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Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order

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Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order

*Anita Bernstein**

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Until April 1999, when it published a draft called *Restatement (Third) of Torts: General Principles* (“*General Principles*”), the American Law Institute (“ALI”) had never purported to declare the “general principles” of anything.¹ This lack of precedent meant a blank slate: Reporters can carry out a general-principles mandate in varying ways. One contributor to this Conference, David Owen, has spoken elsewhere of “paths taken and untaken in the *Restatement (Third)*” to describe choices about products liability rules.² Professor Owen has perceived these divergences as wide and profound.³ In the *General Principles*, which strive to speak about all of Torts rather than just one category of doctrine, options “taken and untaken” present an even wider array.

Because the *General Principles* are in flux, I should specify that in this Essay I address two particular publications in the ALI archive:⁴ the *Discussion Draft* of April, 1999, prepared by Professor Gary Schwartz, and *Preliminary Draft No. 2*, dated May 10, 2000, which in turn contains a chapter on strict liability by Professor

1. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft]. The Institute prefers instead to distill judge-made law on discrete points into blackletter and commentary, often commending one solution or another to questions on which American courts are divided. For a description of the Institute’s work, see <http://www.ali.org>.

In a private conversation with me in 1999, Gary Schwartz related his view that the Model Penal Code was in effect a restatement of the general principles of criminal law. I agree that it is relevant. See *infra* text accompanying notes 79-83 (discussing origin, philosophy, and content of the Model Penal Code); see also James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1153-54 (2001) (contending that Schwartz’s portion of the *General Principles* evinces too much fidelity to the Model Penal Code precedent). One might also contend that the Uniform Commercial Code, co-sponsored by the ALI, started its life as a restatement of general principles, even though its founder, Karl Llewellyn, specifically asserted that the UCC should be understood as inchoate or “semi-permanent,” to be read together with evolving new case law. U.C.C. § 1-102 cmt. 1 (1978); see also Shael Herman, *The Fate and Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 433 n.88 (1996) (pointing out that the UCC now covers decades’ worth of new topics, such as the law of electronic transfers; this temporal swath suggests that the UCC does not encompass one set of general principles).

2. David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the Restatement (Third)*, 61 TENN. L. REV. 1241, 1241 (1994).

3. *Id.* at 1241.

4. The Institute maintains archives containing all published drafts and related materials. See Henderson & Twerski, *supra* note 1, at 1146 n.64.

Schwartz and a document called Supplemental Materials by Professor Harvey Perlman.⁵ Soon after the May publication, the *General Principles* project took several turns, including personnel shifts and rethinkings of the endeavor within the ALI.⁶ Perhaps most significant for purposes of this Essay, a new title has emerged for the project: Shortly before my final deadline, Schwartz's portion became "Liability for Physical Harm: Basic Principles."⁷ Despite this tempest of change and the far-from-final status of the *Discussion Draft* and the Supplemental Materials, these documents remain of interest. They reflect both process and result of an unprecedented endeavor to restate the general principles of Torts. And so two pieces from the *General Principles* collection, which lay out paths that are at the moment simultaneously "taken and untaken in the *Restatement (Third)*," warrant attention here. In recognition of their continuing vitality, I speak of them in this Essay using the present tense.

My claim is that the *General Principles* look at Torts from a gendered perspective: mostly (but far from uniformly) male, an outcome consistent with the overrepresentation of men in all sectors that build the doctrine and theory of Torts. Some readers of the *General Principles* have reached the same conclusion by means that are different from mine. For example, one key assertion in the *Discussion Draft* declares emotional or dignitary injury peripheral to Torts; its corollary, that physical injury is both paradigmatic and preemptive, has troubled Martha Chamallas.⁸ To Professor Chamallas, principles that deny the centrality of emotion and dig-

5. Schwartz's draft is *Discussion Draft*, *supra* note 1. In a later ALI publication, *Preliminary Draft No. 2*, Schwartz updates the strict liability chapter. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES §§18-23 (Preliminary Draft No. 2 May 10, 2000) [hereinafter Preliminary Draft No. 2]. Perlman's draft is *Council Draft No. 2* and also appears in *Preliminary Draft No. 2*. *Id.* §§ 2A-9A, 101-05. The Perlman document has been shelved at the ALI. Telephone Conversation with Lance Liebman, Director, American Law Institute (Dec. 20, 2000). Variations between *Preliminary Draft No. 2* and *Council Draft No. 2* are not pertinent to this Essay.

6. Telephone Conversation with Lance Liebman, Director, American Law Institute (Dec. 20, 2000) (discussing the ALI rethinking). After circulating the *Supplemental Materials*, Professor Perlman became Interim Chancellor of the University of Nebraska, thereby acquiring extensive new duties conflicting with those he held as co-Reporter. Another occasion of significance was the naming of Professor Michael Green as co-Reporter.

7. E-mail from Diana Hansen, American Law Institute, to Anita Bernstein, Professor of Law, Emory University (Dec. 20, 2000) (on file with author). For further discussion of this point, see *infra* notes 74-75 and accompanying text.

8. For this statement, see *Discussion Draft*, *supra* note 1, at xxi ("Given the project's 'general' interests, [it] does not itself consider liability for emotional distress or economic loss"). See also *supra* text accompanying note 7 (noting subsequent title change to "Liability for Physical Harms").

nity within tort law are not general after all, but exclusionary and dismissive.⁹

By contrast I find maleness in the formation of this compendium itself. The belief that it is desirable to describe the essence of one subject in one comprehensive, rationalist, universal, and general compilation descends from forebears of the seventeenth century who strove to penetrate what they perceived as a recumbent, mysterious, passive, and decidedly feminine wilderness of Nature. Although scholars have for centuries been calling these precedents gendered,¹⁰ writers who assert general principles usually do not see themselves as carrying a masculine torch. The endeavor regards itself as driven by observation rather than ideology, following the posture, associated with Francis Bacon, of stepping back to gaze on apparent disorder as a method of educating truth.

Applied to the *General Principles*, the premise is that once accurately perceived, an object of gaze—for the ALI mainly decisional law, with statutes and scholarship occasionally included¹¹—will reveal its inner logic and coherence. Such a stance, I argue, misdescribes the work of restaters; in my view, they are more political intervenors than detached, neutral onlookers. In the name of disinterested examination, the prescription of masculine order suppresses alternatives, and forces that which it sees into a Procrustean framework. An individual restater may sincerely believe that conclusions derive strictly from the material he observes, but choices are in play.

To develop this argument, Part I begins by propounding what I call Alternative Principles, descriptive assertions about American tort law that are not found in the *General Principles*. Although they look different from the principles that Schwartz and Perlman have put forth, these Alternative Principles do not in form or substance violate any canon of *Restatement* draftsmanship.¹² In

9. E.g., Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751, 752-53, 761 (2001).

10. See *infra* Part II.

11. Scholars disagree on which materials ought to go into the *Restatement* mix. See generally James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Restatement (Third) Product Liability Restatement*, 26 HOFSTRA L. REV. 667, 667-68 (1998) (noting strife over what constitutes "politics" in the selection of *Restatement* sources); cf. Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1408 (1994) (contending that a rule should not be installed into a *Restatement* unless it enjoys significant acceptance within state case law).

12. According to eminent authorities, such canons may not exist. In this volume Professors Henderson and Twerski, co-Reporters of the first part of the *Restatement (Third)*, propose what they call "A Short Primer of Do's and Don't's For Drafting *Restatement* Black Letter," Henderson

my opinion they are also accurate and useful, although I will not strain to support that contention. Instead I invite readers to consider on what basis the Alternative Principles can be irregular or unacceptable, given the *tabula rasa* on which the *General Principles* were written. Part II elaborates on the idea of a gendered universal, whereby order is supposed to emerge from observation, and disorder—Nature, or the feminine—is posited out. Using the term “re-statements” to extend beyond ALI-published compendia, Part III links the *General Principles* with other restatements that have also asserted a similar prescription. Part IV invokes the work of numerous eminent jurists—including the Reporters who wrote the draft *General Principles*—as contrary to this prescriptive stance, suggesting that a strong contrary tradition, not just isolated feminist dissent, stands opposed to the prescription of masculine order.

I. WHAT IS A GENERAL PRINCIPLE?

Feminist approaches to traditional disciplines have often sought to point out what is omitted or neglected in canonical work. The venture becomes perilous when readers misinterpret such declarations as flat-out attacks on the material studied.¹³ I intend no attack on the *General Principles*. My reading of what is excluded and included in the *General Principles* is extended instead to explore the question of how to classify propositions as either suited or not suited to *Restatements*, and the implications of this classification. Toward this end, I propose six Alternative Principles, and then explore what makes them different from the *General Principles*.

& Twerski, *supra* note 1, at 1145-48, but acknowledge that heretofore “published guidance for drafting Restatements [was] not to be found.” *Id.* at 145.

13. Susan Bordo notes that a stereotype regards feminist thought as, male hating and canon bashing. So, for example, when feminists criticize existing models of reason (engaging in a critical, reconstructive project that has occupied male philosophers from Aristotle and Hegel to James, Dewey, and Whitehead), it is sometimes read as an all-out attack on rationality or as an “assault on reason”—creating the image of Lorena Bobbit [sic]-like viragos, heading at the canon with their sharpened steak knives.

Susan Bordo, *Introduction to FEMINIST INTERPRETATIONS OF RENÉ DESCARTES* 1, 3 (Susan Bordo ed., 1999).

A. *Some Omissions from the General Principles: Alternative Principles*

1. Citizen Initiative and Expressions Build Law

A tort action begins with the citizen-initiated complaint.¹⁴ Only convention, no longer any formal common-law requirement, compels a plaintiff to fit her story into a familiar label like "battery" or "nuisance."¹⁵ This latitude distinguishes Torts from numerous other legal classifications, in private as well as public law. For instance contract law, another subject shaped by citizen initiative, restricts plaintiffs by requiring them to identify something resembling an agreement in all cases. But the category called Torts specifies little more than grievances.¹⁶ A person can demand legal redress for a wrong even if the legislature and all other relevant political institutions have never considered the wrongness of any conduct described, or the category into which it might fall.¹⁷

The modern plaintiff will often evaluate her injury under the influence of Torts concepts,¹⁸ but she has long been free to prosecute her claim on her own terms. The great ancestor of modern Torts doctrine, trespass, first identified non-contractual legal wrongs as breaches of the king's peace. For centuries following the Norman Conquest, plaintiffs had to allege a transgression that included *vi et armis*, or force and violence, in order to obtain this writ, which gave

14. See Anita Bernstein, *Complaints*, 31 MCGEORGE L. REV. 37, 44-47 (2000).

15. See JOHN W. WADE, VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, PROSSER, WADE & SCHWARTZ'S CASE AND MATERIALS ON TORTS 6 (9th ed. 1994) ("Although we no longer have 'forms of action,' it usually is helpful from the vantage point of advocacy to place one's claim under a tort 'label' that will be familiar to the court . . .").

16. Not everything goes, as I have remarked elsewhere. See generally Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997) (noting that new tort causes of action are hard for plaintiffs to form). Here I am adverting only to the paucity of formal requirements that are necessary to initiate an action, which suggests that the complaint itself is relatively central.

17. A demand is a far cry from a victory. Civil-procedure rules raise the first formal obstacle by permitting defendants to seek dismissal for failure to state a cause of action. See, e.g., FED. R. CIV. P. 12(b). Judges also are free to reject complaints before adjudicating them on the merits. The plaintiff's freedom to complain, however, exists independent of these opportunities, and also of the merits of the complaint.

