L.I. PROC. 476, 477 (1934).

previous nine years preparing other material that did not follow the initial rights-based organization or its framing. For him that original approach may have been something left behind long ago and therefore mainly forgotten. We have found nothing in the ALI archives reflecting his thinking about the matter or indicating when his conception had changed.[162] At the very least, we can say that continuation and extension of the rights-based approach in the material that he went on to draft after 1925 did not occur.

3. The Other Torts

Nor did the Restatement go on to classify groups of any of the other torts based on some distinctive and generalized conception of their effects on the plaintiff or the interests they protected, as it had originally attempted to do with invasion of the interest in "personality." Instead, the Restatement would end up being a mixture of the following: unanalyzed interest identification organizing the intentional torts and a few others; abstract material on negligence making no reference to interests protected; and piecemeal treatment of the other torts. The last treatment gave no indication of what those torrs may have had in common, and made little or no reference to the interests they protected.

The Restatement was more orderly than many of the nineteenth-century treatises we surveyed above; it was not the "grab-bag" that they were. But it was not significantly more organized conceptually, as the first draft seemed to promise it would be.[163] The first two and a half volumes addressed liability for the intentional torts, negligence, and absolute liability, with the minimal interest analysis that we have discussed associated with the former, and virtually no such analysis applied to this

162. The University of Pennsylvania Biddle Law Library maintains the ALI archives, and contains not only drafts but also some minutes and other less formal material. For the contents, *see* Jordon Steele, Leslie O'Neill & Emily Johns, *First Restatement of the Law Records, 1923-1965*, U. PA. FINDING AIDS, http://dla.library.upenn.edu/dla/ead/detail.html?id=EAD_upenn_biddle_USPULPULALI04001 (last updated July 18, 2014).

163. Professor Green, one of the Reporters for the Third Restatement, observes that Bohlen provided "structure and organisation to this topic" of torts. Michael D. Green, *Professor Francis Hermann Bohlen (1868-1942)*, in SCHOLARS OF TORT LAW, *supra* note 69, at 135. But he then observes that the First Restatement "relied predominately on a combination of legally protected interests and specific types of wrongful conduct," which is not the way we have described it. *Id.* Learned Hand praised Bohlen for "trying to impose some pattern upon the amorphous material" of torts. Learned Hand, *Francis Hermann Bohlen*, 91 U. PA. L. REV. 386, 386 (1943). Notably, however, Hand did not indicate that Bohlen succeeded in doing so. *Id.* Although Professor Kelley does not express an opinion on the issue, he argues that "Bohlen was not a systematic thinker . . . . He was a master of 'microtheory.'" Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93, 123–24 (2007).

other material. The second half of Volume III and all of Volume IV took the piecemeal approach, separately addressing Deceit, Defamation, Disparagement, Unjustifiable Litigation, Interference in Domestic Relations, Interference with Business Relations, and Invasions of the Interest in Land other than by Trespass. Except for "Interference with Business Relations," there was no significant classification of any torts in combined analytical or interest-based categories, and there was little reference to interest protection in the piecemeal discussions of each tort.

Further, the superficiality of the interest analysis that did appear was evident. For example, final versions of a few chapters referred to an "interest" protected—the material on trespass, for example, referred to the "interest" in the exclusive possession of land,[164] and the material on defamation carried the subheading, "Invasions of Interest in Reputation"[165]—but most did not. And in any event, those references were not part of a classification system, but merely synonyms describing the freestanding torts of trespass and defamation.

The result is that when it occurred at all, the Restatement approach of classifying based on the effect of the defendant's conduct on the plaintiff was, in effect, merely tautological. False imprisonment distinctively involved unlawful confinement of the plaintiff; defamation distinctively involved a communication to a third party that injured the plaintiff's reputation. Sometimes the classification was even expressly tautological. For example, trespass to personal property and conversion were addressed under the headings, "The Interest in the Retention of the Possession of Chattels" and "The Interest in the Availability of Chattels to Possession."[166] What defined each tort was what determined its "classification." But since something different defined each tort, except for the linkage of battery, assault, and false imprisonment, there really was no interest-based *classification* at all, but just a list of torts that were not classified, simply introduced by reference to the interest each tort protected.

4. Explaining the Change of Approach

We will never know exactly what went through Bohlen's mind as he continued to work on the Restatement, unless records of his thinking that we doubt exist are discovered.[167] But it is worth speculating briefly on his

164. 1 RESTATEMENT OF TORTS ch. 7, at 357 (AM. LAW INST. 1934).

165. 3 RESTATEMENT OF TORTS ch. 24, at 137 (AM. LAW INST. 1938).

