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A HISTORY OF PRIMA FACIE TORT: THE ORIGINS OF A GENERAL THEORY OF INTENTIONAL TORT

Kenneth J. Vandevelde*

I. INTRODUCTION

In the final decades of the nineteenth century, Frederick Pollock and Oliver Wendell Holmes proposed a general theory of intentional tort, a theory eventually known by the courts as the "prima facie tort doctrine." That doctrine can be summarized in a simple proposition: the intentional infliction of injury without justification is actionable.

This Article is a history of that general theory of intentional tort. After describing the origins and early development of the concept of an intentional tort, it traces the process by which that concept gave rise to a general theory and by which the general theory was adopted by the courts. In broad outlines, the story may be sketched as follows:

Modern tort law recognizes a number of so-called "intentional torts," that is, causes of action which arise only when the defendant acted with the intent to injure the plaintiff or with substantial certainty that his action would injure the plaintiff. Examples of modern intentional torts include several "classic" intentional torts, recognized as causes of action for centuries, such as assault, battery, false imprisonment, trespass to chattels and trespass to real property. Modern intentional torts also include newer causes of action, such as intentional infliction of emotional distress, intentional interference with contract, and intentional interference with prospective advantage.¹

Prior to the late nineteenth century, however, tort law did not

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ville, 1975; J.D. Harvard University, 1979. Thanks to my colleague Bill Patton for his com-
ments on an earlier draft.

¹ See infra notes 15-16 and accompanying text.
include a category known as “intentional tort.” Those causes of action here described as “classic” intentional torts generally were brought in an action for trespass, which did not require an allegation of intentional harm. The newer forms of intentional tort were scarcely recognized at all.

In the mid nineteenth century, the common law forms of action, including trespass, were abolished. Legal scholars sought to articulate a conceptual scheme which would organize the various forms of civil liability not arising out of contract in accordance with some principle.

One scheme, following the approach of Blackstone's Commentaries on the Laws of England and adopted by Thomas Cooley, attempted to categorize the various rights protected by the law of torts and conceived of tort law as a series of remedial actions taken to protect those rights against particular kinds of invasions. Battery, for example, protected one's right to physical integrity against forcible invasions.

A second scheme, conceived by Oliver Wendell Holmes and developed by other scholars, notably Frederick Pollock and Melville Bigelow, organized tort law into three categories: causes of action based on intentional conduct, causes of action based on negligent conduct, and causes of action based on strict liability. This scheme originated the concept of intentional tort.

Holmes regarded as fundamental the distinction between strict liability and liability based on fault. He argued that intentional and negligent torts were merely two forms of liability based on fault, which differed only in the degree to which the defendant could foresee that injury would result from her conduct. Finally, he argued that the entire tendency of tort law was toward fault-based liability, which was to be measured by an objective rather than a subjective standard.

Holmes' identification of fault as the governing principle of tort was consistent with a growing body of case law which required the plaintiff to prove negligence in order to recover compensation for injury to the plaintiff's person or property. As others have argued, late nineteenth century courts increasingly displaced strict liability with

2. See infra notes 17-52 and accompanying text.
3. See infra notes 53-58 and accompanying text.
4. See infra notes 66-70 and accompanying text.
5. See infra notes 74-110 and accompanying text.
6. See infra notes 83-94 and accompanying text.
negligence in order to shield emerging commercial enterprises from liability which might otherwise have crippled economic growth.\footnote{7}

In positing a distinct category of intentional torts, Holmes was engaged in an exercise of highly creative scholarship. At the time he wrote, virtually no tort met the definition of a modern intentional tort. Most torts now considered intentional rested on strict liability or required, at most, proof of mere negligence. In a few cases, proof of actual malice was required. Thus, nonmalicious intentional wrongdoing was either somewhat more or somewhat less than was required to prove liability for what is now called an intentional tort.\footnote{8}

Holmes and Pollock went even farther than describing a category of intentional torts and proposed a general theory of intentional tort under which the intentional infliction of injury without justification was actionable.\footnote{9} It was this general theory of intentional tort which in time became known by the courts and commentators as the doctrine of prima facie tort.\footnote{10}

As proposed by Holmes, the doctrine of prima facie tort did not necessarily expand liability and actually had the potential to contract it. Holmes saw prima facie tort not merely as another intentional tort, but as the general principle upon which rested all liability for intentional harm. By an expansive view of justification, Holmes could immunize from liability conduct which might otherwise have been liable under another tort theory.\footnote{11}

While the general theory of negligence had developed to shield commercial enterprises from liability for unintentional physical injury, Holmes sought to use his general theory of intentional tort to shield workers from liability for economic injury deliberately inflicted in advancing the cause of labor. In Holmes' view, peaceful labor strikes were justifiable conduct and thus not actionable even if they did result in intentionally inflicted injury.\footnote{12}

Holmes' general theory of intentional tort has been adopted in various forms by a number of states and by the Restatement. Two versions of the doctrine have emerged, one formulated by the New York courts, and the other articulated most authoritatively by the

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\begin{itemize}
\item 7. See infra notes 172-74 and accompanying text.
\item 8. See infra notes 86-103 and accompanying text.
\item 9. See infra notes 178-81, 190-95 and accompanying text.
\item 10. See infra note 263 and accompanying text.
\item 11. See infra notes 265-73 and accompanying text.
\item 12. See infra text accompanying note 272.
\end{itemize}

}
Second Restatement.\textsuperscript{13}

In those cases adhering to the New York formulation, the prima facie tort doctrine is generally regarded as imposing liability with respect only to conduct not otherwise actionable. In this sense, it is more an additional, rather than a general, theory of liability for intentionally inflicted injury.\textsuperscript{14} The Restatement formulation, on the other hand, imposes no such limitation on the doctrine, thus permitting the doctrine to serve as the basis of liability for all intentional conduct, whether or not actionable under other tort theories.

II. ORIGINS OF THE CONCEPT OF INTENTIONAL TORT

A. Actions for Trespass and Case

The "classic" intentional torts in the modern understanding\textsuperscript{15} are intentional interferences with the person, such as assault, battery, or false imprisonment, as well as intentional interferences with chattels and real property.\textsuperscript{16} Yet, prior to the late nineteenth century, none of these torts included, as an element, intentional harm by the defendant. Until Holmes conceptualized American tort law, all of the classic intentional torts rested on strict liability.

The classic intentional torts generally are traced from the common law writ of trespass, developed in the thirteenth century.\textsuperscript{17} To obtain a writ of trespass, the plaintiff had to allege that the defendant had caused injury to his person or property "by force and arms

\begin{itemize}
    \item \textsuperscript{13} See infra notes 295-349 and accompanying text.
    \item \textsuperscript{14} See infra notes 331-39 and accompanying text.
    \item \textsuperscript{15} At least one modern casebook also uses the term "classic intentional torts" to refer to assault, battery, false imprisonment, and interference with property. See M. Franklin & R. Rabin, Cases and Materials on Tort Law and Alternatives 768 (1987).
    \item \textsuperscript{16} These torts are designated as "classic" intentional torts because they are of ancient origin and, in modern times, are routinely categorized in texts and casebooks as intentional torts. See G. Christie & J. Meeks, Cases and Materials on The Law of Torts at xxv (1990) (omitting false imprisonment); Dobbs, Torts and Compensation at xxvii-xxvili (1985); W. Keeton, Prosser and Keeton on the Law of Torts at xvii (5th ed. 1984); P. Keeton, R. Keeton, L. Sargentich & H. Steiner, Tort and Accident Law at xxix (1989); W. Prosser, J. Wade & V. Schwartz, Cases and Materials on Torts at xxi (1988) (adding conversion); D. Robertson, W. Powers, Jr. & D. Anderson, Cases and Materials on Torts at xxi (1989). These casebooks also commonly include the modern tort of intentional infliction of emotional distress as an intentional tort.
\end{itemize}
and against the king's peace.\textsuperscript{18} The writ of trespass did not require any allegation that the harm was intentional, only that the plaintiff was directly injured by the defendant's act of force.

In time, the writ of trespass became available for nonviolent injury,\textsuperscript{19} although the requirement that one allege the use of force and arms masks the timing and manner of this development.\textsuperscript{20} In these later cases, the use of force would be implied as long as the injury was a direct consequence of the defendant's act and was committed on the plaintiff's person or tangible property.\textsuperscript{21}

Because the writ of trespass did not require an allegation of fault or intentional harm, trespass on its face would seem to have imposed strict liability. Yet, considerable disagreement has arisen concerning whether trespass, in fact, had lain only where the defendant was in some measure at fault.\textsuperscript{22} No modern scholar, however, argues that trespass required a showing that the defendant acted intentionally.\textsuperscript{23}

The limitation of trespass to actions in which the plaintiff's injury was directly caused by the defendant's act left plaintiffs without a remedy where the injury was caused indirectly by the same act. To fill this gap, courts by the fourteenth century had invented the writs of trespass on the case, later known as "actions on the case" or simply "case."\textsuperscript{24}

Actions on the case were a varied category of miscellaneous torts. In general, to recover in case the plaintiff had to show that the defendant had acted negligently with the consequence that the plain-

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\item \textsuperscript{18} 2 F. Pollock & F.W. Maitland, The History of English Law 526 (1968).
\item \textsuperscript{19} See id. at 527 (explaining the evolution of the "force and arms" requirement); see also Malone, Ruminations on the Role of Fault in the History of the Common Law of Torts, 31 La. L. Rev. 1, 12 (1970) (discussing the changed meaning of "force and arms").
\item \textsuperscript{20} T. Plucknett, A Concise History of the Common Law 466 (5th ed. 1956).
\item \textsuperscript{21} J. Koffler & A. Reppy, supra note 17, at 154.
\item \textsuperscript{23} By "intentionally" I mean with the deliberate purpose of causing injury or with a substantial certainty that injury would occur.
\item \textsuperscript{24} Historians do not agree on the exact time at which, or the manner by which, the action on the case was created—a disagreement which need not concern us here. The competing views are discussed in J. Koffler & A. Reppy, supra note 17, at 175-76; Plucknett, Case and the Statute of Westminster II, 31 Colum. L. Rev. 778 (1931); see also Dix, The Origins of the Action of Trespass on the Case, 46 Yale L.J. 1142 (1937); Landon, The Action on the Case and the Statute of Westminster II, 52 Law Q. Rev. 68 (1936).
\end{itemize}
tiff or his property was injured.\textsuperscript{25} Negligence in this context and in the period prior to the middle of the nineteenth century, however, appears to have meant simply the neglect of a duty imposed by law, rather than, as is now understood, the failure to exercise reasonable care.\textsuperscript{26} Because the defendant's nonfeasance of his duty might have been entirely unavoidable, action on the case in particular circumstances could have rested on strict liability.\textsuperscript{27}

In the early nineteenth century, then, the two forms of action for physical injuries to persons or property were trespass and case. Neither required that the defendant have acted with the intent of causing plaintiff's harm or with a substantial certainty that the harm would occur. That is, neither form of action met the modern definition of an intentional tort.

A few nineteenth century cases illustrate the unimportance of intent in establishing the classic intentional torts. In \textit{Higginson v. York},\textsuperscript{28} the defendant was the master of a vessel engaged by one Kenniston to transport a cargo of wood from Burnt Coal Island to Boston.\textsuperscript{29} Entirely unbeknownst to the defendant, the wood had been unlawfully cut and sold to Kenniston prior to Kenniston's agreement with the defendant.\textsuperscript{30} The owner of the land from which the wood had been taken brought an action of trespass \textit{quare clausum fregit} against the defendant for taking the wood.\textsuperscript{31} The court held that "the defendant was clearly a trespasser" in taking the wood, despite his belief that Kenniston owned the wood, and was therefore liable to plaintiffs for the value of the wood taken.\textsuperscript{32} \textit{Higginson}, in effect, held trespass to real property to be a strict liability tort.