18. For example, Gary Schwartz has pointed out that not every society that affords citizens medical care recognizes the existence of "whiplash" as a medical condition, even though American physicians think of it as a distinct clinical phenomenon. Gary T. Schwartz, *Auto No-Fault and First-Party Insurance*, 73 S. CAL. L. REV. 611, 635 n.102 (2000) (citing Harald Schrader et al., *Natural Evolution of Late Whiplash Syndrome Outside of the Medicolegal Context*, LANCET, May 4, 1996, at 347 (noting that whiplash appears unknown in Lithuania)).

them access to the royal courts.¹⁹ This vision of wrongs understood injuries in terms of public order. Gradually, however, tort law turned away from the king's peace into the remediation of personal injuries, first by liberalizing the trespass writ to include indirect application of force (made actionable via the writ of "trespass on the case"²⁰) and then by retreating from the forms of action in favor of code-based procedure.²¹ Without much deference to fixed doctrine, a plaintiff today can press her initiative on the courts.

The injured person has some key partners, also citizens, whose initiative is encouraged. American courts stay relatively open with the help of provisions like contingency fees, due-process and equal-protection guarantees in state constitutions that have been used to invalidate pro-defense tort reform legislation, and the rule that losers do not usually reimburse winners for their litigation expenses. Academic commentators, most famously Samuel Warren and Louis Brandeis, occasionally assert new rights that warrant judicial enforcement.²² An ingenious and aggressive plaintiffs' bar can come up with new ideas about expanded liability, such as the notion that cigarette manufacturers owe state governments recompense for having caused physical injury to smokers.²³ Most of these participants do not work for the government and thus can be counted among the citizens whose initiative changes tort law. The hungry litigator trying to earn a living, the injured consumer, the parent of a disabled child, the physician who decides to work in forensics—tort law welcomes them all, as architects and builders.

Tort law thus has a good claim to a place in the center of the "storytelling" genre. Although not inclined to accept the veracity or relevance of anyone's story—the plaintiff shoulders the burden of proof, after all—Torts maintains as its starting point the unique, subjective, partisan narrative.²⁴ Because academic debate on the virtues and hazards of storytelling in the legal system has tended to

19. See MORRIS ARNOLD, *SELECT CASES OF TRESPASS FROM THE KING'S COURTS 1307-99* (1985).

20. DAN B. DOBBS, *THE LAW OF TORTS* 25-26 (2000).

21. WADE ET AL., *supra* note 15, at 6.

22. I refer to the landmark article on privacy. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The article has generated a large secondary literature. See, e.g., Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991). See generally Bernstein, *supra* note 16, at 1555-63 (recounting other efforts by academic writers to declare new torts).

23. See DAN ZEGART, *CIVIL WARRIORS: THE LEGAL SIEGE ON THE TOBACCO INDUSTRY* 92 (2000) (describing how a Mississippi litigator advanced this idea in 1993).

24. See Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 CORNELL J.L. & PUB. POL'Y 139, 140 (1996) (In tort litigation, a plaintiff "tells her own story, not someone else's story . . . Likewise, the defendant tells its story.").

focus on the content of stories rather than the fact of their existence, Torts has not seemed central to this literature;²⁵ but without stories there would never have been any tort law.

2. Professionals Share Authority With Non-Professionals

As we have just noted, many different categories of citizens help to build tort law in their roles as onlookers and advocates. Plaintiff's counsel, expert witnesses, and academic commentators influence the outcome of decisional law, weighing in with arguments and opinions. Citizen influence on tort law extends even further, into actual power over what happens in a case. Assertions from the plaintiff are especially powerful.

Traditionally, the plaintiff is not thought of as an authority. His label derives from the Latin *planctus*, or lamentation.²⁶ One gets the sense of somebody wailing, beseeching, or hoping, not a decisionmaker. Judges and commentators typically regard him as an amateur, if not a dupe, vulnerable to the maneuvers of a powerful adversary.²⁷ A plaintiff's participation is never sufficient to create tort doctrine. Yet his presence is necessary and powerful enough to shape results.

It is the plaintiff—and for this purpose we can include a defendant who behaves in a plaintiffish manner by bringing a counterclaim or crossclaim—who tells the court which questions to decide, what the case is about. Any point that does not interest the plaintiff stays out of the case; he thus holds a kind of unstated veto power. A court that wants to weigh in on a question of tort doctrine, as the courts in *Palsgraf*, *Greenman v. Yuba Power Products*, and *Rowland v. Christian* were reputed to want,²⁸ must wait for a suitable litigant and cannot stray too far from the story he tells. Whenever he decides not to sue, doctrine remains stagnant—a point cen-

25. The Supreme Court's singular reference to storytelling and narrative, for example, appears in a criminal context. See *Old Chief v. United States*, 519 U.S. 172, 183 (1997). Much of the literature in the law reviews commending narrative addresses race. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL'Y & L. 195 (2000).

26. See 11 OXFORD ENGLISH DICTIONARY 956 (2d ed. 1989) (defining "plaint").

27. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963) (excusing plaintiff from complying with a notice requirement under the Uniform Sales Act, because of his presumed naiveté); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98-103 (1974) (noting power of "repeat players").

28. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968); *Greenman*, 377 P.2d 897; *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

tral to the work of Kent Syverud, Ellen Smith Pryor, and others who remind us that because plaintiffs choose to go, à la Willie Sutton, where the money is, American tort law remains barren and primitive in areas where insurance coverage is unavailable, especially intentional torts.²⁹ The fraction of litigants' circumstances that are conveyed to the courts by plaintiffs create the common law of Torts.

A more noted amateur source of authority in Torts is the civil jury. Almost isolated in the world on this point, American civil litigants typically have a right to present their case before a group of lay factfinders. Unlike the grand jury of criminal law or the expert panels that are assembled on occasion to decide key points disputed in tort litigation, the Torts factfinder will typically consist of a group of utter novices who know next to nothing about adjudication or legal doctrine.³⁰ Even though lawyers, government officials, law enforcement personnel, and experienced jurors are usually not barred from jury service, a strong custom still tends to eliminate them whenever more amateurish persons are available to fill the jury.³¹ Other customs keep jurors in the dark: Trial judges often do not permit them to take notes;³² jury instructions are written to get past appellate review as statements of the law rather than to enlighten;³³ when jurors ask questions of trial judges to clarify their

29. See Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1467-68 (1999) (objecting to the absence of meaningful remedies for intentional harm, an absence attributable to insurance coverage rules). See also Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1722 (1997) (describing the phenomenon of "underpleading" in order to reach insurance policies); Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1632 (1994) (describing a symbiotic relationship between the plaintiffs' bar and the insurance industry).

30. Cf. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 5 (1966) (quoting Erwin Griswold, dean of the Harvard Law School, as deeming the jury trial "the apotheosis of the amateur").

31. See Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV. 257, 298 (1986) (noting the custom of exclusion, and that occasional statutes bar government officials from jury service).

32. The leading case on jury note-taking is *United States v. Maclean*, 578 F.2d 64, 65-67 (3d Cir. 1978); see also Dragan D. Petroff, *The Practice of Jury Note-Taking—Misconduct, Right, or Privilege?*, 18 OKLA. L. REV. 125, 130 (1965) (arguing for modification of "misconduct" notion); Douglas C. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 448-581 (1997) (urging a more active conception of the jury's role, which would include questioning witnesses and communicating with fellow jurors, as well as note-taking).

33. See Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 866-69 (1998) (summarizing literature). Most of the evidence about juror incomprehension comes from simulations. One exception is Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 74-77 (1998) (noting limitations of simulations). Professor Saxton concluded that the problem of incomprehension was significant. *Id.* at 94.

understanding of the law, these judges frequently refuse to answer.³⁴ These conditions affirm the principle that elite expertise cannot give Torts everything it needs to work well.

3. The Pecuniary Nature of Remedies Does Not Deny Emotional and Dignitary Harm

Tort law remains remarkably averse to non-pecuniary relief. Plaintiffs who want an injunction, an apology, medical monitoring, a prior restraint, or even a declaratory judgment, rather than (or in addition to) money, will seldom achieve these goals.³⁵ When Leslie Bender proposed that managers of an errant corporation should, following a judicial determination that a product was tortiously marketed, be compelled to provide hands-on care for injured victims (Professor Bender's paradigm defendant was A.H. Robins Co., maker of the Dalkon Shield), her suggestion seemed to affront an audience at the AALS annual meeting,³⁶ and had no visible effect on the law of tort remedies. One might have thought that Ronald Coase's great insight about nuisance law—that cessation of activity is costly in the same way that writing a check to plaintiffs in order to honor a judgment is costly³⁷—might have achieved at long last the modern merger of law and equity: According to the Coase theorem, money damages are commensurable with everything. Yet the two realms remain separate, and plaintiffs typically receive either money or no money—and nothing else—after they allege that a defendant wronged them.

Despite this affirmation of the money-matrix, however, tort law has never failed to acknowledge the reality of those injuries that can be remedied only approximately in cash. One of the oldest judicial opinions that can be read today as part of the common law

34. See *United States v. Taylor*, 828 F. 2d 630, 632 (10th Cir. 1987) (noting that the trial judge refused to answer a question about legal residency requirements); cf. *United States v. Davis*, 109 F. Supp. 2d 991, 993 n.5 (S.D. Ill. 2000) (noting that, in response to a question about the scope of indictment, the trial judge did not directly answer the jury's question, but instead referred the jury to the instructions).

35. See generally Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999) (describing apology as an alternative to judicially declared remedies); Craig A. Stevens, Casenote, *Redland Soccer Club, Inc. v. Department of the Army: The Recovery of Medical Monitoring Under HSCA's Citizen Suit Provision*, 10 VILL. ENVTL. L.J. 201, 215 (1999) (noting "frustration" of plaintiffs who seek medical monitoring).

36. I speak from memory, having been in that audience in January 1990. The proposal is published in Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759, 769-70 & n.23 (1990), where Professor Bender relates some of this negative reaction.

37. Ronald A. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-8 (1960).

of Torts, the medieval *I de S et ux. v. W de S*,³⁸ awarded "half a mark" as damages to compensate a woman for the injury she suffered when a man angrily threw a hatchet toward her as she looked out from her tavern window;³⁹ the defendant's action affected only her tranquility and dignity. The ancient tort of trespass to land deems a plaintiff injured by the "breaking of the close," an invasion into what one might anachronistically call his personal space, understood in geographic terms:⁴⁰ Even if the defendant leaves the land unchanged by his fleeting intrusion, the plaintiff is entitled to money damages.⁴¹ Although defamation law has taken many shapes and been adjudicated in many different fora, including ecclesiastical courts, its enduring concerns—reputation, dignity, and the idea that words wound⁴²—share the trait of not having an exact price.

Contemporary attempts to limit recompense for emotional, dignitary, or other non-pecuniary harm, which rise and flourish in the lobbies of legislatures, are thus alien newcomers to Torts. Such proposals do not deserve to be called conservative: The business of tort law, by long tradition, partakes of sympathetic imagination about that which cannot be stated in a corporate ledger.⁴³ Imprecision in commensurability has always been at least tolerated, if not openly embraced, within Torts.

4. Parties Are Situated in Communities

Although individual litigants form claims, tort law also recognizes parties to litigation as members of groups and communities.⁴⁴ "Fault" in negligence law, for example, means more

38. *I de S et ux. v. W de S*, Y.B. Lib. Ass. folio 99, plac. 60 (Assizes 1348), reprinted in WADE ET AL., *supra* note 15, at 33-34.

