

The Intellectual Origins of Torts in America*

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The emergence of Torts as an independent branch of law came strikingly late in American legal history. Although Blackstone and his contemporaries, in their 18th-century efforts to classify law, identified a residual category of noncriminal wrongs not arising out of contract,¹ Torts was not considered a discrete branch of law until the late 19th century. The first American treatise on Torts appeared in 1859;² Torts was first taught as a separate law school subject in 1870;³ the first Torts casebook was published in 1874.⁴

A standard explanation for the emergence of an independent identity for Torts late in the 19th century is the affinity of Tort doctrines, especially negligence, to the problems produced by industrialization.⁵ I argue, in what follows, that the process by which Torts emerged as a discrete branch of law was more complex and less dictated by the demands of industrial enterprise than the standard account suggests. Changes associated with industrial enterprise did provide many more cases involving strangers. And those cases did play a part in the emergence of Torts as an independent branch of law. But those cases alone were not sufficient. Also necessary was a reorientation

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1. Blackstone's *Commentaries* had separate chapters on trespass and nuisance and referred to torts as "all actions for trespasses, nuisances, defamatory words, and the like."
3 W. BLACKSTONE, *COMMENTARIES* *117. The general classification system of Blackstone's *Commentaries* is discussed in note 13 *infra*.

2. I F. HILLIARD, *THE LAW OF TORTS* iii-iv (Boston 1859). See L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409 (1973).

3. See *THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL* 29 (1918).

4. J. AMES, *SELECT CASES ON TORTS* (1874). See Rothenberg, Book Review, 23 U.C.L.A. L. REV. 373, 377 (1975).

5. See, e.g., L. FRIEDMAN, *supra* note 2, at 262, 409; M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 85-99 (1977); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368, 377-79, 382 (1951). See also Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L.Q. 191, 204-05, 213 (1965).

of thinking about classifications of law itself. The emergence of Torts owed as much to changes in jurisprudential thought as to the spread of industrial machines.

In brief, this article maintains that the interaction of three trends in the late 19th century fostered the development of Torts as a separate legal subject. The first trend was an impulse toward "conceptualization" among American intellectuals, including legal scholars. A manifestation of the advent of "Victorian" culture in America, the impulse sought universal principles in academic fields of study. It stressed "scientific" methodologies and substituted secular theories for religious dogma. The second trend was the collapse of the system of common law writ pleading, whose jurisprudential scaffolding, once functionally effective, became too random and arbitrary to satisfy those interested in achieving regularity and expediency in legal proceedings.⁶ A third trend was the gradual change of the standard tort case from one involving persons in closely defined relations with each other to one involving strangers. As judges and academics sought to extract a set of universal principles from this new prototypical tort situation, the notion of a general, but severely limited, theory of civil obligation emerged. That notion, slow to be articulated, influenced the transformation of the older tort of neglect into the modern tort of negligence, with its generalized principles and its fault prerequisite for liability. With the convergence of these trends, Torts came to be conceived as a discrete legal subject in treatises, casebooks, and law school curricula.⁷

6. Horwitz argues that the promotion of these values was a significant concern of mid-19th-century judges and jurists. See M. HORWITZ, *supra* note 5, at 258-66.

7. The late emergence of Torts as a separate branch of law cannot be explained merely by reference to changes in the pattern of American legal education. It is true that the generalized categories of modern American private law—Property, Contracts, Torts, etc.—were not universally employed in the early 19th century. See THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 24, 73-75 (1918); A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 139, 146 (1921). Law school courses in what would now be considered subtopics of a general field—Bills and Notes, Bailments, Sales, Bankruptcy—were more common. See, e.g., *id.* at 458. But both Litchfield and Harvard Law Schools, the primary centers of formal legal education in the early 19th century, listed courses in Contracts and Property. *Id.* at 454. No courses in Torts were offered, however, and almost no attention was given to individual actions in tort, such as assault, battery, defamation, deceit, or false imprisonment. (Roger Baldwin's lecture notes at Litchfield Law School indicate, however, that brief coverage was given to torts. See Stevens, *Two Cheers for 1870: The American Law School*, in LAW IN AMERICAN HISTORY 403, 432 n.31 (D. Fleming & B. Bailyn eds. 1971). Moreover, the great treatise writers of the early 19th century, James Kent and Joseph Story, did not perceive Torts as a discrete legal subject. See J. KENT, COMMENTARIES ON AMERICAN LAW (New York 1826-1830); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Boston 1834); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Boston 1833); J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (Boston 1836); J. STORY, COMMENTARIES ON EQUITY PLEADINGS (Boston 1838); J. STORY, COMMENTARIES ON THE LAW OF AGENCY (Boston 1839); J. STORY, COM-

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Events as well as ideas played a part in creating the climate of intellectual legal opinion that spawned Torts as an independent category of law. But this article focuses on events only as they were used by intellectuals in the legal profession as raw material for the formulation of legal doctrine and theory. My concern is to detail the role of designated lawyer intellectuals, who can be called glossators, in influencing the development of legal doctrine in America. Glossators—who, after 1870, were primarily academicians—fulfill their professional roles, in important part, through their efforts to derive and articulate theoretical justifications for the working rules of law that have current acceptance. In this “glossing” process, these intellectuals significantly affect the content of legal doctrines and rules and consequently affect the changing state of law in America.⁸

I. The Conceptualist Impulse in Victorian America

Between 1800 and 1850 the attraction of many Americans to the values of individual freedom, equality, and occupational mobility tended to call into question an 18th-century conception of society as an ordered community with designated social roles and relatively limited mobility. In the 19th century, alongside a relatively static, hierarchical vision of man's place in society, there emerged a dynamic, atomistic vision that emphasized the limitless possibilities for individual mobility, creativity, and achievement.⁹ For a time these visions were apparently not perceived as contradictory. Leading literary figures could espouse both individual freedom and the ideal of communal life.¹⁰ National politicians could simultaneously portray themselves as guardians of a simpler, more orderly republican society and

MENTARIES ON THE LAW OF BAILMENTS (Cambridge, Mass. 1832); J. STORY, COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE (Boston 1843); J. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP (Boston 1841); J. STORY, COMMENTARIES ON THE LAW OF PROMISSORY NOTES (Boston 1845). For a discussion of Story's *Commentaries*, see G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 310-15 (1970).

8. Although the American intellectuals discussed in this article are generally members of academic and professional elites, their elite professional status is not intended to be unduly emphasized. But historically certain groups of persons have tended to serve as articulators of values and goals for the legal profession, and those groups have normally possessed elite status. Whether the goals and values of those groups were shared by other Americans of the late 19th century is an inquiry that takes one well beyond the scope of this article. For present purposes a degree of elite intellectual influence in the late-19th-century legal profession is assumed.

9. This generalization has received widespread support in the historical literature. See, e.g., R. WELTER, *THE MIND OF AMERICA, 1820-1860*, at 117-22, 141-56 (1975) (citing sources).

