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## Accidental Torts

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# Accidental Torts

Thomas C. Grey\*

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One way to understand tort law is as a functional response to the social problem of accidental personal injury. That puts the negligence action at the center, and emphasizes the doctrinal choice between negligence and strict liability, while downplaying the intentional torts and the torts that do not involve physical injury. It also foregrounds the policy choice between tort and other means of dealing with accidents. This functional treatment is not uncontroversial today, but it is certainly orthodox.<sup>1</sup>

Here I propose to bring back into view some neglected aspects of the intellectual origins of the accident-centered approach to tort law. When torts was emerging as an important doctrinal category in the common-law world during the late nineteenth century, the early commentator who did the most to organize it around the problem of accidental injury was the young Oliver Wendell Holmes, Jr. The influential slant he gave to the subject turns out to have resulted from his struggle with doubts, surprising and possibly instructive to us, about whether torts was a viable legal category at all.

Neither Holmes' doubts about torts nor the theory with which he resolved them had much to do with his views about proper social policy toward industrial accidents. He was mainly responding to the inner dynamics of a juristic debate about the taxonomic arrangement of the substantive law, a debate that had been triggered

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1. Its orthodoxy would be underscored by the ALI's adoption of Professor Schwartz's new draft of "general principles" for the *Restatement of Torts*, the occasion for this symposium. The draft purports to govern, not tort law as a whole, or even the tort of negligence as a whole, but only the action for negligent personal injury or property damage. The principles governing this action are said to be "general" despite their restricted domain because—as the perspective I mention presupposes—"the problem of accidental injury" is "the core of tort law." *RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES*, Reporter's Introductory Note (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft]. That the approach continues to be controversial is brought out by Professors Goldberg and Zipursky's article in the present symposium, criticizing the use of this "core" approach to justify reduced emphasis on the traditional duty element in the negligence action. John C. P. Goldberg & Benjamin C. Zipursky, *The Third Restatement and the Place of Duty in Negligence Law*, 54 *VAND. L. REV.* 657 (2001). By contrast, the *First* and *Second Restatements* did not begin with a treatment of accidental injury but gave the intentional torts pride of place as the first subject dealt with, following the traditional organization laid down by the first Harvard torts casebook. JAMES BARR AMES & JEREMIAH SMITH, *A SELECTION OF CASES ON THE LAW OF TORTS* (1875).

by the legislative abolition of the common-law forms of action. Jurists drawing on conceptual traditions inherited from Roman law favored adopting tort as a basic category, while those influenced by the analytical jurisprudence of Bentham and Austin pressed the other way. After first taking the Bentham-Austin side, Holmes discovered that centering tort law around the problem of accidents could justify its recognition as an important subject after all.

Coincidentally, the burst of personal injury litigation that accompanied the growth of railroads and factories in the late nineteenth century made Holmes' accident-centered formulation of tort law especially salient in practical terms, and his theory went on to gain the dominant position it holds today, at least in the United States. It thus turned out that in resolving an abstruse theoretical puzzle about the arrangement of the law in the way he did, Holmes was helping to construct an understanding of torts that is still dominant a century later, when its origins have largely been forgotten. As a final twist, we now have our own quite different doubts about torts, based more on concerns about accident policy than on views about conceptual arrangement—and the accident-centered conception that Holmes devised to justify the subject in the first place turns out to leave it especially vulnerable to these doubts.

I'll start by sketching a version of the accident-centered conception of torts as it exists today—the one I teach in my own introductory course on the subject. Then I'll show why torts was by no means certain to become a fundamental category, a subject taught in every law school, at the time our basic legal taxonomy emerged in the late nineteenth century. Next I'll trace the steps through which Holmes moved from his early rejection of torts as a category to justifying it as a body of law organized around negligence and accidental injury. Finally, I'll note the difficulties that the accident-centered conception poses for the continued survival of torts as a primary division of our substantive law today.

## I. WHAT IS A TORT?

Students come to law school with ideas about contracts, property, crime, and constitutions, but "tort" is a purely legal term corresponding to none of their ordinary notions or experiences. Telling them that it is a French word for "wrong" doesn't help much; a breach of contract is a civil wrong too, and they will learn that not all tort liability involves wrongdoing.

So I begin my introductory course in torts not with a definition, but with a sketch of its relation to the rest of the introductory

curriculum, which I map using the distinctions between private and public, civil, and criminal, and substantive and procedural law. These distinctions mark off constitutional law, criminal law and civil procedure respectively, leaving the substantive private-law subjects: torts, contracts, and property. Private civil liabilities can then be divided between those arising from agreement and those "imposed by law"—between contract and tort.<sup>2</sup> Cutting across this division, property law defines entitlements and regulates their acquisition, use and transfer.

The map helps locate torts, but still leaves it looking like a misshapen semi-catchall category—the substantive law governing some of the private civil liabilities that are not based on contract. The lack of a good definition can be partly offset by supplying some internal structure, and to that end I classify tort doctrines along two dimensions: the interests they protect, and the levels of culpability they require. I divide the interests into three classes: physical security of person and possessions; intangible personal interests in reputation, privacy, and emotional tranquility; and purely pecuniary assets and expectations. And crosscutting those interests are the three standard levels of culpability: serious wrongdoing (intent or malice), negligence, and strict liability.

I tell my students that rather than surveying the whole resulting three-by-three matrix, we will focus on accidental physical injury. That means omitting the intentional torts involving force and fraud; the business torts; the torts linked to land use; and the torts protecting intangible personal interests—defamation, invasion of privacy, and infliction of emotional distress. I have my excuses for each omission,<sup>3</sup> but still it is a lot to leave out. The justification is my judgment that accidental injury is what tort law is really all about.

This is easy enough to show practically and politically, at least in the United States, where accident claims are at the heart of

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2. This division is of course very rough. Contractual liability is "imposed by law" as much as any other kind, at least on some views. Unjust enrichment is often recognized as a third category of private common-law civil liability apart from tort and contract; and there are civil liabilities (for instance, for breach of trust) that for historical reasons get left out of the standard private-law categories. An old-fashioned but still interesting conceptual investigation of the relations of torts to other legal categories is PERCY WINFIELD, *THE PROVINCE OF THE LAW OF TORTS* (1931).

3. Doctrine governing torts of force and fraud closely tracks the substantive criminal law; the business torts are dealt with in connection with legal regulation of the market; nuisance and trespass come in under property law; and defamation, privacy, and emotional distress are dealt with in an advanced torts course.

the "tort crisis" and the calls for "tort reform." But does this concentration obscure something important about the nature of tort law? I take the question seriously, knowing that there are thoughtful scholars who say that it does,<sup>4</sup> and that the first impressions I am imprinting on my students will tend to stick.

Portraying tort doctrines as responses to the accident problem means asking how well they deter unsafe conduct and help cushion shocks to injury victims, and also comparing them to alternative ways of pursuing those goals. One kind of traditional social insurance legislation, worker's compensation, was deliberately adopted to replace tort as the main legal regime for dealing with accidental injuries in the workplace, and more recently no-fault plans have partly replaced tort for automobile accidents in some jurisdictions. Cases on the pre-emption of state tort law by federal regulation show how Congress sees the personal injury suit as a regulatory weapon to be unleashed when more deterrence is wanted and withdrawn when deregulation is the order of the day.

A look abroad reveals that most advanced economies have more extensive social insurance for medical care and disability than does the United States. It is probably no coincidence that they also have less prominent tort systems. Most dramatically, New Zealand has virtually abolished tort liability for accidental injury, replacing it with expanded worker's compensation, supplemented by safety regulation and national health insurance. Tort law taught with a focus on accidents naturally translates into "tort law and alternatives," which then threatens to become "accident law"—a subject within which, as the New Zealand experience shows, torts itself might play no role at all.

The focus on accidents also shapes the sequence of topics. We start with the common law's choice of negligence over strict liability as the default regime for accidental injury, and then work through the elements of the negligence cause of action: duty (or duty limitation), breach, causation (proximate and factual), injury, the defenses, and damages. Next, we consider the pockets of strict liability for personal injury, attending to economic and other theories of enterprise liability. Finally, we take up the alternative ways of dealing with accidents, looking first at the interplay of insurance

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4. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 3-8 (1995) (objecting to purposive or problem-based treatment of torts); Patrick Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 327 (1990) (arguing for the conceptual centrality of the intentional torts); Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649 (1998) (arguing for the essential inclusion within negligence of claims for purely pecuniary loss).

and tort, then at worker's compensation and auto no-fault, and concluding with the threat (or promise) of general tort abolition ("but not before the exam!") à la New Zealand.

My course thus gives tort doctrine a structure, with negligence at the center, flanked peripherally by the intentional and the strict liability torts. And it likewise gives the subject a corresponding central domain, the problem of accidental physical injury. I might teach it in another way, with different implications; this organization is chosen, not simply discovered. And it happens that its prototype was originally not so much chosen as invented, largely by Holmes, when torts was first emerging as a basic category of substantive law. I turn now to an account of the conceptual choices he faced, choices that are still mirrored in the pedagogic decisions I confront in organizing my introductory course.

## II. A PROPER SUBJECT?

When Holmes began his law studies at Harvard in 1864, it was still debatable whether torts would be a fundamental common-law subject. As recently as a decade before, when the prominent American legal commentator Joel Bishop had proposed a treatise on tort law, the publishers responded that "there was no call for a work on that subject, and there could be no sale for it."<sup>5</sup> Times were changing, however, and the first two torts treatises, Francis Hilliard's in America and Charles Addison's in England, appeared by the end of the 1850s. Though both were impressive as first efforts,<sup>6</sup> neither of them did much to justify tort law as a basic legal category. They proceeded *seriatim* through the recognized civil causes of action existing apart from contract, summarizing the applicable case law that had been developed under the actions for trespass, trespass on the case, and trover, but without giving their subject

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5. JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW 2, §3, n.2 (1889). Bishop had gained prominence with his treatise *Commentaries on the Law of Marriage and Divorce*, published in 1852. On the place of Bishop in nineteenth-century legal thought, see generally the splendid account in Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 215 (1995).

6. As Brian Simpson observes, "in treatise writing, as in mountaineering, a special significance is rightly accorded to those who achieve firsts and thereby demonstrate that the feat is in fact possible." A. W. B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 652 (1981).

either a useful definition, a clear internal structure, or a distinctive substantive domain.<sup>7</sup>

One development that helped stimulate the emergence of substantive law categories such as torts was the reform of civil procedure. Starting with New York's Field Code in 1848, legislatures throughout the common-law world abolished the old writs and their offshoots in favor of the unitary "civil action," under which plaintiffs were simply to plead facts that established grounds for the relief sought.<sup>8</sup> The common law had long been taught and indexed under the formidably technical and notoriously unsystematic catalog of forms of action. This meant there was no need to classify law into substantive departments like property, contract, and tort.<sup>9</sup> In fact the term and even the concept "substantive law," conceived as the opposite of "law of procedure," was first brought to prominence by the mid-century movement to reform civil procedure.<sup>10</sup>

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7. The list-like tables of contents in both Hilliard's and Addison's treatises evidence the lack of structure in their approaches to the subject. See CHARLES ADDISON, 1 *A TREATISE ON THE LAW OF TORTS* v-xxiii (1860); FRANCIS HILLIARD, 1 *THE LAW OF TORTS OR PRIVATE WRONGS* xiii-xx (1861). Looking back in 1899 on his own early efforts at a systematic treatment of tort law, Holmes recalled how "Hilliard on Torts . . . proceeds by enumeration in successive chapters through assault and battery, libel and slander, nuisance, trespass, conversion, etc." Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 *HARV. L. REV.* 443, 451 (1899) [hereinafter *Law in Science*], reprinted in 3 *THE COLLECTED WORKS OF JUSTICE HOLMES* 406, 411 (Sheldon M. Novick ed., 1995) [hereinafter *WORKS*].

8. See the contemporaneous account of the procedural reforms in JOHN NORTON POMEROY, *REMEDIES AND REMEDIAL RIGHTS* (1876). By that time, twenty American states had adopted some version of the reformed procedure, following the lead given by New York's enactment of the Field Code in 1848. England, the homeland of the common law, swung into line with the adoption of the Judicature Act of 1873, following the earlier Common Law Procedure Act of 1852. The standard account of the mid-century reforms as a sudden "abolition of the writ system" is a bit misleading; evolution in the direction of a unified system of civil procedure had been going on for some time before the reform legislation of the latter half of the century.

9. Holmes wrote in 1871 that New York had been "clearly right in giving up the common-law forms of action." A system based on forms would be defensible if it matched "a form of action" to "every substantial duty," but the common-law forms were "arbitrary in character," rooted in "purely historical causes" and were "a positive hindrance to sound legal conceptions." Oliver Wendell Holmes, *Book Review*, 5 *AM. L. REV.* 359, 359 (1871), reprinted in 1 *WORKS*, *supra* note 7, at 239, 239.

10. It was Jeremy Bentham who made the distinction between substantive law and procedure (or substantive and adjective law) prominent. Jeremy Bentham, *Principles of Judicial Procedure with the Outlines of a Procedure Code* [hereinafter *Principles of Judicial Procedure*], in 2 *THE WORKS OF JEREMY BENTHAM* 1, 5 (John Bowring ed., 1962). Bentham's dichotomy differs from the older "right-remedy" distinction, and from the Roman-civilian distinction between "law of persons" and "law of things" on the one hand, and "law of actions" (procedure and remedies) on the other. The older conceptions included in the concept of "remedy" both the rules governing what actual relief or sanctions the law provided (injunction, compensatory damages, punitive damages, criminal penalties), and the procedures through which disputes were litigated. The Benthamite scheme brings the former rules within the substantive law, which governs both the rights and duties of the parties, and what the law will do for or to them. The title of POMEROY, *supra* note 8, shows the persistence of the older terminology in a book entirely concerned with



The opening given to legal theory by procedural innovation caught the attention of a new generation of legal intellectuals in England and America who wanted to make the study of law into a modern "scientific" discipline on the model of German legal scholarship. In company with others of his generation, the young Holmes eagerly took up the challenge of developing a new rational and systematic classification of substantive law.<sup>11</sup> He started in 1867 writing for the *American Law Review*, the new organ of advanced legal scholarship, and over the next few years, he intensely pursued the project of reclassifying the substantive law, while immersing himself in the details of established and emerging legal doctrine.<sup>12</sup>

It says a lot about the unsettled state of the scheme of legal categories at the time that the young Holmes—a lawyer steeped in traditional learning, and at the same time ambitious for intellectual reform—could conclude in an 1871 review that "[t]orts is not a proper subject for a law book."<sup>13</sup> Within two years, though, he had changed his mind, and in his 1873 essay "The Theory of Torts," he formulated a structural account of tort law very close to the one we use today. Implicit in this account was a focus on accidental injury as the primary domain of torts—a focus that has continued to shape our view of the field ever since, while never becoming entirely uncontroversial. To get a sense of Holmes' analysis of tort law and how he arrived at it, we need to understand the intellectual and practical context from which he started. What led him to find torts "not a proper subject" in 1871?

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civil procedure, and not at all with remedies in the modern sense of what modes of relief or sanctions the law makes available.

11. G. Edward White points out that the movement for a "scientific" classification of substantive law, from which torts emerged as a primary category, was not simply an offshoot of the procedural reforms of the post-1850 period, but also had independent impetus in the rise of university-based legal education in the United States and England around the same time, and the associated interest of a new group of scholars in law as an autonomous subject inviting systematic conceptual elaboration. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 3-19, esp. 8-11 (1985).

12. On the theoretical side, Holmes read Maine, Bentham, and Austin, and Roman and civilian sources; reviewed jurisprudential writings for the *American Law Review*; and wrote essays on the form of the law. On the practical side, he digested and reviewed the most recent volumes of case reports, also for the *American Law Review*, and undertook to edit the twelfth edition of Kent's *Commentaries*, which meant mastering essentially all the important legal developments of the previous two decades in England and the United States. For a detailed account of his intellectual development during this period, see MARK DE WOLFE HOWE, 1 JUSTICE OLIVER WENDELL HOLMES 264-86 (1957), and MARK DE WOLFE HOWE, 2 JUSTICE OLIVER WENDELL HOLMES 16-95 (1963).

13. Oliver Wendell Holmes, *Book Review*, 5 AM. L. REV. 340, 341 (1871), reprinted in 1 WORKS, *supra* note 7, at 237, 237 (reviewing C.G. ADDISON, *THE LAW OF TORTS* (1870)).

*A. In Favor of Torts*

Even by that date the odds were good that torts would emerge as a basic private law category. There were the Hilliard and Addison treatises, both successful enough to have justified further editions during their first decade. Torts was included as an elementary subject in the up-to-date curriculum recently established by the reforming Dean Langdell at Harvard Law School, the new center of legal science in the common-law world. And the subject was being taught there by one of the most innovative of the younger generation of legal scholars, Nicholas St. John Green.<sup>14</sup> The factors favoring acceptance of the subject included its long-standing prominence in Roman and civil law theory and commentary; its recognition by authoritative common-law commentators, pre-eminently Blackstone; and its manifestation in the actual statutory and decisional law of the common-law jurisdictions.

## 1. Roman and Civil Law

In his portrayal of Greek ideas about justice, Aristotle divided claims for rectification into those based on voluntary and involuntary transactions respectively,<sup>15</sup> and the classical law of Rome made a corresponding fundamental distinction between contract and tort, legal obligations *ex contractu* and *ex delicto*. This conceptual framework was canonized by the commentators who restated Roman law into a general civil law for Europe, later was attributed

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14. See *id.* (describing the teaching of torts at Harvard by an unnamed instructor); CHARLES WARREN, 2 HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 375-76 (1908) (identifying St. John Green as instructor for the first torts class taught at Harvard, 1870-71). Green was one of the earliest contributors to the theory of torts. See Nicholas St. John Green, *Book Notice*, 4 AM. L. REV. 350 (1870) (reviewing SHEARMAN AND REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE (1869)) [hereinafter Green, *Book Review*]; and especially his article on proximate cause, Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870), reprinted in 9 RUTGERS L. REV. 452 (1954). Had he lived, Green might get some of the credit for the innovations in tort theory ascribed in this article to Holmes, who was notoriously stingy in acknowledging the most important sources of his own ideas. See Jerome Frank, *A Conflict with Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 426-27 (1954) (implying Green's large role as a source of Holmes' ideas).