39. *Id.*

40. *Frank v. Mayberry*, 985 P.2d 773, 776 (Okla. 1999) (reciting standard formulation).

41. See *Dougherty v. Stepp*, 18 N.C. 371, 372 (1835) ("For every such entry against the will of the possessor, the law infers some damages").

42. See generally Randall P. Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 556 (1988) (surveying history of the tort, and noting that change has been its most constant theme).

43. Thus even though the concepts of moral hazard and adverse selection will counsel insurance providers not to offer first-party insurance for pain and suffering, as George Priest has noted in *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1547-48 (1987), it does not follow that tort law should similarly refuse to translate pain and suffering claims into dollars for plaintiffs.

44. This recognition is particularly central to accident law: Intentional torts occur in more individualistic contexts. *But see* Henderson & Twerski, *supra* note 1, at 1135 n.10 (claiming that some intentional tort liability is really strict liability "for having acted in ignorance of prevalent social usages").

than the failure to take cost-justified precautions; it encompasses the failure to live up to what might be called the attainable ideals that derive from shared communal life.⁴⁵ Observations of other people, as well as experiences within groups, will teach an individual that inadvertence, distraction, and excessive self-regard have consequences for which she may be held responsible. This lesson cannot be learned entirely from the sensory experience of direct one-on-one impacts.

Variations on the objective standard in negligence illustrate the recognition of collectives as sources of identity and personal development. When the defendant in *Vaughan v. Menlove* tried to escape the rigors of ordinary prudence by arguing that he was too unintelligent to act reasonably, he lost.⁴⁶ Commentators defend this result with various rationales,⁴⁷ to which one might add that all of the approved downward-departure variations require an actor to identify himself as a member of a group, not just as a flawed individual. By treating children more leniently than adults with respect to the accidents they cause, for instance, tort law situates the child in a community of peers while in effect warning her that she is expected to grow up and learn from the adults; maturation must include regard for a larger world around her.⁴⁸ Blind people are aggregated with fellow blind people to yield a sense of what the reasonable person would do if he were blind.⁴⁹ The literature on subjective deviations from the objective standard based on mental impairment stresses integration of distinct, separate groups into the larger collective.⁵⁰

45. See Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1439-40 (2000) (identifying these ideals as based on a combination of prudence and care).

46. *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837).

47. See DOBBS, *supra* note 20, at 286-88 (summarizing rationales); see also RICHARD A. EPSTEIN, *TORTS* 111-12 (1999) (noting ambiguities in the standard rationales); CLARENCE MORRIS & C. ROBERT MORRIS, JR., *MORRIS ON TORTS* 51-52 (2d ed. 1980) ("[I]f liability for negligence is to be educative, perhaps the time had come to try to teach Menlove to do better."). Gary Schwartz endorses this conventional wisdom in his *General Principles*. Discussion Draft, *supra* note 1, § 9 cmt. e (noting administrative convenience and the need to promote safety); *id.* § 10 cmt. b (expressing concern about self-serving testimony).

48. See Caroline Forell, *Reassessing the Negligence Standard of Care for Minors*, 15 N.M. L. REV. 485, 498 (1985).

49. See DOBBS, *supra* note 20, at 281-84.

50. See, e.g., Sarah Light, Note, *Rejecting the Logic of Confinement: Care Relationships and the Mentally Disabled Under Tort Law*, 109 YALE L.J. 381, 390-92 (1999) (arguing that the goal of integration is more important than the notion of security suggested by confinement); Stephanie I. Splane, Note, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153, 164-67 (1983) (describing ideal of integration).

The Torts concept of custom identifies individuals as members of subgroups in almost an anthropological sense. Folkways and traditions of these groups strongly influence the determination of whether a defendant was at fault.⁵¹ For medical malpractice actions in particular, custom is well-nigh dispositive.⁵² In an irony that Richard Epstein may have been the first to point out, Learned Hand, famous for writing the landmark decision associated with allocative efficiency as a method to determine liability in tort, is also famous for noting custom;⁵³ the two devices point in opposite directions.⁵⁴ An inefficient custom can command respect in tort law; the practices of communities can outweigh aggregate utility.⁵⁵

Paired relations appear all over Torts. The roles of landlord, bailor, seller, jailer, innkeeper, employer, and common carrier, among others, generate obligations to another half of the dyad. Contracts and other voluntary undertakings impose some of these relations, but others arise simply from status.⁵⁶ In these pairings the defendant is deemed responsible because of understandings about dyadic communities. Even when tort-speak strips an individual of her name and calls her A, or refers to her land with a generic term like Blackacre, it remains aware of group membership: B and Whiteacre, the partners, are seldom far away.

Just as persons are situated within communities for purposes of tort doctrine, so too are their injuries. For example, a published communication that diminishes the plaintiff's reputation only within her small-minded and otherwise deviant community may be deemed defamatory by a factfinder who can know the mores of that community only secondhand.⁵⁷ A bigoted notion of rape vic-

51. See MORRIS & MORRIS, *supra* note 47, at 98-100.

52. See DOBBS, *supra* note 20, at 133-34, 639. There are a handful of exceptions. See *id.* at 643-44 (noting that *Helling v. Carey*, 519 P.2d 981 (Wash. 1974), flatly rejected an unrefuted expert consensus about ophthalmological practice). Current informed consent doctrine is perhaps another exception. See *id.* at 655-56.

53. In *The T.J. Hooper*, Hand wrote that "in most cases reasonable prudence is in fact common prudence," yet nevertheless custom cannot provide a "final answer" about negligence. The T.J. Hooper, 60 F.2d 737, 739 (2d Cir. 1932); see also *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (propounding the Hand formula, an approach to negligence congruent with allocative efficiency).

54. See Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 5 (1992).

55. Professor Epstein endorses this posture in his study of the famous *Learned Hand* opinions. *Id.* at 4.

56. See DOBBS, *supra* note 20, at 581.

57. See, e.g., *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 312 (Mo. 1993) (stating that "a false allegation of homosexuality is defamatory in Missouri" even though reasonable persons would not deem the plaintiff disparaged); Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 16-18 (1996) (discussing the notion, first stated in *Peck*

tims as somehow deserving what they suffered warrants robust condemnation from all of us reasonable persons, but tort law has recognized that a woman can be injured by being called a rape victim.⁵⁸ Invasion of privacy also situates plaintiffs as members of groups. "Intrusion upon seclusion" and "false light"⁵⁹ are incoherent concepts in a vacuum; in order to consider them, a factfinder must acknowledge the existence of collective-based sources of identity.⁶⁰ Courts also use such contexts in order to assess claims of privilege, whereby behavior identified elsewhere as tortious conduct—and which the plaintiff experiences as injurious and wrongful—may escape sanction because of notions about a social need, or the nature of a relationship. For some claims, in short, group membership is crucial to the question of whether a tort has occurred at all.

5. Action is Presumptively More Desirable Than Inaction⁶¹

Like contract law, tort law encourages people to pursue what they identify as their own projects and opportunities. This preference is more striking in Torts than Contracts, because whereas contract law generally binds only volunteers, Torts is willing to see innocent bystanders suffer in the name of the principle.⁶² Universal inaction—everybody staying home doing nothing—would greatly reduce the quantity of tortious conduct and the social cost of inju-

v. Tribune Co., 214 U.S. 185, 190 (1909), of a "substantial and respectable minority" community in which the plaintiff could be defamed).

58. See *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T.L.R. 581, 584 (C.A. 1934).

59. See RESTATEMENT (SECOND) OF TORTS § 952B (1977) (describing a cause of action for intrusion upon seclusion); *id.* § 652E (referring to "publicity placing person in false light").

60. For instance, the privacy tort is probably not available for a husband or wife to sue a spouse for walking into the household bathroom without knocking when the husband or wife inside has protested this practice—even though bathroom invasions would constitute "intrusion upon seclusion" if done between strangers and even though the abrogation of most intraspousal immunities has meant that spouses can usually sue each other as if they were strangers. See Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1331-32 (1996) (discussing this example). Cf. Lidsky, *supra* note 57, at 1-4 (noting the impossibility of defamation law without a sense of identity emergent from group membership).

61. Professor Jill Fisch, a participant at the Wade conference, thought of this Alternative Principle while sitting in the audience. I thank her for this insightful contribution.

62. One prominent casebook begins with *Hammontree v. Jenner*, a decision that rejected strict liability for injuries attributed to an unexpected epileptic seizure. See MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 1 (6th ed. 1996). The plaintiffs in *Hammontree* were perfectly innocent, whereas the defendant had driven a car while aware that he suffered from epilepsy. *Hammontree v. Jenner*, 20 Cal. App. 3d 528, 529 (1971). The Franklin and Rabin book uses the case to illustrate the overriding need to permit human mobility, even though innocents will suffer unremedied injuries in consequence.

ries, but tort law does not endorse this outcome.⁶³ Its recognition of communities does not deny its overwhelming affirmation of every individual's right to move about. Freedom for individuals is considered a source of wealth.⁶⁴

Tort law expresses this preference by making fault or negligence the basic rule for accidents, and strict liability the exception. The former rule seeks to encourage care within an activity; the latter casts a shadow on an entire endeavor.⁶⁵ Isolating strict liability as suited only to a minority of human activities bespeaks a preference for action over inaction.

6. Peaceful Coexistence is Encouraged, Where Feasible

Similar to the balance it strikes between acclaiming action, on the one hand, and acknowledging that inaction conduces to safety, on the other, tort law finds a midpoint between absolute entitlement for compensation for injury caused by the act of another, on the one hand, and absolute freedom to carry out risky activities, on the other.⁶⁶ Although the rubrics vary—"proximate cause," "policy," "affirmative defenses," and so forth—a uniting principle favors compromise, toward peaceful coexistence. This attitude is not of itself doctrine, but a base on which doctrine rests.

We find this contention in legal maxims, doctrinal rules, legal scholarship, and traditions of adjudication. Judges use phrases such as *de minimis non curat lex*⁶⁷ and "live and let live"⁶⁸ to express this approach to Torts disputes. The tort of intentional infliction of emotional distress is home of both Calvert Magruder's infa-

63. "If a man always acted at his peril, the whole community would be in gaol but for three obstacles. No one could legally build the gaol, no one could legally send people to it, and no one could legally keep them there." Percy H. Winfield, *The Myth of Absolute Liability*, 42 L.Q. REV. 37, 38 (1926).

64. See *Losee v. Buchanan*, 51 N.Y. 476, 484 (1873) ("We must have factories, machinery, dams, canals and railroads.").

65. See EPSTEIN, *supra* note 47, at 89-90 (summarizing this contrast and pointing out that it has been overdrawn).

66. See Feldman, *supra* note 45, at 1433 (identifying tort doctrine as mediating between freedom and security). I elaborate in Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 VAND. L. REV. 1 (2001).

67. "The law does not concern itself with trifles." According to a November 20, 2000, search of the Mega file of the Mega library in Lexis, 1503 published judicial opinions (not all of which are about Torts disputes) contain this phrase.