10. See A. KAUL, *THE AMERICAN VISION* (1963) (tracing this theme in writings of Cooper, Hawthorne, Melville, and Mark Twain).

as apostles of democratic progress.¹¹ Even theologians, such as the influential Unitarian spokesman William Ellery Channing, could assert that the universe was ordered by God's laws and yet applaud "'question[ing] [of] the infinite, the unsearchable, with an audacious self reliance.'" ¹²

Perhaps the most striking indication that early 19th-century legal scholars were similarly affected by these cultural trends was their possession of both synthetic and atomistic visions of law. Blackstone, in his 18th-century synthetic view, had seen the "Law of England" as a unified entity, capable of being classified into distinguishable but interdependent parts.¹³ By the early 19th century, in Kent's and Story's treatises, law was primarily represented as the sum of its parts (the "law" of bailments, the "law" of agency, etc.), but was still perceived as capable of presentation in the form of a grand synthesis. Nathan Dane's widely used *Abridgment*,¹⁴ which first appeared in 1823, was also an attempt at synthesis, but Dane's organization suggested that American law was a series of diverse interpretations of individual actions that possessed little unity or coherence. And by the 1850s leading treatise writers such as Theophilus Parsons and Emory Washburn stressed encyclopedic coverage more than theoretical synthesis.¹⁵

Although a sense that American law was dissonant, diverse, and even chaotic developed in early 19th-century legal scholarship, this perception went hand in hand with a belief that American society was still to some extent a communal entity, bound together by shared values. A major source of these shared communal values was religious dogma.¹⁶ Parsons's treatise on contracts, for example, distinguished between "the law of God" and "human law."¹⁷ Parsons argued, building on this distinction, that human laws, with which his treatise was

11. Andrew Jackson personified these tendencies. See M. MEYERS, *THE JACKSONIAN PERSUASION* (1957); J. WARD, *ANDREW JACKSON, SYMBOL FOR AN AGE* (1955).

12. J. HIGHAM, *FROM BOUNDLESSNESS TO CONSOLIDATION: THE TRANSFORMATION OF AMERICAN CULTURE, 1848-1860*, at 6 (William L. Clements Library 1969).

13. Blackstone's *Commentaries* had divided "the Laws of England" into "the rights of persons" (e.g., sovereign immunities, master-servant, domestic relations), "the rights of things" (real and personal property), "private wrongs" (e.g., trespass, nuisance, equitable remedies, and civil procedure), and "public wrongs" (criminal law and procedure). This fourfold division constituted the four volumes of his commentaries.

14. N. DANE, *A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW* (Boston 1823-1829).

15. See, e.g., T. PARSONS, *THE LAW OF CONTRACTS* (Boston 1853-1855); E. WASHBURN, *A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY* (Boston 1860-1862). Washburn's treatise was written between 1856 and 1860. See *THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL* 356 (1918).

16. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725-27 (1976).

17. 2 T. PARSONS, *supra* note 15, at 265.

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concerned, could not entirely sanction "craft and cunning"; but this fact should not be taken to mean that "whatever human law does not prohibit, [one] has a right to do; for that only is right which violates no law, and there is another law beside human law."¹⁸

If the simultaneous possession of synthetic and atomistic visions of society was a defining characteristic of early 19th-century American culture, and if significant manifestations of these two visions were the binding force of religious dogma and a growing awareness of the value of individual autonomy, a significant change in the intellectual history of America took place in the middle of the 19th century. For after 1850 the role of religion as a unifying force among American intellectuals was considerably diminished, and the sense that American civilization offered endless possibilities for individual growth and progress was sharply qualified. With these developments a new phase in the history of ideas in America emerged, best signified by the term "Victorian."

"Victorian" refers to a cultural and intellectual ethos that had originated in England during the middle years of Queen Victoria's reign.¹⁹ The ethos emerged from tensions associated with the realization that material "progress" in an industrializing, urbanizing society had disintegrative capacities.²⁰ American Victorians discovered that sudden rises in income levels, massive industrial development, and marked urbanization tended to undermine traditional sources of stability, especially religious dogmas, that complemented a homogeneous, village-oriented, preindustrial society. The theological explanations of the universe that were widely shared by early 19th-century intellectuals had assumed an essentially static view of human nature and social organization; such explanations appeared suddenly irrelevant to the rapidly changing cast of American civilization after the Civil War.

Over and over again post-Civil War scholars stressed their interest in deriving secular and scientific theories that would promote order and unity. Henry Adams explained his "instinctive belief" in the theory of evolution as being based on a need for a "substitute for religion," a "working system for the universe," and a means of "enforc[ing] unity and uniformity."²¹ The novelist Hamlin Garland, reading Spencer in the 1880s, found that "the universe took on order

18. *Id.*

19. See W. HOUGHTON, *THE VICTORIAN FRAME OF MIND, 1830-1870* (1957).

20. See BROWN, *Modernization: A Victorian Climax*, 27 AM. Q. 533 (1975); Meyer, *American Intellectuals and the Victorian Crisis of Faith*, *id.* at 585.

21. H. ADAMS, *THE EDUCATION OF HENRY ADAMS* 225-26 (1931). For a collection of essays on the influence of evolution in America, see *EVOLUTIONARY THOUGHT IN AMERICA* (S. Persons ed. 1950).

and harmony.'"²² The architect Louis Sullivan felt that "Spencer's definition implying a progression . . . to a highly organized complex, seemed to fit" Sullivan's own experience.²³ Some scholars, such as the philosopher John Fiske, even believed that secularly based systematic thinking could be reconciled with a religious faith. The authority of religious principles, Fiske wrote in 1875, was no longer derived "from the arbitrary command of a mythologic quasi-human Ruler," but from "the innermost necessities of [the] process of evolution."²⁴

In general, post-Civil War intellectuals were interested in restoring the sense of order and unity that had characterized 18th-century thought, but they rejected efforts to derive order and unity from "mythologic" religious principles. A particular interest of intellectuals in the quarter century after the war was conceptualization—the transformation of data into theories of universal applicability. Their source of unity was to be methodological: the "scientific" ordering of knowledge.²⁵ As the sociologist Lester Ward put it, "[T]he origination and distribution of knowledge [could] no longer be left to chance and nature," but were "to be systematized and erected unto true arts."²⁶ The two legal scholars most immediately responsive to this conceptualist impulse were Nicholas St. John Green and Oliver Wendell Holmes, Jr., who, with Fiske, the philosophers William James and Chauncey Wright, and others, were members of the celebrated Metaphysical Club, a meeting ground of Cambridge intellectuals between 1870 and 1874.²⁷ Green, a practicing lawyer, taught Torts and Criminal Law at Harvard and Boston University Law Schools in the 1870s and wrote several essays in the *American Law Review*, of which

22. Cowley, *Naturalism in American Literature*, in *EVOLUTIONARY THOUGHT IN AMERICA*, *supra* note 21, at 300, 304.

23. L. SULLIVAN, *THE AUTOBIOGRAPHY OF AN IDEA* 255 (1934).

24. 2 J. FISKE, *OUTLINES OF COSMIC PHILOSOPHY* 468 (1875).