15. ARISTOTLE, NICHOMACHEAN ETHICS, bk. V, ch. 2 (W. D. Ross trans.), in THE BASIC WORKS OF ARISTOTLE 1006 (R. McKeon ed., 1941) (distinguishing claims arising out of "voluntary" transactions such as "sale, purchase, loan for consumption, pledging, loan for use, depositing, letting" from those arising out of "involuntary" transactions such as "theft, adultery, poisoning, procuring, enticement of slaves, assassination, false witness . . . assault, imprisonment, murder, robbery with violence, mutilation, abuse, insult").

to the very Law of Nature itself by the philosophical legal writers of the Enlightenment, and finally, during the eighteenth and nineteenth centuries, was enacted into the civil codes of major European nation states.

The structure originally established for Roman law by the Institutes of Gaius and Justinian, and thereafter generally followed by the writers in the civilian tradition, was roughly as follows. Public law (including criminal law) was distinguished from private law, and later came to be largely ignored by the post-medieval civilians, for whom Roman law essentially meant Roman private law.<sup>16</sup> Private law was then divided into three basic categories: the law of persons (status), the law of things, and the law of actions (remedies and procedure). The widest category, the law of things, was further divided into bodies of law governing property, successions, and obligations. Obligations, finally, were subdivided into those arising out of promise or agreement (*ex contractu*), and out of wrongs or torts (*ex delicto*).<sup>17</sup>

The natural law writers of the Enlightenment added further prestige to the Roman-civilian system by smoothing over its more parochial details, and then attributing the remaining abstract structure to the dictates of Reason itself. The philosophers of the law of nature varied in how closely they followed the standard Roman law structure, but most of them recognized some version of the civilian category of tort or delict, encompassing duties to make reparation for loss wrongfully inflicted.<sup>18</sup> The social contract and

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16. There is a brief account of criminal law toward the end of Justinian's Institutes, THE INSTITUTES OF JUSTINIAN, bk. IV, tit. xviii (entitled *De Publicis Judiciis*) (Thomas Collett Sanders ed. & trans., 1922), but in general the "law relating to [public or criminal or religious matters] was, as it were, 'factored out' of the civil law, which became synonymous with private law." PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 13 (1999).

17. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 60, 98-99, 158-59 (1962); REINHARD ZIMMERMANN, LAW OF OBLIGATIONS 10-29 (1992). The categorization in Justinian's Institutes also included two minor divisions, quasi-contract (roughly our law of unjust enrichment), and quasi-delict, a category not readily understandable as based on any general principle, but conceivably embodying Roman notions of strict liability in tort.

18. On the passage of the post-reception Roman law through natural law theorizing to form the modern Civil Law, see the classic account in FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 199-275 (Tony Weir trans., 1995). The prototype is the treatment in HUGO GROTIUS, THE JURISPRUDENCE OF HOLLAND 459-87 (R. W. Lee trans., 1926) (1631), which summarized the Dutch law of delictual obligation in terms derived from Roman law, at the same time justifying the doctrine by reference to the requirements of universal Reason, *see id.* See also SAMUEL PUFENDORF, LAW OF NATURE AND NATIONS, Book III (Basil Kennett trans., 1717) (giving an account of the law of obligations as part of natural law); THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 200-08 (1754) (sketching outlines of tort law under title "Of Reparation for Damage Done"). Pufendorf outlined tort law in Chapter 1 of Book III under the title, "That no Man be hurt; and if a Damage be done to any Man, that Reparation be made." He then treated contract

natural rights political philosophy of the time readily classified private legal obligations into those imposed by law to protect the basic individual rights to life, liberty, and property, and those undertaken by the free consent of the individual—obligations of tort and contract respectively.

In the wake of the Enlightenment, civilian legal commentators like Pothier in France and Savigny in Germany further generalized and abstracted the doctrines of Roman law under the influence of natural law thought and later of Kantian philosophy. The commentators emerged with tort and contract doctrines that provided the basis for the treatment of these subjects in the French Civil Code as well as those of Austria and Prussia. During the nineteenth century, these doctrines were further refined under the influence of the historical school of jurisprudence in the great German Pandectist commentaries that would lay the basis for the ultimate monument of civilian legal science, the German Civil Code of 1900.<sup>19</sup>

Sophisticated English and American legal writers had long promoted the study of Roman and civil law on the ground that it supplied a more logical and elegant arrangement than the common-law writ system.<sup>20</sup> So when in the mid-nineteenth century the abolition of the forms of action required a new arrangement based on substantive law categories, it was natural to look to the civil law—where an impressive body of literature defined and elaborated the distinctions between property and obligations and then between contract and tort.

During the final period of transition from the writ system to the new simplified civil procedure, from about 1850 on, English and

law (the other half of “obligations”) separately in Chapters 4 through 8. Cf. David Ibbetson, *The Law of Business Rome: Foundations of the Anglo-American Tort of Negligence*, in 52 CURRENT LEGAL PROBLEMS 1999, 74, 85-87 (1999) (describing the contribution of the natural law writers to the development of the duty of care concept in modern negligence law).

19. See the summary account in STEIN, *supra* note 16, at 104-23, and the more comprehensive one in WIEACKER, *supra* note 18, at 279-386. The French Civil Code does not have a separate subdivision for obligations, but deals with both contract and delict as “Modes of Acquiring Property,” with contract receiving its own title, while delicts and quasi-delicts are addressed in a chapter within a title on “Engagements Formed without an Agreement.” THE FRENCH CIVIL CODE (as amended to 1 July 1994) (John H. Crabb trans., 1995). For modern European code provisions and judicial decisions representative of the category of “delict” in civil law jurisdictions, see ARTHUR TAYLOR VON MEHREN, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW* 339-464 (1957), and (a more detailed compendium) F.H. LAWSON & B.S. MARKESINIS, 2 *TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW AND THE CIVIL LAW* (1982).

20. Simpson, *supra* note 6, at 655-57; see also MICHAEL H. HOEFELICH, *ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY* 16 (1997).

American legal writers came to agree that contracts would be one fundamental branch of the new substantive private law, and their treatment of the subject was much influenced by civilian scholarship.<sup>21</sup> Since the civilian tradition paired tort with contract as the two fundamental subdivisions of the law of obligations, recognition of contract as one basic category naturally suggested that tort should be another.

## 2. Common Law Commentary

As early as Bracton in the thirteenth century, English commentators seized on the Roman distinction between tort and contract to help classify the actions recognized by the common law.<sup>22</sup> The medieval writs of trespass on the one hand, and debt and covenant on the other, could be seen as roughly corresponding to the Roman tort and contract, and Bracton's treatment meant that from very early on the categories of the civilian law of obligations were available to English lawyers as a way of understanding their own law.<sup>23</sup>

In the eighteenth century, Blackstone, the most influential of all the English institutional writers, clearly set out the Roman/civilian distinction in Book III of his *Commentaries*. He classified the common-law "personal actions" into those on the one hand "founded on contract," comprising "all actions upon debt or promises," and on the other those "founded . . . upon torts or wrongs . . . all actions for trespasses, nuisances, assaults, defamatory words, and the like."<sup>24</sup>

In similar terms, Holmes' own favorite basic American textbook from his law student days, Judge Timothy Walker's intelligent and down-to-earth *Introduction to American Law*, described the category of actions for "civil injury or wrong," for which, he noted,

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21. See DAVID IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 220-44 (1999), for the influence of Pothier and Savigny on nineteenth century English contract theory. As his title suggests, Ibbetson's book is a sustained account of the history of English tort and contract law seen through the conceptual lens provided by the Roman-civilian categories.

22. HENRY DE BRACTON, *2 ON THE LAWS AND CUSTOMS OF ENGLAND* 290 (Samuel E. Thorne trans., 1968).

23. See IBBETSON, *supra* note 21, at 11-94, for a particularly clear account of the medieval origins of what would become the modern law of tort and contract, seen from the perspective of the civilian categories.

24. WILLIAM BLACKSTONE, *3 COMMENTARIES ON THE LAWS OF ENGLAND* 117 (1768). By the "personal actions," Blackstone meant all private civil actions at law apart from the old proprietary "real" and "mixed" actions, which were already obsolescent in his time.

“the law commonly uses the latin word *delictum* or the French word tort, instead of our equally significant English words.” Walker’s linguistic nativism did not stop him from going on to mention the Roman distinction of “personal actions” into “*actions ex contractu*, or *actions of contract*, and *actions ex delicto*, or *actions of tort*.” He classified the common law forms of action accordingly, placing debt, covenant, and assumpsit under contract, and trespass, trover, detinue, replevin, case, and ejectment under tort.<sup>25</sup>

By 1871, no serious student of English or American law could doubt that contracts was established as one of the basic categories in the newly emerging system of substantive law. Langdell’s celebrated casebook had just appeared in America,<sup>26</sup> and over the next few years the Pollock and Anson treatises would conclude almost a century of English contract scholarship by giving the subject the familiar structure that still generally holds today—a structure much influenced by the civilian writers Pothier and Savigny.<sup>27</sup> With contracts thus established, could the other half of the traditional civilian dichotomy be far behind?

### 3. Positive Law

Working lawyers might ignore the refinements of Roman and civil law, and even the categorizing efforts of their native commentators,<sup>28</sup> but they had to take account of statutes and case law that treated the tort-contract distinction as legally operative. In a summary of the history of the distinction in English law published in

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25. TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 549-60 (4th ed. 1860) (1837). Holmes rated this “admirable” work as “the best book we know of to explain to the student the actual bearing of legal principles upon the daily affairs of men;” it goes “to the root of the matter,” asks for “the practical use of all these traditions and forms,” and “those which cannot show such a use in their favor are dismissed from consideration.” Oliver Wendell Holmes, *Book Review*, 3 AM. L. REV. 357, 358 (1869), reprinted in 1 WORKS, *supra* note 7, at 204, 205. Holmes was still repeating his praise of Walker’s book when he was in his eighties. See, e.g., Oliver Wendell Holmes, *Introduction to the General Survey*, 1 CONTINENTAL LEGAL HISTORY SERIES (1912), reprinted in 3 WORKS, *supra* note 7, at 439, 440.

26. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871). See Holmes’ favorable review of it as setting out “the whole law of contracts proper” according to a “plan . . . both original and instructive.” Oliver Wendell Holmes, *Book Review*, 5 AM. L. REV. 539, 540 (1871), reprinted in 1 WORKS, *supra* note 7, at 243, 243.

27. WILLIAM REYNELL ANSON, PRINCIPLES OF THE LAW OF CONTRACT (1880); FREDERICK POLLOCK, PRINCIPLES OF CONTRACT (1876). For an assessment of the influence of Savigny and particularly Pothier on Pollock and Anson, see IBBETSON, *supra* note 21, at 220-44.

28. Holmes noted T. E. Holland’s remark that “the old-fashioned English lawyer’s idea of a satisfactory body of law was a chaos with a full index.” Oliver Wendell Holmes, *Book Review*, 5 AM. L. REV. 114, 114 (1870) reprinted in 1 WORKS, *supra* note 7, at 223, 223 (reviewing T. E. HOLLAND, ESSAYS UPON THE FORM OF THE LAW (1870)).

1887, Frederick William Maitland noted four areas in which it made a practical difference in outcome whether an action was characterized as sounding in tort or in contract:<sup>29</sup>

- Joinder of actions. As early as 1682, English judges were pronouncing that “causes upon contract . . . and causes upon tort cannot be joined.”
- Survival of actions. Contract actions survived a plaintiff’s death, but tort actions did not—so a 1627 case said; and the same distinction was sometimes (generally less clearly) intimated with respect to whether an action survived a defendant’s death.
- Joinder of parties. Joint contractors had to all be sued jointly or the action was subject to dismissal, but tort liability was joint and several, so that any one of a group of joint tortfeasors could be sued alone for the entire damage jointly caused.
- Costs. Several of the procedural reform statutes passed in England leading up to the final abolition of the forms of action in 1873 made the availability of costs turn on whether the action sounded in tort or contract, and the language of some of these statutes assumed that every personal action was either “founded on contract” or “founded on tort.”

The same distinctions could be found in American law, including the tendency of some early procedural reform legislation to assume that civil actions at law sounded either in contract or tort.<sup>30</sup>

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29. F.W. Maitland, *Historical Note on the Classification of the Forms of Personal Action*, in FREDERICK POLLOCK, *THE LAW OF TORTS* 368-70 (1887) (App. A). For other accounts of how English positive law made operative distinctions between tort and contract before the establishment of the modern categorical scheme after 1870, see J. H. BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY* 454-55 (3d ed. 1990); IBBETSON, *supra* note 21, at 171-73; WINFIELD, *supra* note 2 at 76-79 (1931) (also noting the doctrine that punitive damages are sometimes available in tort, but generally not in contract).

30. See, e.g., *An Act Relating to the Proceedings, Practice, and Rules of Evidence, 1852* Mass. Acts 223, § 1 (providing separate actions and proceedings for tort and contract); see also CAL. CIV. PROC. CODE ch. 3, §§ 337-40 (1872) (codifying *Statutes of 1850*, 343) (providing longer limitations period for actions sounding in contract than those sounding in tort, e.g., slander and false imprisonment); MASS. REVISED STATUTES tit. V, ch. 120, §§ 1-8 (1836) (same); N.Y. REVISED STATUTES pt. III, ch. III, §§ 89-93 (same). See generally CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* esp. 116-17 (1897); Jeremiah Smith, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 HARV. L. REV. 241 (1917), reprinted in HARVARD LAW REVIEW, *SELECTED ESSAYS ON THE LAW OF TORTS* 176, 177-78 (1924).

*B. Against Torts*

We now know that the lawyers who made Hilliard's and Addison's treatises commercially successful were betting on a winning horse; torts did indeed eventually establish itself as one of the fundamental categories of Anglo-American law. Given the factors militating in its favor, it may seem to us that things could hardly have gone otherwise. But this is just an instance of the familiar fallacy of hindsight determinism. The reclassification triggered by the abolition of the writs did not have to end up with tort as one of the basic substantive subjects.

The point is supported by the very fact that a legal scholar as attuned to intellectual fashion as the young Holmes could reject torts as "not a proper subject" as late as 1871. And indeed at that point there was still much to be said against the case I have just summarized for accepting tort as a basic category. Roman and civilian theory, the tradition of common law commentary, and the actual positive law of England and America, taken together, still left the matter far from concluded.

## 1. Roman-Civil Law vs. Analytical Jurisprudence

Holmes' fundamental objection to tort as a subject rested on the analytical work of Jeremy Bentham, augmented in Holmes' law student days by the publication of the jurisprudence lectures of John Austin.<sup>31</sup> Bentham had provided much of the ideological fuel for the procedural reforms that were sweeping away the writ sys-

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31. Bentham and Austin were Holmes' primary masters in legal theory, supplemented by the insights of the historical school. He thought them much superior as theorists to the Romans, writing that "The Roman law is a priceless mass of materials for investigations like those of the great Germans . . . But for the philosophy of law [Bentham's] 'Fragment on Government' and Austin's lectures are worth the whole *Corpus*." Oliver Wendell Holmes, *Summary of Events*, 7 AM. L. REV. 578, 578 (1873), reprinted in 1 WORKS, *supra* note 7, at 322, 323. And even the work of the greatest of the German historicist writers, Savigny, was flawed because "the minute and constant reference to the Roman law more or less clogs and retards the free development of principles." Oliver Wendell Holmes, *Book Review*, 7 AM. L. REV. 320, 320 (1873), reprinted in 1 WORKS, *supra* note 7, at 322, 322 (reviewing ARCHIBALD BROWN, AN EPITOME AND ANALYSIS OF SAVIGNY'S TREATISE ON OBLIGATIONS IN ROMAN LAW (1872)). "It is not true that fundamental principles are more clearly brought out in the Roman than in the English law;" they were rather "obscured" by "principles of classification which have lost their significance, and by a philosophy which is no longer vital." Oliver Wendell Holmes, *Book Review*, 7 AM. L. REV. 652, 653 (1873), reprinted in 1 WORKS, *supra* note 7, at 321, 321 (reviewing T. WHITCOMBE GREEN, OUTLINES OF ROMAN LAW (1872)).



tem in the latter years of the century.<sup>32</sup> The same analysis that supported the abolition of the forms of action also portrayed as incoherent and indefensible the Roman/civil categories of "personal actions" and "obligations," subdivided into parallel categories of contract and tort.

Bentham had insisted that law should be analyzed on the basis of a firm distinction between substantive law and procedure. This new conceptual distinction helped Bentham and Austin make the case that English law remained intellectually and practically incoherent because *substantive* legal rights and duties were learned and classified for practice under the jumbled array of *procedural* forms that had grown up over the centuries to enforce them. This had it backwards, Bentham insisted; procedure should be designed functionally to serve as the handmaiden of substance.<sup>33</sup>

Bentham's new substance-procedure distinction was crucial to the legislative reforms that replaced the writ system.<sup>34</sup> The Field Code in America and the English Judicature Act were premised on the idea that a single procedural form, the "civil action," could regulate the adjudication of all civil disputes, without altering either the pre-existing legal rights and duties of the parties or the relief triggered by their violation. The reforms could hardly have been adopted unless they had been backed by the guarantee that they would not change those elements of the existing legal order on which people relied in their everyday lives. To give this assurance, the reformers invoked the new Benthamite concept of substantive law, the law that both established legal rights and duties and provided sanctions and redress for their violation. This substantive law was the substratum left unchanged by the purely procedural re-

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32. Holmes himself ascribed the procedural reforms of his day to "Bentham's ideas." Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV 652, 653 (1873) [hereinafter *The Theory of Torts*], reprinted in 1 WORKS, *supra* note 7, at 326, 327. Austin's contribution had to wait for the publication in 1863 by his widow Sarah of the lectures on jurisprudence he had delivered at London University in the 1830s.

33. *Principles of Judicial Procedure*, *supra* note 10, at 6.

[T]he course of procedure ought to have in every instance, for its main and primary end at least, the accomplishment of the will manifested in the body of substantive laws . . . Of the adjective branch of the law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of law.