166. 1 RESTATEMENT OF TORTS ch. 9, Topic 2, at 565 (AM. LAW INST. 1934); *id.* Topic 3, at 572.

167. Professor Michael Green made a search for Bohlen's private papers in various sources but was unable to locate any. *See* Green, *supra* note 163, at 133–34.

intellectual posture during the critical period between the appearance of Tentative Draft No. 1 in April, 1925, and the first draft on negligence, Preliminary Draft No. 20, about three years later in May, 1928. What happened to his thinking during those three years?

One possibility is that Bohlen never had a systematic organization of the Restatement in mind. On that view, his thinking did not change. Perhaps, when he told the 1925 Annual Meeting that he had organized his first draft based on the effect of the defendant's conduct on the plaintiff, he had only the intentional torts in mind.[168] Perhaps he conceived of the intentional torts and some other individual torts (fraud and defamation, for example) in this way, but did not think that the law of negligence and strict liability could conform to that model. That is, perhaps Bohlen was already thinking that the overall structure of tort law was fragmented, and that the ultimate organization of the Restatement would reflect that fragmentation.

The argument for this interpretation is that the second edition of Bohlen's casebook on torts was published in the same year as Tentative Draft No. 1,[169] and the overall structure and organization of the casebook—which of course covered all of the subject, not just the intentional torts—does not reflect a new vision of tort law. If Bohlen were thinking of a new structure for tort law, would his casebook have not already reflected it? Maybe not. Recall that he had stated in the preface to the first edition in 1915 that, in effect, the market for casebooks discouraged innovation. The structure of the second edition, though altered in significant ways from the first edition, also resembled that edition, and the inertia often associated with later editions of casebooks may therefore explain some of its mixed organization. It was a striking blend of the various classification schemes employed since Cooley,[170] including over 700 pages on "The Development of Tort Liability by the Action of Trespass on the Case,"[171] which looked backward, rather than forward to the ultimate organization of the First Restatement.

168. PROCEEDINGS AT FOURTH ANNUAL MEETING, *supra* note 141, at 190 ("We have approached it primarily from the standpoint of the effect which the defendant's conduct has had upon the plaintiff.").

169. FRANCIS H. BOHLEN, CASES ON THE LAW OF TORTS (2d ed.1925).

170. The casebook began with "Direct and Intentional Invasions of Interests of Personality and Property." *Id.* at 11. This of course echoed the seeming vision of Tentative Draft No. 1. And some of the other actions covered, such as interference with contract and economic relations, were described in terms of legally protected interests. *Id.* at 966, 985. He also classified some actions in terms of the standards of conduct that governed them. *Id.* at 158, 168. But he also described a series of actions as having developed from the action of trespass on the case. *Id.* at 333–488.

171. *Id.* at 158–890.

The other major possibility is that Bohlen was in fact thinking of the organization of tort law we have argued was evident in his first draft and was the logical extension of what he had already done in that draft. It is possible that he then found, however, after moving beyond the intentional torts, that this organization was not feasible. In light of what he had said and done thus far, this seems the more likely possibility. What may have happened, we think, is that the Reporter and his advisors recognized, as the project proceeded, that interest analysis was not as promising a method of organizing or conceptualizing all of tort law, and particularly of grouping torts together, as they had originally hoped, and that subdividing everything that involved protection of a particular kind of interest by reference to the tripartite standards of conduct would not be sensible either.[172] Rather, a combination of the tripartite division of tort law based on standards of conduct, and the fragmented legacy of the forms of action, took over the reorganization of the project—starting first with the intentional torts, then negligence, then strict liability, then all the remaining torts. The titles of the four volumes that comprised the final version themselves reflect this transformation: Intentional Harms (Volume I); Negligence (Volume II); Absolute Liability, Libel, Deceit (Volume III); Miscellaneous Tort Defenses, Remedies (Volume IV).

The challenge of drafting material on negligence—which Bohlen first did between 1925 and 1928—could easily have caused such a change of approach. Negligence is both a standard of care and, in connection with bodily injury and property damage (and sometimes other forms of loss), a cause of action—a separate tort, really. Framing the material on negligence with the notion that the right to personality, and its sub-right to freedom