25. Other recent scholarship has perceived a similar unity in the pattern of reasoning in post-Civil War treatises and judicial decisions. The pattern has principally been characterized by the term formalism. See, e.g., Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEG. HIST. 251, 255-57, 261-62 (1975); Kennedy, *supra* note 16, at 1728-31 (using the term "Classical individualism"); Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 514-16, 560-66 (1974). But see Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1 (criticizing Nelson for oversimplifying changes in styles of judicial reasoning).

26. 2 L. WARD, *DYNAMIC SOCIOLOGY* 539 (1883). Ward had begun work on *Dynamic Sociology* in 1869. See R. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 69 (1944).

27. For an analysis of the philosophical contributions of another member of the Club, Charles Peirce, see Note, *Holmes, Peirce and Legal Pragmatism*, 84 YALE L.J. 1123 (1975). On the Metaphysical Club, see Wiener, *Peirce's Metaphysical Club and the Genesis of Pragmatism*, 7 J. HIST. IDEAS 218 (1946).

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Holmes was an editor, between 1869 and 1876. When he died in 1876, Green had a treatise on Torts in preparation.

Green's approach to legal scholarship, which Holmes called philosophical,²⁸ was characteristically conceptualist. Green refused to accept legal dogmas on faith, being interested in their effectiveness as working analytical guidelines.²⁹ The classification of legal subjects and the derivation of general principles of law, efforts that Green identified with philosophically oriented scholarship,³⁰ were in his judgment useless undertakings unless a given classification or principle had a useful purpose. Purposive organization of a legal subject could be achieved, Green maintained, by understanding the subject's history, as with the law of slander and libel,³¹ or by understanding the practical considerations on which it was founded, as with the doctrine of vicarious liability.³²

Thus, while Green expressed an interest in treating the law as a science and analyzing its developments with something akin to mathematical precision,³³ he conceded that absolute lines could not be drawn because change was constant and "[a]ll things in nature . . . shade into each other by imperceptible degrees."³⁴ Paradoxically, an acceptance of the inevitability of change provided Green with some solace. If one recognized that "[t]he latest decided cases upon [a] subject *make the law*,"³⁵ Green believed, one could try to "settle more definitely" the analytical rationales for those cases and "to see what, and how many, of such reasons apply, and with what force, to . . . new cases."³⁶ Through these techniques one derived general principles that had some operative meaning in practice.

Green's conceptualism, like that of other American Victorian in-

28. See [Holmes], Book Review, 5 AM. L. REV. 340, 341 (1871). See also Frank, *A Conflict With Oblivion: Some Observations on the Founders of Legal Pragmatism*, 9 RUTGERS L. REV. 425, 434 (1954).

29. In a discussion of proximate causation, Green called the phrase "natural and proximate consequence" a "stereotyped [form] for gliding over a difficulty without explaining it." N. GREEN, *Torts under the French Law*, in ESSAYS AND NOTES ON THE LAW OF TORT AND CRIME 71, 82 (1933) [book hereinafter cited as ESSAYS]. The *Essays* are reprints of notes and unsigned articles and book reviews that Green published in the *American Law Review*, in the eighth edition of Joseph Story's *Commentaries on the Law of Agency*, which Green edited, and in two volumes of criminal law cases entitled *Criminal Law Reports*. All the material in the *Essays* was written between 1869 and 1876. *Id.* at v.

30. N. GREEN, *Slander and Libel*, in ESSAYS, *supra* note 29, at 49, 69-70.

31. *Id.* at 53.

32. N. GREEN, *The Liability of a Principal to Third Persons for the Torts of his Agents and Servants*, in ESSAYS, *supra* note 29, at 127, 127.

33. N. GREEN, *Proximate and Remote Cause*, in ESSAYS, *supra* note 29, at 1, 16.

34. N. GREEN, *Insanity in Criminal Law*, in ESSAYS, *supra* note 29, at 161, 166.

35. N. GREEN, *supra* note 30, at 70.

36. N. GREEN, *The Liability of a Master to his Servants*, in ESSAYS, *supra* note 29, at 131, 137.

tellectuals, was thus an effort to derive certainty in the face of continual change. Certainty was achieved not by appeal to received dogma but by a scientific reorientation of techniques of legal analysis. Green was as interested in "perfect[ing] the law as a science"³⁷ as his conceptualist contemporaries in sociology, economics, or philosophy were in perfecting their disciplines.³⁸ Through these techniques new philosophical classifications of law were made possible.

The strong parallels between Green's approach and that of Holmes in the 1870s suggest a degree of mutual influence.³⁹ Green's interest in the historical origins of legal doctrines, his conviction that rules and principles derived their primary meaning from the circumstances in which they were used, and his fascination with systems of legal classification were mirrored in Holmes's early scholarship.⁴⁰ Both men saw themselves as expounders of the law—glossators—whose interest was in treating legal subjects philosophically from the perspective of scientific insight.⁴¹ But despite the increasing acceptance of conceptualist methodologies in American intellectual life after the Civil War, Green, and especially Holmes, might not have been able to apply those methodologies so readily to law had not the principal classification device of 19th-century jurisprudence, the system of writ pleading, collapsed, leaving a void that was ultimately to be filled by the theories of conceptualists.

II. The Collapse of the Writ System

For the first half of the 19th century "torts" was not an autonomous branch of law at all but merely, as Holmes noted in 1871, a collection of unrelated writs.⁴² Lawyers knew how to sue in tort, but they apparently had little interest in a theory of torts. During the early 19th century, however, the writ system became increasingly haphazard as a classification device, in part because of the growing diversity of American law and the tendency of courts to create exceptions to the system's rigorous requirements, and in part, one suspects, because

37. N. GREEN, *supra* note 33, at 9.

38. The interdisciplinary character of conceptualism is discussed in M. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949).

39. The impact of Green on Holmes is discussed in Frank, *supra* note 28, at 434-44. Frank argues that "in several notable respects" Green was "Holmes' precursor." *Id.* at 442.

40. See generally M. HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS* (1963); M. WHITE, *supra* note 38, at 71-75. For a discussion of Green's interest in history, see Frank, *supra* note 28, at 439-40.

41. Cf. L. FRIEDMAN, *supra* note 2, at 531-32 (discussing Langdell's belief that law is a science).

42. [Holmes], *supra* note 28, at 341.

of the absence of any powerful pressure for conceptual unity in American jurisprudence. By the 1850s, the haphazardness of the writ system was a source of irritation to those working with it in the legal profession, and alternatives to writ classifications came to be considered. The nature of those alternatives was influenced by the conceptualist tendencies of contemporaneous legal thought.