*Id.*

34. See generally M.I. Zagday, *Bentham on Civil Procedure*, in JEREMY BENTHAM AND THE LAW 68, 78 (George W. Keeton & Georg Schwarzenberger eds., 1948) (noting that Bentham's works greatly influenced the procedural reforms that took place in the last ten years of his life and that his teachings spurred Romilly, Brougham, and Denman to create Parliamentary Commissions to examine the law and recommend reforms).

forms, which affected only the machinations of lawyers and judges inside the system. The reforms were only intended to make the machinery of justice run with less delay and expense.<sup>35</sup>

The reformers also believed that the simplified procedure would create pressure for systematic reclassification of the law, which would make it easier to teach and learn and more accessible to the public. But a new arrangement of the law would not change its substance, except insofar as a better taxonomy exposed inconsistencies and anomalies to the kind of scrutiny that might lead on to substantive reform.<sup>36</sup> One of Austin's main contributions to the analytical enterprise was his work on classification, which combined Benthamite methods and ideas with civilian learning acquired in the Germany of Savigny.<sup>37</sup>

The case against making torts a main department of law in this new arrangement was that, unlike contract and property, it did not make sense as a primary substantive category. As Holmes put it, the "objection to the title Torts . . . is that it puts the cart before the horse, that legal liabilities are arranged with reference to the forms of action allowed by the common law for infringing them,—the substantive under the adjective law."<sup>38</sup>

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35. See POMEROY, *supra* note 8, at 38 (stating that when forms of action are abolished "the rights of action remain, and the remedies which could be recovered by the use of any particular action may still be secured by means of the civil action which the codes have substituted in place of all the previous forms"); Holmes, *supra* note 9, at 239-40.

Of course it would not be intended to change our rights, by a change in the form of pleading. Accordingly where the present existing law gives alternative remedies . . . the plaintiff's election, signified at the common law by the action brought, would be one of the facts to be stated in the case.

*Id.*

36. For a good recent account of the codification movement in England and America, see Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 *YALE J. INT'L L.* 435 (2000). Some reformers (Bentham, Austin, and Sir James Stephen in England; David Dudley Field in the United States) thought the systematic rationalization of substantive law could best be carried out through codification, while many others, including Holmes, opposed substantive codification, arguing that the work of systematization was better left to the private efforts of independent jurists. See Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 *AM. L. REV.* 1, 1-3 (1870) [hereinafter *Codes, and the Arrangement of the Law*], reprinted in 1 *WORKS, supra* note 7, at 212, 212-14. The Field codification movement in New York produced not only the famous code of procedure enacted in 1848, but also a substantive civil code completed and promulgated in 1865, which, though rejected in its home state, was enacted elsewhere—for instance in California in 1872. *CIVIL CODE, ANNOTATED, OF CALIFORNIA (1872)*; see also Weiss, *supra*, at 511-13 (describing the enactment of the Field Civil Code in Georgia, North and South Dakota, California, and Montana).

37. HOEFLICH, *supra* note 20, at 10-12.

38. *The Theory of Torts, supra* note 32, at 331. Holmes' phrasing showed that he had not fully incorporated the Benthamite terminology—the objection to torts is not that it is a *procedural* ("adjective") category but that it is a *remedial* one. Remedies are part of the substantive law in the Benthamite (and our contemporary) scheme; we regard the question whether specific

According to both Bentham and Austin, the core of substantive law was made up of the rules establishing those legal rights and duties that empowered and regulated the behavior of individuals in daily life. Auxiliary to these "primary" rights and duties, but still within the substantive law, were the remedial or "sanctioning" rights that arose when primary rights were violated.<sup>39</sup> Austin argued that the substantive law should be classified according to an arrangement of primary rights—for example, rights to personal security, liberty of movement, reputation, property, and the like.<sup>40</sup> The remedial part of the substantive law should then be set out in a way that manifested its character as instrumental to the primary rights.<sup>41</sup>

Under this analysis, contract was a proper first-order legal category, because the rights arising from enforceable agreements formed a separate and recognizable class of primary rights, distinct from, say, property rights, and rights of bodily integrity. Torts, however, had no such distinctive primary subject matter. It was made up entirely of sanctioning rights, civil claims arising out of the violation of whatever primary rights, apart from those based on contract, that the law happened to protect by a private civil remedy.<sup>42</sup> The two bodies of law, tort and contract, thus did not form parallel categories at all, and the Roman-civilian division of obliga-

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performance will be allowed for a class of contracts, or punitive damages for a class of torts, as part of the substantive law of contracts and torts respectively.

39. John Austin, *Outline of the Course of Lectures* [hereinafter *Outline*], in 1 AUSTIN'S JURISPRUDENCE 31, 43 (John Campbell ed., 5th ed. 1885) (explaining distinction between primary and sanctioning rights). Bentham had himself earlier made the same distinction; he proposed to state the primary rights and duties in a Civil Code, and the remedies or sanctioning rights and duties in a Penal Code. Jeremy Bentham, *General View of Complete Code of Laws* [hereinafter *View of Complete Code of Laws*], in 3 WORKS OF JEREMY BENTHAM, *supra* note 10, at 155, 160.

40. See *Outline*, *supra* note 39, at 4 (describing categorization of primary rights into Law of Things and Law of Persons, and subcategorization of the latter into specific rights); see also John Austin, *On Law, Considered with Reference to Its Purposes* [hereinafter *On Law*], in 2 AUSTIN'S JURISPRUDENCE, *supra* note 39, at 683, 773 (John Campbell ed., 5th ed. 1885) (describing the division of primary rights).

41. According to Austin, secondary or sanctioning rights are "instruments for the attainment of another right," namely a primary right. *On Law*, *supra* note 40, at 763-66.

42. In the Benthamite codification scheme, civil injuries (including what we call both torts and breaches of contract) belonged in the Penal Code. See *View of Complete Code of Laws*, *supra* note 39, at 163-67 (identifying private offenses—acts detrimental to assignable individuals—as one category of offenses in penal code and including in this category, e.g., offenses against the person and reputation). Contract law (meaning the substantive law by which contractual rights and duties are determined) was in the Civil Code. *Id.* at 190-92. Similarly, Austin placed contract and quasi-contract in the category of primary rights, and torts—rights to remedy arising from delicts—in the sanctioning rights category. See *Outline*, *supra* note 39, at 53.

tions into those arising *ex contractu* and *ex delicto* incoherently mixed logical levels.<sup>43</sup>

Even if some fundamental legal categories—criminal law for example—should be identified on the basis of remedies rather than primary rights,<sup>44</sup> torts could not reasonably be one of them. The remedial category parallel to criminal law would be “civil wrongs,” including breach of contract. But tort excluded breach of contract, while including some (though not all) of the civil protections for property and personal rights. Nor did the primary rights and duties whose violation were remedied by tort actions have any positive unifying characteristic, as was shown by the negative terminology of “apart from contract” and “other than contract” that was often used to name the category in its early days.<sup>45</sup>

Holmes made these points as he explained why he thought tort was “not a proper subject.” Its domain, as generally understood, included everything falling under the common law actions for trespass, trespass on the case, and trover. But no meaningful common feature united these actions, viewed as a grouping of primary rights (or, as Holmes preferred, primary duties).<sup>46</sup> Trespass to land was a tort action, but the primary rights and duties it enforced were part of property law, and were remedied not only by tort suits but also

43. *Outline, supra* note 39, at 53-54.

44. For example, criminal law might be an appropriate substantive law category, not because the primary rights it protects or duties it enforces form a coherent group, but because criminal prosecution inflicts uniquely severe sanctions, which justifies both the use of separate procedures, and the control of this most fearful state power by general overarching substantive principles that are designed to guard against oppression (e.g. the rule of lenity, the requirement of *mens rea*.)

45. See, e.g., BISHOP, *supra* note 5. For a contemporary attempt to justify the common law category “tort” as roughly equivalent to “civil wrong,” see Peter Birks, *The Concept of a Civil Wrong*, in *THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 31 (David G. Owen ed., 1995). Birks takes note of the Austinian objection, but overrides it on the practical (but conceptually question-begging) ground that it “drives us further and further from the categories of the law as we know them”—which is to say from the civilian scheme with its dichotomy of contract and tort, by now too firmly entrenched in Anglo-American legal terminology to be displaced. *Id.* at 47.

46. Holmes argued that the law should be classified by its primary duties, rather than rights, as Austin generally preferred, pointing out that there were legal duties without corresponding rights (duties of military service, or to pay taxes), but no legal rights without corresponding duties. See *Codes, and the Arrangement of the Law, supra* note 36, at 214; Oliver Wendell Holmes, *The Arrangement of the Law—Privity*, 7 *AM. L. REV.* 46, 46 (1872), reprinted in 1 *WORKS, supra* note 7, at 303. Holmes later abandoned his project of devising a universal legal taxonomy (whether of duties or rights); he decided that historical accident played so large a part in shaping even the broad outlines of each legal system that no scheme for classifying substantive doctrine across all systems could be fruitful. See Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 475 (1897) [hereinafter *The Path of the Law*], reprinted in 3 *WORKS, supra* note 7, at 391, 403 (arguing that the pursuit of a “useless quintessence of all systems” should be replaced by the more limited but practical project of achieving “an accurate anatomy of one”).

by the old real and mixed actions, which lay outside the "law of obligations" altogether. Another tort action, assault and battery, enforced the rights and duties of bodily security, a primary category distinct from property. Another tort, deceit, addressed a third distinct set of primary duties, those involving fraud; and these duties were further enforced, entirely outside of tort law, by the equitable doctrine of promissory estoppel. Finally, the tort of seduction enforced a class primary rights and duties that belonged "at the other end of the *corpus juris*"—as part of the law of persons, governing status and domestic relations.<sup>47</sup> Viewed from the perspective of the classification of primary rights or duties, the category of tort was thus entirely incoherent.

The critique of torts as a category was further strengthened by consideration of its relation to criminal law. The Roman-civilian taxonomy discouraged this comparison by making the distinction between private and public law fundamental, placing criminal law in the "public" category, and then focusing juristic science entirely upon private law.<sup>48</sup> Austin attacked both elements, the initial separation of public from private law, and the assignment of crimes to the public law side. This obscured the close relation between criminal and civil remedies in the enforcement of the primary individual rights to life, liberty, and property.<sup>49</sup> Most crimes (the ones that have victims) are also torts.

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47. Here Holmes was following Austin, who had argued that the civilian category "law of persons," should not head the *corpus juris* as it did in Roman law, but should be subordinated as a set of exceptions to the ordinary law ("law of things") that established the presumptively equal rights and duties of mature adults in a liberal society. See *Outline*, *supra* note 39, at 41-42, 364. Austin subclassified the law of things into rights *in personam*, basically contract and quasi-contract rights, which ran against assignable individuals, and rights *in rem*, the bulk of legal rights—those to property, bodily security, liberty of movement, and reputation—which ran against all the world. See *id.* at 45, 371-74. Thus the cases involving trespass to land, assault and battery, and deceit, would each come under separate subdivisions of the law of things, while seduction would belong to the law of persons.

48. Bentham grouped civil and criminal sanctions together in his Penal Code and defined primary rights of property, bodily security, and so on, in his Civil Code. *View of Complete Code of Laws*, *supra* note 39, at 160. The Roman law of delict involved an explicitly penal element that is absent in the common law of torts, though allowance of punitive damages shrinks the gap; see NICHOLAS, *supra* note 17, at 207-09. When modern writers have wanted to discuss crime under the Roman classificatory scheme they have often followed Sir Henry Maine, who considered "Delict and Crime" together in a single chapter of HENRY SUMNER MAINE, *ANCIENT LAW* 367 (1861). I am told by Professor George Fletcher that today criminal law is classified as private law in France, and as a separate category intermediate between private and public in Germany.

49. See *Outline*, *supra* note 39, at 67-69; see also John Austin, *Analysis of Pervading Notions* [hereinafter *Analysis of Pervading Notions*], in 1 AUSTIN'S JURISPRUDENCE, *supra* note 39, at 343, 404 ("All offences affect the community, and all offences affect individuals."). Austin substituted the term "political law" for the Roman-civil "public law," treating it as the creation of special status for public officials, hence classified under the law of persons, which in turn was the

The actual law of remedies and sanctions in modern legal systems reveals every imaginable mix of public prosecution and private civil suit, along with such remedial hybrids as private prosecution, public regulatory enforcement using civil penalties, private rights to initiate public regulatory action, civil suits by private attorneys general, and the award of punitive damages in private civil suits, paid either to private plaintiffs or to the state.<sup>50</sup> The decision how to blend these remedies in enforcing primary rights or duties is an instrumental one to be made on shifting grounds of expediency, even if criminal punishment itself is limited in principle to serious moral wrongdoing.<sup>51</sup> So the line between tort and crime even regarded as remedial categories is blurred, and in any event no basis appears for treating tort as a category of substantive law.

One explanation for the confused legacy of the civilian categorical scheme was the failure of Roman jurists to develop the abstract concept of a legal right with correlative duties. As a result, they could not see tort and criminal law as providing different remedies for a largely overlapping set of rights and duties. Similarly, the failure to think in terms of rights and duties obscured the disparate nature of the substantive claims protected by delictual actions.

By contrast, the modern civilian writers well understood the idea of a legal right. For them it linked law to social-contract politi-

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catch-all category of exceptions to the general law that established the rights and duties of legally equal individuals. See *Outline*, *supra* note 39, at 68. Bentham similarly gave separate treatment to the law governing the structure and powers of government in his Constitutional Code.

50. The modern American law governing when tort actions should be implied from, or preempted by, regulatory statutes gives an ongoing practical demonstration of the "mix of remedies" approach to public regulation and private action. See generally Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

51. Neither Bentham nor Austin made a sharp distinction in principle between civil and criminal sanctions. See *Analysis of Pervading Notions*, *supra* note 49, at 343, 501. Bentham did distinguish between punitive and "satisfactive" remedies, see *Specimen of a Penal Code*, in 1 THE WORKS OF JEREMY BENTHAM, *supra* note 10, at 165, and Austin followed him in describing criminal punishment as having a purely deterrent function, while civil remedies had the dual functions of prevention and reparation. *Analysis of Pervading Notions*, *supra* note 49, at 503-04. Some contemporary functionalist writers have urged sharpening the distinction between tort and crime to maintain the admonitory uses of the criminal law. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 193-04 (1991) ("Characteristically, tort law prices, while criminal law prohibits."); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404-05 (1958). Others have tended to treat criminal punishment and civil damages together under a unified theory of deterrent sanctions. See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1201-05 (1985); see also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 25-32, 88-99 (1987) (critiquing attempts to distinguish criminal punishment in principle from civil regulation).

cal theory, which appealed to the uncertainty and insecurity of individual natural rights in the state of nature to justify the establishment of a government empowered to define those rights by law and enforce them by regular sanctions and remedies. But the modern civilians generally did not escape the effects of the original Roman segregation of criminal law into the (thereafter largely ignored) category of public law. They continued to follow the Romans in portraying delict as a distinct body of obligations parallel to contract, rather than as the catch-all miscellany modern analytical jurisprudence showed it to be.<sup>52</sup>

## 2. Common Law Commentary

Roman and civil law aside, what to make of the place of the category "tort" in the work of common-law commentators? Writers from Bracton to Blackstone to Holmes' own favorite Judge Walker of Ohio seemed to have endorsed and sanctified the civilian distinction between contract and tort. Yet on this matter appearances were deceiving; tort was not yet really an established subject in the common law. And the civilian concepts of "personal actions" and "law of obligations," which paired tort with contract, had never become serious working categories for the leading common-law text writers. Hence the recognition of contract as a fundamental department of substantive law by 1870 did not entail the acceptance of tort as well.

While Bracton, Blackstone (and the good Judge Walker too) all stated the civilian contract-tort distinction, they did so only in passing. No common law commentator treated the distinction as a significant structural classifying device, or made tort a significant subject for independent analysis. Both tort itself, and the tort-contract distinction, were entirely absent from a number of the most important general treatises on the common law as a whole—Sir Edward Coke's *Institutes of the Law of England*, Sir Henry Finch's *Law*, Sir Matthew Hale's *Analysis of the Law of England*, and even (as late as the first half of the nineteenth century) James Kent's *Commentaries on American Law*.

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52. "Delict," while structurally parallel to contract in civilian theory, was not an important category in practice in the civil law until the upsurge of accidental injuries associated with the Industrial Revolution—only a few pages in POTHIER, *A TREATISE ON OBLIGATIONS CONSIDERED IN A MORAL AND LEGAL VIEW* 73-76 (Francois Xavier Martin trans., 1999), and only five sections of the French Civil Code of 1804, *THE FRENCH CIVIL CODE*, *supra* note 19, at art. 1382-86, were devoted to the subject, by comparison to much richer treatments of contract.

Holmes spent several years of his early career annotating Kent, so the Chancellor's treatment is particularly worth noting in this respect. The reader searches in vain through the 2000-plus pages of his *Commentaries* looking for treatment of anything resembling our category of tort law. There are ten pages on the law of defamation, but this comes under the category—"rights of persons," subdivision "right to reputation"—and Kent treats libel indifferently as both a crime and a tort. A single sentence in the section on the personal right to bodily security can be taken as, in effect, the whole of Kent on Torts: "If violence has been actually offered, the offender is not only liable to be prosecuted and punished on behalf of the state, but he is bound to render to the party aggrieved adequate compensation in damages."<sup>53</sup> Kent analyzed private law in terms of what Austin would call primary rights, and as with Blackstone, his basic distinction was between personal and property rights. In such a scheme, tort finds no structural place.

In contrast to Kent, Blackstone did clearly articulate the civilian tort-contract distinction, in a passage earlier quoted.<sup>54</sup> But neither that distinction nor the category "tort" itself played a structural role in his analysis. Blackstone's great influence makes it important to see this, lest we think that acceptance of tort as a basic subject naturally followed from his treatment of the subject. The point can only be understood when his discussion of tort is placed in the context of his work as a whole.

Blackstone's *Commentaries* were published in four books, entitled "Rights of Persons," "Rights of Things," "Private Wrongs," and "Public Wrongs." These headings superficially tracked the Roman categories,<sup>55</sup> so that it might seem that Book 4 dealt with public law, and Books 1-3 with the standard subdivisions of private law—law of persons, of things, and of actions.<sup>56</sup>

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53. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 15 (Oliver Wendell Holmes ed., 12th ed. 1873).

