Is Tort Law Hopelessly Fragmented?

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Like Gaul, tort law is divided into three parts: torts of intent, negligence, and strict liability. At least, that is what most torts professors teach and what many scholars, judges and practitioners suppose.

In an engaging, lively, and perceptive article, Professors Abraham and White remind us that this tripartite division is descriptively inadequate for characterizing the variety of individual torts recognized today. They further claim that this plethora of distinct torts is a disorganized, fragmented mess. They then surprise the reader with a provocative conclusion: tort law is incapable of principled organization. The authors provide solid evidence of their descriptive thesis. Their critiques of the inevitability of this unprincipled disorganization are more controversial, for reasons that I will later suggest.

The authors uncover a “lost history” that largely supports their descriptive argument. They point out that treatise and casebook writers in the 19th and early 20th centuries tried without much success to create a more straightforward organization of tort law after the abolition of the old procedure-based forms of action. In their view, a classification according to the underlying rights that were violated was circular; a classification according to standards of conduct was more promising but still problematic insofar as different scholars had quite different conceptions of the relevant standards. For example, some but not all commentators recognized a category of “willful or wanton” harm; and some but not all restricted “intent” to “malice” or “animus.”

The authors then turn to the efforts of Francis Bohlen in the first Restatement of Torts in the 1920s to develop a more coherent organization of tort law. Bohlen’s earliest drafts displayed a new vision of how to organize tort law—namely, according to the right infringed and then, according to the standard of conduct (intent, negligence, or strict liability). Thus, Bohlen originally suggested that the right to personality[1] includes a right to freedom from bodily harm that should be protected from intentional, negligent, or, in a few cases, faultless invasions, a suggestion that could have been the basis of a rational organization of all torts. But, the authors point out, in the end Bohlen did not realize this vision. Instead, although he organized some of the first Restatement according to intent, negligence, and strict liability, large portions ignore that structure. The authors speculate that Bohlen might have given up on his original, more ambitious classification plan after he drafted the materials on negligence and other specific torts, perhaps because Bohlen concluded that the task was not feasible. And, according to the authors, the Second and Third Restatement of Torts have largely followed the first Restatement in rejecting any rational organizing principles, leaving judges, academics, and practitioners with a fragmented, unprincipled concatenation of miscellaneous individual torts.

The analysis offered by the authors of early tort scholars’ classification schemes and of successive drafts of the first Restatement of Torts is an illuminating exploration of the early history of American tort law—and also quite detailed. Not all readers will relish bushwhacking through these weeds. But many will savor the adventure. The authors are also correct that the Restatement, Second and Restatement, Third of Torts largely carry forward the classification system of the first Restatement. The Third Restatement, they say, “is effectively a collection of independent modules” (P. 53).

The authors conclude that three main reasons explain the fragmented state of contemporary tort law. First, no comprehensive substantive theory explains why some harmful activities are actionable and others are not. Economic efficiency, corrective justice, and civil recourse theories are too abstract to give particularized guidance, they plausibly

claim.

Second, a more coherent organization has only limited usefulness to the practicing bar, which is perfectly content with atomistic listing of numerous distinct torts. This argument has force but seems overstated. For example, a new classification scheme that categorized all emotional harm torts together might spur the development of more consistent legal rules for negligent infliction of emotional distress and intentional infliction of severe emotional distress.

Third, the authors assert that the actual nature of tort law is inevitably fragmented, because of the consensus "that some kinds of harms should be actionable and that some should not be, and that the degree of blame attributable to the party causing the harm may be relevant, but that this relevance may vary, depending on the kind of harm or other circumstances in question. As long as these things are true, then something like the forms of action—separate causes of action with distinctive, mandatory elements—is inevitable" (P. 58).

The authors' skepticism about the promise of principle is understandable. History indeed plays a significant role in explaining otherwise arbitrary and archaic distinctions between torts (as well as distinctions between different property rights and other legal rights and duties). Why, for example, do courts not require contemporaneous awareness of an offensive contact for offensive battery liability, yet require contemporaneous awareness of a confinement for false imprisonment, and require awareness of an anticipated touching for assault? At the same time, the article does not mention, and we should not forget, some of the remarkable and principle-based changes that occurred in tort doctrine in the 20th century—expanding negligence doctrines; recognizing new torts of privacy and of intentional infliction of emotional distress; and developing elaborate, and sometimes strict, rules to govern product liability for defective products.

As an academic who has considered these issues in some prior work[2] I agree with the authors to a point. The tripartite division of all torts into intentional torts, negligence, and strict liability torts is indeed a gross oversimplification. As chief Reporter for the Restatement of Torts, Third: Intentional Torts to Persons, I confess that I have participated in some of the developments that the authors decry. (Why are battery, assault, and false imprisonment singled out for a distinct project, and not combined with privacy and defamation, for example?) Perhaps I am a guilty accomplice. But before the authors pass their final sentence upon me and (more importantly) on the American Law Institute and on other tort scholars, let me raise some questions about their analysis.