The conventional explanation of the demise of the writ system is that in the early years of the century dissatisfaction arose with the system of pleading, which was founded on enforced conformity to arcane technicalities.⁴³ Dissatisfaction, according to this explanation, led to the formation of law-revision commissions in states such as New York and Massachusetts. These commissions were charged with making the common law more intelligible to laymen. At the same time a movement for codification of American laws emerged, which in its headiest versions advocated total replacement of the common law with an American civil code. Although the codification movement ultimately failed, its impetus combined with revisionist impulses to produce a reform of civil procedure. The first manifestation of reform came in the New York Code of Procedure, adopted in 1848, which abolished the forms of action on which the writ system was based. Other states quickly followed New York's example, with 11 states abolishing the writ system by 1856 and 23 by the 1870s.⁴⁴

Thus related, the story has a nice historical momentum, with the pent-up demands of the Jacksonians finding voice in the 1840s through the genius of David Dudley Field, author of the 1848 New York Code.⁴⁵ Unfortunately, not enough scrutiny of the writ system has taken place to justify the conventional explanation. The scrutiny that has taken place, in fact, reveals a more complex series of developments. A study of Massachusetts pleading in the late 18th and early 19th centuries,⁴⁶ for example, has shown that the writ system was not suddenly abandoned in that state, but was gradually and irregularly modified over a 70-year period. Although fraught with technicalities, the Massachusetts system of pleading was not universally rigid: amended pleas were permitted,⁴⁷ and multiple actions were common.⁴⁸ Thus when Massa-

43. See, e.g., L. FRIEDMAN, *supra* note 2, at 340-46; R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 52-53 (1952); A. SCHLESINGER, THE AGE OF JACKSON 329-33 (1945).

44. See R. MILLAR, *supra* note 43, at 54-55.

45. See L. FRIEDMAN, *supra* note 2, at 340-43, 351-53; A. SCHLESINGER, *supra* note 43, at 330-33.

46. Nelson, *The Reform of Common Law Pleading in Massachusetts 1760-1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97 (1973).

47. *Id.* at 112-15.

48. *Id.* at 119.

chusetts eventually abolished writ pleading in 1851, that "reform" was not a major modification of existing practice.

Accompanying the overly dramatic account of the writ system's demise has been an overestimation of the amount of dissatisfaction with the system, especially among those who were most significantly affected by it. The writ system served an important jurisprudential function in the early 19th century, that of a surrogate for doctrinal classification. The rigor of the writs, as Green pointed out, tended to make procedural requirements the equivalent of doctrinal categories. "Whatever may be said of [the science of special pleading] as a practical method of meting out justice between private litigants," Green wrote in 1871, "it is certain that the lawyer who was master of it stood upon an eminence which gave him a clearer view of the position of his case, in its relation both to law and the surrounding facts, than there is any other means of obtaining. . . . Indeed, a knowledge of criminal pleading is a knowledge of criminal law."⁴⁹ One could also master "tort" doctrine by mastering the technicalities of pleading, since, in the writs of trespass and case, the elements of proof that gained one access to a court were often the same elements by which one recovered. Problems of causation were solved by the writ system's requirements; and affirmative defenses such as justification or contributory fault were not usually allowed. A plaintiff took pains to show how his injury resulted, either "directly" (trespass) or "indirectly" (case), from a defendant's act. If he were able to establish a chain of direct or indirect causation, and used the proper writ, his chances for recovery were good.⁵⁰ Knowing the procedure for suing in trespass or case, then, was the equivalent of knowing the doctrinal elements of those actions.

It is difficult, at least from a 20th-century perspective, to identify the sources of the widespread dissatisfaction conventionally attributed to this system. Few trained lawyers would likely have opposed it, since once mastered it proved a handy digest of the common law.⁵¹ Neophyte lawyers or nonlawyers might fall victim to its technicalities, but if customs prevailing in early 19th-century Massachusetts were followed elsewhere, rigid adherence to the formalities of pleading was not universally required, and leave to amend an ill-considered plea was regularly obtained.⁵²

49. N. GREEN, *Some Results of Reform in Indictments*, in *ESSAYS*, *supra* note 29, at 151, 151.

50. For a description of writ pleading in Massachusetts, see Nelson, *supra* note 46, at 98-116.

51. Dane's *Abridgment* was organized around existing forms of action. N. DANE, *supra* note 14.

52. See Nelson, *supra* note 46, at 112-16.

Yet the fact remains that the writ system was widely abolished in the 1850s with remarkably little opposition. In light of the strong lawyer resistance to the codification that took place in the mid-19th century,⁵³ the abolition of technical pleading might seem a little surprising, since the common law, so vigorously defended by lawyers, derived its substantive doctrines largely from its pleading requirements. But if one conjectures that the change came from within—that the system was discarded by those who had profited most from it—the collapse of the writ system becomes more understandable. If one recalls that the writ system functioned as a device for classifying substantive doctrine, one might hypothesize that writ pleading lost support when it ceased to function successfully in that capacity. Its failure to perform as a means of doctrinal organization can be traced to the tendencies toward diversity and dissonance that marked early 19th-century jurisprudence. As the ambit of legal concerns widened and diversified, different localities adopted their own rules of special pleading. In another age the Balkanization of pleading rules might have been intellectually offensive; in the America of the early 19th century, however, jurisprudential order was not universally prized. By the 1850s, however, the haphazardness of the writ system and its structural emphasis—on discrete elements rather than on universals—came to be regarded as analytically unsatisfactory.

With each relaxation of the technicalities of pleading there was a loss of certainty and predictability about substantive legal rules; if the writ system was only indifferently adhered to during the early 19th century, its value as a classification device was undermined. David Dudley Field, for example, called writ pleading “‘clumsily devised,’” and “‘inconvenient in practice.’”⁵⁴ In addition, the writ system’s emphasis on arcane particulars ran counter to a growing scholarly interest in deriving universal principles. “Like other sciences,” a commentator noted in 1851, the law was “supposed to be pervaded by general rules, . . . [and] to have first or fundamental principles, never modified.”⁵⁵ Some years later, Holmes, in discussing a recently enacted state code of procedure, linked this search for scientific universals to a realization of the failings of the writ system:

If those forms had been based upon a comprehensive survey of the field of rights and duties, so that they embodied in a practical shape a classification of the law, with a form of action to cor-

53. See M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 83-88 (1976); P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 251-54 (1965).

54. P. MILLER, *supra* note 53, at 259.

55. *Id.* at 161.

respond to every substantial duty, the question would be other than it is. But [the writs] are in fact so arbitrary in character, and owe their origin to such purely historical causes, that nothing keeps them but our respect for the sources of our jurisprudence.⁵⁶

This same dissatisfaction with the particularistic approach of the writs, and a comparable inclination to seek universal guiding principles in the law, motivated Francis Hilliard to write the first generalized treatment of Torts in America. "By a singular process of inversion," Hilliard wrote in commenting on previous treatments of tort actions, "*remedies* [procedural requirements] have been substituted for *wrongs* [substantive elements of an action]."⁵⁷ "It is difficult to understand," Hilliard maintained,

how so obviously unphilosophical a practice became established.

...