54. See *supra* note 24 and accompanying text.

55. See ALAN WATSON, ROMAN LAW AND COMPARATIVE LAW 166-81 (1991) (noting parallels between Blackstone's structure and the similar four-book organization of Justinian's Institutes). Though Watson argues that Blackstone's structure was more influenced by Justinian's than has previously been recognized, he does not claim that Blackstone incorporated the Roman "law of obligations" with its tort-contract dichotomy into his organization. Another celebrated study of Blackstone's scheme largely ignores the influence of the Roman institutional ordering, emphasizing ideological factors—the need to mediate between liberal and pre-liberal features of eighteenth century English law. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

56. The Blackstonian title phrases "Rights of Persons" and "Rights of Things" are mistranslations of the Roman *jus personarum* and *jus rerum*, law of persons and law of things. Blackstone inherited the terminology (along with much else) from SIR MATTHEW HALE, ANALYSIS



Below the surface level marked by the titles, however, the Blackstonian scheme departed substantially from any Roman models. Book 1 on the "Rights of Persons" did deal with topics such as husband and wife, master and servant, and guardian and ward, which as matters of ascriptive status would have fallen under the Roman law of persons. As its title suggests, however, Book 1 also contained Blackstone's formulation of the modern "absolute rights of individuals," the natural rights to life, liberty, property, and personal security, concepts that had no parallel in Roman law. Further, Blackstone placed his account of the British Constitution (public law to the Romans) in Book 1 as part of the law of persons, treating the powers of government officers as grants of a special kind of legal status.<sup>57</sup>

Book 2, "Rights of Things," contained Blackstone's detailed treatment of English property law. It can be seen to (very roughly) follow the order of the Roman subdivision of the "law of things" into subcategories of property, successions, and obligations. In the part corresponding to "obligations," Blackstone discussed "things personal, or chattels," and included a chapter devoted to contracts. He treated contract, however, not as a form of obligation parallel to tort, but as one among several modes of gaining or losing title to personal property, along with forfeiture, grant, and marriage. And there was nothing in Book 2 that corresponded to the delictual half of the Roman/civilian law of obligations.

Book 4, "Public Wrongs," was a detailed treatment of English criminal law and procedure. (Recall that by contrast the Romans treated criminal law as public law, and therefore not an important focus of juristic science.) The rest of Blackstone's quite extensive treatment of English public law, the body of law governing the

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OF THE LAW OF ENGLAND 1 (1716) ("Now all Civil Rights or Interests are of Two Sorts: 1. *Jura Personarum*, or Rights of Persons. 2. *Jura Rerum*, or Rights of Things."). The Romans had no abstract concept of an individual ("subjective") right, for which the law then provided a remedy; rather the individual simply had an "action." NICHOLAS, *supra* note 17, at 100 n.1. The dichotomy of right and remedy is post-medieval, and our familiar conceptual triad of right, remedy, and procedure dates only from the nineteenth century.

57. Austin, who rarely had a good word for Blackstone, did praise him for his insight that public law in this narrow sense (which Austin called "political law") should be classified as a part of the law of status. See *Outline*, *supra* note 39, at 69; see also *supra* note 47. As Austin noted, Blackstone was here (as elsewhere) following the structure laid down in Sir Matthew Hale's *Analysis of the Law of England*, *supra* note 56, at 4-6. Dicey's famous notion that the Rule of Law rejects "administrative law," the grant of special legal powers to officials who are then safeguarded by immunity from personal suit, is prefigured by Austin's placement (following Blackstone and Hale) of public law under the category, suspect for its illiberal connotations, of the law of persons. A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 120-21 (Liberty Classics ed., 1982) (1889).

structure of the state and the powers of officials, appeared, as previously noted, in Book 1.

It was in Book 3, "Private Wrongs," roughly corresponding to the Roman "law of actions," that Blackstone stated the civilian distinctions between real (proprietary) and personal actions, and then distinguished personal actions into those in tort and contract respectively.<sup>58</sup> Here we might expect to find an account of something like the Roman law of obligations, but in fact there is nothing of the kind. As already noted, Blackstone had already treated contract law in Book 2, as a mode of acquiring property. Book 3 was entirely organized around remedies and procedure, with nothing approximating a unified treatment of tort law. It dealt successively with modes of relief, the system of courts, the common law forms of action, and finally pleading and practice (roughly our civil procedure).

Blackstone's statement of the distinction between tort and contract came in passing as part of the discussion of the forms of action in Chapter 8, entitled "Of Wrongs and of Remedies, Respecting the Rights of Persons." The distinction played no structural role even in that chapter, much less in the larger structure of Book 3 or the *Commentaries* as a whole. Blackstone classified Chapter 8 around the "absolute rights of persons" he had originally listed in Book 1. Among these, for example, was the right of personal liberty, and he listed as remedies available for its protection both the (private law) damage suit for false imprisonment and the (public law) writ of habeas corpus. Clearly Blackstone's concept of "private wrongs" was not limited to what civilians would classify under the law of obligations, or even under private law. He gave no separate consideration to delict or tort as a legal category.

Like Blackstone, Walker stated the tort-contract distinction, and classified the common law writs under its headings.<sup>59</sup> But also like Blackstone, he made no structural use of the distinction, nor did the concepts of "obligation" or "personal action" or "tort" do any conceptual work in his treatise. His primary divisions were constitutional law, law of persons,<sup>60</sup> law of property (with contracts treated as a subdivision), law of crimes, law of procedure, and international law. The tort-contract distinction made its brief appear-

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58. See *supra* note 24 and accompanying text.

59. WALKER, *supra* note 25. I am using the fourth edition of Walker's book (1860), the one Holmes would have used. Its text conformed to Walker's third edition (1855); the latter was substantially revised from his first edition (1837).

60. *Id.* at 226-95. The law of persons comprised domestic relations, master and servant, and executors and administrators, tracking the Roman idea of status-based law.

ance in a section on "classification of actions" in the division on procedure, which catalogued the traditional common-law actions.

Walker (an active procedural reformer in Ohio)<sup>61</sup> criticized the system of forms of action as arbitrary, and went on to re-describe the civil causes of action in substantive terms. But in doing so he did not make use of the tort-contract distinction; rather, like Blackstone, he classified causes of action by the rights they protected—bodily security, liberty, health, reputation, domestic comfort, and property. In listing remedies for these wrongs he confined himself to what we would describe as tort causes of action,<sup>62</sup> but he did not use the term "tort," or refer back to his earlier discussion of "obligation" or to the tort-contract distinction. He described contract actions not as forming a separate legal category, but rather as vindicating a species of "personal property," namely "things in action."<sup>63</sup> Finally, Walker distinguished civil from criminal law on the ground that wrongs "of a more atrocious character than ordinary" were "punished as crimes."<sup>64</sup>

Let me sum up. As of 1871, Holmes had not and could not have read any commentator on the common law as a whole, or on either English law or American law as a whole, who made any practical use of the civil law categories "law of obligations" or "personal actions." And neither in name nor in concept was "tort" or "delict" part of the working conceptual structure used by any of these writers.

### 3. Positive Law

I previously noted Maitland's 1886 survey of the features of late nineteenth century English statute and case law that relied on the tort-contract distinction. But I left out his conclusion, which was that the collective effect of these doctrines was so slight that "the courts of the present day are very free to consider the classification of causes of action without paying much regard" to the tort-contract dichotomy.<sup>65</sup> Maitland judged the recurring attempt to fit

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61. *See id.* at 543. Note (a) (added to his third edition in 1855) describes the recently enacted procedural reforms in Ohio (which had followed New York) and other states, as well as Walker's own earlier efforts along these lines in Ohio.

62. Thus Walker did not follow Blackstone in listing habeas corpus alongside the tort suit for false imprisonment as a remedy protecting personal liberty.

63. WALKER, *supra* note 25, at 567.

64. *Id.* at 561.

65. *See* POLLOCK, *supra* note 29, at 370 (App. A).

“the now obsolete forms of action” into the civilian classification as “never important or very successful” and “foredoomed to failure.”<sup>66</sup> In his view, the rules about joinder of parties and joinder and survival of actions were neither firmly grounded nor hard and fast, and the recent statutory provisions that made awards of costs turn on whether actions sounded in tort or contract were ill-advised, but insignificant.

In addition to the factors noted by Maitland, many features of the common law as it had grown up over the centuries created difficulties for any effort to segregate its private law doctrines into the civilian categories of tort and contract. For accidental procedural reasons, the main common law action for breach of contract, *assumpsit*, had developed out of the writ of trespass on the case, which was also the basis of most of the tort actions.<sup>67</sup> The essential allegation of an “undertaking” (*super se assumpsit*) could readily be construed either as claiming a promise, which then became a binding contract with the giving of consideration, or as charging the defendant with the kind of expectation-altering causal intervention in the plaintiff’s affairs that gave rise to a duty of care in tort. This left large bodies of law arbitrarily classifiable as either contract or tort.<sup>68</sup> The liabilities of bailees for accidental damage to property,<sup>69</sup> and of persons in the common callings for malpractice,<sup>70</sup> were likewise hard to disentangle in this respect, as were the liabilities of masters to servants for workplace injuries,<sup>71</sup> and the warranty liabilities of sellers of goods.<sup>72</sup>

There were other difficulties with classifying English law under the categories of the civilian law of obligations. What, for example, was to be done with trusts and fiduciary obligations in Equity,<sup>73</sup> and with other bodies of law (like Admiralty, with its con-

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66. *Id.*

67. An excellent retelling of this oft-told tale, incorporating the latest learning, is IBBETSON, *supra* note 21, at 126-51.

68. POLLOCK *supra* note 29, at 431-32.

69. See generally Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1132-34 (1990).

70. BAKER, *supra* note 29, at 471.

71. Thus Chief Justice Shaw’s famous formulation of the fellow servant rule in *Farwell v. Boston & Worcester R.R. Corp.*, 45 Mass. 49, 53-57 (1842), was based on his characterization of the question of the master’s vicarious liability for negligent personal injury to the servant as based on contract rather than on tort.

72. IBBETSON, *supra* note 21, at 223.

73. See Jeffrey Hackney, *More than a Trace of the Old Philosophy*, in THE CLASSIFICATION OF OBLIGATIONS 123, 130-31 and *passim* (Peter Birks ed., 1997), who makes the point that the attempt to classify English law according to the civilian scheme of obligations means slighting the importance of the law of trusts, and other equitable doctrines.

cepts of salvage, and maintenance and cure) that had grown up outside the common law courts? In his own torts treatise, Pollock wrote that the attempt to classify personal actions as arising either in contract or tort could not "be defended as a scientific dichotomy" and that the civilian distinction made for "considerable perplexity" in the extensive "intersection between the two regions."<sup>74</sup>

To summarize, nothing in English law as Maitland reported it required lawyers and judges to adopt torts as a basic category of substantive law. And the ambiguous character of large bodies of important doctrine counseled against any program of sorting civil claims into categories of contract and tort. In neither respect was American law significantly different. As a result, Holmes was not defying well-established doctrine or deeply-rooted precedent, or ignoring practical necessity, when he concluded in 1871 that torts was "not a proper subject for a law book."

#### 4. An Alternative Arrangement

It is one thing to reject the category of torts or the tort-contract dichotomy in theory; it is something else to supply a workable alternative scheme of categories. As I have noted, at the time Holmes rejected torts as a subject, he was himself pursuing the Bentham-Austin project of attempting to formulate a universally applicable classification of substantive law around abstract types of legal duties (those of all to all, of some to some, etc.) Yet two years later, when he came to write "The Theory of Torts," he was on the verge of deciding that the historicity (what we would call path-dependence) of systems of law meant that no general substantive classification along the lines laid down by Bentham and Austin was practicable.<sup>75</sup> This decision might have led Holmes to conclude that, whatever the abstract merits of the analytical critique of tort, any practical taxonomy of Anglo-American substantive law had to include it as a primary category.

But in fact, shortly before he rejected torts as a subject in 1871, Holmes had already come across a proposal that seemed to meet this practical objection. John Norton Pomeroy was, like Holmes himself, one of the younger generation of scientifically minded American legal scholars who had been inspired to take on

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74. POLLOCK, *supra* note 29, at 431-32.

75. See *supra* note 46. Holmes half-heartedly continued his project of a general classification of duties in *The Theory of Torts*, *supra* note 32, at 331-34, and then abandoned it for good.

the challenges posed by the abolition of the writ system.<sup>76</sup> In 1864, he produced an entirely plausible and detailed systematic taxonomy of the substantive law that treated property and contract as fundamental categories, and yet managed very well without tort.

Pomeroy's *Introduction to Municipal Law*<sup>77</sup> was advertised as a general textbook for high-school and university students. The book was in fact an impressively sophisticated introduction to the philosophy and history of law, to comparative law (by way of an account of Roman as compared to common law), and to the legal institutions and the main outlines of the substantive law of England and the United States. We know that Holmes read Pomeroy's book in the spring of 1871, around the time he pronounced torts to be "not a proper subject."<sup>78</sup>

For our purposes, the interest of Pomeroy's book resides in its last part, his systematic exposition of substantive law. He divided his analysis into three main chapters, on persons and personal rights, property, and contracts respectively.<sup>79</sup> The latter two chapters treated their subjects in terms that would be familiar to any present-day lawyer. Indeed, Pomeroy sealed his his claim to modernity by promoting contracts from a subdivision of the law of property (as in Blackstone, Kent, and Walker) to independent categorical status.

The ideas behind Pomeroy's first chapter, on persons and personal rights, however, are less accessible to us today. The chapter was divided into sections treating "general" and "peculiar"

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76. Pomeroy (1828-1885) had a distinguished career, most of it spent as the leading member of the faculty at the University of California's first law school, Hastings College of the Law. His writings on jurisprudence, constitutional law, water law, equity, and the reformed civil procedure, were recognized as authoritative in his day. A good analysis of his work, with a biographical sketch, is THOMAS G. BARNES, *HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY* 88-116 (1978). See also Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1453-85; HOEFELICH, *supra* note 20, at 97-101.

77. JOHN NORTON POMEROY, *AN INTRODUCTION TO MUNICIPAL LAW* (1864). Pomeroy meant "municipal law" in its jurisprudential sense, as the internal law of a nation-state, to be contrasted with international law, a subject on which he wrote separately. *Id.* at 1.

78. Eleanor Little, *The Early Reading of Justice Oliver Wendell Holmes*, 8 HARV. LIBR. BULL. 163, 183 (1954). G. Edward White drew attention to Holmes' reading of Pomeroy's book in his biography, and speculated that Pomeroy might have influenced the jurisprudential views Holmes would express in *The Common Law* (1881). G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 524 n.13 (1993). Both Pomeroy and Holmes exemplified the influence on younger American legal scholars of the German historical school, with its tendency to combine conceptualist jurisprudence and historical study.

79. POMEROY, *supra* note 77, at 358-544 (§§ 622-917) (Part III, entitled *Outlines of American Municipal Law*).

rights,<sup>80</sup> the latter dealing with status-based doctrines corresponding to the Roman category of the law of persons, such as the common law of domestic relations, and of master and servant.<sup>81</sup> This was the law governing the household and other feudal remnants, designated "peculiar" because it was thought to be withering away under society's progressive evolution from status to contract.<sup>82</sup>

It was in the first section, on the general rights of persons, that we find Pomeroy's well-concealed treatment of what we call the law of tort. He did not analyze torts as a separate body of substantive law, but included civil suits for damages along with constitutional restrictions on the legislature,<sup>83</sup> and bits of administrative and criminal law, as the remedies protecting the basic primary rights.<sup>84</sup> These primary general rights were distinguished into political rights like the suffrage, and the civil rights presumptively applicable to all persons.

Pomeroy's civil rights (like Blackstone's "absolute rights" of persons in Book 1 of his *Commentaries*) were roughly the standard natural rights of liberal theory: personal security, subdivided into rights to life, body and limb, and reputation; the right to personal liberty; the rights to acquire and enjoy private property; and finally the right of religious belief and worship.<sup>85</sup> Under each right, Pomeroy catalogued the remedies, prominently including tort causes of action—but also constitutional immunities, and with a miscellany of self-help privileges, extraordinary writs, and criminal prohibitions<sup>86</sup> thrown in.<sup>87</sup>

Thus like Blackstone, Pomeroy treated the tort action for false imprisonment and the writ of habeas corpus together as reme-

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80. *Id.* at 358-454 (§§ 622-776) (Part III, Chapter I: *Persons and Personal Rights*) is divided into "persons generally, and [their] rights and dutie[s]," and "some particular classes of persons, and their peculiar rights and duties."

81. *Id.* at 429-54 (§§ 733-76).

82. MAINE, *supra* note 48, at 170.

83. *See, e.g.*, POMEROY, *supra* note 77, at 392 (§ 676) (describing the "right of religious belief and worship"). Pomeroy deals with the structure of legal institutions in an earlier part of his book that is entirely separate from his exposition of the substantive law. *Id.* at 28-213 (§§ 56-355).

84. *See, e.g., id.* at 367 (§ 636) (describing the right of self-defense as an aspect of the right of personal security).

85. *Id.* at 366-91 (§§ 634-75).

86. Pomeroy explicitly omitted any extensive treatment of criminal law in his book, on the ground that "its rules are generally based upon statutes, and are therefore very different in the several States." *Id.* at xv (Preface to the First Edition).

87. *See, e.g., id.* at 377-82 (§ 653-58) (describing how the right of personal liberty may be enforced).

dies protecting the right of personal liberty.<sup>88</sup> Under the right of property, Pomeroy joined civil suits for damages and specific relief with constitutional limitations on taxation and eminent domain.<sup>89</sup> Under the right to security of "body and limb," he described the constitutional immunity against cruel and unusual punishments, the criminal prohibition of mayhem, the privilege of self-defense against attack, and the civil damages available through tort actions for trespass and trespass on the case.<sup>90</sup>

While this arrangement recalled Blackstone, Pomeroy's treatment was actually more consistent with the modernizing spirit of Bentham and Austin.<sup>91</sup> Pomeroy's classification of substantive law was based upon primary rights, and unlike Blackstone he grouped remedies (Austin's "sanctioning rights") under primary substantive categories.<sup>92</sup> As a result, torts (a purely remedial category) formed no part of his conceptual structure. The common-law actions under the writs of trespass, trespass on the case, and trover were not treated together, but broken up and distributed as civil remedies enforcing the distinct primary rights to personal security, property, reputation, and the like.