172. Nothing in what Bohlen published during the rest of his career, however, suggests that he gave up the idea that at least one promising way to think about *individual torts* was to consider the interest of the plaintiff that a tort protected. We think that he simply found that it was not feasible to organize the entire Restatement on this basis. As we have seen, he had made reference to interests protected by tort liability as early 1911. *See* Francis H. Bohlen, *The Rule in* Rylands v. Fletcher, 59 U. PA. L. REV. 298, 317–18 (1911) ("The most important function of modern tort law is, not so much to formulate definite legal rules, as to apply fundamental and traditional conceptions of justice to the solution of new social and economic problems. In a hundred different fields of activity, the interests of one person or class conflict with the interests of another person or class . . . . The solution must depend upon the existing social, political and economic conditions and conceptions prevailing at the particular time and in the particular place . . . ."). As would be expected from the recent author of Tentative Draft No. 1, there was also interest analysis employing "personality" terminology throughout his 1926 article, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926). But nothing he subsequently wrote, even after discontinuing the effort to organize the Restatement based on interest analysis, suggests that he had surrendered the view that tort liability can best be understood as protecting the interests of the plaintiff. *See, e.g.*, *Fifty Years of Torts*, 50 HARV. L. REV. 725, 725 (1937) ("The primary purpose of the law of Torts is to reach a ''fair'' adjustment between the conflicting interests of the litigating parties.").

from bodily injury, were protected through imposition of liability for negligence, would have treated negligently caused bodily injury as a tort, and would have carried forward the approach he had taken with battery, assault, and false imprisonment. But it is not at all clear that liability in negligence for causing bodily injury would have fit comfortably within the notion of protecting the right (or interest) in "personality." It might have been necessary to identify a different general right (or interest) within which to fit this form of protection of the right to freedom from bodily injury. Doing that might have seemed both complicated and potentially peculiar.

In any event, taking that approach would have ignored many aspects of negligence as a standard of conduct. There was a growing body of law about negligence as a standard of conduct, wholly apart from the occasions when negligently causing bodily injury was or was not actionable. Most of this law did arise in cases involving bodily injury, but it was not limited to such cases. Rather, it explicated aspects of the meaning of negligence generally, including in connection with liability for emotional harm, defamation, and any number of other causes of action. This case law addressed the objective standard of care, the role played by evidence of custom, the significance of statutory violation, and the respective roles of judge and jury. Addressing liability in negligence for bodily injury (and property damage) without addressing doctrines that governed negligence more generally would have been radically incomplete. Consequently, the material became a hybrid of negligence as a tort and negligence as a standard of conduct, and the former was not nested within protection of any particular right or interest.

Since those were the difficulties that Bohlen faced, perhaps he simply decided on the approach that required him to forego framing negligence as a cause of action that protected the rights to personality and freedom from bodily injury, in order to minimize complications and to ensure that the concept of negligence as a standard of care received proper explication. Then, when he went to draft the material on the remaining torts, he may have found that those torts were not amenable to any sort of classification that treated some of them together, and that interest analysis applied to them individually was mainly tautological. This is why he would have de-emphasized his original vision in his presentation of the intentional tort material—in order to avoid its contrasting so starkly with an overall product that now contained little interest analysis and nothing about the right to personality. What had started out as a new conceptual scheme ended up as an organization which was more modern than that developed by previous scholars, but not much more coherent or cohesive.

III. REPLICATION OF THE FIRST RESTATEMENT'S ORGANIZATION IN MODERN TORT LAW

Once the First Restatement was completed,[173] it might have appeared to be a transitional document, using a modest amount of interest analysis, and partial classification based on the tripartite division, as a bridge between the disjointed organizations adopted by the late nineteenth and early twentieth-century scholars, and some form of future conceptualization that would be less rooted in the past and more coherent.

But in the years after the First Restatement appeared in 1934, there was no further transition. The approach taken by the First Restatement is essentially the approach that has come down to us today. The leading treatises and casebooks that have subsequently been published have replicated the First Restatement's structure with only the barest discussion of their conceptual organization.

William Prosser's hornbook on tort law, first published in 1941, is the most prominent example. The first edition of Prosser's hornbook began with chapters on "Intentional Interference with the Person" and "Intentional Interference with Property."[174] The former addressed battery, assault, and false imprisonment, just as the Restatement had done.[175] This was interest analysis in precisely the same form that Bohlen had adopted, though with no reference to "rights" or "personality." Then followed multiple chapters on negligence, three on different forms of strict liability, and freestanding chapters, providing atomistic treatment of products liability, misrepresentation, defamation, and other separate torts.[176] Buried in the interior of Prosser's treatise was the statement that "[f]or no other reason than that the author finds it most convenient for what he has to say, the general plan of this book is the same as that adopted by the Restatement of Torts."[177]

Prosser can be said to have moved beyond the First Restatement in setting forth more clearly the tripartite division of tort causes of action on the basis of standards of conduct, and in adding his famously lively and often critical prose to the lean black-letter rules and comments in the Restatement. Beyond those differences, Prosser's organization replicated Bohlen's. In addition, Fowler Harper's far less well-known treatise, which actually predated final publication of the Restatement by a year and

173. Bohlen became ill toward the end of the process, and others finished up the last of the project. *See* Green, *supra* note 163, at 138.

174. WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 36, 76 (1941).

175. *Id.* at 36.

176. *Id.* at ix.

177. *Id.* at 35.

publication of Prosser's hornbook by eight years, contained the same organization and sequence.[178] Prosser's subsequent editions of the hornbook,[179] and of a casebook,[180] never departed from this structure.[181]

Other major casebooks and treatises did the same. Gregory and Kalven's casebook, first published in 1959, divided the subject of torts into three parts, addressing physical harms, harm from insult, indignity, and shock, and tort law in the marketplace, but otherwise duplicated the First Restatement's approach.[182] Nor have there been major changes in the organization of torts treatises. The present-day hornbook by Dobbs, effectively the successor to Prosser, contains a slight modification, dividing itself into two major parts based on interests protected, physical interference with person and property, and economic and dignitary injury. Within the first part, Dobbs employs the tripartite division as the basis of organization. But not within the second part: the treatment there is an atomistic approach to separate torts.[183]

Moreover, the Second[184] and Third[185] Restatements have largely employed the First Restatement's conceptual organization. The Second Restatement continued to address the intentional torts under the heading "invasion of interests in personality," but then addressed negligence, strict liability, and the other torts, without reference to interest analysis. And the Third Restatement's "Intentional Torts to Persons" project seems not to have been concerned with classification, simply launching into material addressing those torts without the heading "invasion of interests in personality" employed by the first two Restatements.[186]

178. *See* FOWLER VINCENT HARPER, A TREATISE ON THE LAW OF TORTS (1933).

179. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

180. WILLIAM L. PROSSER & YOUNG B. SMITH, CASES AND MATERIALS ON TORTS (1951). The most recent edition of that casebook is PROSSER, WADE, & SCHWARTZ'S TORTS, CASES AND MATERIALS (Victor Schwartz, Kathryn Kelly, and David F. Partlett eds., 2015).

181. *See* VICTOR E. SCHWARTZ ET AL., TORTS, CASES AND MATERIALS (13th ed. 2015).

182. *See* CHARLES O. GREGORY & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS (1959). Only the casebook produced by Shulman & James, which deliberately set out to call negligence liability into question, followed a different sequence. It began with strict liability, then moved to negligence, then to freestanding torts, and concluded with a chapter reflecting interest analysis and addressing assault, battery, false imprisonment, and malicious prosecution, without employing any generalizing title for that chapter. HARRY SHULMAN & FLEMING JAMES, JR., CASES AND MATERIALS ON THE LAW OF TORTS (1942).

183. Dan B. Dobbs, Paul T. Hayden, & Ellen M. Burbick, THE LAW OF TORTS (2d ed. 2011).

184. RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1965–1979).

185. RESTATEMENT (THIRD) OF TORTS (AM. LAW INST. 1998–2020).

186. The project indicated only in a "Scope Note" in its first draft that the intentional torts "protect fundamental rights of autonomy, dignity, and security." Restatement of Torts (Third): Intentional Torts to Persons 1, Council Draft No. 1 (AM. LAW INST. October 4, 2013).

Even when any of this modern work employs the simple interest-based classifications to which tort liability is susceptible—such as Dobbs' breakdown into physical, economic, and emotional interests—they do not reveal very much. Similarly, classification based on standards of conduct—using the tripartite division—tell us only one of the things that is relevant to analysis of the differences and similarities among the various torts. In effect, neither interest analysis nor the tripartite division do very much beyond providing a seemingly logical basis for organizing a table of contents for a Restatement, treatise, or casebook. But in fact, the only way to grasp tort law "as a whole" at any level of detail is to study the different torts individually. A classification scheme does not do that.

From the time of the First Restatement through at least the 1950s, the focus of most tort scholars was on individual torts or doctrines, although there was a growing concern, beginning in the 1940s, with the question of whether liability for accidental bodily injury should be based on negligence or be "strict."[187] A considerable amount of tort scholarship addressed this question, as the issue arose in products liability,[188] in auto liability,[189] and for some scholars, across the board.[190] Debates about negligence versus strict liability tended to have little to say about intentional torts, because those torts did not involve accidental bodily injury.