... To consider wrongs as merely incidental to remedies; to inquire for what injuries a particular action may be brought, instead of explaining the injuries themselves, and then asking what actions may be brought for their redress, seems to me to reverse the natural order of things ⁵⁸

For Hilliard, emphasis on the writs gave "a false view of the law, as a system of forms rather than principles; [it] elevate[d] the positive and conventional above the absolute and permanent."⁵⁹ Hilliard's approach to Torts sought to show that the subject "involve[d] principles of great comprehensiveness, not modified or colored by diverse *forms of action*."⁶⁰ In the developing tradition of 19th-century scientific methodology, he proceeded from universals to particulars.

In sum, one can associate the demise of the writ system with the emergence of conceptualism in intellectual thought. By the 1850s the haphazardness of the writ system had become a source of irritation to those working with it in the legal profession, and a search had begun for alternatives to writ classifications.⁶¹ In the effort by glossators to replace the writs with generalized substantive legal principles and doctrines, the idea of treating Torts as an independent legal subject came into being. The origins of Torts, then, can be traced to the

56. [Holmes], Book Review, 5 AM. L. REV. 359 (1871) (reviewing THE CODE OF PROCEDURE OF THE STATE OF NEW YORK, AS AMENDED TO 1870 (10th ed. J. Townshend 1870)).

57. 1 F. HILLIARD, *supra* note 2, at v (emphasis in original).

58. *Id.* at vi-vii.

59. *Id.* at vii.

60. *Id.* at viii (emphasis in original).

61. Another factor possibly prompting mid-19th-century American lawyers to reassess the worth of the writ system was a growing consciousness of the image of their profession. See M. BLOOMFIELD, *supra* note 53, at 136-90.

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interaction, in post-Civil War America, of a conceptualist jurisprudence with a deteriorating system of pleading and procedure. Because of this interaction recognition of an independent branch of tort law was, at least, possible. Still wanting was the development of theoretical principles by which Torts could identify itself.

III. A Theory for Torts: The Emergence of Negligence

Francis Hilliard conceded in his 1859 preface that although he had “entire confidence in the *idea*” of treating Torts as a separate subject, he had “much diffidence as to the *execution*.”⁶² His treatise, in fact, was not entirely successful in distinguishing Torts from other legal categories. Included in his discussion of torts were chapters on crimes and property and, in his discussion of slander, treatments of evidence and damages. Hilliard’s effort was representative of early attempts to organize the subject matter of Torts. In James Barr Ames’s case-book, which appeared in 1874, coverage was limited to intentional torts and trespass.⁶³ It was classifications like these that caused Holmes, reviewing Charles Addison’s treatise on Torts in the *American Law Review* in 1871, to assert that “Torts is not a proper subject for a law book.”⁶⁴ He found an absence of a “cohesion or legal relationship” between the variously treated topics. Trespass, for example, was far closer to “possession enforced by real actions” than to assault and battery; yet the two were paired as “torts.”⁶⁵ Holmes “long[ed] for the day when we may see these subjects treated by a writer capable of dealing with them philosophically.”⁶⁶ By philosophically Holmes meant, as Hilliard and Green had, with sufficient consciousness of scientifically derived universal principles.

It was at this point—the 1870s—that an academic search for overriding theoretical principles in Torts seems to have begun in earnest.⁶⁷

62. 1 F. HILLIARD, *supra* note 2, at x (emphasis in original).

63. J. AMES, *supra* note 4.

64. [Holmes], *supra* note 28, at 341.

65. *Id.*

66. *Id.*

67. In 1870, Green, in his preface to Charles G. Addison’s *Law of Torts*, wrote that Torts was “the law of those rights which avail against all persons generally, or against all mankind.” Green noted that Torts was “usually treated of under the titles of the various forms of action which lie for the infringement of such rights.” He felt that such a treatment tended “to confuse these fundamental principles which should be kept distinct in the mind of the student.” Green, *Preface to C. ADDISON, LAW OF TORTS* at iii (abr. 1870). Holmes reviewed the book in the *American Law Review*. See note 28 *supra*. Others working on the reorientation of Torts at the same time were Melville Bigelow, Charles Doe, and Thomas Cooley. See M. HOWE, *supra* note 40, at 83-84, 139.

Although this article does not focus on the professionalization of the field of law in

Two years after Holmes's assertion that Torts was an unfit subject for a treatise, he attempted to formulate a theory of Torts; in passing, he noted that "there is no fault to be found with the contents of text-books on this subject."⁶⁸ The study of Torts had become promising for Holmes because he had been able to discover that "an enumeration of the actions which have been successful, and of those which have failed, defines the extent of the primary duties imposed by the law."⁶⁹ Examination of the tort writs showed Holmes that in the case of certain civil wrongs, such as allowing dammed water or wild animals to escape, liability was found regardless of the culpability of the actor; that in others, such as assault or fraud, culpability was a prerequisite for liability; and that in still others the culpability of the defendant, although pivotal to recovery, was determined not from "facts" but "from motives of policy . . . kept purposely indefinite."⁷⁰ This last category of cases constituted "modern negligence."⁷¹ Thus Torts could be subdivided into three categories: absolute liability, intentional torts, and negligence.⁷²

Holmes's theory was not remarkable in itself; common law writs had, as noted, acquired roughly similar classifications through their procedural requirements. The significant contribution Holmes made was the isolation, in academic literature, of negligence as a substantive tort doctrine. This contribution was significant in two respects. First, it articulated in authoritative terms an expansion in American case law of the concept of negligence from a specific, predetermined duty to a general standard of care. Second, Holmes's isolation of "modern negligence" provided Torts with a philosophical principle⁷³ (no liability for tortious conduct absent fault; fault to be determined by reference to "the felt necessities of the times"⁷⁴) that, in a short

the late 19th century, there is doubtless some significance to the fact that conceptualism in academic law emerged at the same time that law schools began to hire professors on a full-time basis. See Stevens, *supra* note 7, at 424-41. With law designated a "science" and academics urged to develop scientific methodologies, it was perhaps inevitable that an ordering of intellectual fields would take place, if for no other reason than a grand synthesis of Torts or Contracts provided a means of making one's professional mark.

68. [Holmes], *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873). Mark DeWolfe Howe attributes this essay to Holmes. M. HOWE, *supra* note 40, at 64.

69. [Holmes], *supra* note 68, at 659-60.

70. *Id.* at 659.

71. *Id.* at 653.

72. The efforts of Holmes and his contemporaries to develop a general theory of Torts mark one instance in which an American development in 19th-century legal scholarship preceded an analogous development in England. The first English treatise to attempt a generalized treatment of Torts, Frederick Pollock's *The Law of Torts*, did not appear until 1887. It was dedicated to Holmes.