As noted, Pomeroy showed his modernity, and further distinguished himself from the older Blackstone-Kent tradition, by treating contracts as a primary category of substantive law, equal in status to property. But the civilian division of "obligations" into contract and delict did not lead him to conclude that if contracts was a basic category, torts must be one as well. His book thus provided Holmes with a practical demonstration that torts was not a

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88. *See id.*

89. *Id.* at 388-91 (§§ 670-75).

90. *Id.* at 368-69 (§§ 638-40).

91. Pomeroy did not mention Austin, and dated the Preface to his first edition December 22, 1863; Austin's *Lectures on Jurisprudence* were published earlier that year. The spirit of analytical jurisprudence, with its central distinction between the law that is (expository jurisprudence) and the law that ought to be (censorial jurisprudence) can be seen in Pomeroy's criticism of Blackstone's definition of law in terms of "right[ ] and . . . wrong" as "either tautological or incorrect," POMEROY, *supra* note 77, at 10-11 (§§ 16-18), and his account of the common law as having been "enacted" by the judges, *id.* at 20. In the preface to the 1883 edition of *Municipal Law*, Pomeroy praised Austin as a "profoundly able and scholarly jurist," while claiming to have himself given a better account of common law adjudication. *Id.* at vii. *See also id.* at 19-20 (§§ 38-39), 23-26 (§§ 51-54), for his account of the quasi-legislative powers of common law judges. At the same time, Pomeroy expressed allegiance to traditional natural law thinking as the best guide to what the law ought to be. *Id.* at 7-8 (§ 11).

92. Pomeroy integrated the remedies enforcing individual rights with the rights themselves, whereas Blackstone had separated rights (Book 1) from remedies (Book 3). Both property and contracts, Pomeroy's other two basic divisions of law apart from "persons and personal rights," are proper legal subjects on Austinian principles, with each organized around a distinctive domain of "primary rights."



necessary component in a systematic and up-to-date account of the substantive law. An alternative categorical scheme, organized in good Austinian fashion around "primary rights," was entirely feasible.

### III. THE STRUCTURE AND DOMAIN OF TORT LAW

Two years after declaring tort law not a proper subject, Holmes published "The Theory of Torts." It was the first serious attempt in the common law world to give torts both a coherent structure and a distinctive substantive domain. Though he would both amplify and modify his account in later and better-known writings,<sup>93</sup> the essential elements of "Holmes on Torts" can be found in this remarkable 1873 article. Let me first summarize the main features of the account, and then show how the theory arose from his struggle to overcome the difficulties that had earlier led him to reject torts as a substantive category.

The central features of Holmes' account of torts, all of which remain influential to this day, were these:

- his account of negligence as conduct falling below the community's standard of reasonable care, with the determination of that standard treated as a question of law, but one usually involving the identification of social norms, and so a matter on which the judge could properly take the advice of the jury;
- the related idea that judges and other lawmakers have discretion to treat the requirement of due care either as a standard to be used in deciding individual cases, or as a principle to be specified into more particularized and determinate rules—with the consequence that many rules which make no reference to negligence or due care are nonetheless properly interpreted as falling under the negligence principle;

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93. Holmes' other primary writings on torts are his article *Trespass and Negligence*, 14 AM. L. REV. 1 (1880), reprinted in 3 WORKS, *supra* note 7, at 76; his treatment of the subject in THE COMMON LAW, *supra* note 78, primarily Chapters 3 and 4; and his article *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894), reprinted in 3 WORKS, *supra* note 7, at 371. Important supplementary aspects of his theory are found in the brief but significant passages on tort law in *The Path of the Law*, *supra* note 46, and *Law in Science*, *supra* note 7; and his concurring opinion in *Arizona Employers' Liability Cases*, 250 U.S. 400, 431 (1919). I am working on a full-scale study of Holmes' treatment of torts; here I summarize some of the conclusions of that study.

- the placement of liability for negligence at the doctrinal and practical center of the law of torts, covering “the great mass of cases;”<sup>94</sup>
- the division of tort law into three parts: intentional, negligence-based, the strict liability—with intentional and strict-liability torts treated as categories peripheral and subordinate to the central principle of liability for negligence;
- the idea that a plaintiff creates *prima facie* liability in tort by showing that the defendant has harmed him, and so does not have to show violation of an independently existing legal right or duty;
- the related idea of torts as a body of substantive law formed by the active accommodation of conflicting considerations of policy, in particular the prevention of harm, and the freedom to engage in valued activity—by contrast to the remedial conception of torts as the provision of compensatory damages for the breach of rights and duties found elsewhere in the law;
- the idea that the modern form of strict liability in tort redresses injuries caused by persons engaging in “extra-hazardous” activities,<sup>95</sup> who for reasons of policy are required to insure the safety of those they foreseeably harm.

Holmes’ great breakthrough, the innovation that allowed him to treat torts as a “proper subject” after all, was his decision to organize tort law around the principle of liability for negligence. That principle gave torts a conceptual and doctrinal center, and implicitly designated its distinctive substantive domain as accidental injuries. With its own principle and subject matter, torts could overcome the difficulties that analytical jurisprudence placed in the way of making it a fundamental legal category. But before this could happen, Holmes had to do a good deal of work on the legal concept of negligence.

### *A. Negligence: The Background*

Negligence was becoming a subject of increasing practical importance around the time Holmes wrote “The Theory of Torts.” The spread of factories, railroads, streetcars, and other technologi-

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94. *The Theory of Torts*, supra note 32, at 327.

95. *Id.* at 326-27.

cal innovations, and the associated rise in accidental injuries, meant that a good number of lawyers were making their living in whole or in part by bringing or defending negligence suits.<sup>96</sup> The growth in personal injury litigation had made negligence an appealing subject to commercial legal publishers, and the first treatise on the subject, by the Americans Thomas Shearman and Amasa Redfield, appeared in 1869, followed by two English monographs, by Robert Campbell and Thomas Saunders respectively, in 1871. The distinguished American legal writer Francis Wharton had also turned his attention to the subject, and his magisterial scholarly treatise appeared in 1874.

Unlike these more practical commentators, Holmes gave no indication that he was responding to the growth of negligence litigation in "The Theory of Torts." What motivated him to bring negligence to the center of tort law was neither a desire to sell books nor a practical concern about how the law should deal with accidental injuries. His ambition was rather to advance the project of developing a general conceptual map of the substantive law.

The conduct giving rise to negligence suits was a domain of "wrongs" that could be separated conceptually from breaches of contract, that did not involve invasions of property rights, and that were distinct from the more serious forms of wrongdoing that formed the primary focus of the criminal law.<sup>97</sup> Here was a piece of the legal map that needed a label, and the concept of tort, traditional in civil law and increasingly popular with common lawyers, seemed to fit it. What had to be worked out was the relationship between negligence and tort law.

Negligence was and remains a confusingly protean concept in the law, with at least three standard meanings, arising from two distinctions. First, it is a tort cause of action, whose conventional

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96. Both the upsurge in accidental injuries and the corresponding growth of a personal injury bar around this time are documented, with a thorough discussion of the measurement difficulties and controversies, in John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Growth of the First-Party Insurance Movement*, 114 HARV. L. REV. 690, 713-22, 758-66 (2001). For a lucid statement of how new technology often produces more accidents (and more accidents that the law will properly judge to be caused by negligence, however socially advantageous the new technology may be), see Mark Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293 (1988).

97. Pomeroy had already identified property and contract as categories of substantive law properly justified by Austinian criteria. See *supra* text accompanying notes 78-82. Walker had offered a practical definition of crimes as the "more atrocious" of the class of legal wrongs, with their "atrocious" distinguishing them from the civil wrongs as a group. See *supra* text accompanying note 64.

elements are (1) a duty of due care toward the plaintiff, (2) breach of that duty, (3) causing (4) injury to the plaintiff, with plaintiff's negligence either a defense or a factor reducing damages. This "cause-of-action" meaning, specific to tort law, is distinguishable from negligence as an element in a variety of civil actions and crimes, generally connoting the lowest legally cognizable level of fault. Negligence in this latter sense supplies the breach element of the negligence cause of action, and hence metonymically gives its name to the tort.

A second distinction then separates two competing versions of the "element" aspect of negligence—the "mental state" and the "conduct" versions. As an element, negligence might mean carelessness, a state of mind involving culpable inadvertence toward risk, or it might simply mean conduct that (irrespective of state of mind) was somewhat more risky than what a reasonable person would do. Thus under the "conduct" but not the "mental state" version, someone who proceeds after deliberately considering all risks can still be found negligent on the ground that the act was unreasonably risky when measured against the community standard.

With both distinctions in hand, we then have three senses of negligence: a "cause-of-action" sense, a "mental state (element)" sense, and a "conduct (element)" sense. Holmes argued for the "conduct" over the "mental state" version of negligence as an element, a position which has since generally prevailed.<sup>98</sup> Though he was not original in treating negligence as conduct, he seems to have been the first to give a clear statement of the distinction between the two views. He then went on to make his formulation the basis of his primary innovation—yet another sense of negligence, an overarching principle, specific to tort law, covering both the ordinary negligence cause of action and also actions basing liability on specific conduct judged by lawmakers to be unreasonably unsafe. This formulation allowed him to give a coherent account of the relation between law and fact (and so between judge and jury) in ordinary

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98. FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, 3 THE LAW OF TORTS § 16.1 (2d ed. 1986). This standard treatise summarizes the debate over whether negligence is more properly defined as conduct falling below a certain standard, or as an indifferent or inadvertent state of mind. The notion of negligence as conduct promotes administrative simplicity because it is easier to judge conduct than mental state. Moreover, it avoids leaving the cost of unreasonable behavior on innocent victims. On the other side, the state of mind approach more closely links legal liability with the moral culpability of the defendant. *Id.* In *The Theory of Torts*, Holmes distinguished between "negligence *lato sensu*" (in the broader sense), the conduct version, and "negligence *stricto sensu*" (in the narrow sense), the state of mind version, and argued that the former defined the breach element in the negligence action. *The Theory of Torts*, *supra* note 32, at 334.

negligence cases. It also supplied the basis for his claim that negligence, in the sense of his Negligence Principle, covered the central "great mass" of tort cases.<sup>99</sup>

### 1. The Negligence Cause of Action

At the time Holmes wrote, the relationship between negligence and torts was unclear and contested. After a long prehistory,<sup>100</sup> a "tort of negligence" had emerged from the action of trespass on the case to take fairly clear shape in a few prescient judicial decisions and bits of commentary during the 1860s. Thus the 1862 English opinion in the important *Swan* case stated its elements much as we understand them today: "The action for negligence proceeds upon the idea of an obligation on the part of the defendant towards the plaintiff to use care, and a breach of that obligation to the plaintiff's injury."<sup>101</sup> Of the four early treatise-writers on negligence, Saunders clearly recognized a distinctive negligence action, quoting the standard formulation in his opening paragraph,<sup>102</sup> while Shearman and Redfield, as well as Wharton, more vaguely conveyed awareness of the tort action in their discussions of "general principles" of negligence.<sup>103</sup>

On the other hand, recognition of negligence as a separate tort was by no means universal. In his monograph, Campbell did not treat negligence as a distinct cause of action, and he explicitly declined to locate his subject within the law of torts, reiterating

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99. See *supra* note 94 and accompanying text.

100. The earliest intimations of an "action on the case for negligence" in English law dated back to the second half of the eighteenth century; for the history see M.J. PRICHARD, SCOTT V. SHEPHERD (1773) AND THE EMERGENCE OF THE TORT OF NEGLIGENCE (1976), and David Ibbetson, *The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries*, in NEGLIGENCE (E.J.H. Schrage ed., 2001).

101. *Swan v. N. British Australasian Co.*, 31 Law J., Exch. 437 (1862).

102. THOMAS WILLIAM SAUNDERS, A TREATISE UPON THE LAW APPLICABLE TO NEGLIGENCE 1 (London: Butterworth's, ed., 1871) (quoting the description of the action from *Swan v. North British Australasian Co.*, 31 Law J., Exch. 437 (1862)).

103. THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 1-14, esp. 3 (1869) ("Negligence, in respect to obligations imposed by law, is therefore called tortious negligence."). They discuss contributory negligence, an aspect confined to the tort action. *Id.* at 23-57. Wharton defines negligence as "such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another." FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE 3 (1874). We have here the elements of duty, breach, cause and injury; Wharton's discussion indicates that he sees negligence straddling contract and tort, but also has a full discussion of contributory negligence, a doctrine specific to the tort action. *Id.* at 264-366.

Austin's critique of the civilian tort-contract dichotomy.<sup>104</sup> As late as the beginning of the twentieth century, Sir John Salmond was still portraying negligence as a mental element in a number of separate torts on his view, but not a separate tort.<sup>105</sup>

The ambiguous conceptual status of negligence in the emerging law of tort was also reflected in its treatment in the two established torts treatises. As already noted, both Hilliard and Addison treated tort law in an unsystematic way, moving through the recognized tort causes of action in an order revealing no clear design. There was no chapter treating negligence as one of the recognized torts in either book. However each treatise began with a rudimentary "general part" meant to address tort law as a whole, and each implicitly outlined the elements of the negligence action in this introductory part, though without any discussion of its relation to the other torts discussed in more detail in the later chapters.<sup>106</sup>

The first torts casebook produced at Harvard after the adoption of the case method, edited by James Barr Ames in 1875, contained no treatment of negligence at all, whether as a separate cause of action or an element; instead, it was limited to a treatment of torts involving intent or malice. Apparently this reflected the unfinished character of the teaching materials rather than a conscious decision to exclude negligence from the ambit of tort, but the omission of negligence from the most prestigious casebook for many years may well have influenced the profession's sense of the relative importance of the intentional and the accidental torts.<sup>107</sup>

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104. ROBERT CAMPBELL, *THE LAW OF NEGLIGENCE* 12-13 (Stevens & Haynes ed., 1871). Campbell made the Austinian argument that a breach of contract is as much a civil wrong—a breach of primary duty—as are the actions conventionally recognized as delictual, and added the point that any subcategorization of civil wrongs had to take account not only of tort and contract but unjust enrichment—the Roman *obligatio quasi ex contractu*.

105. JOHN W. SALMOND, *THE LAW OF TORTS: A TREATISE ON ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES* § 2(3) (3d ed. 1912) ("Just as the criminal law consists of a body of rules establishing special offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability."). Salmond described negligence as a mental element, *see infra* note 121, but did not treat it as a distinct tort.

106. *See* ADDISON, *supra* note 7, at 15-22; HILLIARD, *supra* note 7, at 131-39. Addison's first edition (1860) lacked any introductory general part on torts as a whole, or any account of the negligence action; its nearest approximation to the latter was a chapter, *supra* note 7, at 237-66, entitled "Of Trespasses and Injuries from the Negligent Use and Management of Chattels, and the Negligent Performance of Work."

107. When a second edition of the casebook was issued in 1893, it had an entire second volume devoted to negligence, the work of Jeremiah Smith, and a note by Ames indicated that the first edition had been left incomplete. JAMES BARR AMES & JEREMIAH SMITH, *2 A SELECTION OF CASES ON THE LAW OF TORTS*, at v (2d ed. 1893).

Holmes himself apparently did not think of negligence as an individuated tort action before the conceptual breakthrough marked by his 1873 essay. He had occasion in one of his early articles on classification to formulate a list of recognized torts (under the heading of "duties of all the world to all the world"), and he came up with "assault and battery, libel, slander, false imprisonment, and the like, considered as causes of action *civiliter*." To the same purpose, as late as 1872, he gave a similar list.<sup>108</sup> Of course his main objection to torts as a legal category was that it was no more than the name of a list—an incoherent miscellany of civil causes of action apart from contract.<sup>109</sup> But in his mind that list of torts apparently did not include negligence.

## 2. The Negligence Element

The tentative treatment of the relation between tort law and negligence by early writers on those two topics was not surprising in light of a tradition that had mainly considered negligence not as a distinct tort cause of action, but as an element of liability in a variety of civil actions ranging across a number of fields of law. In common-law commentary, negligence had mainly been treated under the law of bailments, which was considered either a fundamental legal category in itself<sup>110</sup> or a subdivision of property or contract law.<sup>111</sup> Negligence was the fault element in the bailor's claim against the bailee for lost or damaged property, and Lord Holt's judgment in *Coggs v. Bernard* in 1703 had brought into English law the civilian analysis of negligence into three degrees: gross, ordinary, and slight.<sup>112</sup> The early treatises on bailments by Sir William

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108. See *Codes, and the Arrangement of Law*, *supra* note 36, at 216; *The Arrangement of the Law—Privity*, *supra* note 46, at 305.

109. Oliver Wendell Holmes, *Book Notice*, 5 AM. L. REV. 536 (1871), reprinted in 1 WORKS, *supra* note 7 at 241, 241-42 (reviewing CAMPBELL, THE LAW OF NEGLIGENCE (1871)).

110. Bailment was actually the subject of both the first significant English-language treatise on any legal category, SIR WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS (1781), and also the first important American treatise, JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS (1832). See Simpson, *supra* note 6, at 651-52.

111. Bailment was treated as part of the contract branch of the law of obligations in Roman Law, ZIMMERMANN, *supra* note 17, at 188 (chapter on *commodatum*, *depositum*, and *pignus*), 204 (comparison to English law of bailment), and was still treated as basically contractual in Campbell's 1871 book on the law of negligence, CAMPBELL, *supra* note 104, at 12. It was treated as part of the law of property by Blackstone and Kent. 2 BLACKSTONE, *supra* note 24, at 396, 451; KENT, *supra* note 53, at 558-611.

112. *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703). The *Coggs* trichotomy held that the bailee was liable only for gross negligence if the bailment was gratuitous to the bailor (looking

Jones in England and Joseph Story in America had solidified the tradition of considering negligence—and its three degrees—mainly as an element in bailment actions. Thus when Holmes wanted to insert a summary of his new negligence-centered theory of torts into his edition of Kent's *Commentaries*, he had to make it a footnote to the Chancellor's treatment of bailments.<sup>113</sup> And both Campbell's monograph and Wharton's treatise on negligence began with an exposition of the three degrees of negligence from bailment law, emphasizing the Roman-civilian roots of the doctrine.