It is no surprise, therefore, that beginning in the 1960s the concerns of torts scholars began to move beyond what was reflected in the structure of the Restatements, treatises, and casebooks. But new theoretical approaches to tort law did not usher in a new conceptual organization of the subject. The work of Calabresi[191] and Coase[192] introduced economic analysis of tort law, and within a decade, others—Posner[193] and Shavell,[194] for example—were engaged in this form of analysis. Most of the work of scholars informed by economic theory centered on accidental injury, although

187. For an account of the positions of the major figures, see George L. Priest, *The Invention of Enterprise Liability*: *A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 482 (1985).

188. *See, e.g.*, Marcus L. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products – An Opposing View*, 24 Tenn. L. Rev. 938, 938 (1957); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120–21 (1960).

189. *See, e.g.*, ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

190. *See generally* Priest, *supra* note 187.

191. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517–18 (1961).

192. R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 38 (1960).

193. *See, e.g.*, Richard A. Posner, *A Theory of Negligence*, 1. J. LEGAL STUD. 29, 33 (1972).

194. *See, e.g.*, Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 9–10 (1980).

Posner had something to say about intentional torts as well,[195] so initially new theoretical literature on tort law was directed at only a portion of the field. But when, partly in reaction to economic analysis, philosophically oriented scholars such as Ernest Weinrib[196] and Jules Coleman[197] developed a conception of tort liability as corrective justice, and John Goldberg and Benjamin Zipursky[198] offered a contrasting but also deontological conception, civil recourse, the intentional torts fit comfortably within those approaches.

For our purposes, however, the common feature of the theoretical contributions to modern tort law is that they involve conceptualization without classification. They make no effort to locate all the different torts within a detailed conceptual scheme, or to subdivide them into categories. They implicitly accept the proposition that tort law appears to be a disparate array of causes of action, linked only by the classic definition of tort law—a set of civil wrongs not arising out of contract. They then seek instead to make sense of all, or major portions of, tort law, from a different perspective entirely, fitting it into a single descriptive or normative conception—welfare maximization, corrective justice, or civil recourse. Such conceptions float above the messy details of the different torts that Restatements address and that we have been discussing. The post-1950s theoretical literature therefore stands to one side of the central concerns of this Article.

IV. THE CLASSIFICATION PROBLEM IN TORT LAW

All this brings us to the present. The century-and-a-half of struggle that we recounted above has not yielded anything like a coherent conception of tort law. On the contrary, tort law is about as fragmented today as it was 100 years ago. The odyssey of the Restatement (Third) of Torts recapitulates the condition of its subject. Preparation of this Restatement has occurred in a series of separate projects, both because no single reporter or small group of reporters would dedicate themselves to preparation of the entire Restatement for as long as that would take, and because it simply was not necessary for Reporters to have a view of the entire subject while restating its parts. Why else would it be feasible first to restate the law governing apportionment (essentially contributory

195. William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127 (1981). '

196. *See, e.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

197. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS (1992).

198. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 946 (2010).

negligence, assumption of risk, and problems of multiple causation),[199] then turn to the law of products liability, and then turn elsewhere?

The ALI next took up the core of tort law, liability in negligence for causing bodily injury or property damage, but termed the project liability for "physical and emotional harm,"[200] despite the fact that it omitted battery, a major form of liability for physical harm, and invasion of privacy, a major form of liability for emotional harm. Battery, as we have seen, is included in the intentional torts to persons project,[201] though that project does not cover all intentional torts to persons. And invasion of privacy will be included in the "Defamation and Invasion of Privacy" project. There is also an entire, completed project on economic loss, that covers liability for much, but not all, economic loss.[202] The Restatement is effectively a collection of independent modules.

That there is nothing objectionable about this division of labor and subject matter, just the risk of project names that are overinclusive or underinclusive, is part of our point. Even the last project in the series, "Concluding Provisions,"[203] which will include medical malpractice—certainly a form of liability for physical harm that would have fit comfortably in the "physical and emotional harm" category—reflects the difficulty of classification and the legacy of the category of miscellaneous torts that has been with us since the treatises of the late nineteenth century. In short, there is nothing obviously wrong with the organization of the Third Restatement, because there is no obviously right alternative organization.

With a full picture of this fragmentation in view, it is time to ask why that is the state of contemporary tort law. In our view there are three main reasons, the same reasons that have accounted for this fragmentation for the century-and-a-half that we have been discussing.

A. The Absence of a Substantive Theory of Liability

We showed in Part I that the torts scholars of the late nineteenth and early twentieth century felt an understandable impetus to classify tort law. One of the reasons for this impetus is that, with the abolition of the forms of

199. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (AM. LAW INST. 2000).

200. 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. LAW INST. 2010).

201. *See Restatement of the Law Third, Torts: Intentional Torts to Persons*, *supra* note 7.

202. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM (AM. LAW INST. 2018).