73. See [Holmes], *supra* note 68, at 660.

74. The phrase is Holmes's. O. HOLMES, *THE COMMON LAW* 1 (1881).

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space of time, came to dominate tort law. So infatuated was Holmes with his discovery of "the great mass of cases" in which a negligence standard was applied, and so convinced was he of the soundness of conditioning tort liability on a policy determination that a standard of care had been violated, that only eight years after his first theory of Torts he was prepared to argue that absolute liability had never truly existed in tort law, and that fault, either in the strict (intentional) or looser (negligent) sense, had always been a prerequisite for liability.⁷⁵

Holmes's conception of negligence as a general standard of conduct and, parenthetically, as a distinguishing principle for tort law, was one toward which certain American courts had previously been groping. Prior to the 1830s, with the exception of a handful of cases in New York,⁷⁶ the term "negligence" generally referred to "neglect" or failure to perform a specific duty imposed by contract, statute, or common law. Examples were the duty of a sheriff to maintain prisoners in custody⁷⁷ and the duty of a town to keep bridges in good condition.⁷⁸ Suits arising out of the escape of prisoners or damage to bridges or roads alleged that the official responsible had been negligent or neglectful. Commentators used negligence in a similar fashion.⁷⁹ There is little indication that prior to the 1830s negligence was generally equated with carelessness or fault. A neglectful person could be found liable simply for nonfeasance.⁸⁰

During the 1830s certain state courts, among them New York, Massachusetts, and Pennsylvania, increasingly came to associate negligence with violations of a general standard of care that was not limited to specific persons, offices, or occupations. *Brown v. Kendall*,⁸¹ a Massachusetts case in which a dog owner inadvertently injured a bystander while attempting to break up a dog fight, is regularly cited as the first American case clearly to employ a "fault" standard in Torts.⁸² It was preceded, however, by at least three other cases in New York

75. *Id.* at 89. Holmes acknowledged that fault might not have been a prerequisite "in that period of dry precedent which is so often to be found midway between a creative epoch and a period of solvent philosophical reaction." *Id.*

76. *E.g.*, *Percival v. Hickey*, 18 Johns. 257 (N.Y. 1820); *Foot v. Wiswall*, 14 Johns. 304 (N.Y. 1817). *See* M. HORWITZ, *supra* note 5, at 85-97.

77. *E.g.*, *Patten v. Halsted*, 1 N.J.L. 277 (1795).

78. *E.g.*, *Lobdell v. New Bedford*, 1 Mass. 153 (1804).

79. *See, e.g.*, 3 N. DANE, *supra* note 14, at 31-33.

80. *See, e.g.*, *Patten v. Halsted*, 1 N.J.L. 277 (1795). *See also* M. HORWITZ, *supra* note 5, at 86.

81. 60 Mass. (6 Cush.) 292 (1850).

82. *See, e.g.*, M. FRANKLIN, *INJURIES AND REMEDIES: CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 30 (1971); W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 9 (6th ed. 1976).

and Pennsylvania.⁸³ *Brown v. Kendall*'s significance lay in the impressive articulation of a generalized "fault" standard by Chief Justice Lemuel Shaw, a judge who by the 1850s had come to view the common law as a set of broad and comprehensive principles.⁸⁴ Shaw did not originate the association of the term "negligence" with violations of a general standard of care in *Brown v. Kendall*,⁸⁵ but suggested that the fault principle had wide application. Negligence, Shaw implied, was more than a neglect of specific duties imposed only under certain circumstances; it was the touchstone (and principal limiting factor) of a general theory of civil obligation, under which persons owed a universal, but confined, duty to take care not to injure their neighbors.⁸⁶

Viewed in this fashion, the modern negligence principle in tort law seems to have been an intellectual response to the increased number of accidents involving persons in no preexisting relationships with each other—"stranger" cases.⁸⁷ In this limited sense the conventional identification of the rise of Torts with the advent of industrialism is accurate. Advances in transportation and industry—mills, dams, carriages, ships—made injuries involving strangers more common. As judges and legal scholars sought to establish a theory of liability for stranger accidents, older notions of neglect proved inadequate, for increasingly parties involved in accidents owed no previously imposed duties to one another. The special requirements of individual writs may have served to distinguish one tortious injury from another, but they did not address the principal policy question raised by stranger accident cases: As a matter of policy, what general duties were owed to all by all?⁸⁸ Once the import of this question became clear, the ground for a new theory of tort liability in stranger cases was broken. Neglect was widened to become a generalized theory of legal carelessness; an objective fault standard emerged as a limiting principle of tort liability; modern negligence was born.

Two stranger cases from the 1870s, one of which made use of

83. *Livingston v. Adams*, 8 Cow. 175 (N.Y. 1828); *Panton v. Holland*, 17 Johns. 92 (N.Y. 1819); *Lehigh Bridge Co. v. Lehigh Coal & Navigation Co.*, 4 Rawle 8 (Pa. 1833). *Livingston v. Adams* and *Lehigh Bridge* were "bursting dam" cases, and *Panton v. Holland* a case in which a foundation for a house had been dug improperly.

84. *Norway Plains Co. v. Boston & M.R.R.*, 67 Mass. (1 Gray) 263, 267 (1854). See G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 60-61 (1976).

85. See M. HORWITZ, *supra* note 5, at 90 (maintaining that "an exaggerated significance" has been assigned to *Brown v. Kendall*).

86. See 60 Mass. (6 Cush.) at 296.

87. M. HORWITZ, *supra* note 5, uses similar terminology. Professor Horwitz sees mid-19th-century judges as "develop[ing] the idea of duties owed to noncontracting strangers." *Id.* at 95.

88. See [Holmes], *supra* note 68, at 663.

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Holmes's insights, illustrate the increasing dominance of the newer generalized conception of negligence. Both cases, *Brown v. Collins*⁸⁹ and *Losee v. Buchanan*,⁹⁰ were reactions against the implications of *Rylands v. Fletcher*,⁹¹ the 1868 House of Lords decision holding a defendant liable regardless of fault for allowing water to seep through his land and damage the mines of a neighbor. Both the *Brown* and *Losee* courts concluded that strict liability for injuries to strangers was not to be retained in modern American tort law. In *Brown* a pair of horses, startled by the engine of a passing train, had shied off the road and damaged a lamppost on an adjoining property owner's lot. The parties stipulated that the driver "was in the use of ordinary care and skill" in managing his horses prior to the time they became frightened. Judge Charles Doe held that, absent a showing of "actual fault" in the driver, no liability would attach.⁹² Relying in part on Holmes's observations in *The Theory of Torts*,⁹³ Doe maintained that to extend the *Rylands v. Fletcher* principle of "absolute liability without evidence of negligence," seemed "contrary to the analogies and the general principles of the common law."⁹⁴ Holding a defendant liable without a showing that he had acted negligently was the equivalent of suggesting that "every one is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence."⁹⁵ Doe argued that liability in tort, where a defendant had acted unintentionally, should be conditioned on a showing of lack of "ordinary care and skill."⁹⁶

One of the precedents Doe relied upon in *Brown v. Collins* was *Losee v. Buchanan*, a New York case also decided in 1873. In the absence of any New Hampshire precedent for applying negligence in the generalized sense employed in *Brown*, Doe had looked to other courts and scholars for support for his critique of *Rylands v. Fletcher*. But in *Losee* Commissioner Robert Earl had the benefit of a prior New York case,⁹⁷ which he cited as holding that "[w]here one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away Negligence should be shown in order to make him liable."⁹⁸ Earl's

89. 53 N.H. 442 (1873).