A further traditional locus for the discussion of negligence involved yet another area that straddled the emerging categories of contract and tort—the responsibilities of common carriers and innkeepers for accidental personal injury, and for property loss or damage.<sup>114</sup> The largest group of suits of this kind were against common carriers, who were also bailees of shipped goods. As common carriage came to be a routine commercial service, the most contested issue with respect to these liabilities was whether they could be disclaimed by notice or agreement—a decision that we associate with the question whether the liability rule should be classified under contract or tort.<sup>115</sup>

Even the writers who recognized negligence as a separate tort action had to spend most of their time discussing it as an issue of bailment and carrier law. Shearman and Redfield wrote that if they treated negligence only as a tort this would leave the profession "without any information upon several important branches,"

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after a friend's pet), liable for even the slightest negligence if gratuitous to the bailee (loaning a car to a friend), and liable for ordinary negligence where the bailment was for mutual benefit (a car rental).

113. KENT, *supra* note 53, at 561 n.1.

114. See POLLOCK, *supra* note 29, at 339-40. Innkeepers and common carriers were required by law to serve all reasonable comers, refusal to serve was a tort (the origin of our law of anti-discrimination in public accommodations), and by extension injury to a customer in the course of the required service was also a tort.

115. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, 205-07 (1977); see also Kaczorowski, *supra* note 69, at 138-44 (describing nineteenth century trend toward making the strict liability disclaimable, once it was recognized that it was a form of compulsory insurance that commercial shippers should be free to decline). For us the main consequence of placing liabilities arising out of consensual relations in tort or contract involve disclaimability; thus the decisive shift of strict product liability from contract to tort came with decisions to the effect that disclaimers of liability for product defects would not generally be upheld where they involved threats to safety. This could occur in cases that were formally based on warranty (hence arguably contractual), see e.g., *Henningsen v. Bloomfield Motors*, 161 A.2d 69 (N.J. 1960), or in cases that explicitly based the liability on a new form of strict liability in tort, see e.g., *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).



and they went on to discuss bailment and carrier cases at length.<sup>116</sup> Wharton devoted a whole section of his treatise to cases in which the duty of due care arose out of contract, thus allowing the plaintiff to elect between suing for negligence in contract or tort.<sup>117</sup> And in the bulk of his book, after his clear statement of the elements of negligence as a tort action, Saunders also mainly discussed case law in the debatable middle ground.<sup>118</sup>

In short, negligence in 1870 was just emerging as a tort cause of action, and otherwise was a concept only loosely linked to the nascent law of torts. It was much more commonly considered an element or issue in bodies of law like bailment and common carrier liability; these in turn were understood either as freestanding legal categories, or as overlapping the line between contract and tort.

### 3. Mental Element or Conduct

The further question then arose whether negligence, regarded as an element, was to be understood as a mental state—culpable carelessness—or simply as conduct that departed from the standard of the reasonable man. Holmes' first scholarly engagement with negligence involved this question. He first endorsed the concept as sufficiently "philosophical" to be a proper topic for scholarly study in one 1871 book review,<sup>119</sup> but changed his mind later that year when reviewing Campbell's *Law of Negligence* forced him to focus on the Austinian analysis of negligence as a careless or inadvertent state of mind.<sup>120</sup> The mental-state view articulated by

116. SHEARMAN & REDFIELD, *supra* note 103, at iv. The authors went on to make clear their allegiance to the tort-contract dichotomy, and to show their understanding of its civilian roots, when they wrote that "treatises expository of the common law . . . arranged in strict logical order" would have to await the coming of "some new Pothier" who would "do for America and England what the first Pothier did for France." *Id.* at iv-v.

117. WHARTON, *supra* note 103, at 393-654.

118. SAUNDERS, *supra* note 102, at 15-61 (evidence of negligence), 155-224 (negligence of attorneys, bailees, common carriers, innkeepers, physicians—the "non-stranger" situations of tort-contract ambiguity that provided most of the negligence cases)

119. Oliver Wendell Holmes, *Book Notice*, 5 AM. L. REV. 343 (1871) (reviewing SHEARMAN & REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE (2d ed. 1870)).

120. See Oliver Wendell Holmes, *Book Notice*, 5 AM. L. REV. 536 (1871) (reviewing ROBERT CAMPBELL, THE LAW OF NEGLIGENCE (1871)); see also THE COMMON LAW, *supra* note 78, at 86 n.48, where Holmes again cited Campbell "for Austin's point of view." In his detailed treatment of culpable mental states, Austin followed Bentham in distinguishing among "negligence," which in his terminology applied only to omissions, "heedlessness" or culpable inadvertance to risk, and "rashness," or culpable failure to give adequate consideration of a risk actually noted, the latter two of which applied to acts. See *Analysis of Pervading Notions*, *supra* note 49, at 425-34; Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, reprinted in 1 THE

Campbell was widely held among nineteenth century commentators,<sup>121</sup> and Holmes apparently accepted it without question on this first encounter.

Holmes' point was that if negligence was a mental state to be alleged and proved as a fact to a jury, it could only serve as an element of liability in an incoherent collection of civil cases. In other cases involving similar issues, legislation or common law doctrine premised liability on proof of specific conduct, without any reference to state of mind. Negligence understood as a factual mental state would thus not be a promising concept around which tort law, or any distinctive portion of it, could usefully be organized.<sup>122</sup> Holmes' rejection of negligence as a fruitful concept for legal analysis thus fit well with his view, expressed later the same year, that tort was not a proper substantive legal category.

An alternative to the view of negligence as a mental fact, though, was available in standard definitions given by common law judges. These treated negligence simply as conduct falling below the standard set by the reasonable man, without any reference to an inadvertent state of mind. Thus, as Baron Alderson defined it in the *Blyth* case in 1856: "Negligence is the omission to do something that a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a prudent and reasonable man would not do."<sup>123</sup> If negligence was whatever the reasonable man would not do, it was irrelevant how carefully and thoroughly the party charged with neg-

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WORKS OF JEREMY BENTHAM, *supra* note 10, at 43-44. Later writers did not generally follow these elaborate distinctions, but treated acts and omissions, both advertent and inadvertent, under the single concept of negligence.

121. Thus Shearman and Redfield defined negligence as "carelessness . . . want of care, caution, attention, diligence, or discretion, in one having no positive intention to injure the person complaining thereof." SHEARMAN & REDFIELD, *supra* note 103, at 1-2. Wharton followed Austin in carefully analyzing negligence and intent as qualitatively distinct and mutually exclusive states of mind, to be inferred as a matter of fact from the evidence in each case. WHARTON, *supra* note 103, at 11-17. The "state of mind" approach by no means passed away with the nineteenth century; it was still stated to be the law in Salmond's influential English treatise.

Negligence and wrongful intent are the two alternative forms of *mens rea*, one of the other of which is commonly required by law as a condition of liability. Each consists in a certain mental attitude of the defendant toward the consequences of his act . . . He is guilty of negligence . . . when he . . . is . . . indifferent or careless whether they happen or not . . .

SALMOND, *supra* note 105, at § 5(1).

122. And quite consistently, Salmond, a leading proponent of the "state of mind" conception, denied that tort law as a whole had any defining structure. *See supra* note 105.

123. *Blyth v. Birmingham Waterworks*, 11 Ex. 781, 784 (1856).

ligence had contemplated the risks.<sup>124</sup> Specific authority to this effect was the 1837 English case of *Vaughan v. Menlove*, upholding the denial of an instruction that a defendant could not be found negligent if he had "acted bona fide to the best of his judgment." That the defendant had done his best did not mean that he had acted as a reasonably prudent man.<sup>125</sup>

### *B. Holmes' Innovations*

#### 1. The Centrality of Negligence

Holmes made no reference to the "reasonable man" test as suggesting an alternative conduct-based conception of negligence in his 1871 review of Campbell's book. He was surely aware of the objective element in the standard negligence charge, but perhaps interpreted it as Tindal, C.J., had presented it in *Vaughan*, as an *ad hoc* practical concession to the difficulty of taking individual peculiarities into account in proving the actual mental state of the defendant.<sup>126</sup> As such, it was fully reconcilable in principle with the Austinian analysis, and this is how most of the early judges and commentators who dealt with negligence as a legal concept seem to have understood it.

But Holmes apparently continued to wrestle with the intuition that negligence was a promising concept around which to organize tort law, and at some point he broke through to the reformulation that he set out in "The Theory of Torts." Negligence was not, as ordinary usage suggested and as jurisprudential tradition maintained, a state of mind, and so a matter of fact, to be determined by the jury as present or not on the evidence in each case. Rather it was a complex legal conclusion, a determination that a public standard of conduct existed, that it applied to a party's conduct, and that the conduct fell below the standard. The "reasonable man" test was not a concession to the difficulties of proving individ-

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124. *Hover v. Barkoof*, 44 N.Y. 113, 117 (1871) (testimony of defendant engineer that he believed all necessary steps for safety of bridge had been taken was properly excluded as irrelevant and potentially prejudicial).

125. *Vaughan v. Menlove*, 3 Bing. N. C. 468, 471, 132 Eng. Rep. 490 (C.P. 1837).

126. *See id.* at 475.

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.

*Id.*

ual capacities and states of mind, but rather a substantively distinct theory of liability.

Though Holmes was the first to formulate the point clearly, this much could have been pieced together from existing doctrine, taking account of the established elements of duty (due care as the standard of conduct) and breach (violation of that standard) in the usual formulation of the negligence cause of action. All that was needed was to join these to the objective ("reasonable man") aspect of the concept of negligence, which had been stated in *Vaughan and Blyth*.

Holmes' next step, though, was more inventive. He postulated an overarching principle of objective negligence, based on the general idea of a public standard of reasonable behavior, applicable to all conduct creating risks to others. He then argued that this principle was sometimes applied as an operative standard to the facts, as in a normal negligence case, but other times it was specified, legislatively or judicially, into more particular rules defining what would be considered reasonable or unreasonable in recurring situations. This expansion of the concept of negligence brought within its ambit a wide array of legislated and judge-made tort rules that did not in so many words require "due care" or make liability turn on "negligence." These rules could nonetheless be interpreted as defining what counted as reasonable conduct for the situations they covered. This was the innovation that allowed Holmes to say that negligence (thus expansively reconceived) covered "the great mass of [tort] cases."<sup>127</sup>

Holmes' formulation did more than widen the scope of negligence; it also supplied the first clear rationale for the respective roles of judge and jury in deciding the breach issue in ordinary negligence cases. When jurors decided whether someone had acted with due care, on Holmes' theory they were *not* simply finding facts, at least not adjudicative facts about an individual litigant's state of mind.<sup>128</sup> Rather, they were endeavoring to "suggest a rule of law to

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127. See *supra* note 94 and accompanying text.

128. This was the orthodox view, stated in an unsigned book review that, on the basis of its style and content, appears to have been written by Nicholas St. John Green. See Green, *Book Notice*, *supra* note 14, at 351.

As we understand the question it is as follows: 1) Does the law impose a duty or obligation? 2) What is that duty or obligation? These are questions of law. 3) Was the conduct under investigation a violation of that duty? . . . The legal duty which is generally imposed, is to take that forethought for the rights of others which under the particular circumstances of the case might be expected from a person of mature age who is not deficient in prudence. Whether that forethought has been exercised is a question of fact. Negligence is conduct

the court" by using their knowledge of a social fact: the existence of a social norm of conduct, "the practice of the average member of the community—what a prudent man would do under the circumstances." This practice or customary conduct then served as the standard in those cases where neither legislature nor court had further specified the elements of reasonable care.<sup>129</sup>

Holmes thus brought to the center of tort law negligence reconceived in terms of conduct, which he here called "negligence *la-tiori sensu*" ("in the looser sense").<sup>130</sup> This focusing of tort law upon objective negligence was his most important innovation. He would again emphasize the centrality of negligence to torts in *The Common Law* by beginning his treatment of the subject with his Chapter 3, "Trespass and Negligence," which dealt with the choice of negligence over strict liability as the default principle for handling accidents. This left the intentional torts for subordinate treatment in Chapter 4, where Holmes applied the analysis in terms of conduct creating risk that he had already established in his discussion of negligence; intentional wrongdoing was causing harm by conduct more risky as a matter of degree mere negligence. None of the other torts commentators or treatise writers of the nineteenth century followed Holmes in either this order of exposition or this conceptual priority.

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arising from want of forethought which violates a legal duty. In our opinion negligence is a question of fact.

*Id.* at 351. Green's analysis is based on the Austinian theory, so Holmes seems not to have derived his importantly novel reconception of negligence from Green. The "mental fact" view of negligence was maintained in the face of Holmes' arguments by a great contemporary and sometime collaborator of his in James Bradley Thayer, *Preliminary Treatise on Evidence at the Common Law*, 226-29, 249-53 (1898) (negligence is a pure question of fact, but one on which, for reasons of policy, courts review the judgment of the jury more aggressively than usual).

129. *The Theory of Torts*, *supra* note 32, at 330. Holmes' account of the jury role in negligence determinations led him to propose his idea that judges would tend to reduce the standard of care to rule-like formulations in recurring situations, thereby cutting back the law-making role of the jury. His own judicial efforts in this direction were not successful in the United States. See *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934). Some now regret this, see Kenneth Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187 (2001), but Holmes' project was carried out to an extreme in England, where judicial formulations of separate type-situational standards of care proliferated to the point where more than 1000 pages of Beven's work on negligence were required to record them by 1928. THOMAS BEVEN, *NEGLIGENCE IN LAW* (4th ed. 1928). Shortly thereafter, jury trial in negligence cases was discontinued by statute. See IBBETSON, *supra* note 21, at 188-91. Holmes himself would not have wanted to go that far; he "believe[d] in our practice of leaving questions of negligence to" the jury, which helped to keep "the administration of the law in accord with the wishes and feelings of the community." *Law in Science*, *supra* note 7, at 418.

130. *The Theory of Torts*, *supra* note 32, at 334.

## 2. The Tripartite Classification of Torts

Having placed objective negligence at the center of the spectrum of tort liability standards, Holmes portrayed it in "The Theory of Torts" as bracketed by "two extremes." At one end were rules of true strict liability, both ancient and modern; at the other were rules requiring true moral culpability—intent to harm, or malice, or "negligence *stricto sensu*," meaning Austinian negligence, a culpably careless "actual condition of the defendant's consciousness."<sup>131</sup> Here we find the familiar tripartite arrangement of torts into those involving serious fault, those involving only negligence, and those requiring no fault at all. This structure would be adopted by Melville Bigelow in his *Elements of Torts* in 1878, and by Sir Frederick Pollock in his treatise in 1887—the first modern treatise on tort law—from whence it went on to become the standard organizing scheme for the subject to this day.<sup>132</sup> Bigelow explicitly and Pollock more vaguely gave due credit to Holmes as the primary innovator.<sup>133</sup>

In *The Common Law*, Holmes would retain the basic idea of a tripartite structure dominated by objective negligence in the center, with strict liability at one end. At the other end, however, he placed, not torts involving malice or intent, but rather doctrines of privilege that protected conduct from liability, sometimes even conduct willfully or maliciously doing harm, on the basis of a judgment that the conduct in question required extra breathing room from the law.<sup>134</sup>

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131. *Id.* at 327.

132. POLLOCK, *supra* note 29, at 12-14. Pollock took the additional step of comparing the tripartite organization with the Roman law concepts of *dolus*, *culpa*, and *obligatio quasi ex delicto* respectively, and hence linking the common law scheme to civilian categories. In Roman Law, *dolus* meant "fraud," but could be expanded to encompass intentional wrongdoing more generally; *culpa* could mean fault generally, or the lesser variety of fault corresponding to negligence. Pollock's equation of the Roman liability *quasi ex delicto* with strict liability has not been uniformly followed; Austin thought the Roman category incoherent, and Pothier equated it with negligence, while treating the Roman *culpa* as intentional or malicious wrongdoing. *See Analysis of Pervading Notions, supra* note 49, at 343, 497-98; POTHIER, *supra* note 52, at 73 (noting tort is an act causing damage through "fraud or malice," quasi-tort act causing damage "without malice, but through inexcusable imprudence"). A valuable analysis of Roman law influences on the nineteenth-century development of negligence doctrine is David Ibbetson, *supra* note 18.

133. POLLOCK, *supra* note 29, at vi; MELVILLE BIGELOW, *ELEMENTS OF THE LAW OF TORTS* at v (1878). Eventually the tripartite scheme would become standard in the organization of American tort casebooks, at least with JAMES BARR AMES & JEREMIAH SMITH, *A SELECTION OF CASES ON THE LAW OF TORTS* (Roscoe Pound ed., 1916).

134. THE COMMON LAW, *supra* note 78, at 128.

The theory of torts may be summed up very simply. At the two extremes of the law are rules determined by policy without reference of any kind to morality.

The categories of intentional (or malicious) torts on the one hand and privileged activity on the other are closely connected under Holmes' theory of torts. If, as Holmes argued, liability for negligence is the default rule in tort law, to require intent or malice for liability is to protect that class of risky conduct by a qualified privilege to inflict harm negligently. Holmes finally got his views clear on the relation between privilege and serious wrongdoing in "Privilege, Malice, and Intent" in 1894,<sup>135</sup> arguing that the law grants privileges protecting socially valued conduct like the owner's free use of land, or the entrepreneur's freedom to start a business, but normally withdraws those privileges in cases of injury inflicted out of pure malice. In the 1894 essay, Holmes also returned to the tripartite structure as he had formulated it originally in 1873, and as we generally understand it today, dividing torts into those involving malice or intent, negligence (the general rule), and strict liability for mere "mischance."<sup>136</sup>

### 3. Objective Negligence as Compromise

Partaking of both moral fault and no-fault, objective negligence mediated between the two poles of the tort spectrum. "Actual fault" or blameworthiness was an important influence, invoking as it did socially defined standards of prudent conduct. But the objective element could also be seen as itself a kind of strict liability, motivated by each person's right to expect normal conduct of (even abnormal) others, and by a policy of putting deterrent pressure for

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Certain harms a man may inflict even wickedly; for certain others he must answer, although his conduct has been prudent and beneficial to the community. But in the main the law . . . adopted the vocabulary, and in some degree the tests, of morals.