203. *See Restatement of the Law Third, Torts: Concluding Provisions*, AM. LAW INST. (2020), https://www.ali.org/projects/show/torts-concluding-provisions/.

action, the dominance of procedure in tort law waned, and substance came to the forefront. But what substance? Those scholars wanted to understand the basis or bases for the imposition of liability.

Much of their organization of tort law reflected their effort to find the themes that were common to the different forms of liability. But their efforts always had a "connect-the-dots" quality: the scholars tried to find what linked together different causes of action. One of the reasons we have identified for their lack of success was that the different torts had less in common than the scholars supposed might be the case. There was another reason for their lack of success, however, that was in a sense even more fundamental.

Those scholars, and their successors to this day, never developed a theory that explained why there was no tort liability when there was not. Why did some conduct intended to cause harm—some negligent conduct, and some non-negligent conduct—not result in liability? Without a theory explaining those distinctions, whether the characteristics that certain torts seemed to have in common were actually their operative characteristics could not be determined for certain. Why, for example, was intent to cause bodily injury actionable, but intent to cause emotional harm not actionable? Whatever factor or factors distinguished those situations would be one of the bases for organization. Without these factors, there would be only formal categories, not substantive ones.

There have been some attempts to develop general theories of tort liability in the years since the first treatise writers addressed this problem, but those efforts have not provided a detailed enough basis for the organization of all of tort liability. The claims that tort law is principally concerned with corrective justice, civil recourse, protection of individual liberty, or optimizing welfare, whatever their accuracy, do not come down close enough to the ground to explain why there is and is not liability in different, related situations. Those claims therefore cannot be a basis for organizing the various forms of liability. Indeed, they place all of tort law under a single heading, without providing any sub-headings or any way of developing them. The very idea of a unitary tort law is inconsistent with tort law as we know it.

Thus, a first reason for the fragmentation of tort law has been the absence of a comprehensive substantive theory that explains why some activities producing physical, emotional, or economic injury are actionable and others not. Late nineteenth-century scholars sought to address that issue by labeling some injuries resulting from seemingly wrongful conduct "*damnum absque injuria*," but that designation was employed in a circular

fashion, and the issue persists.[204] Although some modern torts scholars have advanced normative reasons for why some injuries should give rise to tort liability[205] and others have not, in the main scholars refer to specific doctrinal rules accompanying individual torts that serve to preclude liability for certain kinds of injuries, such as the rule that a conditional threat, one to take place in the future, is not an assault. Since that approach emphasizes particularistic rules associated with individual torts, it actually contributes to the fragmentation of tort law as a subject.

B. The Limited Usefulness of Coherent Organization

The conceptual organization of tort law can have a number of uses. It guides scholars; it enables students to place what they are studying in perspective; and it can give practicing lawyers a sense of the relationship among different causes of action. But conceptual organization of tort law is the least useful for the practicing bar. The reason is that, beyond providing practicing lawyers a table of contents, the organization of tort law simply does not matter much to the practicing lawyer.

Most potential tort actions fall squarely (if at all) within the confines of a particular tort, and only that tort. Plaintiffs' lawyers know which tort that is. Their first concern is whether the elements of that particular tort are satisfied. Defendants' lawyers have the same concern, though they hope for a different answer. It makes little difference to either plaintiffs' or defense lawyers whether the tort alleged in a suit bears a family relationship to another tort, or protects a similar interest. Only in the occasional appeal posing a cutting-edge issue or involving a set of facts right on the border between two different torts does conceptual organization come into play.

The result is that there has never been any pressure from the practicing bar for torts scholars to develop a better or more insightful conceptual organization of tort law. Treatises are highly useful because they provided a source for black-letter rules, and a soundbite's worth of analysis. But as long as the subject a lawyer wants to find in a treatise is readily findable, that is all the practicing bar needs.

A case in point is Prosser's "handbook," probably the most successful torts treatise of all time, published in multiple editions between 1941 and 1984. This work adopts just about the most atomistic organization possible. The book contains only two chapters discussing more than one tort.[206]

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204. *See* HILLIARD, *supra* note 31, at 82–87.

205. These include Calabresi, *supra* note 191, and Posner, *supra* note 193 .

206. PROSSER, *supra* note 174, at 36, 76 (containing chapters headed "Intentional Interference with the Person" and addressing battery, assault, false imprisonment and IIED, and Intentional Interference with Property" and addressing trespass to land, trespass to chattels, and conversion).