In \textit{Dexter v. Cole},\textsuperscript{33} the defendant, who was a Milwaukee butcher, was driving some sheep he had purchased along the highway when they became mixed with a "small lot" of twenty-two sheep owned by the plaintiff which were running loose on the highway.\textsuperscript{34} The defendant then drove the sheep into a yard where he at-

\begin{itemize}
\item \textsuperscript{25} Gregory, \textit{supra} note 22, at 363 (discussing the origin of "case"). See generally J. Koffler & A. Reppy, \textit{supra} note 17, at 183-84 (describing the writ of trespass on the case).
\item \textsuperscript{26} M. Horwitz, \textit{supra} note 22, at 86-87; T. Plucknett, \textit{supra} note 20, at 469.
\item \textsuperscript{27} M. Horwitz, \textit{supra} note 22, at 90.
\item \textsuperscript{28} 5 Mass. 341 (1809).
\item \textsuperscript{29} Id.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id. at 341-42.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} 6 Wis. 319 (1858).
\item \textsuperscript{34} Id.
\end{itemize}
tempted to part them.35 Despite these efforts, however, four of the plaintiff’s sheep remained in the flock and were driven to Milwaukee and slaughtered.36 Plaintiff brought an action for trespass de bonis asportatis against the defendant for the value of the four sheep and the jury returned a verdict for the plaintiff.37 The Wisconsin Supreme Court affirmed, holding that it was not “necessary to prove that the act was done with a wrongful intent; it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake.”38 Thus, liability would lie for causing injury without justification, regardless of the defendant’s intent or state of mind. Trespass to personal property was a strict liability tort.

In Ricker v. Freeman,39 the defendant was a sixteen year old schoolboy climbing an internal stairway in a schoolhouse when he encountered the plaintiff entering the stairway through an exterior door.40 Plaintiff was a thirteen year old student in the school.41 The defendant grabbed plaintiff’s arm and spun him around, causing plaintiff to bump into a third student, David Townsend.42 Defendant later admitted that he had pushed plaintiff, but said he merely had been “fooling” with him.43 Townsend, in any event, pushed the plaintiff away, and as a result the plaintiff was impaled by a coathook on the wall and severely injured.44 Plaintiff then brought a trespass action against the defendant.45

The trial court instructed the jury that defendant’s touching of plaintiff would be considered wrongful if done in a “rude, rough, violent manner.”46 The defendant’s state of mind, however, was not relevant. In language strikingly similar to that in Dexter, the court instructed that “it was not essential for the plaintiff to prove that the act was done with any wrongful intent by the defendant, it being sufficient if it were done without a justifiable cause or purpose, though done accidentally or by mistake.”47 Thus, the inquiry for the

35. Id.
36. Id.
37. Id.
38. Id. at 322.
39. 50 N.H. 420 (1870).
40. Id. at 421, 423.
41. Id. at 421.
42. Id. at 421-22.
43. Id. at 423.
44. Id. at 421.
45. Id. at 420.
46. Id. at 424.
47. Id.
jury was whether the injury was caused by the defendant, who initially put the plaintiff in motion, or by Townsend, who gave the plaintiff the final push that sent him in the direction of the coathook.\textsuperscript{48} The jury returned a verdict for the plaintiff.\textsuperscript{49}

On appeal, the defendant argued that the trial court had improperly instructed the jury on causation and that it was Townsend, not the defendant, who had caused plaintiff’s injury.\textsuperscript{50} The court affirmed, however, holding that the jury had been properly instructed.\textsuperscript{51} The court explained that

\begin{quote}
malice is not essential to the maintenance of trespass for an assault, but that the action is supported by a negligent act and pure accident, if the negligent or accidental act is also a wrongful act. And we think the principle is clearly established, that negligence may be regarded as the proximate cause of an injury, of which it may not be the sole nor the immediate cause.\textsuperscript{52}
\end{quote}

Trespass to the person, thus, did not require that the defendant have intended to harm the plaintiff. The defendant would be liable whether his action was negligent or “pure accident.” The issue was simply whether the defendant had proximately caused the injury through wrongful, \emph{i.e.}, unjustified, conduct. Assault was a strict liability tort.

\section*{B. The Creation of Modern Tort Law}

\subsection*{1. The Abolition of the Forms of Action}

The common law forms of action governed the structure and content of tort law from the thirteenth through the mid-nineteenth century. The latter half of the nineteenth century, however, witnessed the abolition of the forms of action, clearing the way for a new conceptualization of the law of torts.

In 1848, reacting to claims that the common law writ system was too rigid and technical, and to a general movement to codify the law, New York adopted a new code of civil procedure known as the “Field Code,” after its principal draftsman, David Dudley Field.\textsuperscript{53} Major features of the Field Code included the merger of law and

\begin{thebibliography}{9}
\bibitem{48} Id. at 425.
\bibitem{49} Id.
\bibitem{50} Id. at 426, 431.
\bibitem{51} Id. at 433.
\bibitem{52} Id. at 430.
\bibitem{53} L. Friedman, \emph{A History of American Law} 391-98 (2d ed. 1985).
\end{thebibliography}
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equity and the abolition of the common law forms of action. In place of the common law writs was a single "civil action" for the enforcement of all private rights. By the 1870s, some 24 states had adopted the Field Code, while other states made similar procedural reforms without adopting New York's code.

The Field Code required that the plaintiff plead facts constituting a "cause of action." In determining what facts were necessary to state a cause of action, courts referred back to the common law writs. At the same time, however, courts were free to recognize causes of action which would not satisfy the technical requirements of trespass, case, or any other common law form of action.

2. The Conceptualization of Modern Tort Law

a. Early Attempts.—The abolition of the forms of action provided the freedom to develop a free-standing body of substantive law, independent of the procedural forms of action. Late nineteenth century legal scholars, imitating their colleagues in other academic disciplines, sought to create a science of law based on a systematic structure of concepts.

The first American treatise on torts was written by Francis Hilliard in 1859. Although published only eleven years after the first

54. Id. at 392.
55. Id.
56. J. KOFFLER & A. REPPY, supra note 17, at 25.
57. L. FRIEDMAN, supra note 53, at 392-93, 397-98. The court in Ricker v. Freeman, 50 N.H. 420 (1870), for example, observed that the distinction between trespass and case was "in effect broken down in Massachusetts." Id. at 429.
58. In 1881, Holmes noted that "the abolition of the common-law forms of pleading has not changed the rules of substantive law. Hence, . . . anything which would formerly have been sufficient to charge a defendant in trespass is still sufficient, notwithstanding the fact that the ancient form of action and declaration has disappeared." O.W. HOLMES, THE COMMON LAW 67 (M. Howe ed. 1963) [hereinafter HOLMES II]; see also Keviczky v. Lorber, 290 N.Y. 297, 305, 49 N.E.2d 146, 149 (1943) (stating that "[a]lthough forms of action have been abolished, the specified categories of wrongdoing have left their imprint upon the law, and still serve as guides.").
60. F. HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS (1859). According to Burdick, there was an attempt to write a torts treatise as early as 1720. C. BURDICK, THE LAW OF TORTS 1 (4th ed. 1926). The treatise was entitled The Law of Actions on the Case, for Torts and Wrongs; Being a Methodical Collection of all the Cases Concerning Such Actions. See C. BURDICK, supra, at 1 n.4. Burdick did not name the author, but reported that the book was "not very successful." Id. at 1. Frederick Pollock referred to it as a "meagre and unthinking digest" which was "remarkable chiefly for the depths of historical ignorance which it occasionally reveals." F. POLLOCK, THE LAW OF TORTS IX (1894) [hereinafter POLLOCK II].
Field Code abolished the forms of action, Hilliard's treatise was not organized around trespass and case. Indeed, it was scarcely "organized" at all. Some chapters dealt with individual causes of action based on trespass or case, while others discussed special duties owed by various persons or entities. Still other chapters dealt with a miscellany of topics involving particular types of property or transactions or cutting across several causes of action. Hilliard's treatise demonstrated that legal scholars were beginning to think of torts as a separate category of law, but that they had yet to identify the boundaries or organizing principles of this category. Hilliard's treatise, for example, did not contain a separate chapter on negligence.

In 1880, Thomas Cooley published a torts treatise which was organized considerably better than Hilliard's. Although the scheme was not entirely consistent, most chapters dealt with invasions of particular rights and discussed the various causes of action which were available to remedy those invasions. Chapter VI, for example, dealt with "Wrongs Affecting Personal Security," and included discussions of assault, battery, false imprisonment, malicious prosecution and abuse of process. Chapter X dealt with "Invasions of Rights in Real Property," and discussed abuse of license, various forms of trespass, and waste.

In organizing his causes of action around invasions of rights, Cooley's treatise reflected one of the two competing schemes for organizing tort law that emerged during the late nineteenth century.

61. F. HILLIARD, supra note 60. For example, Chapter V covered "Torts to the Person — Assault and Battery"; Chapter VI covered "False Imprisonment"; Chapter XVI covered "Malicious Prosecution"; Chapter XVII examined "Injuries to Property"; Chapter XIX examined "Nuisance"; and Chapter XXV "Conversion." Id. at xiv-xix.

62. For example, Chapter XXXIV dealt with the tort liability of corporations; Chapter XXXVI with the tort liability of railroad corporations; Chapter XLII with "Torts connected with the Relation of Husband and Wife"; and Chapter XLIII with "Parent and Child." Id. at ii-viii.

63. Chapter XLIV, for example, dealt with "Bailments," while Chapter XXIII covered "Patents, Copyrights, etc." Id. at viii, xx.

64. Chapter III discussed the "General Nature and Elements of a Tort," while Chapter XL discussed the liability of the master for acts of a servant. Id. at xiii, vii.

65. Even Holmes, as late as 1871, had suggested that torts might not be "a proper subject of a law book." Book Notice, 5 AM. L. REV. 340, 341 (1870-71). Although the article is unsigned, scholars have attributed the writing to Holmes. See, e.g., G. WHITE, supra note 59, at 7 n.25.

66. T. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT (1880).

67. Id. at vii.

68. Id. at ix.

69. The balance of this Article will, at several points, contrast Cooley's approach with
Cooley's approach began with the assumption that individuals are entitled to the protection of certain rights, such as the rights to personal safety, personal liberty and property, and regarded the law of torts as a series of remedies for invasions of those rights.\(^7\)

This rights-based approach was hardly novel. Its origins can be traced to William Blackstone's Commentaries on the Laws of England published in 1765.\(^7\) Blackstone had devoted one of his four volumes to the "Law of Wrongs," which had an organizational scheme remarkably like Cooley's.\(^7\) Cooley, thus, was less an originator than an influential proponent\(^7\) of his rights based conception of tort law.

b. *The Holmes Scheme and Intentional Tort.*—The second and ultimately prevailing organizational scheme was largely the inspiration of Oliver Wendell Holmes. It was Holmes who provided tort law with its modern theoretical structure.

In an 1873 article, Holmes concluded that cases imposing tort liability fell into one of three classes.\(^7\) At one extreme, were cases in which liability was strict, *i.e.*, "irrespective of culpability."\(^7\) At the other extreme were cases involving "frauds, or malicious or wilful injuries,"\(^7\) *i.e.*, intentional torts.\(^7\) Between these categories was "the
great mass of cases" requiring an allegation of negligence.

The tripartite division of law described by Holmes in his 1873 article was expanded upon considerably in Lectures III and IV of his 1881 book, *The Common Law.* In late 1879, Holmes had been invited to give the annual Lowell Lectures the following year in Boston. The opportunity to give these Lectures spurred Holmes to combine several of his unconnected articles on various aspects of the common law into a single work. After approximately one year of frenzied research, Holmes delivered the twelve Lowell Lectures in November and December of 1880. They were published in book form as *The Common Law* the following year.

The fundamental thesis in Holmes' theory of tort law was that liability is imposed on grounds of public policy, rather than subjective moral fault. In the case of strict liability torts, Holmes regarded that proposition as self-evident.