68. See *Bamford v. Turnley*, 122 Eng. Rep. 27 (Ex. Ch. 1862). This phrase is not so popular with judge-authors as the *de minimis* maxim; only 108 cases turned up in a November 20, 2000 search, see *supra* note 67, and several of them were referring to a business enterprise called "Live and Let Live."

mous (but sometimes quite accurate) comment that "there is no harm in asking"⁶⁹ for a sexual favor, at one end of the continuum, and the understanding that behaviors that exceed the bounds of toleration will be classified as tortious, because they are outrageous,⁷⁰ at the other. In scholarship, George Fletcher situates Torts as occupying a central point between Contracts and Criminal Law;⁷¹ similarly, Jay Tidmarsh describes Torts as simultaneously "conceptualist" and "anti-conceptualist,"⁷² suggesting centrism. Lay participation in Torts decisionmaking brings a commonsense perspective to disputes.⁷³

B. The Alternative Principles in Contrast to the General Principles

What's wrong with these Alternative Principles? By reference to which goals are they irregular? One might begin with the ALI tradition that associates improvement with something like utilitarianism or pragmatism (in a popular rather than a philosophical sense) and with reference to decisional law: *Restatement* blackletter, some believe, ought to be of help in deciding cases.⁷⁴ This criticism might condemn the Alternative Principles as too vague or indeterminate to aid the work of a trial judge or a jury struggling with a particular case. Two flaws mar this conclusion, however. The first is that the Institute is not, in fact, committed to a principle of workaday utilitarianism in the crafting of its *Restatements*. The second is that this version of a utility criterion—utility, that is, to answer a question about the law that disputants pose in litigation—would exclude much of the Perlman work product, and some of the Schwartz blackletter as well. To the extent

69. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936).

70. See, e.g., *Glenn v. Cent. Contra Costa County Transit Auth.*, No. C 98-4940 CRB, 1999 U.S. Dist. LEXIS 5255, at *10 (N.D. Cal. Apr. 9, 1999) (holding that an allegation that defendants encouraged another employee to accuse the plaintiff of sexual harassment fulfills this "exceeded the bounds" criterion); *Hogan v. Forsyth Country Club*, 340 S.E.2d 116, 121 (N.C. Ct. App. 1986) (terming allegations of harassment severe enough to exceed what decent society would tolerate).

71. See generally George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347 (1996) (contrasting the victim-protective principle of criminal law and the collaborative principle of contract law; Torts lies between them).

72. Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1316 (1994).

73. See *supra* Parts I.A.2, I.A.3.

74. See Leon Green, *The Torts Restatement*, 29 U. ILL. L. REV. 582, 595 (1935) (faulting the *First Restatement* for its uselessness as jury instructions).

that it did not stop the *General Principles*, it cannot support rejection of the Alternative Principles.⁷⁵

If the American Law Institute thought of usefulness as a basis to include or exclude provisions in *Restatements*, then it would operate with some definition of the term, and would, after propounding blackletter, invite feedback and make use of this response. Postponing for a moment the problem that the Institute has no clear definition of usefulness or utility, one must first acknowledge that the Institute does not ignore its work product after releasing it for consumption. The ALI has numerous members whose work gives them an excellent vantage point on both the function of *Restatement* provisions and the circumstances they try to address: Sitting judges and senior litigators with years of experience in a subject are valuable informants. *Restatement in the Courts* has long counted citations, even back when computerless retrieval technology used to make the task laborious; this collection of data can easily get bigger and faster.

Neither its engaged membership nor powerful information technology, however, can tell the ALI reliably whether a *Restatement* provision has passed or failed the test of utility. Working judges and lawyers have no incentive to expunge anything idle from the *Restatement*, or even to complain about non-utility. Only an important or controversial provision will make a strong claim on their time. As for citations, their number does not indicate the utility of any *Restatement* provision. Judges have cited *Restatement* sections to make points other than endorsement.⁷⁶ Other citations have filled string cites, adding no independent strength to an assertion. Perhaps the most useful provisions make litigation go away.⁷⁷ The

75. In an essay on the task of pulling together Torts decisional law, Denis Brion argues that "the Restatement project" (which he does not define) demonstrates the "extreme difficulty in deriving a rational structure of doctrine that comprehensively embraces the accumulation of relevant judicial decisions at any particular moment." Denis J. Brion, *The Chaotic Indeterminacy of Tort Law: Between Formalism and Nihilism*, in *RADICAL PHILOSOPHY OF LAW* 179, 180 (David S. Caudill & Steven Jay Gold eds., 1995). The most one can derive from reading Torts decisions is what Brion calls "quasi-order," which "appears not at the level of doctrine but at the deeper level of theme." *Id.* at 193. According to this view, the Alternative Principles—thematic rather than rule-asserting—are as useful as any summaries of tort law can be.

76. See, e.g., *Saratoga Fishing Inc. v. Marco Seattle Inc.*, 69 F.3d 1432, 1441 (9th Cir. 1995) ("[W]e need not, and do not, adopt the formulation of the Restatement (Third) at this time . . ."); *Banca Cremi v. Alex. Brown*, 955 F. Supp. 499, 522 (D. Md. 1997) (stating that Maryland rejects the *Restatement (Second) of Conflicts*); *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1331 (Conn. 1997) (vehemently rejecting the "reasonable alternative design" requirement of the *Restatement (Third)*).

77. John Wade was justifiably proud of Section 339 of the *Second Restatement*; he measured its success not by counting hits but by the gradual disappearance of the unfortunate phrase "attractive nuisance" from caselaw—a kind of anti-citation, dog-that-didn't-bark indicator of

retired heavyweight champion of citation, Section 402A of the *Restatement (Second)*, was to Reporter-aspirants James Henderson and Aaron Twerski something to be revised: In their 1992 article advocating a new restatement of products liability, Henderson and Twerski noted the large number of citations to § 402A,⁷⁸ thereby suggesting that citation frequency does not prove the absence of disarray, volatility, and the need for reform.

The Model Penal Code, the closest to a compendium of general principles that the Institute has heretofore published, bears mention here. Like Professors Henderson and Twerski, who used their scholarship to anticipate a products restatement, Herbert Wechsler first framed his project in an article;⁷⁹ he thereupon spent "every bit of time and energy" that he possessed for the next ten years working on the Code.⁸⁰ This experience makes Wechsler's perspective on ALI general-principles compendia relevant to our present purpose. Wechsler, late in his life, described his perspective as utilitarian.⁸¹

Wechsler elaborated to interviewers Norman Silber and Geoffrey Miller:

Wechsler: I was trying to influence the ALI effort, which then was starting out under absolutely terrible auspices and with literally fantastic conceptions. Fortunately, it was aborted, partly I guess, because of Pearl Harbor. But if that damn thing had gotten going, in those days, with the background premises and the approach of the people that were involved, I really think that the result would have been disaster.

Silber and Miller: What was wrong with the premises and approach?

Wechsler: For one thing, the notion was somehow that the reordering of criminal law involved a great empirical exercise. In other words, they needed millions and millions of dollars in order to study something that you were going to go out into the world and look at and count. I never got very clear on what it was that you were going to count and look at, but the techniques of sociology were all going to be conscripted—as though this was going to increase your insight as to whether forcible sexual intercourse is something that a good society should try to protect people against, whether you have to count something in order to know that . . .

influence. John W. Wade, *The Restatement (Second): A Tribute to its Increasingly Advantageous Quality, and an Encouragement to Continue the Trend*, 13 PEPP. L. REV. 59, 74 (1985).

78. See James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1527-29 (1992).

79. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

80. Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 918 (1993) (quoting Professor Wechsler).

81. "I have always been exceedingly utilitarian in my views and approaches," Wechsler said in response to a question about his early views on codifying the criminal law. *Id.* at 869.

We were trying to show that by sitting down and thinking and following what I suppose one would call a method of philosophy—that is to say, a dialectical method of putting to oneself questions and coming up with answers, expounding problems and raising issues, discussing them—that one could make a good deal of progress towards systemization, clarification, and improvement.⁸²

Although the Model Penal Code and various *Restatements* have achieved considerable “systemization,” it cannot be systematic for an institution to propound blackletter for professional consumption without establishing *ex ante* criteria or benchmarks to measure its effects. If, to use Wechsler’s illustration, everyone knows that forcible sexual intercourse is wrong, then *Restatement* blackletter declaring nothing more would be otiose. If, alternatively, the Model Penal Code has something to say about forcible sexual intercourse that we all do not already know, then its proposition is novel (and probably controversial). A scholar will sometimes enjoy professional gain inside the academy from novel proposals and assertions that the outside world ignores. But the ALI aspires to participate in the creation of new case law; it is obliged therefore to care whether its offerings do or do not effect change. Such power cannot be known at the propositional level in the way that peer review, for instance, can measure the force of academic claims. Any plan to provide “exceedingly utilitarian” law reform, therefore, must include real-life measurement.⁸³

By what measure of “utilitarianism,” then, can an Alternative Principle like “Peaceful coexistence is encouraged, where feasible” or “Professionals share authority with non-professionals” be deemed idle? Certainly a principle need not have the power to decide disputes, if the *General Principles* are any guide. We know that Gary Schwartz’s blackletter about duty—“Findings of no duty

82. *Id.*

83. *See supra* note 81 (quoting Wechsler’s use of “exceedingly utilitarian”). The Institute not only commits no resources internally to this kind of empirical measurement of its most *General Principles*-like compilation: it has also not yet responded to one important external measurement. Victoria Nourse used the very sensible technique of comparing Model Penal Code and non-Model Penal Code jurisdictions to see whether the Code has been a force for good or ill on the subject of provocation in the law of homicide. After surveying all of the reported cases of intimate-partner homicide in the thirteen jurisdictions that follow the Model Penal Code where the defendant asserted provocation, comparing them with non-Model Penal Code and “mixed” jurisdictions, Professor Nourse concluded that the Model Penal Code has had a baleful effect, tending to exonerate killers who felt provoked simply because the victim, a woman they wanted, had left them or rejected their overtures. Victoria F. Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L.J.* 1331, 1332-36 (1997). Such an analytic conclusion cannot be achieved by Wechsler’s talking-to-ourselves Q&A, because it actually looks at *Restatements* in the courts—not the citation checklist, but the experiences of judges, litigants, and injured complainants. Without this investigation of the world, the Institute cannot know which of its formulations are useful.

are unusual, and are based on judicial recognition of special problems of principle or policy that justify the withholding of liability"⁸⁴—tells judges and litigants almost nothing about how to resolve a dispute about whether a duty exists. His definition of negligence in Section 4 of the Discussion Draft provides advice and guidance rather than concrete rules,⁸⁵ and his Section 17, consisting of one sentence, "The conduct of a defendant can lack reasonable care insofar as it can foreseeably combine with or bring about the improper conduct of the plaintiff or a third party," is all gentle suggestion, a feel-free-to-disregard-me-if-you-like option containing two conditional clauses, certainly nothing that will determine the outcome of a dispute.⁸⁶ These quotations are not representative; most of the Schwartz-authored blackletter lays down rules concretely. They suffice, however, to show that an assertion is not unwelcome *per se* in the *General Principles* simply because it cannot dispose of litigants' contentions.

The Perlman-authored blackletter defies the tenet of outcome-determinative utility much more overtly. Perlman's Section 2A, which is called "Basic Elements of a Tort Claim" and includes five elements recited conjunctively, does not have any obvious utility. Even assuming that the sorting of a claim into Torts or not offers clear utility in practice (for example, to determine whether a particular statute of limitation applies), Section 2A cannot be read to mean, "If any of these elements are missing, then the claim is not a tort claim," because some tort claims do not fit within these elements. The section on "obligations" of reasonable care⁸⁷ similarly does not indicate whether they are exhaustive or otherwise necessary to a determination of liability.