Every other cause of action is addressed in a separate chapter, with no umbrella or organizing headings other than the names of the causes of action themselves.[207] Practicing lawyers obviously had little difficulty finding what they needed to find in Prosser's treatise, despite absence of conceptualization, or it would not have been as successful as it was for many decades. The table of contents is essentially a list of all the torts.

If Prosser's atomistic organization of tort law had served to prevent effective litigation of torts cases, there would undoubtedly have been demands from the practicing bar for treatises whose organization was more helpful. But in fact, atomistic organization captures the essence of tort law. Some clusters of individual tort causes of action may have common features. That was undoubtedly why late nineteenth- and early twentieth-century scholars experimented with classifying intentional torts with respect to the common interests they protected or the standard of liability they seemed to require. But we have shown in this Article that torts scholars, in seeking to establish some conceptual organization of the field, have repeatedly run up against the disparate character of tort causes of action, each with their own doctrinal requirements that appear to have little in common with other torts. Given this feature of tort causes of action, arguably the most important dimension of them for practicing lawyers, and the most accurate description of them for scholars, is their doctrinal elements. And since those elements differ radically from tort to tort, perhaps the most coherent organization of tort law is an atomistic one. Such an organization, of course, serves to reinforce the fragmented character of the subject.

C. The Inevitable Character of Tort Law

This Article has sought to show, in fact, that whatever its flaws, no superior alternative to the fragmented organization of tort law that has come down to us has ever been developed. And the final reason why no superior alternative has ever been developed is that fidelity to the actual nature of tort law precludes it. The great historian of the common law, Frederick William Maitland, said that we may have buried the medieval forms of action—the procedural writs under which suits at common law had to be brought—but that "they still rule us from our graves."[208] We think that, although this is no longer true, some of the same imperatives that gave rise to the forms of action still operate, and influence the conceptual organization, and fragmentation, of tort law.

207. *Id.* at x–xiii.

208. MAITLAND, *supra* note 16, at 1.

This is because the exigencies that gave rise to the forms of action have not disappeared. Like our forebears hundreds of years ago, we still think that some kinds of harms should be actionable and that some should not be, and that the degree of blame attributable to the party causing the harm may be relevant, but that this relevance may vary, depending on the kind of harm or other circumstances in question. As long as these things are true, then something like the forms of action—separate causes of action with distinctive, mandatory elements—is inevitable, because some circumstances will qualify for tort liability and others will not.

Although separate causes of action with distinctive elements are inevitable, in principle it would be possible to show that many separate causes of action nonetheless have common characteristics. As we indicated in Part II, Bohlen appears to have thought at the outset of his work on the First Restatement that all the torts would fall into groups based on the interests they protected, though the only general interest he identified before changing his mind was the right of personality.[209] We recently suggested in this vein that a number of torts could be understood to protect dignitary interests, although the burden of our argument was that dignity is so general a concept that it could not do much work beyond providing a label for several distantly-related causes of action.[210]

Beyond such categories as the general interests in physical, emotional, dignitary, and economic well-being, however, the different torts do not hang together very much. This is a contingent fact, not a necessary one, but it has turned out that the kinds of wrongs that have been deemed actionable in tort simply do not have much more than this in common. The intentional torts of battery, assault, and false imprisonment turn out to be the exception rather than the rule.

Intentional torts share two characteristics, and it takes both of them to enable the torts to be classified together. First, as the label says, battery, assault, and false imprisonment, the "classic" intentional torts most commonly grouped together, each require an intent to cause harm. But as noted earlier, there are other torts that require intent as well: fraud, intentional infliction of emotional distress, malicious prosecution, and intrusion on seclusion, just to give some examples. Intent alone, therefore, would not be enough to justify classifying battery, assault, and false imprisonment together, while excluding other intentional torts.

The First Restatement seemed to anticipate addressing this seeming contradiction by distinguishing the intentional torts that protected the

209. *See supra* Part II.

210. *See generally* Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317 (2019).

"interest in personality" from all the others, but it never got to the point of doing that before it changed direction.[211] The Second Restatement followed the same nomenclature, treating these three torts as "Intentional Invasions of Interests in Personality."[212]

The second and obvious factor that links the "classic" intentional torts together, and excludes the others, is that each of the three classic "intentional torts" protects the interest in freedom from bodily interference, whereas the other intentional torts protect non-bodily interests. But even if this bodily-interference classification holds up intellectually, why is it preferable to others that also hold up? Why not place assault and intentional infliction of emotional distress ("IIED") together in a separate category, for example, since those torts each mainly protect the interest in being free form of mental anguish? Why is assault classed with battery rather than with IIED?