Negligent and intentional torts presented a greater challenge to his thesis because their "moral phraseology” suggested that tort liability was "the result of some moral short-coming." The principal task of Lectures III and IV was to show that liability, even for negligent and intentional tort, was based on considerations of public policy and not moral blameworthiness.

In the case of negligence, Holmes argued that fault was measured not by a personal, internal standard, but a general, external one. The test was "what would be blameworthy in the average man, the man of ordinary intelligence and prudence." Thus, negligence shown below, however, he devoted considerable effort to equating fraud and malice with intent. Thus, it seems fair to label this category as one of intentional torts and such has become the convention. See, e.g., G. White, supra note 59, at 13.

78. *The Theory of Torts,* supra note 74, at 653.
79. O.W. Holmes, supra note 22. In analyzing Holmes' theory of torts, I found helpful and have been influenced by M. Howe, supra note 74; Kelley, *A Critical Analysis of Holmes's Theory of Torts,* 61 Wash. U.L.Q. 681 (1983); Holmes II, supra note 58, at xi-xxvii (introduction by M. Howe). As Howe notes in his biography of Holmes, there is considerable change in Holmes' approach to tort law between 1873 and 1881. M. Howe, supra note 74, at 186-87. For my purposes, I simply have focused on Holmes' theory of torts as it had developed by 1881, essentially disregarding his early writing to the extent that it is inconsistent. Subsequent citations to *The Common Law* will be to the 1963 Howe edition.
81. *Id.* at 157-58.
82. *Id.* at 158-59.
83. *Id.* at 159.
84. Holmes II, supra note 58, at 65.
85. *Id.* at 87.
consisted of a failure to satisfy some external, objective standard of conduct imposed by the courts on considerations of policy.

In the case of the intentional tort, Holmes' argument built on his analysis of both negligence and criminal law. The category of intentional torts comprised those involving "fraud, malice, and intent." Holmes began his discussion of these torts by asserting that, in criminal law, both malice and intent referred simply to foresight that a harm would occur. He suggested that, in the civil law as well, fraudulent, malicious, intentional and negligent harms could be brought into a "philosophically continuous series" organized according to the degree of foreseeability of the harm. Foreseeability, moreover, would be measured by an objective standard so that the extent to which the defendant actually foresaw or intended harm would be irrelevant.

For Holmes, the category of fraud, malice and intent included none of what are now considered the classic intentional torts. These traditionally had been strict liability torts. Rather, the category was a grab-bag of miscellaneous torts which had developed out of the old action on the case: deceit, slander and libel, malicious prosecution and conspiracy. He treated each separately.

Holmes regarded deceit as an "intentional" wrong. The relevant intent was the intent that the defendant's false statement be acted upon. He defined intent in that context, however, as including knowledge of the probability of harm. Knowledge, moreover, was measured by an objective standard. Thus, liability for deceit, like that for negligence, was imposed when public policy so required, not because of the moral shortcoming of the tortfeasor.

Slander, Holmes observed, often had been said to require malice, which suggested that actual intent to cause harm, if not malevolence, was required. Yet, he argued malice, in fact, was presumed upon the speaking of certain words, regardless of the speaker's state of mind. Liability for slander, thus, was based on considerations of policy and not the personal blameworthiness of the speaker.

86. Id. at 104.
87. Id.
88. Id. at 104, 116-17.
89. Id. at 117.
90. See supra notes 15-52 and accompanying text.
91. HOLMES II, supra note 58, at 106.
92. Id. at 106-08.
93. Id. at 110.
94. Id.
Malicious prosecution did not fit so easily into Holmes' theory. The difficulty was that Holmes was forced to admit that the element of malice was, in fact, measured by a subjective test which evaluated actual moral blameworthiness. There was "weighty authority to the effect that malice in its ordinary sense is to this day a distinct fact to be proved and to be found by the jury." Thus, it was entirely possible to say that malicious prosecution was limited to cases where the underlying charge was made for improper motives.

Holmes responded to this difficulty by denigrating the importance of malicious prosecution, calling it "comparatively insignificant." He noted further that this instance of an actual malice standard, in which the defendant's subjective state of mind was relevant, stood "almost alone in the law of civil liability" and was justified by the peculiar nature of the wrong.

Holmes also acknowledged that "the moral condition of the defendant's consciousness might seem to be important" to the tort of conspiracy as well. In part, this was because the action originally was much like malicious prosecution, although it had been broadened to cover other circumstances. The law might recognize other "isolated instances" in which actual malevolence was a basis for liability, but these were exceptions.

In truth, Holmes' category of intentional torts was really not that at all. As Holmes knew, slander was really a strict liability tort because malice was presumed from certain conduct. Holmes treated deceit as an intentional tort, but there was authority in Holmes' day for the view that an action for deceit would lie for even innocent misrepresentation. Proof of intentional wrongdoing was unneces-

95. Id. at 112.
96. Id. at 112-15.
97. Id. at 113.
98. Id. at 112.
99. Id. at 113.
100. Id. The tort was peculiar in nature because it rendered actionable the use of legal process, which Holmes regarded as "treading on delicate ground." Id. The peculiarity of this tort explained the use of an actual malice standard.
101. Id.
102. Id. at 114.
103. See generally POLLOCK II, supra note 60, at 353 (observing that, while it generally is said that fraudulent intent is necessary to sustain an action for deceit, many cases hold innocent misrepresentation actionable). See, e.g., Totten v. Burhans, 91 Mich. 495, 51 N.W. 1119 (1892) (stating "that it is immaterial whether a false representation is made innocently or fraudulently, if, by its means, the plaintiff is injured"); Holcomb v. Noble, 69 Mich. 396, 37 N.W. 497 (1888) (holding that "in equity an actual design to mislead is not necessary if a party is actually misled by another in a bargain.").
sary. The remaining torts in the category required some form of actual malice.

The inevitable question is why Holmes created a category of intentional tort at all. At the time Holmes wrote, intentional wrongdoing appears not to have been a necessary condition for liability for any tort, with the possible exception in some jurisdictions of deceit, although it was a sufficient basis for many kinds of injuries. Holmes might well have simplified his scheme by dividing torts into those based on fault and those based on strict liability, without further subdividing the former category into intentional and negligent tort. Alternatively, he could have, with equal ease, organized tort law into malice, fault and strict liability. On the assumption that Holmes was willing to press the case law into a "philosophically favorable shape," it required at least as much pressure on the materials to create a category of intentional tort as to disregard intent altogether.

The problem for Holmes was that a few torts of some importance in his day required proof of actual malice or improper motive. These were hard to reconcile with his central thesis that tort liability was based on public policy and not personal blameworthiness.

Holmes' solution was to create a category of intentional torts which could swallow up malicious torts. In his discussion of criminal law in Lecture II of *The Common Law*, Holmes had argued that malice, as used in criminal statutes, simply meant intent. It became his rhetorical device thereafter routinely to pair malice and intent as if essentially synonymous. In this way, he collapsed malicious torts into intentional tort.

Indeed, intentional wrongdoing played an important part in Holmes' general theory of tort. The first lecture in *The Common Law* had argued that the earliest forms of liability had been based on intentional injuries for which one could be held morally blameworthy. The core of Holmes' subsequent discussion of criminal law, torts and contracts was a demonstration that the trend of the

104. Within ten years of when *The Common Law* was published, Melville Bigelow had proposed just such an arrangement. See infra text following note 131.
105. See Holmes II, supra note 58; see also Kalven, *Torts*, 31 U. Chi. L. Rev. 263, 266 (1964) (finding that Holmes' efforts to fit the intentional torts into his analysis are "doctrinaire, unilluminating, and even a little foolish.").
106. Holmes II, supra note 58, at 185-86.
107. Id. at 190-91.
108. Id. at 192-95.
109. Holmes II, supra note 58, at 8.
law had been toward replacing standards of liability based on personal culpability with standards based on legislative policy.

Including a category of intentional torts created a symmetry between criminal law and tort law,\textsuperscript{110} while providing a place to bury malicious torts. The former was important to his effort to organize the law in a "philosophically continuous series" while the latter seemed to strengthen his argument that liability was based on public policy rather than moral blameworthiness.

In Holmes' 1881 tort theory, then, liability based on fault consisted of a general theory of negligence and a category of intentional torts. Holmes did not address the question of why some torts should require proof of intentional conduct while others required only negligence. Rather, he posited the existence of intentional torts as a given and devoted his efforts to merging malice into intent and then subjecting the latter to an objective standard in order to eradicate the element of personal fault. Holmes seems not to have seen any anamoly in the fact that negligence had been formulated as a general theory, while intentional tort was a miscellany of specific causes of action.

c. The Pollock and Bigelow Adaptations.—In the decade following the publication of \textit{The Common Law}, Holmes’ tripartite scheme was adopted as the organizing principle of treatises authored by two of his friends, Sir Frederick Pollock and Melville Bigelow. Pollock’s treatise\textsuperscript{111} appeared first, in 1887.

Holmes had met Pollock in 1874 during a trip to England,\textsuperscript{112} beginning a correspondence and friendship that lasted until Holmes’ death.\textsuperscript{113} Holmes had sent a copy of \textit{The Common Law} to Pollock upon its publication and had anxiously sought Pollock’s opinion.\textsuperscript{114} When Pollock published his own treatise in 1887, he dedicated it to Holmes.\textsuperscript{115}

Pollock began his discussion with the observation that the law

\begin{footnotesize}
\begin{enumerate}
\item[110.] \textit{Id.} at 186, 194-98; see also Kaplan, \textit{Encounters with Holmes}, 96 HARV. L. REV. 1828, 1830-33 (1983) (discussing Holmes' application of an objective standard to both crime and intentional torts).
\item[111.] F. \textsc{Pollock}, \textit{The Law of Torts} (1887). Subsequent citations to Pollock’s treatise will be to the American edition, published in 1894. According to the preface to the American edition, the latter did not alter the text or the notes of the original, although certain new material, designated as such, was added. F. \textsc{Pollock} II, supra note 60.
\item[112.] S. \textsc{Novick}, supra note 80, at 145-46.
\item[113.] Id. at 149-50, 155, 229-30, 324, 337, 355, 373. The correspondence has been published. See 1 \textsc{Holmes-Pollock Letters} (M. Howe ed. 1941).
\item[114.] S. \textsc{Novick}, supra note 80, at 163-64.
\item[115.] \textsc{Pollock} II, supra note 60, at vii.
\end{enumerate}
\end{footnotesize}
provided a remedy for certain types of wrongs, such as "wrongs affecting a man in the safety and freedom of his own person, in honor and reputation" or "wrongs which affect specific property." He organized them into three groups: Group A, which were "Personal Wrongs"; Group B, which were "Wrongs to Property"; and Group C, which were "Wrongs to Person, Estate, and Property Generally." Thus far, his approach resembled Cooley's and Blackstone's.

Pollock went on to observe, however, that "on further examination" it could be seen that these three groups "have certain distinctive characters with reference to the nature of the act or omission itself." Specifically, in Group A, the wrongs were "wilful or wanton," that is, they were intentional torts. In Group B, liability was "apparently unconnected with moral blame," that is, the torts were based on strict liability. In Group C, liability was based on negligence and included principally the torts of nuisance and negligence.

Pollock, thus, superimposed Holmes' scheme on Cooley's. Tort law protected some rights against intentional invasion, some against negligent invasion, and others without regard to the defendant's state of mind.

Pollock's category of intentional torts was larger than Holmes'. It included deceit, malicious prosecution, conspiracy and slander and libel — the four torts which Holmes had included as intentional torts. Pollock also included, however, certain "Wrongs affecting personal relations in the family," specifically, seduction and enticing away of servants, which had not been mentioned by Holmes. Finally, he included three of what would become classic intentional torts: assault, battery and false imprisonment. The other classic intentional torts, trespass to land and trespass to chattels, still were listed by Pollock in Group B as strict liability torts.