*Id.*

135. *Privilege, Malice, and Intent*, *supra* note 93.

136. *Id.* at 371-72 ("If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance."). *Privilege, Malice, and Intent*, *id.* at 372-77, also provided the structure of another of Holmes' innovations in tort theory, what became known as the doctrine of *prima facie* intentional tort. See *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904) (Holmes, J.); Kenneth Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447 (1990). This doctrine provided the conceptual underpinnings for Holmes' celebrated dissents in labor injunction cases in the late 1890s, the opinions that probably convinced Theodore Roosevelt to appoint him to the United States Supreme Court. See *Plant v. Woods*, 57 N.E. 1011, 1015 (Mass. 1900) (Holmes, J., dissenting); *Vegeahn v. Guntner*, 44 N.E. 1077, 1079 (Mass. 1896) (Holmes, J., dissenting); see also WHITE *supra* note 78, at 300 (identifying labor dissents as "strong point in Holmes' favor" for Roosevelt).

safety on socially useful but more than usually risky activities. Thus the legal attribution of negligence was not ultimately constrained by moral (which in Holmes' usage meant purely internal) conceptions of personal virtue or wickedness.<sup>137</sup>

In Chapter 3 of *The Common Law*, Holmes took care to emphasize that the principle of objectivity was not simply based on the evidentiary difficulties involved in taking account of "minute differences of character," the ground that had been given for the objective test in *Vaughn v. Menlove*.<sup>138</sup> A "more satisfactory" reason for the objective standard was substantive. A naturally hasty or awkward person's slips, he said, were "no less troublesome to his neighbors than if they sprang from guilty neglect." Tort liability in such cases, though not based on actual moral fault, was "necessary to the general welfare."

Holmes' point in this passage was that the victim's expectation of normal behavior from others in risky interactions deserves the law's protection as much as does the injurer's expectation that he will not be penalized if he does the best he can. Both expectations cannot be entirely fulfilled, and the law treats both equally when it strikes the compromise embodied in the objective standard. Moreover, Holmes made it explicit that the objective standard of negligence *was* a compromise between true fault and strict liability—a "middle point between the horns of this dilemma."<sup>139</sup> This middle way could be seen in two aspects: either as striking the equitable balance required by corrective justice,<sup>140</sup> or (more function-

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137. See 2 HOWE, *supra* note 12, at 169-70, 176-78 (citing standard nineteenth century criminal law treatises for the individual moral approach to fault). Howe describes this approach as Kantian, referring to Kant's theory of personal ethics, which locates all virtue in the good will. This is a common misattribution. Kant, who insisted on a sharp separation of public justice from the ethics of private virtue, himself held an external theory of legal liability very much like Holmes' (as Holmes was quite aware—he had noted it in the French translation of the *Rechtslehre* that he read, *id.* at 178 n.48). When Holmes speaks against confusing "morality" with law, it is almost always traditional Christian morality that he has in mind—the morality that "see[s] men as God sees them," THE COMMON LAW, *supra* note 78, at 86, and hence considers a sin in the heart to be of the same order as a sin in deed. Holmes' understanding of the Kantian distinction between external legal justice, and subjective and inner ethical virtue, is suggested by the conclusion of Chapter 1 of *The Common Law*, where he insists that on the one hand "the terminology of morals is still retained, and . . . the law does still and always, in a certain sense, measure legal liability by moral standards," while on the other hand "by the very necessity of its nature, [it] is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated." THE COMMON LAW, *supra* note 78, at 33. Holmes' equivocation with the word "moral" here is consistent with a Kantian division of the realm of morality between a sphere of objective justice, and one of inner ethical virtue.

138. See *supra* note 126.

139. THE COMMON LAW, *supra* note 78, at 86.

140. As argued by WEINRIB, *supra* note 4, at 177-83.



ally) as a compromise between the two lines of deterrence-based argument favoring negligence and strict liability respectively.<sup>141</sup>

#### 4. Harm, and the Domain of Torts

In *The Common Law*, Holmes would explicitly formulate the evil against which tort law was directed as the doing of harm, rather than the infringement of rights or the violation of duties. The general question for the law to answer was when "a man is liable for *harm* which he has done."<sup>142</sup> The purpose of torts was "to secure a man against certain forms of *harm*," and to sanction the acts causing them "not because they are wrong, but because they are *harms*."<sup>143</sup> The general principle was that "[m]ost liabilities in tort . . . are founded on the infliction of harm which the defendant had a reasonable opportunity to avoid."<sup>144</sup>

Not every interest whose infringement counted as harm established a right; not every doing of harm violated a duty. The concrete rights and duties of the law had to be spelled out by striking a balance between the social interests in preventing the doing of harm on the one side, and protecting freedom of action on the other. To make every harm to an individual's interests a wrong "would interfere with other equally important enjoyments on the part of his neighbors." Hence the law privileged certain acts against liability even though the actor foresaw "that harm to another will follow from them."<sup>145</sup> Holmes' point in using this terminology was to em-

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141. For the deterrent case supporting strict liability, see *Arizona Employers' Liability Cases*, 250 U.S. 400, 431 (1919) (Holmes, J., concurring); negligence liability serves to deter unsafe conduct by designating individual unreasonably unsafe acts, rather than identifying risky activities that are the cheapest cost-avoider of injuries jointly caused by their interaction with other activities. Holmes was generally careful to preserve the neutrality of his account of tort law between a forward-looking account emphasizing deterrence, and a retrospective one based on corrective justice. See THE COMMON LAW, *supra* note 78, at 115 (aim of tort law to "prevent or indemnify from harm"); *id.* at 116 (purpose of tort law "to prevent or secure indemnity from harm at the hands of his neighbors"); *Privilege, Malice, and Intent*, *supra* note 93, at 371 (Tort law "recognizes temporal damage as an evil which its object is to prevent or to redress . . .") (emphasis added). In this he followed Austin, who distinguished civil relief from criminal punishment on the ground that whereas the latter was justified solely by its deterrent effect, the former served the dual purpose of prevention and redress. See *Analysis of Pervading Notions*, *supra* note 49, at 503-04; see also *supra* note 51.

142. THE COMMON LAW, *supra* note 78, at 64.

143. *Id.* at 115.

144. *Id.* at 116.

145. *Id.* at 115. In *Privilege, Malice, and Intent*, *supra* note 93, at 371-72, Holmes further refined his account: tort liability was triggered by "temporal damage" to plaintiff, by an act of the

phasize that the rights and duties established in tort decisions were not premises taken from pre-existing law, but conclusions shaped by the judges' traditional common law power to strike the community's balance between freedom and security. Torts was thus an autonomous body of substantive law.

Holmes did not yet explicitly formulate the idea of harm as the trigger in "The Theory of Torts." But he avoided the conventional formulation of negligence as breach of a duty of care, which implied a standard of conduct based on pre-existing rights and duties found elsewhere in the law. Property law spelled out such a body of independent rights, but there was no independent "law of bodily security" parallel to property law, and Holmes' innovations shifted emphasis toward the personal injury case. Instead of duty and breach, Holmes simply spoke of the "standard of conduct," and went on to offer his analysis of the respective roles of judge and jury in formulating that standard.<sup>146</sup>

Under the more familiar formulation in terms of duties (with their correlative rights), tort was essentially remedial, providing civil damage awards for violations of primary norms established in other departments of law. Thomas Cooley implied as much in his influential torts treatise of 1879, which thus failed to designate any distinctive primary conduct for tort law to govern.<sup>147</sup> By contrast, Holmes made torts a system of positive claims and liabilities aimed at preventing or redressing secular harms, thus rescuing the subject from his own Austinian critique of it as merely a remedial category.<sup>148</sup>

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defendant whose "manifest tendency" was to inflict such damage, subject to privileges that exempted defendant from liability if his act was done with "just cause."

146. *The Theory of Torts*, *supra* note 32, at 327-31.

147. After a sophisticated discussion of the power of "judicial legislation" possessed by common law judges, THOMAS COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARE INDEPENDENT OF CONTRACT 11-19 (1879), Cooley laid the basis for his presentation of tort doctrine with a chapter entitled "General Classification of Legal Rights," *id.* at 23, which dealt with "security in person," "security in the acquisition and enjoyment of property," and "security in the family relations[.]" *id.* at 29. The latter two classes of rights were defined elsewhere in the law, of course, and "personal rights" were defined by the protections offered them by criminal as well as tort law. The connections of tort law to other aspects of the law are emphasized by such an arrangement; but its unity and its coherence as a subject in its own right are not as clear. We still speak of many tort causes of action mainly in terms of the rights they protected—thus "the right of privacy," and the tort remedies for violations of constitutional rights by government officials. See David Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769, 769-92 (1990), for a good discussion of the distinction between right-based and harm-based accounts of tort law, using Cooley and Holmes as representatives of the two tendencies.

148. Holmes did not make a dogma out the formulation in terms of harm, but sometimes himself stated tort doctrines in terms of rights and duties, as with his justification of the last

The connotations of the formulation in terms of harm gave torts a grander part indeed. A modern government's main job, specified by nineteenth century liberal theory as formulated by John Stuart Mill in *On Liberty*, was to deal with conduct doing "harm to others."<sup>149</sup> When contractual liability was treated in traditional liberal fashion as non-coercive because based on consent, the rules of tort liability could be seen as Holmes described them in *The Common Law*, as the law's authoritative baseline of "the conduct which every one may fairly expect and demand from every other, whether that other has agreed to it or not."<sup>150</sup>

Though in the 1873 article Holmes had yet to formulate tort law in terms of harm as such, he did anticipate the later move in his answer to his own earlier objection that torts had no proper substantive domain. He boldly affirmed that torts was indeed a proper subject because "an enumeration of the [tort] actions which have been successful, and of those which have failed, defines the extent of the primary duties *imposed* by the law."<sup>151</sup> Holmes' point was that it is mainly through tort law, its mildest vehicle of coercion, that the state draws the line between the acts it will regulate and those it will leave alone.<sup>152</sup> Tort thus deals with the space between contract and crime—imposing liabilities based on wrong rather than consent, but wrong that is not serious enough to merit punishment.<sup>153</sup> It is a space dominated by accidental injuries negligently caused. These wrongs constitute the special domain of torts, the subject-matter that makes it an important branch of the substantive law. The "law of bodily security" and its correlative "law of personal liberty" is made up of the rules of tort and criminal law, and because tort is the less drastic mode of the two modes of coer-

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wrongdoer rule in *Privilege, Malice, and Intent*, *supra* note 93, at 377-79, and his denial of tort recovery for foreseeable pecuniary loss from a negligent breach of contract to someone who was neither a party to the contract nor an intended beneficiary. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-09 (1927).

149. JOHN STUART MILL, *ON LIBERTY* 1-2 (1859). Mill's formulation in terms of harm marks the modern shift of liberal theory away from the earlier Lockean formulation in terms of natural rights.

150. *THE COMMON LAW*, *supra* note 78, at 63.

151. *The Theory of Torts*, *supra* note 32, at 331 (emphasis added).

152. *Cf.* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (treating a tort rule granting damages for defamation as a law abridging the freedom of the press).

153. And, we might add, wrongdoing that is not serious enough to justify either granting punitive damages to those injured by it, or prohibiting liability insurance as contrary to public policy.

cion, it draws the law's most basic line between freedom and protection.<sup>154</sup>

### 5. Strict liability and Extrahazardous Activities

Holmes' centering of torts around its lowest cognizable level of wrongdoing, ordinary negligence, naturally raised the question whether his theory required that conduct must be wrongful (blameworthy) at all in order to be tortious. His answer was clear; both in "The Theory of Torts" and in *The Common Law* he accepted liability without fault as a legitimate if relatively peripheral part of tort law. Later he would come to recognize that the idea of enterprise liability might even make strict liability central, though he never actually endorsed recasting tort theory along those lines.<sup>155</sup> But from the first, Holmes recognized the English courts' modern recognition of strict liability in *Rylands v. Fletcher* as good law, and he never joined forces with the many prestigious judges and commentators of his period who believed that the conceptual purity of tort law, or liberal principles of formal equality and economic freedom, or a devotion to economic development required rejection of tort liability without fault.<sup>156</sup>

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154. Tort law of course overlaps with criminal law in the area of serious wrongdoing, where it provides redress for harms resulting from crimes. But its distinctive subject matter is the wrongs not serious enough to be made crimes.

155.

Our law of torts comes from the old days of isolated, ungeneralized wrongs . . . But the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses.

*The Path of the Law*, *supra* note 46, at 397. Jury behavior in workplace injury cases shows that "the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal." *Id.*; see also *Arizona Employers' Liability Cases*, 250 U.S. 400, 432 (1919) (Holmes, J., concurring) (giving insurance rationale to justify constitutionality of statute imposing employer strict liability for workplace injuries). For my doubts that Holmes ever actually accepted enterprise liability, see *infra* note 170.

156. Most notable to this effect was *Brown v. Collins*, in which Judge Doe quoted Holmes' passage from *The Theory of Torts* interpreting *Rylands* as imposing liability for "extra-hazardous activities," and expressly repudiated it as carrying liability too far. *Brown v. Collins*, 53 N.H. 442, 445-46 (1873); see also *Ives v. S. Buffalo Ry.*, 201 N.Y. 271 (1911) (striking down New York statute that held employers strictly liable for employee injuries on grounds that constitution prohibits liability without fault); *Losee v. Buchanan*, 51 N.Y. 476 (1873) (refusing to impose strict liability for exploding steam boiler, rejecting *Rylands*); COOLEY, *supra* note 147, at 81 ("That which is right and lawful for one man to do cannot furnish the foundation for an action in favor of another."); Smith, *supra* note 30 (proposing exclusion of strict civil liability from field of tort on

Nor did Holmes regard existing strict liability rules merely as survivals from a more primitive era.<sup>157</sup> In "The Theory of Torts," he explicitly distinguished between "ancient examples . . . traceable to conceptions of a much ruder sort," and modern rules based on "more or less definitely thought out views of public policy." He put the *Rylands* doctrine in the latter category, justified by "the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders."<sup>158</sup> This is, so far as I know, the first use of the "extrahazardous" concept, though common-law courts had often justified pockets of strict liability by arguments of policy.<sup>159</sup>

Holmes supported strict liability for extrahazardous activities with an insight he had developed in the jurisprudence course he taught at Harvard in 1872.<sup>160</sup> He argued that civil liability did not always imply a legal duty, an "absolute wish" on the part of the sovereign to prohibit the conduct in question. Compensatory damages were sometimes imposed on permitted conduct to make the actor pay the price, as in the case of private eminent domain; and in other cases damages could be imposed to discourage an activity

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ground that fault should be essential to tort liability); Ezra Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801, 814-15 (1916) (stating that fundamental principle of the common law is that liability is linked to fault). For Pollock's more nuanced opposition to *Rylands*, see Frederick Pollock, *Duties of Insuring Safety: The Rule in Rylands v. Fletcher*, 2 L.Q. REV. 52 (1886), and POLLOCK, *supra* note 29, at 393 (explaining that "the ground on which a rule of strict obligation has been maintained and consolidated by modern authorities is the magnitude of the danger, coupled with the difficulty of proving negligence as the specific cause, in the particular event of the danger having ripened into actual harm"). See also DAVID ROSENBERG, *THE HIDDEN HOLMES* 147-59 (1995) (showing that Holmes was not interpreted as a critic of *Rylands* in his own time).

157. Cf. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 97-99 (1908). Holmes did believe that the generalized strict liability of employers for the torts of their employees, and of common carriers for goods, were survivals, and could not be justified at their full scope by the policies that were cited in their behalf. But he thought in both cases that enterprise liability might justify the liability of corporate or other business defendants under these doctrines. See Oliver Wendell Holmes, *Agency I*, 4 HARV. L. REV. 345, 353-63 (1891), reprinted in 3 WORKS, *supra* note 7, at 347-54; Oliver Wendell Holmes, *Agency II*, 5 HARV. L. REV. 1, 14-23 (1891), reprinted in 3 WORKS, *supra* note 7, at 364-71; Oliver Wendell Holmes, *Common Carriers and the Common Law*, 13 AM. L. REV. 609 (1879) [hereinafter *Common Carriers*], reprinted in 3 WORKS, *supra* note 7, at 60, 61, 74-75.

158. *The Theory of Torts*, *supra* note 32, at 326.

159. For example the strict liability of carriers for loss of goods was justified on the twin policy grounds of the shipper's lack of access to proof of a carrier's fault, and the need to deter carriers from colluding with robbers. See Kaczorowski, *supra* note 69, at 1135-37. Holmes thought these policy arguments were largely bogus rationalizations of a "survival" that derived from the ancient strict liability of all bailees, established at a time when the owner had no remedy over against a thief who stole from the bailee. *Common Carriers*, *supra* note 157, at 61.

160. See Oliver Wendell Holmes, *Law Magazine & Review*, 6 AM. L. REV. 723 (1872) [hereinafter *Law Magazine & Review*], reprinted in 1 WORKS, *supra* note 7, at 294, in which Holmes used the excuse of a book review to summarize what he had taught in the course.

without prohibiting it, a kind of private analog to an excise tax on liquor or a protective tariff.<sup>161</sup> Where the sovereign had a genuinely mandatory intent, plenty of serious legal remedies were available—for example, criminal punishment, injunctions, and punitive damages. So the choice to impose compensatory damages as the sole remedial consequence of conduct left open the possibility that the lawmaker did not intend a prohibition.<sup>162</sup>

Austin had treated civil liability as equivalent to punishment, and so invariably expressing the sovereign's prohibition of the conduct in question. Holmes' point was that the relatively weak remedy of compensatory damages could be made available for harm caused by conduct that was thought justified as long as the price was paid. A primary example he had used in his jurisprudence course was the strict liability imposed for "injuries from extra-hazardous sources." And to illustrate that the decision whether or not to impose tort liability could turn on policy considerations independent of the defendant's wrongdoing, he noted that the usual strict responsibility for straying animals was relaxed in some western states, where the impracticability of fencing made it too much of a burden on essential economic activity.<sup>163</sup>

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161. This insight, one of Holmes' most original, underlies much current literature—including the idea that civil liability characteristically charges a price, while criminal penalties inflict punishment, see Coffee, *supra* note 51; the distinction between property rules and liability rules, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); the theory of efficient breach in contract, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 107 (3d ed. 1986); and the idea that strict liability in tort might be used to encourage efficient activity levels for lawful forms of conduct, see S. SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5-46 (1987).