Given this more flexible approach to utility with which the Schwartz and Perlman-authored *General Principles* work, one can readily identify utility in the Alternative Principles. When we start to seek something more general (so to speak) than an answer to the question of which of two litigants ought to prevail in a directed-verdict dispute, the Alternative Principles offer pertinent guidance. For example, many people of the Torts community—I mean to include litigators, judges, academics, and even legislators—take an interest in the division of power between legislators and judges to

84. Discussion Draft, *supra* note 1, § 6.

85. *Id.* § 4 (listing "[p]rimary factors to consider in ascertaining whether conduct lacks reasonable care").

86. *Id.* § 17.

87. Preliminary Draft No. 2, *supra* note 5, §§ 103-04.

decide Torts questions. The phrase "legislative supremacy" has proved enduring and influential in Torts case law and commentary, though not entirely self-enforcing or -defining.⁸⁸ A contrary assertion, about the power of citizen initiative, states a principled objection to some claims of legislative supremacy. It also shows that the power struggle goes beyond legislators versus judges: Organized, institutional interests are juxtaposed against citizen protest.⁸⁹ Similarly, proposals to limit the role of lay juries in Torts should be seen as contrary to a general principle about the subject—a judgment that should not of itself quash the proposals, but raise questions about them.

The question of whether a candidate for *Restatement* blackletter is useful can also be considered with reference to the ALI as an institution, and here again the Alternative Principles manifest utility. A strong tradition in the Institute looks for "the best."⁹⁰ Like Wechsler's utilitarianism, this preference lacks a factual predicate: Consumers of ALI work product have not been told clearly what makes something or someone better than another. The Platonic ideal of putting civic power in the hands of wise philosophers may yield answers to questions that *Restatement* blackletter aspires to answer, but it is contrary to the principle of sharing power with amateurs, outsiders, and non-elite citizens. The ALI has had occasion to consider the overlap between access to the Institute and wealth or social privilege,⁹¹ and has become more sensitive to the

88. This point arose at a symposium on the role of judges as tort lawmakers. See Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 533-35 (1999) (noting difficulties of legislative supremacy); Anita Bernstein, *The New-Tort Centrifuge*, 49 DEPAUL L. REV. 413, 433 n.58 (1999) (noting controversy over whether Section 402A of the *Second Restatement* illegitimately gained ascendancy over the legislature's UCC).

89. See Abel, *supra* note 88, *passim*.

90. See *What is the American Law Institute? 2* (1935) (unpublished manuscript).

91. Prominent members of the ALI have put these concerns at the fore. See Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WIS. L. REV. 1, 38 (describing ALI efforts to combine unabashed elitism with a diverse membership); Alex Elson, "From the Trenches and Towers": *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQ. 625, 631 (1998) (noting that the ALI has been regarded as elitist). The ALI has been attacked from the outside as biased in favor of the wealthy and powerful. See, e.g., Walter Gordon, *Strict Legal Liability, Upper Class Criminality, and the Model Penal Code*, 26 HOW. L.J. 781, 796-97 (1983) (accusing the ALI of hypocrisy and class bias for rejecting strict liability for corporate crimes but imposing it for felony murder); Paul A. Simmons, *Government by an Unaccountable Private Non Profit Corporation*, 10 N.Y.L. SCH. J. HUM. RTS. 67, 83-84, 97 (1992) (faulting the ALI as undemocratic, and arguing that *Restatements* should have no weight in the courts); see also Jeffrey W. Stempel, *Halting Devolution or Bieak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem"*, 46 FLA. L. REV. 57, 91 (1994) (contending that because it is a less elite organization, the American Bar Association rather than the ALI should handle discovery reform).

dangers of restating the law of politically fraught contexts, such as consumer banking, without due regard for the interests of weaker sectors.⁹² The Alternative Principles invite the ALI to contemplate the tension between elitism and the subject under consideration in the *General Principles*. Even if the Institute concludes that expertise and elites are better than ignorance and amateurs for all subjects (even Torts), a recognition of the Alternative Principles counsels that the ALI balance between improvement and description⁹³ might be struck in favor of description in an area where lay authority is so strong.

Furthermore, by departing from a strict notion of rigid, atomistic separation between human beings, the Alternative Principles declare that the ALI's prior penchant for calling people A, B, C, and such in Illustrations is at odds with a tradition in tort law. Illustrations in the *Restatement (Third)*—written by both Gary Schwartz in the *General Principles* and Aaron Twerski and James Henderson in the Products Liability comments—already move in this direction. In the *General Principles* Schwartz writes about “Joanne, a physician,”⁹⁴ and “Sharon,” a driver who injures “Dan” and “Nate.”⁹⁵ Schwartz reserves “A” and “B” to stand for nonhuman hypotheticals, such as possible causes of an injury.⁹⁶ In moving away from *Restatement (Second)*-era non-humanism (and also in recognizing, by the way, that women are players on the Torts stage), these Illustrations admirably declare that tort law is about human beings.⁹⁷ It may be time to go further and acknowledge the web of relationships that brings people together.⁹⁸ Stating that “parties are situated in

92. See Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons From the Uniform Commercial Code*, 78 MINN. L. REV. 83, 162 (1993) (advocating new procedures for uniform law drafting and enactment to assure “reasonable accommodation among the interests of all affected groups”). Professor Patchel, once an external critic of the ALI, went on to serve as an Associate Reporter for the UCC revision. See Michael Greenwald, *American Law Institute to Return to Washington for 77th Annual Meeting* (listing Professor Patchel as an Associate Reporter for the UCC revision), available at <http://www.ali.org> (last visited February 22, 2001).

93. See Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1667 (1995) (book review) (referring to the ALI goals of “reconciliation and reform”).

94. Discussion Draft, *supra* note 1, § 1 cmt. d, illus. 5.

95. *Id.* § 7 cmt. a, illus. 1.

96. *Id.* § 15 cmt. g.

97. The *Restatement of Apportionment* favors the A, B, and C approach to Illustrations. See, e.g., RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. j, illus. 1-2 (Proposed Final Draft (Revised) Mar. 22, 1999).

98. This argument is stated in Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 595-96 (1993).

communities" usefully identifies the existence of groups, long recognized in tort law.

By refusing to say how any particular case should come out, the Alternative Principles fit nicely within the Torts corpus. In this area of the law, judicial decisions become famous more for the questions they raise than the answers they deliver. Quick: name a landmark Torts case. Does it state a crisp rule or principle? *MacPherson v. Buick Motors* comes to mind as a great, stark moment in the history of Torts, although its significance perhaps needed the efforts of Edward Levi and William Prosser to reach full effect.⁹⁹ But most other landmarks twinkle elusively out of restatability: *Palsgraf v. Long Island Railroad Co.*,¹⁰⁰ with its nearly even split between two views; *Vincent v. Lake Erie Transportation Co.*,¹⁰¹ which cannot even be classified within an elementary fault/non-fault divide; *Baltimore & Ohio Railway Co. v. Goodman*,¹⁰² gloriously wrong; *Brown v. Kendall*,¹⁰³ on its surface an account of a fight between two dogs, but to some readers an allegory or parable about the railroad industry.¹⁰⁴ The subject presents itself in topics and themes, without the rule-focus found in the many landmark cases of Contracts or Criminal Law.¹⁰⁵

Finally, the Alternative Principles challenge the unspoken norm that the ALI must work only with a small stack of reported appellate decisions.¹⁰⁶ In looking at such motley and ambiguous sources as the jury, "citizen initiative," the intermittently fashionable concept of "communities," and the notion of amiability inherent in "peaceful coexistence," the Alternative Principles refuse to enforce rigid separation between subject and object. In the *Restatement (Second)*, by contrast, Prosser and Wade always knew who they were and what they were looking at. The subject is the restater himself; his object is a small percentage of reported judicial

99. *MacPherson v. Buick Motors*, 111 N.E. 1050 (N.Y. 1916).

100. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

101. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910).

102. *Baltimore & Oh. Ry. Co. v. Goodman*, 275 U.S. 66 (1927).

103. *Brown v. Kendall*, 60 Mass. 292 (1850).

104. See Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368 (1951) (referring to the desire of Justice Shaw to use his *Brown v. Kendall* opinion "to make risk-creating enterprise less hazardous to investors and entrepreneurs"); see also MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 99-108 (1977) (arguing that nineteenth-century private law advanced a judicial agenda to protect industry).

105. See generally Tidmarsh, *supra* note 72, at 1331 (describing Torts "as being in perpetual process, a timeless battlefield scarred by previous skirmishes among theories, doctrines, and practices . . .").

106. Cf. Elson, *supra* note 91, at 633 (attributing to Judge Richard Posner the view that ALI members are insufficiently diverse with respect to their training in disciplines other than law).

decisions. This citadel of certainty about what defines the object under study had already fallen before I even dreamed of my Alternative Principles; the *Restatement (Third)* relies liberally on secondary materials. Schwartz in particular is willing to learn from and cite law review articles, monographs by nonlawyers, an unscripted remark by Prosser,¹⁰⁷ a newspaper clipping,¹⁰⁸ a veterinary text for clinicians,¹⁰⁹ *Sports Illustrated*,¹¹⁰ and other eclectic sources. Professors Henderson and Twerski looked at state statutes in compiling their products liability *Restatement (Third) of Torts: Products Liability*.¹¹¹

The next step in this eclecticism, a short one indeed, is to admit forthrightly that *Restatements* restate more than the *ratios decidendi* of reported decisions from the appellate courts. The "literally fantastic"¹¹² pre-World War II plan of the American Law Institute to invest in sociological studies to find out the obvious, castigated by Herbert Wechsler, certainly sounds like a bad idea, but what Wechsler deemed its happy antithesis, "sitting down and thinking and following . . . a dialectical method of putting to oneself questions and coming up with answers,"¹¹³ leaves too many questions unanswered and cannot serve as a sole method. The sources for *Restatements* are undeniably more diverse. Pluralistic material is now a fact from which the ALI cannot retreat.

In sum, the Alternative Principles suggest that the *General Principles* do not emerge naturally and inevitably from the content of contemporary tort law.¹¹⁴ Once an observer identifies a tendency within the *General Principles* to exclude and dismiss relevant source material, new questions arise. What gets lost in these exclusions and dismissals? How does this tendency relate to other events and experiences in the history of law reform? Is exclusion the right response to irregularity, dissent, and pluralistic contradictions?

107. *E.g.*, Preliminary Draft No. 2, *supra* note 5, § 21 cmt. j.

108. *E.g.*, *id.* § 21 cmt. i.

109. *E.g.*, *id.* § 20 cmts. b, d, g.

110. *Id.* § 20 Reporters' Notes.

111. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20 Reporters' Notes, at 48-50 (1998) (mentioning, in Reporters' Notes, that Illinois and Louisiana among other states, had adopted statutes requiring a plaintiff in a design-defect case to prove a reasonable alternative design).

112. *See supra* text accompanying note 80.

113. Silber & Miller, *supra* note 80, at 918.

114. A similar conclusion could be drawn about the *First* and *Second Restatements*, but the point is even stronger today, following the growth of a deeper literature about the work of the American Law Institute. *See supra* notes 91-92.