We acknowledge the possibility that the classification that Bohlen and some of the treatise writers before him adopted simply reflects the way that most people divide up the world. Assault may just seem more akin to battery than to IIED, without analyzing the issue. Somehow, hitting someone, threatening to hit someone, and locking someone up might seem to have more in common than making someone afraid of being hit and saying mean things that make someone unhappy or cause that person emotional suffering. But neither grouping seems completely obvious, even if the former seems a bit more "natural" than the latter. Both pose apples-and-oranges problems. Perhaps this is not a matter of pure logic, but simply an unavoidable fact about cultural perceptions.

But there is another explanation. Battery, assault, and false imprisonment each were actionable under the writ of *trespass vi et armis*, whereas the other torts that require intent to cause harm were not. The first three involved direct, forcible injury (or bodily interference) that fell within the core of this form of action because, originally, they involved breach of the King's peace.[213] They were the three torts that Blackstone had mentioned in his discussion of trespass *vi et armis*.[214] They were the same torts (along with malicious prosecution) that Cooley had classified together as involving the protection of "personal security."[215] And they were the

211. *See supra* notes 144–150 and accompanying text.
212. *See* RESTATEMENT (SECOND) OF TORTS ch. 2 (AM. LAW INST. 1965).
213. *See* VAN CAENEGEM, *supra* note 20.
214. *See* BLACKSTONE, *supra* note 26, at 120–21.
215. *See* COOLEY, *supra* note 64, at vii.

first three torts that Ames and Smith had addressed in their casebook.[216] So it is no surprise that Bohlen would also see the three torts as related.

But it is ironic, nonetheless. Bohlen's effort in the Restatement to escape the gravitational pull of the forms of action began by replicating important aspects of trespass *vi et armis*. This organization not only placed the classic intentional torts together and continued to do so until this day. In addition, the organization places the torts that require intent to harm but that were not actionable in *trespass vi et armis* elsewhere, and it turns out mostly outside of any organization. Fraud and malicious prosecution, for example, just stand on their own in most organizations of tort law, as if they were separate forms of action. At least in part because of the legacy of the forms of action, then, the other intentional torts are treated in piecemeal fashion.

The alternative, however, would have been even more as unsatisfying and formalistic. Placing all the intentional torts together would effectively have adopted an organization based entirely on the tripartite division of standards of conduct. It would then have been inevitable to place all the torts that were actionable on the basis of negligence in a second category, and all the torts actionable on a strict liability basis in a third. This classification based on standards of conduct would have been a mere taxonomy that revealed nothing about the reasons that the different torts were subject to different standards of conduct.

In short, the more we seek some comprehensive organization of tort law, the more we run up against endemic characteristics of the field that stand in the way of such organization: the absence of a substantive theory which can explain, across a range of diverse tort actions, why some civil conduct producing injury generates actions in tort and other conduct does not; the limited practical utility to be gained from a stronger organization of atomistic torts, even if it could be achieved; and, perhaps most fundamentally, the inherently fragmented character of the field itself, resulting in the only fully accurate characterization of tort law as consisting of (some) civil wrongs not arising out of contract. Prosser's typically exaggerated cynicism about conceptual order in tort law seems a good place for us to end. "There are many possible approaches to the law of torts, and many different arrangements of the material to be considered have been attempted," he said.[217] "Other than mere convenience in discussion, there is of course no inherent merit in any of them."[218]

216. *See* AMES & SMITH, *supra* note 104, at vii.

217. PROSSER, *supra* note 174, at 34.

218. *Id.*

CONCLUSION

After 150 years of conceptual struggle, the organization and classification of tort law, and of the individual causes of action of which it is comprised, is only slightly more orderly than it was at the outset. We have tried to show why this is the case. The late nineteenth and early twentieth-century scholars sought to transcend the legacy of the forms of action, but were only partly successful in doing so. And the various organizations of tort law that they developed in place of the ancient forms were disorderly. Bohlen's First Restatement was an advance over these early efforts, but he abandoned his apparent ambition to provide a conceptual reorganization of tort law, falling back on a mix of interest analysis, organization based on standards of conduct, and atomistic presentation of separate causes of action. The treatises, casebooks, and Restatements that followed have not departed substantially from the approach taken by that First Restatement.

There are a number of reasons, we have argued, why all this has occurred. The absence of an accepted comprehensive theory of the purposes underlying tort liability has contributed, as has the lack of a practical payoff that could be obtained from a new conceptual organization of tort law. The principal reason, however, is that the subject of tort law is not amenable to any such organization. Although tort law can be ordered in a taxonomic sense, at its heart, tort law is a series of causes of action—the classic set of fragmented "civil wrongs not arising out of contract" that it has always been. Any effort to make it more than that, except at the most general level, is bound to fail.