Melville Bigelow and Holmes had become acquainted as members of a small circle of scholarly lawyers which formed in Boston in 1866 and also included John Gray, John Ropes, and Nicholas St. John Green. Ropes and Gray founded The American Law Review, in which Holmes' 1873 article on tort law appeared and to which

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116. Id. at 6.
117. Id.
118. Id. at 8.
119. Id. at 9-12.
120. S. Novick, supra note 80, at 116.
Bigelow also contributed. After lecturing at the Harvard Law School for a time in the late 1860s, where Holmes also was a lecturer, Bigelow joined the faculty of the Boston University Law School. When Holmes delivered the lectures in 1880 that were to be published the following year as *The Common Law*, Bigelow was among those in attendance.

Bigelow published the first edition of his torts treatise in 1878, but it was apparently organized along the lines preferred by Cooley, that is, organized as a series of wrongs to the person, to property and to reputation. In the 1891 edition, Bigelow rearranged the treatise, grouping all torts into one of three categories.

The first category was “Breach of Duty to Refrain from Fraud or Malice.” In this category, Bigelow placed Holmes’ intentional torts: deceit, malicious prosecution, conspiracy and slander and libel. He also included a relatively new tort—malicious interference with contract. Bigelow’s organization was less argumentative than those of Holmes and Pollock. Unlike his two contemporaries, Bigelow had not attempted to construct a category of intentional tort into which malicious torts fell as merely an unimportant residuary. Rather, Bigelow had recognized that the third category largely was malicious torts, to which the tort of deceit could be annexed.

The second category was “Breach of Absolute Duty.” This category included all of what have now become the classic intentional torts: assault, battery, false imprisonment, and trespass to property. The third category was “Breach of Duty to Refrain from Negligence” and included a single tort: the tort of negligence. Bigelow’s scheme, thus, reflected the tendency originating with *The Common Law* to conceive of intentional tort as a collection of discrete torts and negligence as a general theory of liability in tort.

In Bigelow's 1891 treatise, all vestiges of Cooley's approach had
vanished. Tort law was conceptualized as a series of discrete causes of action organized into three categories: fraud and malice, strict liability, and negligence. The notion of organizing torts around particular rights to be protected, even as subdivisions of the three principal categories, had been abandoned.

d. The Triumph of the Holmes Scheme.—The different organizational schemes proposed by Cooley and Holmes reflected different assumptions about the nature of tort law. As already noted, Cooley understood tort law as a set of remedies for invasions of rights. His treatise set forth the "general principles under which tangible and intangible rights may be claimed and their disturbance remedied in the law." In Cooley's view, the rights preexisted the law. Through judicial decisions, these principles were discovered and applied to decide cases. But, as Cooley explained:

[A] principle newly applied is not supposed to be a new principle; on the contrary, it is assumed that from time immemorial it has constituted a part of the common law of the land, and that it has only not been applied before, because no occasion has arisen for its application.

Every recognition of a new right, however, was "likely to raise questions of its adjustment to, and its harmony with, existing rights previously enjoyed by others." Thus, the chief business of government was to define rights, prescribe their limits, and protect against infringement.

As disputes arose, the court was required either to find an existing rule which would resolve the dispute or await the establishment of a new rule by the legislature. For the court itself to invent a rule would be an improper usurpation of the province of the legis-

132. See supra notes 66-73 and accompanying text.
133. T. COOLEY, supra note 66 (preface).
134. From this view, one is tempted to deduce that Cooley believed in natural law. In fact, the contrary was true. Cooley was a positivist, believing that rights were the creation of government. T. COOLEY, supra note 66, at 6 n.2 (2d ed. 1888). Further, he understood that his premise that rights have always existed, but are only gradually discovered, was based on "a liberal use of fiction." Id. at 11. Nevertheless, the legitimacy of judicial decision making was based on this fiction. Id. at 14.
135. Id. at 13-14.
136. Id. at 1-2.
137. Id. at 5-6.
138. Id. at 12-13.
lature. If the court were to resolve the dispute, it could do so only by accepting the "principle that the existing law governs all cases, and that the ruling principle for any existing controversy will be found, if sought for." Case law, in short, developed through the application of principles to facts.

Tort law was organized as a set of rights, the invasion of which the law would remedy. Conduct was actionable as tortious when it invaded a right and caused damage. Cooley did not conceive of the defendant's state of mind as an organizing principle or a dimension of tort law requiring separate discussion.

In fact, Cooley's only systematic discussion of the defendant's mental state was in the final chapter of his treatise in which he went to some pains to deny the importance of malice, which he seemed to regard as synonymous with intent. Cooley wrote that:

In the course of the preceding pages it has been made very manifest that when the question at issue is, whether one person has suffered legal wrong at the hands of another, the good or bad motive which influenced the action complained of is generally of no importance whatever.

Thus, "[a]n act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." Or, as Cooley put it in perhaps the most quoted passage of the entire treatise, "[m]alicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful."

Holmes, in contrast to Cooley, simply did not believe that the results of concrete cases could be deduced from abstract rights. As he was to observe in *American Bank & Trust Co. v. Federal Reserve Bank*, "the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion." In Holmes' view, judicial deci-

139. Id. at 12.
140. Id. at 13.
141. Id. at 66.
142. Id. at 830.
143. Id.
144. Id.
146. Id. at 832.
147. S. Novick, supra note 80, at 250.
148. 256 U.S. 350 (1921)
149. Id. at 358.
sions were based on considerations of policy.\textsuperscript{150} The very act which Cooley decried as an illegitimate usurpation was for Holmes the essence of judicial decision-making.

In fact, the concept of “right” had very little role in Holmes’ tort theory. Holmes’ fundamental conception in tort law was not “right” but “duty.” Tort law consisted of a set of duties not to injure another imposed by government for reasons of public policy. The breach of some duties resulted in liability without fault, while the breach of others resulted in liability only where harm was foreseeable or intended.\textsuperscript{151}

Yet, for all the difference between these two jurists regarding the fundamental nature of law, Holmes and Cooley had much in common.\textsuperscript{152} Both were positivists. Holmes had an instrumentalist vision of positivism, while Cooley would have to be called a formalist.

Consistent with their positivism, both men sharply distinguished between law and morality. Holmes devoted the greater portion of his torts discussion in \textit{The Common Law} to proving that personal moral blameworthiness was irrelevant to tort liability.\textsuperscript{153} Cooley similarly believed that it was “impossib[le] [to] make moral wrong the test of legal wrong.”\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{150} See supra notes 82-102 and accompanying text.
\item \textsuperscript{151} See supra notes 85-103 and accompanying text.
\item \textsuperscript{152} The problems which occupied these two theorists were very similar. Within five years of each other, both men wrote a passage attempting to state in general terms the nature of judicial decision-making in the common law. The similarities are as striking as the differences. Holmes, writing in his 1873 article on the theory of torts, began, “[t]he growth of law is very apt to take place in this way.” \textit{The Theory of Torts}, supra note 74, at 654. Cooley, writing seven years later in his treatise noted, “[t]he process of growth has been something like the following.” \textit{T. COOLEY}, supra note 66, at 13 (2d ed. 1888).

Holmes’ idea was that widely different cases suggest a general distinction between two opposite positions. As cases cluster around the poles, however, they begin to approach each other until the distinction becomes difficult to discern. Holmes argued, particularly in \textit{The Common Law}, that the placement of a case on either side of the line separating the poles was a matter of policy. \textit{The Theory of Torts}, supra note 74, at 654.

Cooley’s idea was that a case articulates a principle which, as it is followed in additional cases involving different facts, seems to expand. If new cases arise which cannot fit within a previously declared principle, then a new principle must be announced. The newly announced principle “must always be so far in harmony with the great body of the law that it may naturally be taken and deemed to be a component part of it, as the decision assumes it to be.” \textit{T. COOLEY}, supra note 66, at 14 (2d ed. 1888).

Holmes thus conceived of the law as fundamentally based on conflicts between competing ideals, which judges must resolve through resort to public policy. Cooley, on the other hand, conceived of the law as fundamentally in harmony, with adjudication being the process of a systematic exposition of the law as it applies to new factual situations.
\item \textsuperscript{153} See supra notes 83-102 and accompanying text.
\item \textsuperscript{154} \textit{T. COOLEY}, supra note 66, at 4 (2d ed. 1888).
\end{itemize}
Both also shared, at least initially, an opposition to inquiry into motive. In Holmes' case, conditioning liability upon motive or actual moral blameworthiness gave an importance to the individual that was inconsistent with his instrumentalist view of law, under which legal entitlements rested on public policy. In Cooley's case, conditioning liability upon the actor's motive was inconsistent with his purely formal scheme in which tortious conduct was, in its essence, wrongful because of the right it invaded. That is, taking motive into account would have required a particularized inquiry that would have defeated the purpose of a scheme in which the lawfulness of conduct was prescribed at such a high degree of generality. As will be seen below, Holmes, within a few years, changed his position and found a role for evil motive in his scheme, while Cooley's position apparently never changed.

Pollock and Bigelow were pioneers in the organization of tort law in accordance with Holmes' scheme. Gradually, Holmes' scheme displaced competing schemes in other treatments of tort law as well. For example, early editions of James Barr Ames' casebook followed an approach which perhaps most resembled that of Hilliard. When Roscoe Pound revised the casebook in 1919, however, he reorganized it according to Holmes' tripartite division. Other casebooks in the period after 1910 also adopted Holmes'
The ultimate triumph of Holmes' tripartite scheme was assured in 1934, when the American Law Institute adopted it for use in its *Restatement of the Law of Torts*. The first *Restatement* organized tort law into three divisions coinciding with Holmes' three categories: intentional harms to persons, land and chattels; negligence; and liability without fault.\(^1\)

In the Institute's view, however, these three divisions did not exhaust the law of torts. The first *Restatement*, thus, contained additional divisions relating to defamation; deceit and malicious prosecution; harms to contract relations; harms to domestic relations; and legal and equitable relief against tortfeasors.\(^2\)

In structure, the approach to intentional tort of the first *Restatement* closely approximated Pollock's refinement of Holmes' scheme. Intentional tort was subdivided according to the various interests protected, such as the interest in freedom from harmful bodily contact, the interest in freedom from confinement, or the interest in the retention of the possession of chattels.\(^3\) In this manner, various interests protected by tort law were grouped according to Holmes' three categories.

While the scholarly literature written after publication of *The Common Law* increasingly accepted Holmes' tripartite division as the organizational scheme for the law of torts, there was continuing disagreement over which precisely were the intentional torts. Pollock, although writing his treatise only six years after *The Common Law* had been published, added assault, battery and false imprisonment to Holmes' listing.\(^4\) Bigelow, writing four years after Pollock, followed Holmes more closely.\(^5\)

The first *Restatement* followed Pollock's trend away from Holmes to an astonishing degree. None of the torts considered intentional by Holmes—fraud, libel and slander, malicious prosecution and conspiracy—were included by the first *Restatement* in the division devoted to intentional harms to persons, land and chattels. Rather, these were distributed among separate divisions.\(^6\) As inten-

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160. *RESTATEMENT (FIRST) OF TORTS* xi (1934) [hereinafter *RESTATEMENT*].
161. *Id.*
162. *Id.* at xix-xxii.
163. *See supra* text following note 119. For yet a different approach by Roscoe Pound, see J. AMES & J. SMITH, *supra* note 158.
164. *See supra* notes 124-31 and accompanying text.
165. *See supra* text accompanying note 161.
tional torts, the first Restatement included assault, battery, false imprisonment, and trespass to land and chattels\textsuperscript{166}—the torts now considered "classic" intentional torts, but none of which were included by Holmes in his category of torts based on fraud, malice and intent.

c. The Holmes Scheme and Negligence.—However much his scheme was a product of his own creativity, Holmes' embrace of fault as the central organizing principle of tort law reflected genuine changes in the case law during the last half of the nineteenth century. This period saw the emergence of negligence as the principal basis for recovery in tort for physical injuries to person or property.