II. RESTATEMENTS AND THE GENDERED UNIVERSAL

A. *The Method: Order Emergent from Observation*

The idea that one can master the chaotic-looking world by using a faculty for detached observation derives from seventeenth-century forebears, notably René Descartes and Francis Bacon.¹¹⁵ This notion maintains that a correct vantage point, made operational through necessary intellectual commitments, brings order. Order exists in at least two distinct senses associated with each of the thinkers. Descartes differentiated *res cognitans*, the reality that a person experiences based on knowing who he or she is, and *res extensa*, the world beyond, mysterious and unintelligible, and perhaps not even real.¹¹⁶ By contrast Bacon claimed that knowledge, derived from standing in the proper vantage point, becomes the basis for masterful action.¹¹⁷

The "prescription of masculine order" is not synonymous with sexism. Whereas Bacon acquired a reputation for despising and repudiating women thoroughly,¹¹⁸ Descartes enjoyed many mutually respectful relationships with women.¹¹⁹ His decision to site philosophy entirely in the mind of an individual—a geography that dismissed monasteries, universities, and libraries, all of which barred women from study, as inessential to this work—offered women a unique invitation to a subject that had never previously tolerated their presence. Privileged women of the seventeenth century knew well what a gift Descartes was giving them, and they were among his earliest disciples.¹²⁰ The prescription of masculine order, then, can readily coexist with generous, egalitarian attitudes

115. See, e.g., Karen T. Litfin, *The Gendered Eye in the Sky: A Feminist Perspective on Earth Observation Satellites*, FRONTIERS, Mar. 1997, at 26 (arguing that space-based observation of Earth is an example of Baconian ordering).

116. See Karl Stern, *Descartes*, in FEMINIST INTERPRETATIONS OF RENÉ DESCARTES, *supra* note 13, at 29, 36-42.

117. See FRANCIS BACON, THE NEW ORGANON 39 (Fulton H. Anderson ed., 1960) (1620) ("Human knowledge and power meet in one; for where the cause is not known the effect cannot be produced.").

118. See generally Alan Soble, *In Defense of Bacon*, 25 PHIL. SOC. SCI. 192 (1995) (summarizing this view of Bacon, as stated in the writings of Sandra Harding, Carolyn Merchant, and Evelyn Fox Keller).

119. See, e.g., Thomas E. Wartenberg, *Descartes's Mood: The Question of Feminism in the Correspondence with Elisabeth*, in FEMINIST INTERPRETATIONS OF RENÉ DESCARTES, *supra* note 13, at 190, 190-210 (analyzing Descartes' friendship and correspondence with Princess Elisabeth of Bohemia).

120. See, e.g., Cynthia B. Bryson, *Mary Astell, Defender of the "Disembodied Mind,"* HYPATIA, Fall 1998, at 40 (describing an early feminist's appreciation for Descartes).

toward women (just as women, including feminists, can prescribe masculine order).¹²¹

To get a sense of masculine order, it may be helpful to imagine an approach to order associated with femininity. Order in a feminine, and therefore disparaged, sense suggests attention to trivial and peripheral matters. A wife and mother, in this stereotype, maintains order through such repetitive tasks as refereeing squabbles among children, picking up small objects and moving them someplace else, restocking a larder with mundane groceries and then taking these items off the shelves to prepare meals, and wiping away dirt and mess. It is impossible to think of her without a contrast to the wide world outside her home: a man who "makes a living" (the housewife has no claim on this phrase even after she has made babies inside her own body) out in a public, entrepreneurial space. The judiciary expresses its version of this dichotomy with its notion of "housekeeping,"¹²² a word that judges use to classify those aspects of their work that they prefer not to do.¹²³ Like his counterpart the housewife, the federal magistrate judge is a lesser half, occupied with routine disorder and dirt—he referees discovery squabbles, for existence, or picks up lesser scraps of the caseload—in contrast to the Article III judge, a lordly source of masculine order.¹²⁴

Order in what we may call the feminine sense emphasizes particulars and concrete, specific facts. The work of Carol Gilligan,

121. Cf. Catharine MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 695 (2000) ("If anyone does 'grand narratives,' I suppose I do . . .").

122. See Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 913 (1990). Soon after the African-American college executive Ruth Simmons was appointed president of Brown University, she described in an interview her work style as president of Smith College with an analogy to housekeeping, something that her mother had done to earn a living: "It's like cleaning. Some people clean just enough so that what you see looks good. I clean so that you can move the chair out of the way and not find dust bunnies under it." Geneva Overholser, *Rise of Women Could Change Sound of Power*, ATLANTA J.-CONST., Nov. 27, 2000, at A11 (quoting Simmons and praising her for her "analogy overhaul" away from "retreats and victories, blows delivered and knockouts scored, bulls'-eyes, pilings on, Hail-Mary passes and hat tricks. A few fewer penalty boxes and fumbles, saturation bombings, shots across the bow and hits below the belt—wouldn't this be a pleasure for everyone?").

123. See Resnik, *supra* note 122, at 958-59 (discussing social security appeals as an example of work that Article III judges frequently assign to magistrate judges).

124. Even those commentators who are troubled by the rise of magistrates typically do not abandon the effort to sort the trivial from the lordly. See, e.g., Richard A. Posner, *Coping With the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989) (lamenting the proliferation of "adjuncts" to the federal judiciary, including law clerks, special masters, and staff attorneys as well as magistrate judges, and arguing that their growth indicates that Congress has been remiss for not limiting the jurisdiction of the federal courts or shifting the judicial workload to administrative agencies).

on care as integral to moral reasoning, is central. Recall "Amy," almost a celebrity by now in the law reviews, who when asked, "Is it right or wrong to steal a drug in behalf of one's dying wife when one cannot afford to pay for it?," revealed herself as deficient by responding with questions about particulars (such as, "Couldn't the would-be thief and the druggist negotiate some kind of payment plan?") rather than identifying the problem as a war between two large principles, the exclusive right of property versus the claim of necessity. For Amy, order could not emerge except through consideration of details and particulars. Juxtaposing two rights got her nowhere; for Amy, order lay in the missing facts rather than transcendence.¹²⁵

Order in the masculine sense thinks big, rather than small, and seeks an overwhelming command.¹²⁶ A subject's faculty for observation should not, in this view, concern itself with the tiny, deviant particular. Descartes insisted that cogitation yields truths of the most profound and far-reaching kind; Bacon, no less grandly, supposed that infinite knowledge about the world, its processes and riches, and its utterly reliable mechanistic principles on which new machines could depend, could be derived from the proper combination of detached observation and bold initiative. Masculine order is, then, above all *comprehensive*.

A related characteristic is the determination to achieve coherence by *positing out*. For centuries male and female readers of Descartes have been struck by the tendency of *cogito, ergo sum* to exclude.¹²⁷ In achieving order by assertion, this seventeenth-century method denies the existence of inconvenient conditions, especially those that bespeak subjectivity.¹²⁸ Order becomes more important than exceptions to order. Once cast as marginal or irrelevant, all posited-out exceptions are extrinsic to, and thus cannot threaten, the built structure.

125. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 24-39 (1982).

126. Donna Haraway writes about masculine "reductionism, when one language (guess whose) must be enforced as the standard for all the translations and conversions. What money does in the exchange orders of capitalism, reductionism does in the powerful mental orders of global sciences: there is finally only one equation." DONNA J. HARAWAY, SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 187-88 (1991).

127. See BRIAN EASLEA, SCIENCE AND SEXUAL OPPRESSION: PATRIARCHY'S CONFRONTATION WITH WOMAN AND NATURE 72-73 (1981) (cataloguing some of the exclusions posited in this philosophy); Stern, *supra* note 116, at 36-46; Wartenberg, *supra* note 119, at 199-200 (recounting the protests of Princess Elisabeth).

128. Desire, for one: individual wishes for anything other than the improvements (philosophical or material) that derive from masterful perception are assumed not to exist. Diversity, for another: plural, variant, and deviant impulses are also posited out.

A third defining characteristic of masculine order is its *superimposition*. Its proclamations about the world are asserted to override conflicting prior assertions used to synthesize and understand. Critiques of seventeenth-century philosophy describe a "death of nature" where men like Bacon imposed a mechanical, inert, lifeless Earth over an ancient understanding of the world as alive and bountiful (though sometimes angry and refusing to yield its fruits).¹²⁹ The planet had been alive, but Bacon saw to it that it would now be dead—meaning under the control of a superimposed scientific authority.

Related to this notion of superimposed mechanism, masculine order is noted for its claim to neutrality, often accompanied by an air of science. Neutrality calls for masculinity. The aspects of a person that do not comport with an unchanging, detached Cartesian gaze—such as living in a permeable, penetrable body, or being vulnerable to the shape-changes that result from getting pregnant and ceasing to be pregnant—interface with the purity of observation. In this kind of order, proclamations emerge from no personal vantage point; they rest above politics and social strife.

B. The Method Practiced in Restatements

Law reformers have frequently prescribed masculine order. Within American law, the prescription appears most stunningly in restatements. Having once said that a restatement is a codification, produced with attention for procedural or political legitimacy, that strives to reconcile and improve the state of legal doctrine, I use this word here to include more than ALI work products.¹³⁰ The *General Principles* (particularly its Perlman-written sections) is one of several restatements that prescribe and try to follow a masculinist ideal of order. In so doing, the *General Principles* emulate a foreign tradition: National codes are prominent among the world's restatements. We may therefore draw on codification and the civil law tradition as well as ALI compendia to explore how restatements in general, and the *General Principles* in particular, pursue this end.¹³¹

129. See EASLEA, *supra* note 127, at 72. See generally CAROLYN MERCHANT, *THE DEATH OF NATURE: WOMEN, ECOLOGY, AND THE SCIENTIFIC REVOLUTION* (1980).

130. See Bernstein, *supra* note 93, at 1665.

131. In using the terms "codification" and "the civil law tradition" I do not mean to join ongoing discussions about what these words mean, nor to exaggerate the contrast between them on the one hand and a common-law alternative on the other. See generally Gunther A. Weiss, *The*

1. Order Through Codification

Restaters have suggested that reducing a jumble to blackletter is a bit like creating the world:¹³² "The chaotic state of the law arises, of course, from the vast mass of unarranged, and sometimes discordant, material. To take this material, separate the discordant parts, analyze, compress, remold the rest, is to educe order out of chaos." So wrote David Dudley Field in a letter to the California Bar in 1870.¹³³ Field, the most celebrated codifier in American history, may or may not have wanted to do his compressing and remolding in homage to another great proponent of codification, Francis Bacon, who had written that by "art and the hand of man," Nature would be "forced out of her natural state and squeezed and molded."¹³⁴

Common themes emerge when one looks at the secondary writings associated with efforts at codification. Although it is impossible to say briefly and accurately, for example, what the writers of any national code thought they were doing or what they achieved,¹³⁵ the work of codifying and restating, in general, reveals attention to various aspects of masculine order. For centuries codes have contained a certain male authoritarianism and even swagger. One does not perhaps want to read too much into either phallic etymology ("code" derives from the Latin *codex* or *caudex*, meaning the trunk or stem of a tree)¹³⁶ or the Great Men political history of codification which, as Pierre Legrand has pointed out, is "inextricably linked to the personae of Justinian, of Frederick the Great, of Napoleon; even in common law jurisdictions like England and the

Enchantment of Codification in the Common-Law World, 25 YALE J. INT'L L. 435, 438-41 (2000) (arguing that the distinction between common-law and civil-law systems has always been overdrawn, and is getting even smaller). Despite having stated a binary thesis in this Essay, I would agree that all dichotomies should be read with the standard caveat about the danger of claiming too much in the way of polar opposition.