First, although the authors are correct in noting the piecemeal way that the Restatement, Third of Torts has been developed over many years, the full story of its evolution is more complex. The original plan of the American Law Institute was to restate only certain portions of the Restatement Second of Torts in the Restatement Third—those that were in special need of updating, such as products liability (in 1992) and apportionment (in 2000). Over time, however, the Institute determined that this partial approach was inadequate and that a comprehensive Restatement was necessary. This was a wise judgment. As evidence, consider the Third Restatement's evolving treatment of the traditional intentional torts—battery, assault, and false imprisonment. The Restatement Third, Torts: Liability for Physical and Emotional Harm (completed in 2012) asserted a broad criterion of intentional tort liability in § 5: "An actor who intentionally causes physical harm is subject to liability for that harm." Unfortunately, this umbrella provision is an awkward fit with the traditional intentional torts. Battery, for example, requires an intent to contact but (in most states) does not require an intent to cause physical harm or offense. The ongoing Restatement Third of Intentional Torts is much more careful in identifying the specific intent requirements and other elements of harmful battery, offensive battery, assault and false imprisonment. Although it is true that the many projects that comprise the Third Restatement of Torts are overlapping and, on first appearance, haphazard, the best explanation is a change in direction, not a commitment to fragmentation.

Second, when an actor causes bodily harm to another, the tripartite division does have some descriptive power—and more than the authors concede. Ceteris paribus, intentionally causing such a harm is a more serious wrong than negligently causing it; and liability is least justifiable when the harm is caused faultlessly. These differences matter: they affect the availability of punitive damages, the relevance of plaintiff's fault, the causal scope of liability, and

whether another will be vicariously liable, as well as collateral legal rules such as insurance and worker's compensation coverage.

For evidence that the tripartite classification remains vital, consider a recently adopted provision in the Intentional Torts Restatement, imposing liability for the purposeful infliction of bodily harm.[3] This provision effectively expands the ancient tort of battery and recognizes that an actor's purposeful causation of bodily harm is a proper basis of liability, even if the actor does not physically contact the plaintiff. (Suppose a prison guard turns off the heat to an inmate's cell in order to make the inmate sick.) Strikingly, Bohlen's first Restatement of Torts also adopts this expansionist approach in a little-noticed provision, recognizing "an actor's liability for the intentional infliction of bodily harm by means other than bodily contact"[4]—precisely the position recently adopted in the Intentional Torts Restatement. Thus, Bohlen executed his vision of a comprehensive tripartite approach to the right to freedom from bodily harm to a greater extent than the article acknowledges.

Third, the article's account of the tripartite approach is somewhat oversimplified. Most torts do not merely identify a relevant harm and then simply require that the actor have intentionally, negligently, or faultlessly caused that harm. Rather, torts typically contain several elements, and often the fault required for one element differs from that required for another. For example, trespass to land requires an intent to enter but does not require the actor to know that the parcel that she intentionally entered is the property of another. Battery requires an intent to contact, and in some states an additional intent to harm or offend, but it does not require that the actor intend or know that the plaintiff does not consent to the contact.

Fourth and relatedly, the authors seem to assume that a principled account of tort law would entail either the tripartite division or some other relatively simple classification system. Others have also endorsed a much greater degree of simplification of tort law.[5] But this assumption can be, and has been, questioned.[6] Pluralism, in both law and morality, can be principled.[7] On this view, the wrongs addressed by tort law are multifarious because the rights underlying them, their potential fault requirements, and their other relevant characteristics are multiple. Yet these characteristics can be combined in a principled way.

Notwithstanding these questions, Abraham and White have written an enlightening historical and critical analysis, nicely framing an important challenge to tort scholars, the challenge of developing a principled and useful classification of the wide range of tort doctrines.

1. The authors criticize Bohlen for not elucidating the meaning of a general right to "personality." However, in a document entitled "Treatise No. 1a Supporting Restatement [Tent. Draft] No. 1" (Hein, dated May 1-2, 1925), Bohlen does provide an account of this general right, embracing the intentional torts of harmful and offensive battery, assault, and false imprisonment. Bohlen states: "The desire for the inviolability of one's person and the desire for freedom to choose one's location without external dictation are so universal to mankind that it is difficult to conceive of any legal system which does not recognize and protect the interests therein." Id., page 7.
2. *See* Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?,* 48 **Ariz. L. Rev**. 1061 (2006), available at SSRN; Kenneth W. Simons and Jonathan Cardi. *Restating the Intentional Torts to Persons: Seeing the Forest and the Trees,* 10 **J. Tort L.** (2018), available at SSRN.
3. *See* Restatement Third, Torts: Intentional Torts to Persons, § 4 (Tentative Draft No. 1, originally numbered § 104).
4. *See* Restatement of Torts § 17, comment b. Section 17 states: "The rules which determine an actor's liability for the infliction of bodily harm otherwise than by harmful bodily contact are the same as those stated in §§ 13 to 16 [covering battery], as determining liability for the infliction of a harmful bodily contact." By contrast, the Restatement Second, Torts does not include a provision analogous to § 17.
5. *See*, *e.g.*, Stephen Sugarman, *Restating the Tort of Battery*, 10 **J. Tort L.** 1 (2017) (proposing the merger of harmful battery and negligence causing physical harm); European Group on Tort Law, *Principles of European Tort Law* (recognizing, in Art. 1:101, the "basic norm" that a person is liable for causing harm to a protected

interest through fault, an abnormally dangerous activity, or vicariously).

6. *See* Peter Cane, *Mens Rea in Tort Law*, 20 **Oxf. J. L. Stud.** 533 (2000); Scott Hershovitz, *The Search for a Grand Unified Theory of Tort Law*, 130 **Harv. L. Rev.** 942 (2017); Simons, *supra* note 2; Simons & Cardi, *supra* note 2. See also Ellen Bublick, *A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts*, 44 **Wake Forest L. Rev.** 1335 (2009) (proposing that the Third Restatement contain three separate chapters for intentional physical harms to persons; for emotional harms related to the first category; and for negligent emotional harms and dignitary injuries).
7. *See* Stanford Encyclopedia of Philosophy, *Value Pluralism* (Rev. Feb. 7, 2018).

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