The conventional wisdom is that the emergence of modern negligence began with the 1850 decision in \textit{Brown v. Kendall}\textsuperscript{167} by Chief Justice Lemuel Shaw of Massachusetts.\textsuperscript{168} In \textit{Brown}, the defendant unintentionally struck the plaintiff with a stick which he swung while trying to separate two fighting dogs.\textsuperscript{169} In deciding that the defendant was not liable, Chief Justice Shaw observed that to prevail the plaintiff must "show either that the intention was unlawful, or that the defendant was in fault."\textsuperscript{170} Shaw later equated fault with a lack of due or ordinary care, which he defined as "that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger."\textsuperscript{171}

Shaw's opinion is famous because of its apparent rejection of strict liability as a basis for tort recovery and for its formulation of a modern standard of negligence based on a failure to exercise reasonable care, rather than a failure to perform a duty, \textit{i.e.}, as misfeasance rather than nonfeasance. Shaw suggested that a plaintiff could recover only if the defendant acted intentionally or negligently.

Notwithstanding its fame, \textit{Brown} is but an illustration of a general trend in which nineteenth century courts began to require a showing of negligence, at a minimum, for recovery in tort for physi-
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1. Physical injury. Although it has been challenged, the prevailing view is that courts adopted negligence as a general standard of liability for physical injury in order to shield emerging economic enterprises from the cost of compensating those whom their activities injured, thus promoting economic development. Brown also reflected the trend toward defining negligence as a breach of reasonable care owed to other persons generally, rather than breach of a duty established by law to a particular person. This trend can also be attributed to the process of industrialization, which increasingly led to injuries between strangers, where there was no prior relationship, and thus no preexisting duty. Only through a general duty of care could injuries between such persons be made actionable.

Modern negligence theory thus accomplished two seemingly contradictory tasks. It created a duty which each person owed to all other persons, while limiting that duty to one of reasonable care. Negligence theory, in other words, both expanded and contained liability for physical injury.

III. ORIGINS OF THE GENERAL THEORY OF INTENTIONAL TORT

A. The Conceptualization of a General Theory

Although tort scholars were quick to embrace a general theory of negligence, no similarly broad acceptance of a general theory of intentional tort occurred. The first treatise writer to posit a general theory of intentional tort appears to have been Pollock, who in that respect anticipated Holmes by about seven years.

In Chapter II of his 1887 treatise, Pollock attempted to state


173. See Schwartz, Tort Law, supra note 172; Schwartz, Early American Tort Law, supra note 172.


175. M. HORWITZ, supra note 22, at 88, 92; G. WHITE, supra note 59, at 16.

176. G. WHITE, supra note 59, at 18-19.

177. See infra note 190 and accompanying text.
the general principles upon which tort liability was based. He opened the chapter with the assertion that it was “a general proposition of English law that it is a wrong to do wilful harm to one’s neighbour without lawful justification or excuse.” At the same time, he candidly admitted that there was no “express authority” of which he knew that would support the proposition. Rather, this was a general principle of modern tort law established by many cases, none of which dealt with the subject at that level of generality.

Pollock believed it to be a matter of simple logic that there should be a general theory of intentional tort. Observing that the law of negligence imposed a universal duty on all persons to avoid causing harm to others, he reasoned that “[i]f there exists, then, a positive duty to avoid harm, much more must there exist the negative duty of not doing wilful harm; subject, as all general duties must be subject, to the necessary exceptions.” This duty to abstain from wilful injury, like the duty to use due diligence to avoid causing harm, was “of a comprehensive nature.”

The English authority which Pollock lacked for his proposition appeared three years later in Mogul Steamship Co. v. McGregor, Gow, & Co. In that case, the defendants were several shipping companies which had formed a “conference” and allocated among themselves the European tea trade with China. Under their agreement, they paid a five percent rebate to any shipping agent or principal who dealt exclusively with conference members. If an agent dealt with a nonmember, the agent would forfeit the rebate for all of his principals for an entire year. When plaintiff, a nonmember shipping company, arrived in Hankow to take on a load, defendants bid such a low price that plaintiff was able to take the cargo only at

178. POLLOCK II, supra note 60, at 22.
179. Id.
180. Id. at 23.
181. Id. Pollock suggested in the same passage that there was a third general duty—to respect the property of others. This apparently was a general duty to avoid committing trespass. Because Pollock regarded trespass as a strict liability tort, this third duty amounted to a general theory of strict liability. Since it was limited to protecting property, however, Pollock's general theory of strict liability was narrower than his general theories of intentional tort and of negligence.
182. 23 Q.B.D. 598, 613 (1889), aff'd, [1892] App. Cas. 25; see also Skinner & Co. v. Shew & Co., 1 Ch. 413, 422 (1892) (Bowen, L.J.) (stating that “[a]t Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse.”).
184. Id. at 601-02.
185. Id. at 602.
Plaintiff alleged that defendants had engaged in an unlawful conspiracy.\footnote{Id. at 602-03.}

In analyzing the lawfulness of the defendants' conduct, Lord Bowen began with this principle: "[I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."\footnote{Id. at 600.} Lord Bowen concluded, however, that the defendants' intentional infliction of injury to the plaintiff's trade was justified by the defendants' commercial motive of advancing their own trade, and, therefore, defendants were not liable.\footnote{Id. at 614-15.}

Seven years after Pollock's treatise appeared, Holmes articulated a general theory of intentional tort in his 1894 article, \textit{Privilege, Malice, and Intent}.\footnote{Holmes, \textit{Privilege, Malice, and Intent}, 8 HARV. L. REV. 1 (1894).} Holmes wrote that "the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause."\footnote{Id. at 3.} Although Holmes referred to this doctrine as "commonplace,"\footnote{Id. at 2-3.} he cited only two cases in support of the principle: \textit{Mogul Steamship Co. v. McGregor, Gow, & Co.} and \textit{Walker v. Cronin}, an earlier Massachusetts case discussed below.\footnote{See infra notes 216-23 and accompanying text.}

Holmes did not explain what he meant by temporal damage. Further, he passed over the requirement of intentionality or foreseeability with the casual remark that these were governed by the external standard and referred the reader to Lectures II, III and IV of \textit{The Common Law}.

Holmes' discussion in \textit{Privilege, Malice, and Intent} reflected a noticeable shift in his thinking from regarding intentional tort as a collection of discrete causes of action to regarding it as a general theory of liability. The discussion no longer is of intentional torts,
but of intentional tort.

Holmes also demonstrated in *Privilege, Malice, and Intent* a greater willingness to acknowledge the importance of actual malice as a basis for liability. In *The Common Law*, Holmes attempted to reduce cases involving actual malice to a type of residual category contained within the larger grouping of intentional torts. Holmes had tried to explain away the requirement of actual malice, which was an embarrassment to his theory of torts. In *Privilege, Malice, and Intent*, Holmes rather freely admitted the existence of cases in which “actual malice may make [one] liable when without it he would not have been.” Holmes defined malice as “a malevolent motive for action, without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another.” For the first time, Holmes articulated a role for actual malice in his analytical scheme. The fact that the defendant was motivated by actual malice or improper motive was a factor to be considered in weighing the defendant’s justification. That is, an intentional injury that was justified if done for a proper motive might not be justified if done for an improper one.

This approach in effect modified an important part of Holmes’ thesis in *The Common Law*. There, he had attempted to arrange malice, intent and negligence in a “philosophically continuous series.” That is, these terms denoted simply different degrees of foreseeability of harm, with intentional torts representing a mid-point between malicious and negligent tort. In *Privilege, Malice, and Intent*, Holmes in effect acknowledged that the presence of malice was relevant to the justification rather than the foreseeability element of intentional tort. Intent and negligence could be arranged

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196. See supra notes 107-10 and accompanying text.
197. Holmes, supra note 190, at 2.
198. Id.
199. Id. at 5-6; see also HOLMES-POLLOCK LETTERS, supra note 113, at 65, 110 (stating that one’s motive has an effect on one’s privilege).
200. HOLMES II, supra note 58, at 104.
201. See id. at 116.
202. See Holmes, supra note 190, at 2-6. The acknowledgment that malice is relevant to the element of justification rather than foreseeability is “in effect” because Holmes certainly never made that acknowledgment expressly. Quite to the contrary, the opening paragraphs of *Privilege, Malice, and Intent* are a brief summary of his theory of torts from *The Common Law* and explicitly repeat his thesis that malice and intent refer simply to a “very great” probability of harm, while negligence refers to a lesser degree of foreseeability of harm. Holmes, supra note 190, at 1.

The shift occurs on the very next page, however, when during a discussion of justification he explains that “[i]n this connection I mean by malice a malevolent motive for action, with-
along a continuum, but malice measured an entirely different dimension of the defendant's conduct.\(^{203}\)

Holmes now acknowledged that liability could depend upon malice or evil motive. In so doing, he qualified in an important respect his fundamental thesis that liability is dependent upon public policy and not moral blameworthiness. While the foreseeability of harm still was to be measured by an objective test, justification was dependent, at least in part, upon the defendant's actual subjective state of mind.\(^{204}\)

The change in Holmes' position on the role of malice also placed him at odds with Cooley with respect to an issue on which they previously had agreed. Cooley's position remained that malicious motives did not render a lawful act unlawful, and motives thus were immaterial.

Holmes' new position with respect to malice undercut both of the functions which his category of intentional tort had performed in *The Common Law*. By treating malice as relevant to justification rather than as an endpoint on a continuum which also included intent and negligence, Holmes destroyed the very symmetry between criminal and tort law that the category of intentional tort had served so well to establish.\(^{205}\) Furthermore, by openly acknowledging the relevance of moral blameworthiness, he had eliminated the need for a category of intentional torts in which to bury malicious torts.\(^{206}\)

Yet, far from rendering the category of intentional tort superflu-

\(^{203}\) See id. at 2 (arguing that a showing of malice could produce liability where none would otherwise exist by defeating the defendant's privilege).

\(^{204}\) In Aikens v. Wisconsin, 195 U.S. 194 (1904), Holmes briefly alluded to the fact that, in his view, foreseeability was measured by an objective standard, while justification was measured by a subjective standard. After observing that some justifications “may depend upon the end for which the act is done,” Holmes went on to argue that:

> It is no sufficient answer to this line of thought that motives are not actionable and that the standards of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen.

*Id.* at 204. Holmes never explained why an objective standard should apply to the element of foreseeability, but not justification, a surprising omission given that establishing an objective standard was both a major purpose and a principal legacy of *The Common Law*; see also Kaplan, supra note 110, at 1833 (concurring in the view that Holmes retreated from an objective standard in *Privilege, Malice, and Intent*).

\(^{205}\) See supra notes 109-10 and accompanying text.

\(^{206}\) See supra notes 107-10 and accompanying text.
ous, *Privilege, Malice, and Intent* suggested that intentional tort now had an entirely new function in Holmes' tort theory. As will be shown, intentional tort provided the theoretical basis for analyzing a new category of harm which had been entirely excluded from consideration in *The Common Law.*

**B. The General Theory in the Courts**

In reading *Privilege, Malice, and Intent,* one is struck by the sudden importance of intentional tort to Holmes' conceptual scheme. Between 1881 and 1894, Holmes' idea of an intentional tort seems to have changed dramatically. In *The Common Law,* Holmes categorized intentional torts as a miscellany of relatively well-established causes of action—fraud, slander and libel, malicious prosecution and conspiracy—all loosely lumped together seemingly to prove some larger philosophical points about the nature of law. In *Privilege, Malice, and Intent,* Holmes is concerned with an entirely different species of intentional injury: primarily injury to economic interests caused by trade unions or business competitors.