132. Cf. DAVID NOBLE, *THE RELIGION OF TECHNOLOGY* 61-62 (1997) (describing a vision of scientific progress that begins by man's first equaling the biblical Adam, who observed and named everything in the world, and next by reaching "a truly divine understanding of creation rather than its mere Adamic reflection").

133. Letter from David Dudley Field to the California Bar (Nov. 28, 1870), quoted in Lewis Grossman, *Essay, Codification and the California Mentality*, 45 HASTINGS L.J. 617, 628 (1994).

134. Francis Bacon, *Novum Organum*, quoted in MERCHANT, *supra* note 129, at 171.

135. See generally James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 459-60 (1994) (arguing that current beliefs about the principles of the French Civil Code are actually revisionist notions propounded by nineteenth-century treatise writers in France).

136. See Pierre Legrand, *Strange Power of Words: Codification Situated*, 9 TUL. EUR. & CIV. L.F. 1, 5 (1994). The word "codification" was coined by Jeremy Bentham, who first wrote it in an 1815 letter to Tsar Alexander I. See Weiss, *supra* note 131, at 448. Several actual codes preceded the formation of this word. *Id.* at 449.

United States where codification, as understood by civilian jurists, has not taken hold, it evokes the names of Bentham and Field.¹³⁷ But the association is there, embodied in various male figures.¹³⁸ National codifiers like Robert Joseph Pothier of France and Andres Bello of Latin America, for instance, are often called "fathers," authority figures blanketed in a "pervasive rhetoric of science, sanctity, and perfection."¹³⁹ Associating codes with maleness, then, puts this Essay on familiar terrain.

Equally familiar are the recurring characteristics associated with national codes. As sketched by the German comparatist Gunther Weiss, the defining elements of codification include "completeness" (the code must be "exclusive," "gapless," and "comprehensive"); "system;" "reform;" "national legal unification;" and "simplicity."¹⁴⁰ With the exception of "reform"—which can subvert, or at least confront, traditional hierarchies—these concepts all line up with the elements of masculine order. They posit out, they superimpose, and they aspire to comprehensiveness and quasi-scientific neutrality.

Regarding comprehensiveness, codes generally assert that "each solution to a legal problem must be, directly or indirectly, derived from the text of the code itself."¹⁴¹ This version of order puts forward a relatively small document to stand in microcosm for a

137. Legrand, *supra* note 136, at 8. "My true glory is not that I have won 40 battles; Waterloo will blow away the memory of these victories," Napoleon declared from his exile. "What nothing will blow away, what will live eternally, is my Civil Code." Oliver Moréteau, *Codes as Straight-Jackets, Safeguards, and Alibis: The Experience of the French Civil Code*, 20 N.C. J. INT'L L. & COM. REG. 273, 278 (1995) (quoting Napoleon).

138. Although the club of codifiers admits no women, codes themselves can be feminine, following the masculine-order pattern of identifying a subject as male and an object as female. Robert Anthony Pascal, for instance, evokes an aging Southern belle, sullied a bit by rapacious men over the years:

To speak in metaphor, the shape of Miss Louisiana Civil Code was enough to make her my mistress. Once I learned of her ancestry and character, I found her all the more attractive. Tonight I shall try to describe the shape of Miss Louisiana Civil Code when I first met her and note some of the changes in her appearance wrought by the attentions of men . . . Finally, I shall speculate on what we may do to heal and rejuvenate her and to teach ourselves to show her more respect.

Robert Anthony Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301, 302 (1998).

139. Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage Over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 94-95 (1998).

140. Weiss, *supra* note 131, at 454. I have omitted one item from Weiss' list—"authority" in the belief that it is common to all legal systems, whereas the other defining elements are particular to codified systems. *Id.*

141. Legrand, *supra* note 136, at 16.

larger whole.¹⁴² The two European codes that serve as precedents to American restatements establish competing methodologies—stark simplicity *à la mode française* versus “complicated terms and abstract concepts” or “the work of scientists” as in the German alternative¹⁴³—to achieve a similar comprehensiveness. Whereas French codifiers looked for “man’s nature” as revealed within secular national law, their German counterparts aspired to build a science of German national law.¹⁴⁴ Both types of code aspired to a comprehensive order.¹⁴⁵

The codifier posits out by sorting out the big from the small, the universal from the particular, and denies the disparaged half of this division a place within the codification. “La rinascita del particolarismo giuridico è incompatibile con l’idea di codificazione,” gloomily wrote Rodolfo Sacco in 1983, condemning “particularism” as contrary to the very essence of codification.¹⁴⁶ “Codes today are grounded in the particular,” laments the Canadian comparativist Patrick Glenn, “and may serve no loftier mission than entry into the World Trade Organization. We have moved a long way from the enlightenment.”¹⁴⁷ To Professor Glenn, newer codes like those of Quebec, Vietnam, and Russia depart sharply from the codes envisioned in civilian jurisprudence chiefly in that they concern themselves with particulars of time and space.¹⁴⁸ These newer codes themselves practice positing-out; for example, the Russian and Vietnamese codes deviate sharply from their ancestors by excluding family law, while “positing in” the subject of intellectual property, seen as of particular interest to foreign investors.¹⁴⁹

As for superimposition, the relationship between codification and the assertion of a new state recurs throughout history. Among the commentators on the gendered nature of this phenomenon is

142. See Mario Ascheri, *Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoleon*, 70 TUL. L. REV. 1041, 1045 (1996) (noting development of a code as containing “a rational structure of technical concepts all related to each other”).

143. Moréteau, *supra* note 137, at 279.

144. See Thomas F. Blackwell, *Finally Adding Method to Madness: Applying Principles of Object-Oriented Analysis and Design to Legislative Drafting*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 227, 244-46 (2000).

145. See CSABA VARGA, CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON 112 (Sander Eszenyi et al. trans., 1991) (noting that even very open textured successors to the French and German codes, such as the Switzerland codification, see to it that freedoms allotted to judicial construction and interpretation keep judges within the code).

146. Legrand, *supra* note 136, at 22 (quoting Rodolfo Sacco, *Cadifare: Modo superato di legiferare?*, RIVISTA DI DIRITTO CIVILE 117, 119 (1983)).

147. H. Patrick Glenn, *The Grounding of Codification*, 31 U.C. DAVIS L. REV. 765, 767 (1998).

148. *Id.* at 766, 782.

149. *Id.* at 778.

the Australian political philosopher Carole Pateman who, borrowing a phrase from Francis Bacon, perceives the assertion of a new civil society as a "masculine birth," or "the appropriation by men of the awesome gift that nature has denied them and its transmutation into masculine political creativity."¹⁵⁰ Following a masculine design that asserts birth-from-no-mother, codifications typically deny their pasts and invalidate their anterior sources.¹⁵¹ It is thus unsurprising that rhetoric about the new republic and its new needs was central to the formation of the French Civil Code.¹⁵² David Dudley Field, who achieved his strongest success when he formed a code in the nation-like state of California, appealed to American chauvinism in competition with nations that had used new codifications to assert their new identities. "Are we inferior to Frenchmen, Germans, or Italians?"¹⁵³ demanded Field in 1886. Such claims link the order that codification provides with the man-made artifice of the state, especially the positive law enacted within its boundaries.

When Field implied that the United States would remain inferior to European nations until it had formed a code of its own, he proclaimed one of many associations of codification with hierarchy. To proponents of codification, the completion of a code denotes maturity within a legal system.¹⁵⁴ Pierre Legrand, borrowing a sequence from the philosopher Robert Blanché, claims that codification can be seen as the axiomatic stage at which law arrives after completing "its obligatory passage through its descriptive, inductive, and deductive phases."¹⁵⁵ Sharing this view of codification-as-apex, nineteenth-century proponents of codification in the United States decreed that the principles amenable to statement in a code were "higher in rank than deduction or example."¹⁵⁶ One recalls the psychologist Lawrence Kohlberg, foil and nemesis to Carol Gilligan,

150. CAROLE PATEMAN, *THE SEXUAL CONTRACT* 102 (1988).

151. Legrand, *supra* note 136, at 17. Legrand finds this stance "a plain case of cognitive dissonance" because "it is clear that civil codes have borrowed their system, if not their contents, mainly from the experiences of one of the legal pasts of the legal system they purport to organize." *Id.* at 17-18.

152. See Gordley, *supra* note 135, at 483-84.

153. Andrew P. Morriss, *Codification and Right Answers*, 74 CHI.-KENT L. REV. 355, 380-81 (1999) (quoting David Dudley Field, Address Before the Law Academy of Philadelphia (Apr. 15, 1886)).

154. See Legrand, *supra* note 136, at 2 (attributing this view to Max Weber).

155. *Id.* (citing ROBERT BLANCHÉ, *L'ÉPISTÉMOLOGIE* 65 (3d ed. 1983)).

156. Morriss, *supra* note 153, at 385 (quoting the Civil Code of the State of New York, pt. 1 (1870)). Cases, at best sources of these principles, were "merely so much bran to aid digestion." *Id.*

who placed masculine abstraction at the top of a developmental hierarchy, relegating particularism to nether reaches.¹⁵⁷

The relationship between quasi-scientific neutrality and codification has a long pedigree. Although the common law is not free of this ambition,¹⁵⁸ codifiers aspire especially ardently to science. The German Civil Code is famous for evincing this desire, but American codification history contains its own versions of the tendency. For instance, when California opened its first law school in 1878, this event followed—and was linked to—the enactment of the California Code,¹⁵⁹ “whose civil-code centerpiece conjoined the state’s statutory and common law rules governing private relations (corporations, property, torts, contracts, and domestic matters) into one meticulously arranged volume.”¹⁶⁰ At the inaugural address of the new school, Hastings College of Law, its principal instructor, John Norton Pomeroy, declared that “California has embodied the important and controlling doctrines of her jurisprudence in the form of a scientific code.”¹⁶¹ Other nineteenth-century American proponents of codification made similar assertions about codes as science;¹⁶² the notion endures.¹⁶³

2. A Prescription of Masculine Order in the *General Principles*

More than any blackletter or commentary in precedent-restatements, the *Restatements (First)* and *(Second) of Torts*, and much more than the decisional law on which they rest, the *General Principles* contain strong expressions of comprehensiveness, posit-

157. LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* 409-12 (1981) (situating the embrace of abstract principles at the highest level of moral development).

158. See NORMAN ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 169 (1986) (noting ubiquity of this belief among “the late nineteenth-century elite”).

159. See Grossman, *supra* note 133, at 617.

160. *Id.*

161. *Id.* (quoting John Norton Pomeroy, *The Hastings Law Department of the University of California: Inaugural Address* 10 (1878)).

162. See, e.g., Richard P. Cole, *Orthodoxy and Heresy: The Nineteenth Century History of the Rule of Law Reconsidered*, 32 *IND. L. REV.* 1335, 1364 (1999) (reviewing DAVID RAY DADKE, *HERETICS IN THE TUMBLE* (1998)) (stating that one important American proponent of codification, Thomas Grimke, claimed that “legal science, especially a comprehensive body of code law,” made order out of legal precedents); Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 *LAW & HIST. REV.* 421, 440 (1999) (attributing to David Dudley Field the view that law is a science greater even than astronomy).

163. See Markus Dirk Dubber, *Reforming American Penal Law*, 90 *J. CRIM. L. & CRIMINOLOGY* 49, 103 (1999) (implying that the concept of codification as science is sound, and should be revived).

ing-out, and superimposition. Our review of alternative principles has shown that such characteristics do not turn up naturally and inevitably in a recitation of general principles about Torts. They reflect choices.