90. 51 N.Y. 476 (1873).

91. 3 L.R. 1 E. & I. App. 330 (1868).

92. 53 N.H. at 450-51.

93. *Id.* at 445.

94. *Id.* at 450.

95. *Id.* at 451.

96. *Id.* at 442.

97. *Livingston v. Adams*, 8 Cow. 175 (N.Y. 1828).

98. 51 N.Y. at 487.

task was to extend that principle to a case in which a steam boiler had exploded, damaging buildings on a neighboring tract of land. He thought the extension simple enough. "We must have factories, machinery, dams, canals and railroads," he maintained. "If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares"⁹⁹

As for *Rylands v. Fletcher*, Judge Earl found it to be "in direct conflict with the law as settled in this country."¹⁰⁰ The "universal" American rule, Earl asserted, was that "no one can be made liable for injuries to the person or property of another without some fault or negligence on his part."¹⁰¹ Negligence was thus much more than a specific duty. It was a general precondition of liability for unintentional torts—a "universal rule" that helped define the subject of Torts itself. As Holmes wrote eight years later in *The Common Law*: "The general principle of our law is that loss from accident must lie where it falls 'No case or principle can be found . . . subjecting an individual to liability for an act done without fault on his part.'"¹⁰²

With the growth of negligence from a specific unperformed duty owed to a particular person to a generalized standard of care owed to all, the emergence of Torts as an independent branch of law was ensured. Impulses to conceptualize law around a series of universal principles had extracted Torts from a diverse series of writs and transformed it into a discernible academic subject; these same impulses were struggling to find some unity in the various civil wrongs that were being cataloged. Negligence provided that unity; it also provided a workable standard—a limiting principle—for the numerous inadvertent injuries involving strangers that had come to be a characteristic late 19th-century tort action. Negligence can thus be identified with all of the trends that combined to produce the emergence of the subject of Torts in America. Negligence was a universal rule, satisfying conceptualist tendencies in legal thought; it was an all-purpose cause of action, supplanting both trespass and case; and it was an evaluative standard for decisionmaking in cases involving unintentional injuries to strangers.

99. *Id.* at 484-85.

100. *Id.* at 486-87.

101. *Id.* at 491.

102. O. HOLMES, *supra* note 74, at 94-95 (quoting Chief Justice Nelson of New York). Holmes cited *Brown v. Kendall* with approval at 105-06.

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The close identification of Torts with the rise of negligence can be seen in the evolution of Torts casebooks and treatises by legal scholars in the late 19th century. As late as the third edition of Hilliard's treatise in 1866, negligence had only a nine-page treatment, and most of the cases cited used the term in its earlier sense of failure to perform a specific duty.¹⁰³ Ames's 1874 casebook, as indicated, contained no negligence cases.¹⁰⁴ By 1880, in Thomas Cooley's treatise,¹⁰⁵ the need for a generalized treatment of negligence had begun to be perceived. Cooley devoted a chapter to "Wrongs from Non-Performance of Conventional and Statutory Duties," and included negligence among them.¹⁰⁶ But he also recognized that "in every relation of life . . . some duty is imposed for the benefit of others,"¹⁰⁷ and in a separate chapter discussed "the general principles which must govern when . . . one has been injured by the neglect of another to observe due care."¹⁰⁸ His discussion included reference to a great many stranger accident cases.¹⁰⁹ In 1893 Ames's casebook was supplemented by a second volume, authored by Jeremiah Smith, that devoted six chapters to negligence, including discussions of standards of care, the concept of a duty, and contributory negligence.¹¹⁰ Smith retained a chapter on negligence as a duty imposed by contract; but that chapter was omitted in the 1909 edition.¹¹¹ By 1911 John H. Wigmore apparently believed that Torts was sufficiently discrete to merit a full-blown conceptualist treatment. He divided the "Science of Law" into "public" and "private" components,¹¹² and each component into "groups" and their "topic[s],"¹¹³ and proceeded to analyze the legal relations this categorization created.¹¹⁴ He found Torts to be concerned with universal, "non-refusable" duties, which created correlative "general rights."¹¹⁵ He then subdivided "general rights" into three elements—damage, causation, and excuse¹¹⁶—and further subdivided these elements¹¹⁷ in a virtual mania of classification. His tech-

103. See 1 F. HILLIARD, *THE LAW OF TORTS* 115-23 (3d ed. Boston 1866).

104. See p. 683 *supra*.

105. T. COOLEY, *A TREATISE ON THE LAW OF TORTS* (1880).

106. *Id.* at 628-58.

107. *Id.* at 659.

108. *Id.*

109. *Id.* at 661-66 (citing cases).

110. 2 J. AMES & J. SMITH, *A SELECTION OF CASES ON THE LAW OF TORTS* (J. Smith ed. 1893).

111. *Id.* at iii (J. Smith ed. 1909).

112. 1 J. WIGMORE, *SELECT CASES ON THE LAW OF TORTS*, app. B, at vii, x (1911).

113. *Id.* at xi.

114. *Id.* at x.

115. *Id.* at x, xi.

116. *Id.* at xi.

117. *Id.* at xi-1.

nique was made possible, Wigmore felt, because Torts, being a branch of law, had "the quality of being uniform and regular."¹¹⁸

Behind Wigmore's nomenclature was the triumph of an insight of Holmes's in the 1870s: Torts was that part of the law concerned with universal private duties "of all to all."¹¹⁹ It was, in short, virtually synonymous with negligence. Intentional torts were clear violations of duties "of all the world to all the world";¹²⁰ they raised few policy questions and primarily involved only problems of causation and assessment of damages. Inadvertent, nonnegligent torts were not actionable unless a given duty had been imposed on the nonnegligent actor by statute, custom, or practice. Negligence cases most starkly raised the policy issue that Holmes and his followers found most significant: When does society impose a duty not to harm one's neighbor? Thus Torts, by the close of the 19th century, had been transformed from its former status as a handful of civil, noncontractual wrongs, some of which (assault and battery) were retained in the new conceptualization of the late 19th century, others of which (neglect) were cast aside in the treatises and in the courts. Torts had become an entity distinct from the other private-law categories of Contracts or Property: it was that branch of private law which dealt with universally imposed duties.

IV. The 19th-Century Legacy

The climate of opinion in which Torts emerged as an independent branch of the law has had significant effects on its subsequent development. Tracing those effects is beyond the scope of this article, but there is one general legacy of the formative period of Torts worth noting here. The scientific methodologies of Green and Holmes, as well as those of conceptualists in other fields, regularly succeeded in deriving social theories that were "evolutionary" in character, that is, theories that built their intellectual systems on the assumptions that life was constantly changing and man continually adapting to change. Looking back on his intellectual experiences in the 1860s and 1870s, Holmes observed that evolutionary theories had affected "our whole way of thinking about the universe."¹²¹ One of the paradoxes of the conceptualism of this period was that although it tended to derive monistic theories, those theories rested on a sense of fluidity:

118. *Id.* at vii.