Like his embrace of negligence, Holmes' sudden interest in this new form of intentional harm paralleled changes in the case law. As already noted, one consequence of industrialization was the increased number of unintentional injuries among strangers which created the opportunity for courts to posit a general theory of negligence based on a universal duty. Another consequence of industrialization was the rise of trade unionism with concomitant strikes, picketing and other forms of industrial warfare. It has been suggested that the United States in the late nineteenth century had the bloodiest and most violent labor history of any industrial nation in the world.

The struggle between labor and management led to new forms of *intentional* injury, particularly injury to economic interests. These injuries provided the opportunity for innovative judges to adopt a general theory of intentional tort, similar to the general theory of negligence already in existence.

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207. *See infra* notes 216-342 and accompanying text.
208. *See generally* HOLMES II, supra note 58, at 104-05 (discussing parallels between criminal and civil law).
210. *See supra* note 175 and accompanying text.
211. *See generally* L. FRIEDMAN, *supra* note 53, at 554-55 (discussing the labor strife that occurred in the late 1800s).
212. *Id.* at 484-86.
Numerous decisions, exemplified by *Dexter v. Cole*\(^\text{213}\) and *Ricker v. Freeman*,\(^\text{214}\) had articulated the principle that the infliction of injury without justification was actionable. If taken at face value, this principle created a general theory of strict liability. At least where the common law forms of action were in place, however, the scope of this principle was limited by the requirement that the plaintiff plead facts which would state a cause of action in trespass or case.

As will be seen, the courts created a general theory of intentional tort by taking the ostensibly general theory of strict liability articulated in the case law and adding a requirement of intentionality.\(^\text{215}\) Thus, the general theory of intentional tort, like the general theory of negligence, represented both an expansion and a contraction of tort liability. It expanded liability by providing a general theory of recovery divorced from the requirements of trespass, case, or any of the specific causes of action originating with those two writs. At the same time, it served to limit liability by restricting recovery to situations involving intentional conduct.

1. *Massachusetts and Holmes*

The doctrine of prima facie tort was first articulated in the United States in a series of Massachusetts decisions. The leading case is *Walker v. Cronin*\(^\text{216}\)—one of the two authorities relied upon by Holmes for his statement of a general theory of intentional tort in *Privilege, Malice, and Intent*.\(^\text{217}\)

In a case arising from a labor dispute, plaintiffs, who were shoe manufacturers in Milford, Massachusetts, alleged that the defendant and others, whose names were unknown, induced large numbers of persons who were in plaintiffs' employ or who were about to enter such employ not to work for plaintiffs. As a result, plaintiffs suffered injury to their business.\(^\text{218}\) The defendant demurred that the complaint failed to state a cause of action and the trial court sustained the demurrer.\(^\text{219}\)

In its decision reversing the trial court, the Massachusetts Su-
The Supreme Judicial Court began its analysis by quoting the familiar principle from *Dexter*,220 *Ricker*,221 and similar cases that "[i]n all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages."222 In its very next sentence, however, the court reformulated the principle and held that "[t]he intentional causing of such loss to another, without justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong."223 *Walker* thus carved the prima facie tort doctrine out of a general theory of strict liability already recognized in the case law, although limited in its application to facts falling within recognized causes of action.

In 1882, the year after *The Common Law* was published, Holmes was appointed to the Massachusetts Supreme Judicial Court.224 He used that position, rather deliberately, to begin to write his objective theory of tort law into the case law of Massachusetts.225 Following the publication of *Privilege, Malice, and Intent* in 1894, Holmes undertook a similar endeavor to write his general theory of intentional tort into Massachusetts law as well. His first opportunity came two years later with a labor injunction case—*Vegelahn v. Guntner*.226

Frederick O. Vegelahn owned a furniture factory on North Street in Boston.227 His upholsterers, principally German immigrants, went on strike for shorter hours and higher pay.228 They organized a picket and sought to discourage others from working or doing business with Vegelahn.229 After a fistfight broke out, Vegelahn came into equity court, where Holmes was sitting as sole judge, seeking an injunction against the picketing and the boycott.230

Holmes issued a preliminary injunction ordering the workers not

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220. *Dexter v. Cole*, 6 Wis. 319 (1858); see supra notes 33-38 and accompanying text.
221. *Ricker v. Freeman*, 50 N.H. 420 (1870); see supra notes 39-52 and accompanying text.
223. *Id.*
224. S. Novick, supra note 80, at 168-69; F. Biddle, MR. JUSTICE HOLMES 67 (1942).
225. S. Novick, supra note 80, at 179; see, e.g., Commonwealth v. Pierce, 138 Mass. 165 (1884) (upholding the manslaughter conviction of a doctor who recklessly prescribed a lethal course of treatment); see also Holmes Pollock Letters, supra note 113, at 26 (stating that "[i]f my opinion goes through it will do much to confirm some theories of my book.").
227. The description of the underlying facts is taken from S. Novick, supra note 80, at 221-22.
228. *Id.*
229. *Id.*
230. *Id.*
to obstruct the factory door and to refrain from threats or violence, but refused to enjoin peaceful picketing or the boycott.231 When the case came before the entire court, the majority issued a final injunction prohibiting the picketing and boycott entirely.232

In a separate dissent, Holmes argued that the picketing would not necessarily be violent and then went on to defend the legality of peaceful picketing and boycotting.233 Holmes began his defense with the assertion that “in numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified.”234 The decision whether the intentional infliction of damage was justified was to be made based not on “logic and general propositions of law” but on “considerations of policy and of social advantage.”235 Holmes next observed that much of our law was based on the policy of “free competition” or, more broadly, the “free struggle for life,” that combinations of capital in pursuit of competition had been permitted, and that combinations of labor are the “necessary and desirable counterpart.”236 Holmes concluded that the workers’ attempts to better their wages justified the harm to their employer from the strike, with the result that peaceful picketing was lawful.237

Holmes had endeavored to write his general theory of intentional tort into the case law, while applying it to further the cause of peaceful trade unionism. Although Holmes was not particularly sympathetic to the cause of labor, he believed that workers should have the right to organize in their struggle against capital, which was permitted to organize in corporate form.238 After the opinion became public, Holmes told a friend, “I have just handed down an opinion that shuts me off forever from judicial promotion.”239

Holmes, in other words, used his general theory of intentional tort not to expand, but to limit, liability. Although Pollock had written that the intentional infliction of injury was wrongful if not justified, Holmes had proposed the obverse: the intentional infliction of

232. Id. at 100, 44 N.E. at 1078.
233. Id. at 104-09, 44 N.E. at 1079-82.
234. Id. at 105, 44 N.E. at 1080.
235. Id. at 106, 44 N.E. at 1080.
236. Id. at 106-08, 44 N.E. at 1081.
237. Id. at 109, 44 N.E. at 1081-82.
239. S. Novick, supra note 80, at 223.
injury was not wrongful if justified. The general theory of intentional
tort, as seen by Holmes, not only could impose liability where none
existed before, but could immunize conduct actionable under other
tort theories. The doctrine seemed to supplant, rather than supple-
ment, other intentional torts.

Four years later, the Massachusetts Supreme Judicial Court
adopted Holmes' analytical approach in *Plant v. Woods,*240 but did
so without bringing Holmes into the majority. In *Plant,* the parties
were rival labor unions.241 Members of the defendant union re-
quested that various employers induce members of the plaintiff union
to join the defendant union.242 Although the defendant union did not
threaten violence, it led the employers to believe that failure to honor
its request would lead to strikes or a boycott.243

In upholding an injunction against the defendant union, the
court cited Holmes' article *Privilege, Malice, and Intent* for the prin-
ciple that the lawfulness of an injurious act depends upon its justifi-
cation.244 The court then found that the defendant union's activities
could be restrained because they were not justified, saying

> [T]he necessity that the plaintiffs should join this association is not
> so great, nor is its relation to the rights of the defendants, as com-
> pared with the right of the plaintiffs to be free from molestation,
> such as to bring the acts of the defendant under the shelter of the
> principles of trade competition. Such acts are without justification,
> and therefore are malicious and unlawful, and the conspiracy thus
> to force the plaintiffs was unlawful.246

Holmes' dissent expressed satisfaction that the court had adopted the
correct approach, but then argued that the defendant union's pur-
pose of strengthening its bargaining position justified the conduct at
issue.246

The court in *Plant* confronted the argument by Cooley and
others that "where one has the lawful right to do a thing, the motive
by which he is actuated is immaterial."247 The court, however, hav-
ing embraced Holmes' conceptualization of adjudication as a choice

240. 176 Mass. 492, 57 N.E. 1011 (1900).
241. Id. at 494, 57 N.E. at 1012.
242. Id. at 494-95, 57 N.E. at 1012.
243. Id. at 495, 57 N.E. at 1012.
244. Id. at 499-500, 57 N.E. at 1014.
245. Id. at 502, 57 N.E. at 1015.
246. Id. at 504-05, 57 N.E. at 1016.
247. Id. at 499, 57 N.E. at 1014; see supra notes 141-46 and accompanying text (dis-
cussing Cooley's articulation of this position).
among policies, rejected the argument that the inherent lawfulness of an activity simply could be deduced from general principles about rights. The court observed that “[i]f the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism.” In other words, if the proposition meant simply that one has a right to do what one has a right to do, irrespective of motive, it was a “truism” which begged the initial question of what it is that one has a right to do. The court went on to explain that determining the lawfulness of conduct required an inquiry into the justifications for it—an inquiry which in some cases might take motives into account.

The court’s rejection of Cooley’s approach, however, was less than complete. Despite its view that the general measure of lawfulness was justification, the court also observed that “in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor,” giving as an example the right to dig upon one’s own land for water. This precisely reflects Cooley’s approach of finding certain conduct lawful in its essence based on a right to engage in the conduct. Had the Court followed the Holmesian approach in the example given, it would have been required to say that the lawfulness of digging on one’s land for water depended upon whether any resulting injury to neighbors was justified. Holmes’ policy analysis was gradually undercutting Cooley’s rights analysis, but the process was not complete.

Holmes finally found himself in the majority on an intentional tort case, although one not involving a labor dispute, in Moran v. Dunphy. In that case, Dunphy had made statements about Moran to Moran’s employer prompting the latter to fire Moran. Moran sued Dunphy for damages arising out of Dunphy’s interference with his contract. The court held, per Justice Holmes, that “maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort.”

248. 176 Mass. at 499, 57 N.E. at 1014.
249. Id.
250. Id.
251. Id.
252. Id. at 485, 59 N.E. 125 (1901).
253. Id. at 485-86, 59 N.E. at 125.
254. Id.
255. Id. at 487, 59 N.E. at 126.
Presumably because the case was before the court on a demurrier, the opinion does not disclose what Dunphy's justification was or how the court would have balanced the justification against the injury. Moreover, the language of the opinion arguably states only the test for the actionability of interference with contract, not of intentional injury in general.

Holmes' most enduring statement in a judicial opinion of his views on intentional tort came three years later, after he had been elevated to the U.S. Supreme Court. In *Aikens v. Wisconsin*, Defendants had agreed among themselves that any advertiser who paid a newly-increased advertising charge by a particular competitor would be charged a similarly increased price by defendants' newspapers. Defendants contended that they had done no more than exercise their right not to contract, which was protected by the due process clause of the Fourteenth Amendment.

In his opinion for the court upholding the statute, Holmes asserted that the defendants' conduct would have been actionable at common law. He explained that "[i]t has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." Interestingly, the authority cited by Holmes for this proposition was not any of his Massachusetts decisions, but *Mogul Steamship Co. v. McGregor, Gow, & Co.* The quoted language became the classic American statement of the doctrine of *prima facie* tort, *viz*, that the intentional infliction of injury without justification is actionable.

Holmes' opinion also addressed the distinction between intent and justification. The Wisconsin statute had prohibited combinations which were either wilful or malicious. Holmes suggested that wilful
injury "would embrace all injuries intended to follow from the parties' acts, although they were intended only as the necessary means to ulterior gain for the parties themselves." Malicious injury, on the other hand, meant "doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired." A few paragraphs later Holmes equated malice with the somewhat more memorable phrase "disinterested malevolence."