162. It is useful to keep Holmes' limited point about the compensatory damage remedy distinct from the more general skepticism he sometimes expressed about the grounding of law in a deontological morality of rights and duties. The two are often conflated (as they sometimes were by Holmes himself). See, e.g., John C. P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1737-43 (1998). As the discussion in the text shows, the narrower doctrine depends on the existence of genuinely peremptory legal duties and rights, evidenced by remedies more stringent than compensatory damages. Under this analysis private law, where compensatory payment is the standard remedy, is then seen as an arena for the "civil" (in all senses) adjustment of human friction, and not involving rights that are to be "taken seriously" in the sense that they are meant to trump policy judgments.

Corrective-justice views of tort law are entirely consistent with this view, if, like Ernest Weinrib's version, they give no trumping effect to the rights they recognize, and so place no obstacle in the way of legislative decisions to limit or even abolish tort law public policy grounds. See WEINRIB, *supra* note 4, at 210-12. Taking private law as a domain of serious (trumping) rights comes most naturally to libertarians; it condemns workers' compensation as unjust, as in *Ives v. South Buffalo Railway*, 201 N.Y. 271 (1911), and carried out consistently would treat New Zealand as a human rights violator for its abolition of tort claims for negligent injury.

163. *Law Magazine & Review*, *supra* note 160, at 297.

Holmes reiterated his support for the legitimacy of strict liability in his more complete treatment of torts in *The Common Law*. Again arraying tort rules along a spectrum, with objective negligence covering the great middle area, Holmes added for the first time a discussion of the imposition of strict liability on grounds of corrective justice as well as instrumental policy.<sup>164</sup> He also emphasized and amplified a point he had made in "The Theory of Torts"—that the rules resulting from specification of the negligence principle were often difficult to distinguish from strict liability rules laid down for reasons of public policy. Not only was strict liability legitimate in itself, but it also faded off by indistinct degrees into the category of rules specifying what should count as due care in recurring situations.<sup>165</sup>

On the basis of Chapter 3 of *The Common Law*, Holmes has often been misread as a champion of the principle of no liability without fault. His best-known torts passage is the one in which he argued that losses should presumptively lie where they fall, and that fault alone justifies shifting them. He counseled that if society wanted to cushion no-fault losses, such insurance decisions were better left to the market.<sup>166</sup> More decisively, shifting losses through tort would not insure the loss by spreading it, but would rather arbitrarily shift it to an individual defendant who was only the

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164. He did this in cases of private takings such as later theorists have discussed mostly in connection with *Vincent v. Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910). Holmes discussed the issue in connection with the old English case of *Gilbert v. Stone*, 82 Eng. Rep. 539 (K.B. 1648), in which the defendant stole plaintiff's horse under duress of a threat to his life, and was nevertheless held civilly liable to the owner. *THE COMMON LAW*, *supra* note 78, at 118. *Cf.* *Spade v. Lynn*, 172 Mass. 488, 489 (1899).

It is a question which deserves more discussion than it has received, whether a man is answerable for an injury inflicted upon an innocent stranger knowingly, or with sufficient notice of the danger, if the injury is an unavoidable incident of lawful self-protection. It might be said, and it has been held, when it is a question of paying damages, that a man cannot shift his misfortunes to his neighbor's shoulders.

*Id.* (citations omitted). For the classic discussions of the *Vincent* doctrine, see Francis Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307 (1926); Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959). Some corrective justice theorists analyze liability of the *Vincent* type as based on unjust enrichment rather than tort. *See, e.g.*, WEINRIB, *supra* note 4, at 196-98.

165. He discussed a number of older rules of strict liability to illustrate "the difficulty of distinguishing rules based on other grounds of policy [i.e. strict liability rules] from those which have been worked out in the field of negligence." *THE COMMON LAW*, *supra* note 78, at 121-26.

166. "The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members . . . Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise." *Id.* at 78.

chance instrument of the plaintiff's loss. This would not only be unwise, but unjust.<sup>167</sup>

In that famous passage, Holmes was debating which principle should *generally* govern accidental injuries, fault or strict liability. He vigorously supported fault as the ruling general principle,<sup>168</sup> but we must remember that this is the same Holmes who is famous for insisting that "general principles do not decide concrete

167.

The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would . . . be open to . . . the still graver [objection] of offending the sense of justice. Unless my act is of a nature to threaten others . . . it is no more justifiable to make me indemnify my neighbor against the consequences, than to . . . compel me to insure him against lightning.

*Id.* at 77-78. The latter argument is the one he would qualify in the 1890s, recognizing that strict tort liability placed upon enterprises was indeed genuine (if compulsory) insurance, because its cost could be statistically predicted and spread to the customers. *See supra* note 155.

168. This is where David Rosenberg errs, in seeing Holmes as arguing, not for fault over strict liability, but for a restricted form of strict liability ("foresight-based") over a more extensive ("cause-based") form. ROSENBERG, *supra* note 156, at 5-6. I believe that Rosenberg is led astray by the fact that Holmes' account of negligence treats the creation of a substantial risk of injury as culpable, without explicitly taking account of the cost of avoidance; this makes his version of negligence resemble some present-day descriptions of strict liability. But Holmes simply held to the "non-balancing" interpretation of negligence that was usual in his day, and that is still advocated by many, as a proper interpretation of what should count as culpable behavior. *See Bolton v. Stone*, 850 A.C. 867 (1951) (Lord Reid's speech provided the standard citation for the non-balancing conception of negligence in Commonwealth law); WEINRIB, *supra* note 4, at 147-52; Richard Wright, *The Standards of Care in Negligence*, in *THE PHILOSOPHICAL FOUNDATIONS OF NEGLIGENCE* 249, 251 (David G. Owen ed., 1995) (arguing that as a matter of positive law the Hand balancing test fails to explain how the courts treat negligence); Stephen Perry, *The Impossibility of General Strict Liability*, 1 *CANADIAN J.L. & JURISPRUDENCE* 147, 169-71 (1988). In American case law and commentary, the balancing conception of negligence did not become popular until at least a generation after Holmes wrote. *See* Michael D. Green, *Negligence = Economic Efficiency: Doubts*, 75 *TEX. L. REV.* 1605 (1997).

Holmes made very clear that the main standard of liability he argued for was fault-based (albeit objective) negligence, which was rooted in blameworthiness. Thus the reason there was no liability in the typical horse rundown case where nothing suggested special danger was that "the defendant is not to blame." *THE COMMON LAW*, *supra* note 78, at 75. And with respect to the early English cases "liability *in general*, then as later, was founded on the opinion of the tribunal that the defendant *ought to have acted otherwise, or, in other words, that he was to blame.*" *Id.* at 82 (emphasis added). He summarized "the *general notion* upon which liability to an action is founded" as "*fault or blameworthiness in some sense.*" *Id.* at 85 (using "some sense" to refer to the objective test) (emphasis added). He referred in passing to "[t]he rule that the law does, in general, determine liability by *blameworthiness*," *id.* at 87 (emphasis added), and, again in a self-conscious summary, said that the law does not "*in general*" hold a man liable for unintended injury unless "he might and *ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did,*" *id.* at 88 (emphasis added). In "*some cases*" (by contrast to the general case) lawmakers "put the mark higher . . . than the point established by common practice at which *blameworthiness* begins." *Id.* at 92 (emphasis added). And after the more extended discussion of the exceptional cases of strict liability in Lecture IV, Holmes finally summarized his doctrine as "*in the main*" deriving the test of tort liability from popular moral notions of blame, objectified, that is: "whether [defendant's] conduct would have been *wrong* in the fair average member of the community." *Id.* at 128 (emphasis added).



cases."<sup>169</sup> Principles to him were not absolutes. This did not mean they were empty or useless; rather they served as guidelines and default rules, subject to exceptions and decreasingly applicable by degree as they diverged from their paradigm instances.<sup>170</sup>

The structure of Holmes' tort theory well illustrated these aspects of his treatment of legal principles. His general principle of liability was negligence, which provided the conceptual center for tort law, covered "the great mass" of cases, and supplied the default doctrine. But it allowed for exceptions at both ends of the continuum it dominated. At times something more than negligence was required for liability, as with the intentional torts. (Indeed, sometimes even intentional wrongdoing was not enough, and the law granted an absolute privilege.) Objective negligence shaded into deliberate wrongdoing at that end of the spectrum, as courts first found intent or malice from knowledge of facts suggesting a very high likelihood of injury, and then eventually came to equate intent or malice in the legal sense with this knowledge.

At the other end of the spectrum were another group of exceptions to the principle that based liability on objective negligence. Sometimes the law imposed strict liability for policy reasons of deterrence, as with extra-hazardous activities,<sup>171</sup> and other times it did so on the basis of a principle of corrective justice.<sup>172</sup> No sharp

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169. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

170. Indeed he gave the first formulation of this central idea of his jurisprudence in *The Theory of Torts*, *supra* note 32, at 330-31 (describing the "core-penumbra" structure of most general legal concepts). In the *Lochner* dissent, he noted that while general principles do not "decide" cases, they can "carry us far toward the end." *Lochner*, 198 U.S. at 75.

171.

There is no more certain way of securing attention to the safety of the men . . . than by holding the employer liable for accidents . . . [T]hey probably will happen a good deal less often when the employer knows that he must answer for them if they do.

*Arizona Employers' Liability Cases*, 250 U.S. 400, 432-33 (1919) (Holmes, J., concurring). To make the deterrence argument convincing, the party to the interaction who is made strictly liable should have most of the opportunities for taking care. See William Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1751 (1992); see also WILLIAM M. LANDES & RICHARD R. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW*, 310-11 (1987) (pointing out in regards to worker's compensation that making employers strictly liable reduces workers' safety incentives). Holmes may well have doubted that this asymmetry obtained in the hazardous employment situation, and it seems unlikely he would have voted for employer liability or worker's compensation laws as a legislator; thus he told a correspondent in 1908 that "little as I liked the Act" he had voted to uphold the constitutionality of the Federal Employers' Liability Act. *THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN, 1903-1935*, 33-34 (James Bishop Peabody ed., 1964).

172. This is the *Gilbert v. Stone* idea, which Holmes confined to intentional torts in *The Common Law*. See *supra* note 148. Later Holmes came to see that a version of the *Gilbert* argu-

line divided the domains of fault and strict liability; they shaded into each other where rules could plausibly be characterized either as specifying negligence or as implementing the policies behind strict liability.<sup>173</sup>

#### IV. CONCLUSION

Despite his famous jurisprudential slogans on behalf of a functional approach to legal theory, Holmes was not a jurist who habitually took careful account of social facts or even generally showed sound practical judgment on questions of public policy. As he admitted himself on occasion, he was really a philosophically-minded legal theoretician with deficiencies as a policymaker.<sup>174</sup> Had he been a more practical sort, we might imagine that he shrewdly observed the surge of litigation over accidental injuries stemming from technological and industrial developments, and then consciously shaped his theory of torts to center it around an idea (objective negligence) that was particularly well-suited to this newly dominant subject matter.

But given Holmes' intellectual proclivities, any such practical insight or motivation is unlikely, and there is no evidence for it in his writings on torts. Rather his published essays leading up to 1873 show him single-mindedly pursuing the jurisprudential project of systematic reclassification of the substantive law. Here as elsewhere, he wanted to connect his work in law to the great world of ideas, to science and philosophy. The reward he wanted was the approval of the few fellow legal scholars and thinkers whose opinion

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ment supported forms of enterprise liability like workers' compensation. *See supra* note 155. Thus in the *Arizona* case he gave it as an alternative rationale for the statute:

It is reasonable that the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production.

By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just.

*The Arizona Employers' Liability Cases*, 250 U.S. at 433.

173. THE COMMON LAW, *supra* note 78, at 92-96, 121-26.

174. A point familiar to torts professors who every year teach *Baltimore & Ohio Railroad v. Goodman*, 275 U.S. 66, 70 (1927), *overruled by* *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 105-06 (1934), the decision in which Holmes (who had never driven an automobile) undertook to legislate for the whole nation a safety rule requiring motorists at railroad crossings to get out of their cars to look along the tracks when their view was obstructed. Holmes was aware of his deficiencies as a practical policy-maker; thus he contrasted Chief Justice White's attention to "the practical effect of the decision," properly its "ultimate justification," with his own tendency to "think of [the decision's] relation to the theory and philosophy of the law." HOLMES-SHEEHAN CORRESPONDENCE 58 (David H. Burton ed., 1976); *see also* Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19, 39-40 (1995) (providing similar Holmesian acknowledgements of fallibility).

he respected. And his ultimate hope was that his ideas might enter into the fabric of the law and eventually exercise power over events.<sup>175</sup>

In the law, theories, however brilliant, do not thrive unless they also serve significant interests. John Norton Pomeroy had ideas about the organization of the law that, simply regarded as ideas, may have been as good as Holmes'—yet no one remembers them. Holmes' theory of torts turned out to have practical strengths that he never claimed for it, and that he may never have realized it possessed. Above all, his approach centered tort doctrine around its emerging primary source of litigation, accidental personal injuries. At the same time, it established a doctrinal framework flexible enough to allow a remedial structure originally grounded in intuitions of corrective justice to be adapted without too much strain to modern regulatory and compensatory uses.

It is natural to wonder how much Holmes' theory mattered. First, to what extent did his conceptual innovations influence the way we talk about torts today? And then, how much does the way torts teachers and academic commentators conceive and structure the subject affect the working tort law? On the first question, I would ascribe considerable influence to Holmes on the basis of the evidence I have set out here. On the second, though, little more than speculation seems justified. There is always room for skepticism, in an enterprise whose life is more experience than logic, about the influence of categorical arrangements and high-level doctrine on the law in action.<sup>176</sup>

The features of American tort law that seem best to fit Holmes' conceptual framework might have come out the same whatever the theories were, and indeed whether or not torts was accepted as a basic subject. Tort doctrines that combine regulatory with reparative purposes may have been inevitable in a federal sys-

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175. "To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas . . . . Read the work of the great German jurists, and see how much more the world is governed today by Kant than by Bonaparte." *The Path of the Law*, *supra* note 46, at 405.

176. Thus writing about Holmes' influence on the law of torts, Brian Simpson pointedly distinguishes between "tort law" and "theorizing about tort law," and writes that "there is not the least evidence that Dean Langdell, the Continental Pandectists, or even the great Savigny ever had any effect on the nineteenth-century common law of tort, either in England, the United States, or anywhere else." Holmes' "theory of tort law," he suggests, was "a purely philosophical enterprise," of the sort likely to be of interest only in "the world of high legal theory, so typical of the scholarship associated with American law schools." A.W.B. Simpson, *The Elusive Truth About Holmes*, 95 MICH. L. REV. 2027, 2032 (1997) (reviewing DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* (1995)).

tem that generally left private law to the states, while authorizing the national government to regulate interstate commerce.<sup>177</sup> And attention to private damage suits as a substitute for social insurance seems to have been a likely development, independent of theory, in a country as individualistically resistant to safety-net legislation as the United States. Holmes' theory triumphed as theory, but in practice maybe it mattered and maybe not.

One interesting possible consequence of Holmes' work remains to be considered. The accident-centered perspective that he promoted portrays American tort law in a way that makes it exceptionally salient in social and political terms, but at the same time leaves it curiously unstable. When the destiny of torts is tied to the problem of accidental injury, the subject as a whole becomes vulnerable to practical reassessments of the best public policy for dealing with that problem. If tort is essentially about accidents, it faces the risk of abolition as a significant body of law today.<sup>178</sup>

By contrast, corrective justice theorists, who think of tort as an abstract legal category organized around the distinctively bilateral character of certain paradigmatic wrongs, do not have to worry in the same way about losing their subject altogether. The intentional wrongs on which Aristotle founded his analysis of corrective justice<sup>179</sup> still remain torts in most legal systems today, even while these systems increasingly abandon tort as a way of dealing with accidental injury.

In our present American regime, we take torts for granted as a fundamental category, and we organize it (with some continuing

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177. Congress and the courts have long had to confront the clash of federal regulatory purposes with the doctrinal structure of state tort law, in the contexts both of setting the limits to federal power where it enters the domain of private law, and determining the pre-emptive force of the valid exercise of that power. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (the local tort law treating absence of airbag as design defect, pre-empted as interference with the purpose of a federal auto safety regulation, meant to encourage the introduction of airbags by gradual steps); *Second Employers' Liability Cases*, 223 U.S. 1 (1912) (holding that the federal statute eliminating employers' tort defenses in rail workers' negligence suits is a valid safety regulation of interstate commerce). Holmes himself helped develop this body of law, reading a federal safety statute broadly to override state tort defenses in his important opinion for a bare majority of the Court in *Schlemmer v. Buffalo, Rochester & Pittsburgh Railway*, 205 U.S. 1 (1907) (the Federal Safety Appliance Act's invalidation of assumption of risk as defense in suits involving conduct violative of Act's safety requirements implicitly prohibits using contributory negligence to defeat recovery in the area of overlap between the two doctrines).

178. Compare the titles of Stephen Sugarman's law review article and his subsequent book—*Doing Away With Tort Law*, 73 CAL. L. REV. 555 (1985), scaled back to *DOING AWAY WITH PERSONAL INJURY LAW* (1989). The original and more ambitious title in a sense stated the reality of the situation, given how widely held is the accident-centered conception of tort law that I trace back to Holmes.

179. ARISTOTLE, *supra* note 15.

dissent) around the problem of accidental injury and the concept of negligence. My argument has been that things need not have turned out this way. Working in the doctrinally fluid context created by the abolition of the forms of action, Holmes re-examined civil and common law traditions in the light of the latest nineteenth century jurisprudential notions, and out of the mix he formulated one plausible theory of torts. His account of the subject happened to fit with the flow of events and so took hold, and now it strikes us almost as common sense rather than theory. But we might not even have adopted torts as a basic legal category at all, much less taken that particular approach to it. So it is that the law sometimes arrives at a state that seems natural and even inevitable along a path shaped by—well, by accident.