119. The phrase is Holmes's in *The Theory of Torts*, *supra* note 68, at 662.

120. *Id.* at 660.

121. 1 HOLMES-POLLOCK LETTERS 57-58 (M. Howe ed. 1941).

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the evolutionary "laws" of the universe were everywhere true but were based on the permanency of change. In both Green's and Holmes's writing in the post-Civil War years one can see a dual concern for achieving order and unity and for recognizing that "all things in nature . . . shade into each other by imperceptible degrees."¹²² Against a scientifically derived philosophical synthesis was juxtaposed "the felt necessities of the times."¹²³

Historians have noted the two-pronged character of these evolutionary theories: they led, in the early 20th century, either to a deterministic view of society, in which the fittest invariably survived, or to a pragmatic view, in which man continually adapted himself to changing conditions.¹²⁴ One can see traces of this same duality in early 20th-century scholarly approaches to tort law. Even though a conceptualist methodology persisted among some torts scholars as late as 1920,¹²⁵ other torts scholars soon disassociated themselves from conceptualism in its most monistic forms. Shortly after the triumph of negligence as a unifying principle of Torts, scholars suggested that the negligence principle had little meaning outside the changing circumstances in which it was to be applied.¹²⁶

When this critique of conceptualism in Torts, often identified with realism in American jurisprudence,¹²⁷ is reexamined in light of the intellectual origins of Torts, an additional observation suggests itself. It is conceivable that the evolutionary character of negligence theory may have itself contributed to the dissatisfaction with universal rules in Torts. The dynamic component of evolutionary theories was the component most attractive to early 20th-century intellectuals. Rapid change came to be seen as a permanent feature of American civilization, and legal scholars, as well as other intellectuals, criticized universal rules as mechanical and static.¹²⁸ The major late-19th-century rule of Torts, the negligence principle, had an inherent capacity to adapt itself to change, since its operative standard, "ordinary care under the circumstances," presumed that no one set of circumstances

122. N. GREEN, *supra* note 34, at 166. See Frank, *supra* note 28, at 436-37.

123. O. HOLMES, *supra* note 74, at 660.

124. See, e.g., E. GOLDMAN, *RENDEZVOUS WITH DESTINY* (1952).

125. See, e.g., Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 636 (1920).

126. See, e.g., L. GREEN, *Analysis of Tort Cases*, in JUDGE AND JURY 21 (1930); L. GREEN, *THE JUDICIAL PROCESS IN TORTS CASES* iii (1931). (Both of Green's books contain other examples of his critique of the negligence principle.)

127. In his celebrated article, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1226 n.18 (1931), Karl Llewellyn identified Leon Green as one of the advocates of "realistic" jurisprudence.

128. See White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1003-05 (1972).

was precisely like another. But the negligence principle was also intended to be monistic, in the sense of being capable of universal application in a predictable manner. As suspicion of monistic principles mounted in the early 20th century, the fluid character of negligence was stressed.¹²⁹ It was a short step from perceiving the negligence principle as fluid to perceiving it as meaningless outside the circumstances in which it was applied.

Conclusion: The Role of Dominant Methodologies in American Legal History

This article has attempted to stress the importance of the values and thought patterns of 19th-century American intellectuals in fostering the growth of Torts as an independent branch of law. I have resisted a linear explanation for what "caused" the emergence of Torts, suggesting that the growth of industrialization is only part of the explanation. A fuller understanding of the origins of Torts as a separate branch of law requires, I have maintained, an appreciation of the changes in American intellectual culture that took place after 1850.

By my focus on scholars and academicians within the legal profession, I do not mean to suggest that the role of those groups in shaping the content of law is more significant than that of practitioners, judges, or other persons with legal training. I do mean to suggest, however, that it is more significant than perhaps commonly supposed; that treatise writers and scholars do not merely collect data supplied by courts and practitioners, but organize it in accordance with their existing intellectual inclinations. The raw material for a theory that would distinguish Torts from other areas of law was present in mid-19th-century America. The significance of a classification of Torts as a discrete branch of law was accentuated by the collapse of the writ system, a collapse that was not brought about by scholars. But the methodological apparatus that ultimately derived the modern negligence principle was created by intellectuals. The independence of Torts was ultimately linked to the triumph, in Victorian America, of a conceptualist methodology.

The significance of dominant disciplinary or professional methodologies,¹³⁰ and the value choices or assumptions those methodologies

129. See, e.g., B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 161 (1921); B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 85 (1928).

130. The phrase "dominant methodology" can be analogized to "paradigm" or "disciplinary matrix" as used by Thomas Kuhn. T. KUHN, *THE STRUCTURE OF SCIENTIFIC*

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tacitly make, seems to me to represent a theme in the history of American law that has received inadequate treatment. Current scholarship in American legal history makes the now-commonplace assumption that law "mirrors"¹³¹ society and that factors "external"¹³² to the workings of legal institutions have had an important influence on the course of American law. While this assumption is not unsound, it tends to underemphasize the role of dominant thought patterns within the legal profession that form the intellectual context in which "external" developments take place. We need to know much more about the origins of these patterns of thought, whose primary function seems to be that of shaping and limiting the interpretation of the changing source materials of the legal profession.

My interest here has been in identifying some of the cultural forces that served to focus the theoretical concerns of American intellectuals, including legal scholars, during the period when Torts emerged as an independent branch of law. My analytical model has been one that seeks to identify the features of American culture that, during given periods, shape the intellectual inquiries of scholars in academic disciplines or professions into tacitly approved pursuits, reflecting the acknowledged primacy of certain values, such as order, unity, creativity, or independence, and creating certain methodological orientations, such as conceptualism.

The relationship between ideas and events in American legal history is probably more complex than some current scholarship implies. The fields into which law is classified, the subjects taught in American law schools, the treatise literature, and the doctrinal bases of case law are not merely reflections of current events; to an important extent they are the end products of intellectual trends within the legal profession. These trends themselves develop from complicated interactions of events and ideas which legal historians have not studied in any detail. Examining the dominant methodological assumptions of academicians and other scholars in the legal profession is, in my view, a potentially fruitful way to address the relationship among ideas, events, and the history of American law. This article is intended, therefore, as an initial exploration of a broad and complex subject.

REVOLUTIONS 175, 182 (2d ed. 1970). Kuhn defines "paradigm," in the sense most akin to my focus here, as "the entire constellation of beliefs, values, [and] techniques . . . shared by the members of a given community." *Id.* at 175.

131. L. FRIEDMAN, *supra* note 2, at 10.

132. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC. REV. 9 (1975).

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Student Contributors to This Issue

David J. Grais, *Statutory Entitlement and the Concept of Property*

Peter J. Kalis, *Interest Arbitration and the NLRB: A Case for the Self-Terminating Interest Arbitration Clause*

John H. Marshall, *Sewers, Clean Water, and Planned Growth: Restructuring the Federal Pollution Abatement Effort*