Holmes, in other words, took the same position in Aikens that he had in Privilege, Malice, and Intent. Malice was relevant to the element of justification, rather than intent.

Holmes explained that he understood the Wisconsin Supreme Court as construing the statute to apply only to malicious conduct. He reserved judgment on whether a statute which punished conduct that was intentional but not malicious would be constitutional. Further, conduct which was prompted by mixed motives, i.e., "partly from disinterested malevolence and partly from a hope of gain," should be treated as if not malicious.

The Wisconsin statute had not required the plaintiff to prove that the defendant's conduct was unjustified, only that it was malicious. Thus, malice was to the Wisconsin statute what the absence of justification was to Holmes' prima facie tort theory. By defining malice very narrowly as the state of mind in which malevolence was the defendant's sole motive, Holmes acted consistently with his general approach to prima facie tort theory, which was to define justification broadly.

Holmes' postulate that the intentional infliction of injury is actionable unless justified remains the essence of the prima facie tort doctrine today. In his hands, the doctrine of prima facie tort did not necessarily lead to an expansion of liability because of his broad view of justification, under which even futile self-interest often justified the infliction of injury on others. Indeed, as Vegelahn shows, Holmes would have used the doctrine of prima facie tort to immunize self-
interested conduct actionable under other theories.^{270}

Prima facie tort doctrine thus had the potential to play a role analogous to that of negligence theory. Like negligence, prima facie tort provided a new basis for recovery, while simultaneously limiting liability where conduct was, in the case of negligence, "reasonable" or, in the case of prima facie tort, "justified." In Holmes' view, for example, prima facie tort made union activity actionable where it was violent or unrelated to "legitimate" union goals, while immunizing non-violent union activity from liability where it was in pursuit of legitimate goals.^{271}

Yet, there was also a striking difference between the general theory of negligence and Holmes' theory of prima facie tort. Negligence theory in the late nineteenth century was developed in cases shielding commercial enterprises from "accidental" injuries to their employees, customers and various innocent bystanders. Prima facie tort, on the other hand, was advanced by Holmes in cases in which he sought to shield workers from liability for "intentional" injuries which they inflicted during industrial warfare. The two doctrines, thus, were initially poised on opposite sides of the class conflict wrought by industrialization.^{272}

As will be seen, however, in the hands of others the prima facie tort doctrine was applied to impose liability on unions for injuries they inflicted in their struggle for economic advancement and thus served to expand, not contract, the liability of trade unions.^{273} Because the doctrine sheltered commercial enterprises from the injurious effects of labor action, it soon came to serve the same interests as negligence theory had at its inception.

In Massachusetts, the doctrine of prima facie tort continued to be applied principally to cases involving interference with contract or prospective advantage.^{274} Although Massachusetts gave birth to the doctrine, its courts limited the doctrine largely to the factual settings

^{270} See supra notes 233-39 and accompanying text (discussing Holmes' approach in Vegelahn).


^{272} See supra notes 172-75 and accompanying text (discussing the emergence of a negligence standard to protect industrial enterprises).


^{274} See Owen v. Williams, 322 Mass. 356, 77 N.E.2d 318 (1948); Saveall v. Demers, 322 Mass. 70, 72, 76 N.E.2d 12, 13 (1947); Robitaille v. Morse, 283 Mass. 27, 32, 186 N.E. 78, 80 (1933).
in which it first was articulated.

2. Early Decisions in Other States

The decisions of Massachusetts, nevertheless, were of central importance in establishing and developing the doctrine of prima facie tort, largely because of the seminal influence of Holmes. At the same time, scattered decisions in other states reflected a growing sense that the intentional infliction of injury without justification should be actionable.

The most influential of these decisions was *Tuttle v Buck.*

The defendant in *Tuttle* was a wealthy and influential banker who opened a barber shop in a small Minnesota village for the sole purpose of destroying the plaintiff's own trade as a barber. The defendant demurred to the cause of action, the trial court overruled the demurrer, and the defendant appealed.

The Minnesota Supreme Court began its analysis with an acknowledgement of the view taken by Cooley and others that mischievous motives cannot make that a wrong which "in its own essence is lawful." It rejected that formalistic approach, however, saying that "[s]uch generalizations are of little value in determining concrete cases." Each word and phrase used therein may require definition and limitation. Thus, before we can apply [this] language to a particular case, we must determine what act is "in its own essence lawful."

The *Tuttle* court concurred with the *Plant* court that Cooley’s position begged the question of whether an act is lawful. Without entering upon "an elaborate discussion of the subject," the court observed that the common law "is the result of growth, and that its development has been determined by the social needs of the community which it governs." Moreover, the form and substance of the law has "been greatly affected by prevalent economic theories." What was lawful, in other words, was based on policy considerations.

The court noted that, on the one hand, competition was desirable while, on the other hand, courts also wish to protect against the

275. 107 Minn. 145, 119 N.W. 946 (1909).
276. *Id.* at 146-47, 119 N.W. at 946.
277. *Id.* at 145, 119 N.W. at 946.
278. *Id.* at 148, 119 N.W. at 947.
279. *Id.*
280. *Id.* at 150, 119 N.W. at 948.
281. *Id.* at 148, 119 N.W. at 947.
282. *Id.* at 149, 119 N.W. at 947.
evils of unrestrained competition. The court thus had to determine to what extent "a man may use his own property according to his own needs and desires." The use must be limited to take into account the rights of others. It concluded that "[t]he purpose for which a man is using his own property may thus sometimes determine his rights." Citing Pollock's treatise, Plant, Walker, Mogul Steamship Co., Aikens and a few other cases, the court held that defendant's operation of a business, not for the sake of profit to himself, but for the sole purpose of driving a competitor out of business, was actionable.

Occasionally, one of the early decisions applied the prima facie tort doctrine to remedy an injury outside the context of labor disputes or unfair competition. In Mangum Electric Co. v. Border, for example, the defendants had attempted to induce a politically prominent physician to perform an illegal abortion in order to damage his reputation and thereby lessen his influence with respect to a controversial bond issue. The court held that, under these facts, the physician had a cause of action against the defendants.

Most of these early decisions, however, like those in Massachusetts, involved situations in which the defendant had interfered with the plaintiff's business relationship with his customers or employees. In some states, the prima facie tort doctrine never achieved an identity separate from the tort of interference with prospective ad-

283. Id.
284. Id.
285. Plant v. Wood, 176 Mass. 492, 57 N.E. 1011 (1900); see supra notes 240-51 and accompanying text.
286. Walker v. Cronin, 107 Mass. 555 (1871); see supra notes 216-23 and accompanying text.
288. Aikens v. Wisconsin, 195 U.S. 194 (1904); see supra notes 256-69 and accompanying text.
290. 101 Okla. 64, 222 P. 1002 (1923).
291. Id. at 65-66, 222 P. at 1004.
292. Id. at 67, 222 P. at 1005.
293. See, e.g., Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371 (1911) (holding that the conduct of an oil company in setting up a retail distribution network for the purpose of driving plaintiff out of business was actionable); see Passaic Print Works v. Ely & Walker Dry Goods Co., 105 F. 163 (8th Cir. 1900) (Sanborn, J., dissenting); Connors v. Connolly, 86 Conn. 641, 86 A. 600 (1913) (citing with approval Aikens and Mogul S.S. Co.); Hutton v. Watters, 132 Tenn. 527, 532, 179 S.W. 134, 135 (1915) (finding that defendants' efforts, motivated by ill will, to drive a boarding house out of business by threatening boarders were actionable).
vantage. It fell to New York to apply the doctrine as a general principle of the common law across a broad variety of factual settings and to give it the name of prima facie tort.

3. New York

Prima facie tort made its entry into New York jurisprudence in 1923 with the decision of the Court of Appeals in Beardsley v. Kilmer. Defendant Kilmer and his father manufactured a patent medicine in Binghamton known as "Swamp Root." Plaintiff Beardsley owned a local newspaper which published a series of unflattering articles about Kilmer and his medicine. After several requests that the articles cease went unheeded, Kilmer started a rival newspaper which drew away Beardsley's employees, advertisers and subscribers, eventually forcing Beardsley to close his newspaper.

Beardsley brought an action against Kilmer and the latter's partner, alleging that they had conspired to injure him in his business. Although interference with contractual relations was recognized as a tort at that time, Beardsley apparently did not allege that tort. Rather, the court explained, Beardsley conceded that defendants' acts were "inherently lawful" and urged as his only ground for recovery that their acts were "malicious and unjustifiable."

The court asked the question; when will "an inherently lawful act... be held actionable because of the impulses which lead to its performance?" While expressly declining to get into an extended discussion of that question, the court did observe that numerous courts had "tended toward the denial of this proposition that it is lawful to perform an otherwise legal act injuring another when there is no excuse for its performance except the malicious purpose of injury." The court's authority was Plant, Moran, Tuttle, and

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294. See Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 302-03 (Utah 1982). In their treatise, for example, Prosser and Keeton treat the doctrine as a species of interference with prospective advantage. W. Keeton, supra note 16, at 1010-11.
295. 236 N.Y. 80, 140 N.E. 203 (1923).
296. Id. at 83, 140 N.E. at 203.
297. Id.
298. Id. at 83-84, 140 N.E. at 203.
299. Id. at 85, 140 N.E. at 204.
300. See Lamb v. S. Cheney & Son, 227 N.Y. 418, 125 N.E. 817 (1920).
301. Beardsley, 236 N.Y. at 87, 140 N.E. at 204.
302. Id. at 86, 140 N.E. at 204.
303. Id. at 89, 140 N.E. at 205.
304. Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900); see supra notes 240-51 and accompanying text.
The court thus was prepared to test the lawfulness of conduct by whether it had any justification other than malicious injury. After noting that Kilmer was an experienced newspaperman who had expressed a desire to publish the best small-town newspaper in the state and who had continued to operate the newspaper even after Beardsley went out of business, the court concluded that the plaintiff had been injured by an act which was "the product of mixed motives some of which are perfectly legitimate." The court held that in light of these "legitimate" purposes, defendants were not liable.

The court stopped short of explicitly stating Holmes' proposition that, in the absence of justification, intentionally inflicted injury was actionable. Indeed, because defendants' conduct was justified, any statement of the consequences of intentionally injurious conduct which was not justified would have been dicta. The court nevertheless did adopt Holmes' analytical approach of resting the lawfulness of activity on its justification.

Beardsley reflects a court torn between the approaches of Cooley and Holmes. It framed the issue as whether "inherently proper" conduct can be rendered unlawful by improper motives, precisely the manner in which Cooley would have framed it. Yet, its entire discussion of the lawfulness of the defendant's conduct assumed that justification, including motive, was the measure of lawfulness—thus implicitly rejecting the concept of inherently lawful conduct. If the language still sounded like Cooley, the analysis was that of Holmes.

The Beardsley Court's move toward Holmes' approach is illustrated by its discussion of the very hypothetical case on which the Massachusetts court in Plant had faltered in its adoption of Holmes' approach: the case of the man digging a well on his own land. Whereas the Plant court had thought the right to dig was absolute, the Beardsley Court was more willing, albeit reluctantly, to evaluate the lawfulness of the digging according to the owner's justification.

305. Moran v. Dunphy, 177 Mass. 485, 59 N.E. 125 (1901); see supra notes 252-55 and accompanying text.
306. Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909); see supra notes 275-89 and accompanying text.
308. Id. at 89-90, 140 N.E. at 205-06.
309. Id. at 88, 140 N.E. at 205.
310. Id.
311. Id. at 89-90, 140 N.E. at 205-06.
312. Id.
As the court observed:

[T]he proposition that a man may not dig a well upon his own land . . . is one to be advanced with considerable caution and the cases seem firmly to establish the rule that if he digs a well because he really wants the water . . . his neighbor is without remedy however much he suffers, and even though the act may also have been tinged with animosity and malice.313

The right to dig a well was not, contrary to what the Plant court had thought, clearly absolute or inherently lawful. The right to dig the well, i.e., the lawfulness of digging the well, could depend upon the reason that it was dug.

At the same time, Beardsley also reflected a very broad view of justification. Quoting Holmes' phrase "disinterested malevolence," the court observed that "the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another."314 In other words, "otherwise lawful" conduct was actionable only if motivated solely by malice. If there was some motive other than the infliction of injury, whether selfish or altruistic, that motive would justify the conduct.

Because the defendant's conduct in Beardsley was justified, the court could only suggest in dicta that intentionally injurious conduct would be actionable if not justified.315 The New York Court of Appeals moved one step closer to imposing liability under Holmes' general theory of intentional tort eleven years later in Al Raschid v. News Syndicate Co.316 In that case, plaintiff alleged that the defendant maliciously had given false information to the immigration authorities which caused them to arrest and deport him, even though he was a native-born American citizen.317 Plaintiff sued for malicious prosecution, the trial court sustained a demurrer and plaintiff appealed.318

The Court of Appeals first held that plaintiff's claim did not satisfy the elements of malicious prosecution.319 It went on to state

313. Id.
314. Id. at 90, 140 N.E. at 206.
315. Id. at 89, 140 N.E. at 205.
316. 265 N.Y. 1, 191 N.E. 713 (1934).
317. Id. at 2-3, 191 N.E. at 713.
318. Id.
319. The facts did not give rise to a claim of malicious prosecution because the deportation proceeding was not a "judicial" one and the defendant's conduct in giving false informa-
the general rule, however, that "[e]ven a lawful act done solely out of malice and illwill to injure another may be actionable,"\textsuperscript{320} citing, among other authorities, Beardsley, Tuttle and several cases involving intentional interference with contract as well as Pollock's treatise. The court found that the complaint did not plead the material facts necessary to state the cause of action and affirmed the decision below with instructions that the plaintiff be given ten days to replead.\textsuperscript{321}

The New York Court of Appeals finally affirmed the imposition of liability under the prima facie tort doctrine seven years later in a pair of labor relations cases similar to those which had led to adoption of the doctrine in Massachusetts. In \textit{Opera on Tour v. Weber},\textsuperscript{322} a musicians' union induced a stagehands' union to refuse to work for a traveling opera company unless the latter employed live musicians to provide orchestral accompaniment rather than recorded music. The opera company sought an injunction to prevent the two unions from interfering with its business. The Court of Appeals quoted,\textsuperscript{323} as the governing rule of law, Justice Holmes' classic definition of a prima facie tort from \textit{Aikens}.\textsuperscript{324} The court found that, because the musicians were not then employed by the opera company, their strike had no lawful objective.\textsuperscript{325} Accordingly, an injunction could properly be issued to prevent the labor action. In a lengthy dissent mirroring the views of Holmes, Chief Judge Lehman argued that the strike was "within the allowable area of economic conflict"\textsuperscript{326} and was beyond the power of the court to restrain.

In \textit{American Guild of Musical Artists v. Petrillo},\textsuperscript{327} a musicians' union had informed a number of employers that its membership would not perform at any function in which members of a rival musicians' guild were participants.\textsuperscript{328} The guild sought an injunction prohibiting the union's conduct. The Court of Appeals, citing \textit{Opera on Tour}, held that "harm intentionally done is actionable if not juj-
The court found no justification for the union's conduct and the complaint stated a cause of action. The doctrine of prima facie tort has been litigated in hundreds of New York cases since the 1940s in a tremendous variety of factual settings. In *Advance Music Corp. v. American Tobacco Co.*, for example, the court held that a music publisher stated a cause of action against defendants who, although purporting to list on a radio program current songs in their order of popularity, failed to include plaintiff's songs, with the intent to injure the latter. *Advance Music Corp.* was the first case to call the general theory of intentional tort by the name “prima facie tort.”

The New York cases from the very beginning, however, added qualifications to the general theory of intentional tort articulated by Holmes and Pollock. One qualification was that the plaintiff could recover in prima facie tort only where the defendant acted solely out of malice, defined as “disinterested malevolence.” This qualification had appeared initially in *Beardsley*, went unmentioned in *Al Raschid, Opera on Tour*, and *American Guild of Musical Artists*, and then was resurrected by later cases. A second qualification was that prima facie tort would lie only where the defendant's
conduct did not fall within a traditional tort. A third qualification was that the plaintiff could recover only "special damages," generally meaning pecuniary loss.

The prima facie tort doctrine has not become, in New York, what Holmes envisioned—a general principle of tort liability supplanting other intentional torts—but a specific tort with its own particular elements. Its function in New York has been to impose liability only for certain malicious conduct which falls outside the ambit of traditional intentional torts.

4. The Restatement

The American Law Institute adopted a unique version of the prima facie tort doctrine as Section 870 of its Restatement of the Law of Torts, published in 1934. That section provided that:

[A] person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results, except where the harm results from an outside force the risk of which is not increased by the defendant's act.

Although the inclusion of this section reflected some interest in formulating a general principle of intentional tort, the language adopted was narrower than the doctrine championed by Holmes and developed in modern tort law.

Specifically, Section 870 of the first Restatement was limited to injury intentionally caused by acts which were otherwise tortious. Under the first Restatement, conduct was not judged by whether it


344. Halpern describes how the doctrine of prima facie tort was inserted into the First Restatement in the final volume under the "Miscellaneous Rules" category because the drafters "didn't dare" include it as a broad principle at the inception of their work. Halpern, Intentional Torts and the Restatement, 7 Buffalo L. Rev. 7, 18-19 n.41 (1957).

345. Section 870 of the first Restatement thus took the opposite approach of the New York courts, which apply the prima facie tort doctrine only to conduct which is not otherwise tortious. See supra note 340 and accompanying text.
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was justified, but rather by whether it already had been rendered tortious by other principles of tort law. Section 870, then, did not appear to reflect the powerful capacity of Holmes' version of the prima facie tort doctrine either to broaden or to restrict the scope of conduct which was potentially subject to tort liability.

The section, on the other hand, did have some independent force. For example, conduct which was otherwise tortious might not subject the actor to liability because of some technical limitation in other specific tort doctrines. The commentary to Section 870 suggested that the section could provide a separate basis for imposing liability unimpeded by such limitations.

The version of the prima facie tort doctrine in the first Restatement, in short, reflected the appropriateness of developing a general theory of intentional tort, without contributing much to the development of such a theory. Section 870 of the first Restatement has had little impact on case law.

The second Restatement considerably revamped Section 870, producing a version of the doctrine which differed little in substance from the doctrine formulated by Pollock and Holmes:

[O]ne who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

Thus, the prima facie tort doctrine as defined by the second Restatement...
ment holds that the intentional infliction of injury without justification is actionable. 351

Section 870, by its express terms, may impose liability on conduct not actionable under a different tort theory. In contrast to its counterpart in the first Restatement, Section 870 of the second Restatement has been central to the development of the modern prima facie tort doctrine. 352

5. Contemporary Case Law

The prima facie tort doctrine is now an established doctrine of modern tort law, notwithstanding the relative inattention it has received from the commentators. 353 The majority of states which recognize the doctrine have adopted the formulation articulated by the second Restatement. 354 In some cases, states have adopted what may be characterized as the second Restatement formulation, although they did so years, or even decades, before the second Restatement was published. 355

The competing formulation is the one adopted by New York. It requires not only the elements required by the second Restatement—an intentional infliction of injury without justification—but three additional elements: disinterested malevolence as the defendant's sole motivation; conduct not actionable under another tort; and special damages. 356 A small number of courts have treated the New York formulation as the definitive articulation of the doctrine, 357 al-

351. The second Restatement seems to require that the conduct be "generally culpable" as well as unjustified. Whether both of these requirements are met in fact is determined by a single test and thus they represent only a single element, which can be characterized as a lack of justification. See Vandevelde, supra note 333.


353. See Vandevelde, supra note 333.

354. See, e.g., cases cited supra note 352; see also Vandevelde, supra note 333.

355. See cases cited supra notes 275-94.

356. See supra notes 334-41; see generally Vandevelde, supra note 333.

though in some cases they have done so in the course of declining to adopt it. 358 Missouri has fashioned its own approach, borrowing from New York the requirement that conduct not be actionable under another tort, but otherwise following the Restatement. 359

IV. CONCLUSION

The idea that the law should treat the intentional infliction of injury as a special case of tort liability was not self-evident to the American legal community of the late nineteenth century. Indeed, as Cooley demonstrated, it was entirely possible to conceptualize tort law in a way that lawyers regarded as useful, but did not treat the defendant’s state of mind as an organizing principle.

The concept of an intentional tort was formulated by Holmes as an element of a scheme designed to accomplish a larger purpose than merely categorize case law. Holmes sought to establish a theoretical symmetry within the law, while simultaneously demonstrating that the principle underlying the symmetry was that liability was based on public policy, not personal blameworthiness.

Whatever its deficiencies as a descriptor of existing law or the reasons for its initial formulation by Holmes, the concept of an intentional tort, once proposed, had an immediate intuitive appeal to his contemporaries. Over a period of years, legal scholars came to agree that there was a distinct category of intentional torts, even if they could not initially agree on which torts fell within the category. Eventually, however, a consensus was reached that a number of formerly strict liability torts were in fact the intentional torts.

Once accepted by the academic community, the concept of intentional tort acquired an intellectual force of its own. Pollock became the first to see the implication of Holmes’ scheme: if intentional and negligent tort were in symmetry and if there were a general theory of negligent tort, then there must also be a general theory of intentional tort. Shortly after Pollock published his insight, Holmes embraced and began the theoretical elaboration of a general theory of intentional tort.

The formulation of a general theory of intentional tort coincided with the emergence of a new class of intentional economic injuries occasioned by late nineteenth century industrialism. These new forms of injury presented Holmes and other judges with the opportu-
nity to write the general theory of intentional tort into law. In much the same way that negligence had governed recovery for new forms of physical injury, the general theory of intentional tort provided a basis for imposing liability for these new forms of economic injury.

Again, as in the case of negligence, the earliest cases recognizing the prima facie tort doctrine treated it not as a new principle of law, but as a qualification of the previously-existing rule of strict liability for harm, albeit without the limitations of the forms of action. Prima facie tort, like negligence, both expanded and contained liability.

To say that the doctrine was applied to provide a remedy for new types of injury is not to say that the adoption of the doctrine necessarily represented a victory for any set of political interests. Holmes applied the doctrine initially to shield labor from liability for injury to capital, while others applied it to protect capital against labor. In the unfair competition cases, the doctrine was applied in many cases to protect small businesses against powerful concentrations of capital. Its capacity to expand and to contain liability allowed the prima facie tort doctrine to further the ends of judges with sharply opposed political convictions.

The prima facie tort doctrine, as articulated by Holmes and Pollock, was not only a rule of law, but the embodiment of a positivist instrumentalism that decided cases on policy grounds. Its adoption, thus, required rejection of Cooley's positivist formalism, under which any decision that did not constitute a simple elaboration of existing principle was an illegitimate judicial usurpation.

Although a court might choose to organize the case law according to Holmes' tripartite scheme without necessarily becoming an instrumentalist, application of Holmes' prima facie tort doctrine was all but impossible without an instrumentalist approach. Thus, the adoption of the prima facie tort doctrine necessarily represented a victory for a particular school of jurisprudential thought.

These developments in tort law, of course, were not independent of developments in other areas of the law. The abandonment of Cooley's formalist conception of tort law in which the protections afforded by law could be deduced from rights paralleled, for example, the abandonment of a formalist conception of property law in which the nature of the protection afforded also could be deduced from the existence of rights. Thus, the rise of prima facie tort was both an

360. For discussions of the transformation in the concept of property which accompanied
important doctrinal innovation and an exemplar of the general transformation in legal thought which accompanied the collapse of formalism.