Begin with comprehensiveness. In a memorandum to the Advisers and the Members Consultative Group of the American Law Institute, Professor Perlman announced a new scope. "Since its original inception where Gary Schwartz was named sole Reporter," Perlman wrote, the *General Principles* have been "expanded to include additional provisions that state the basic elements of tort law generally."¹⁶⁴ Perlman went on to elaborate that the "purpose of this expansion is to provide a common framework and vocabulary for the various projects revising the Restatement (Second) of Torts."¹⁶⁵

If this declaration had been written before the final publication of any portion of the *Restatement (Third)*, it might have been understood as referring to the alignment that characterizes good draftsmanship.¹⁶⁶ "Negligence," for instance, should have the same definition in the section on Products Liability as it has in Apportionment. But Perlman's memorandum appeared *after* the final versions of those two sections were published. Any malocclusion of "framework and vocabulary" inside these published portions of the *Restatement (Third)* would just have to be lived with, as Perlman knew. Readers must take his statement about "expansion," therefore, as aspiring to comprehensiveness—order for its own sake, an abstract ideal, rather than technical accord.

As Perlman goes on to contend, a master-truth unites all the constituents of tort law:¹⁶⁷

This section [2A, "Basic Elements of a Tort claim,"] has common elements and principles that apply across a wide range of different harms and regardless of whether the claim is stated in negligence, intentional conduct, or strict liability . . . Courts have employed a variety of rhetorical formulations. . . which often conceal the universality of the rule stated in this section. . . The purpose of this section is to state the elements common to the imposition of tort liability and to adopt a verbal formulation of those elements for this Restatement.¹⁶⁸

164. Memorandum from Harvey Perlman to Advisers and Members Consultative Group 1 (May 3, 2000), in Preliminary Draft No. 2, *supra* note 5.

165. *Id.*

166. See Henderson & Twerski, *supra* note 1, at 1150-51 (praising alignment in *Restatements*).

167. For a contrary view, see Tidmarsh, *supra* note 72, at 1331 (noting that Oliver Wendell Holmes had observed that Torts did not begin with a general theory, and has never worked one out).

168. Preliminary Draft No. 2, *supra* note 5, § 2A cmt. a.

Certainly any document called *General Principles* reflects a similar agenda: In order to write this portion of the *Restatement*, a Reporter or team of Reporters must seek to isolate the common content of tort law. All six of my Alternative Principles resulted from a comparable effort. What distinguishes Perlman's blackletter is his insistence on a unitary schema. "Basic Elements of a Tort Claim" purports to characterize the essence of tort law, all of it, in eight lines and five elements.¹⁶⁹ Whether Perlman's list is accurate as a summary of tort rules has been questioned,¹⁷⁰ but I am less troubled by the problem of accuracy than by the implication that tort law will become tidier or more cogent after the publication of his Section 2A. Tidier or more cogent for whom? The aspiration to comprehensiveness that characterizes the prescription of masculine order often maintains a remote stance away from anyone's needs. Following this pattern, Section 2A retreats into abstraction, far from the human experiences that concern tort law.

As for positing-out, a second attribute of masculine order, we may begin by repeating that restatements as a group, not just the *General Principles*, favor this device. "Just as the Newtonian scientist must disregard as aberrational some of the data that descriptive experimentation yields," as Denis Brion writes in his description of *Restatements*, so too "the legal formalist must discard as aberrational some judicial decisions in order to construct a rational structure in any particular doctrinal area."¹⁷¹ While the game of positing-out in order to form a unified restatement has stuck many observers as not worth the candle,¹⁷² a decision to recite *General Principles* reflects a contrary view. And so it is unsurprising to see a preemptive focus on accidentally inflicted physical injury in Schwartz's share of the *General Principles*. After allotting his Section 1 to defining "intentional" and Section 2 to defining "reckless,"

169. I attended a Members Consultative Group meeting at the ALI on June 10, 2000, where, according to my notes, Perlman announced that an unprovided section, to be numbered 1, would define a tort (and thereby limit the criteria laid out in Section 2A, some of which can serve as an equally accurate description of contract law).

170. For example, Item 1 on Perlman's list of basic elements provides that an actor is subject in liability in tort for the harm of another if "[t]he actor has a legal obligation, the nature of which includes protecting the other against harm." Preliminary Draft No. 2, *supra* note 5, § 2A(1). This reference to "protection" probably misdescribes most types of tort liability. Item 2 adds a requirement that the actor have "breache[d] the legal obligation;" not true with respect to strict liability, as Gary Schwartz pointed out at the June meeting. *Id.* § 2A(2).

171. Brion, *supra* note 75, at 186. Speaking for the Institute, Geoffrey Hazard appears not to disagree. See Discussion Draft, *supra* note 1, Foreword xi (noting that "the drafting task has been one of selection by exclusion").

172. See, e.g., Bernstein, *supra* note 93, at 1671-77 (summarizing criticisms); Gordley, *supra* note 135, at 142 (arguing that clarity and simplicity are not worth pursuing via restatements).

Schwartz marches straight on toward accidents, never turning back. The resulting Discussion Draft strongly implies that there is nothing of interest to be found in intentional torts. Similarly, as was noted, Schwartz posits out certain kinds of injuries from his conception of harm.¹⁷³

The ALI took note of this positing-out when it decided to re-name Schwartz's *General Principles*. This retitling acknowledges that "Torts: General Principles" is a misnomer for a narrow work; Schwartz's overview of the law of accidentally inflicted physical injuries does not address much of Torts. Just as feminists and other revisionists have shown that the apparently universal is really particular, the apparently whole really partial, and the apparently axiomatic worthy of question,¹⁷⁴ the ALI has taken note of positing-out. By correcting the misnomer of "General Principles," the Institute commendably has made the device more transparent.

As for superimposition, the ALI assigns each *Restatement* an ordinal number upon publication of the first revision. Although courts do not pay slavish heed to these numbers, sometimes treating *Restatements* as non-hierarchical—a First can be as good as a Third—the preparation of a new *Restatement* expresses the ALI's intent to superimpose. The *General Principles* extend this method of superimposition by stepping above the particulars that occupy the *Restatements* (*First*) and (*Second*), which contain no General Principles sections, to locate bigger and higher truths about tort law.

Quasi-scientific neutrality, the final aspect of masculine order taken up here, can be found only beneath the surface of the *General Principles*, which do not state any desire to achieve the neutrality and disinterested power associated with science. This characteristic emerges when one reads the *General Principles* as a fraction of the larger *Restatement* (*Third*), a conception planned and executed by the ALI rather than two Torts scholars. Viewed as a small set designed to form the base for a multitude of assertions, the *General Principles* look like the axioms that support knowledge by deduction.¹⁷⁵ Pure mathematics appears to be the model here.¹⁷⁶

173. See *supra* note 8 and accompanying text.

174. See *supra* note 13 and accompanying text.

175. A 1963 text suggests a blueprint for general principles. Pierre Henri van Laer identifies the characteristics of science as (1) consisting of interrelated facts, principles, laws, and theories (2) demanding specialization (3) seeking universal statements about commonalities of properties (4) committed to that which is true or probably true (5) concerned with logical order and (6) able to explain its investigations and arguments. P.H. VAN LAER, *PHILOSOPHY OF SCIENCE* 8-19 (2d ed. 1963).

This subject enjoys a unique prestige, widely envied.¹⁷⁷ Although I would certainly grant that mathematics and other disciplines cannot function without their sets of axioms, no such things are integral to the ALI's *Restatements*, which have flourished for many decades without containing anything called General Principles. The identification of axioms is congruent with a prescription of masculine order.

III. A CONTRARY TRADITION

A. *Specifics Within the General Principles*

The Schwartz-authored sections of the *General Principles* manifest a preference for specifics over grand generalizations. Most of the sections by Schwartz could easily have been filed under forthcoming titles of the *Restatement (Third)* instead of *General Principles*; just as the ALI has published a volume called *Restatement (Third) of Torts: Products Liability*, it could prepare volumes with other subtitles after the colon, such as *Strict Liability and Negligence*, using the Schwartz-authored text. Schwartz's Section 14, on statutory compliance,¹⁷⁸ and Section 15, on *res ipsa loquitur*,¹⁷⁹ and Section 16, on negligent failure to warn,¹⁸⁰ do not articulate anything general. They correspond to equally pointed and measured provisions in the *Restatement (Second)*, blackletter rules that were never called General Principles. Only the first six sections in the Schwartz-authored share of the *General Principles* fit the masculine-order model of broad, comprehensive declarations about large portions of tort law. The remaining sections of the Discussion Draft and the six Schwartz-authored sections of Preliminary Draft No. 2 are concerned with particulars.

176. See *Pure and Sweet*, THE ECONOMIST, Feb. 19, 2000, at 6 (book review) (noting that "starting from basic assumptions known as axioms, results are proved purely by logical argument" in mathematics).

177. See, e.g., F. Neil Brady & Gary M. Woller, *Administration Ethics and Judgments of Utility: Reconciling the Competing Theories*, 26 AM. REV. PUB. ADMIN. 309, 311-15 (1996) (describing the appeal of a "scientific" theory of public administration incorporating utilitarian values of efficiency and effectiveness); Mark Parascandola, *Epidemiology: Second-Rate Science?*, 113 PUB. HEALTH REP. 312, 315, 319 (1998) (noting that epidemiology, which works with inductive rather than deductive reasoning, has been disparaged for this departure from the pure-mathematics ideal).

178. Discussion Draft, *supra* note 1, § 14.

179. *Id.* § 15.

180. *Id.* § 16.

Gary Schwartz is not the only particulars-minded author of the *General Principles*. Like Schwartz, Harvey Perlman takes up the subject of negligence per se,¹⁸¹ a very un-general segment of accident law. Similarly, Perlman's Section 103 on voluntary undertakings follows a precise precedent in the free-of-*General Principles Restatement (Second)*,¹⁸² as does Section 104 on special relationships as a source of obligation.¹⁸³ Although of the two authors Perlman expresses much more enthusiasm for generalities, his work product consists mostly of particulars.

These decisions by the Reporters suggest a succumbing to the lure of specifics, an attraction common to American specialists in Torts. The lure can be resisted, as may be seen from the codified tort law of other nations. French and German codifications of tort law have rejected the particular. The French Civil Code famously takes up Torts in five short articles,¹⁸⁴ maintaining silence on such fundamentals as the existence or nature of a fault requirement, the question of causation, the role of foreseeability, and other questions that have called for extensive judicial exegesis.¹⁸⁵ The German Civil Code covers much of Torts in one sentence: "A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom."¹⁸⁶ Scholars can, then, write a Torts restatement that eschews particulars and specifics. This choice has been largely rejected in the *General Principles*.

B. A British Stance

Any survey of the prescription of masculine order as a phenomenon that accompanies codification and much of the civil law tradition would be incomplete without looking at the most signifi-

181. *Id.* § 12 (Schwartz's draft); Preliminary Draft No. 2, *supra* note 5, § 9A (Perlman's draft).

182. Preliminary Draft No. 2, *supra* note 5, § 103.

183. *Id.* § 104.

184. Their chapter title is either "Delicts and Quasi-Delicts" or "Of Torts and Quasi-Torts," depending on which translation of "Des Délits et des Quasi-Délits" one prefers. Compare ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 555 (2d ed. 1977) (using former definition), *with* Civ. Code [Fr.] 380 (Henry Cachard ed., 1930) (using latter definition).

185. See VON MEHREN & GORDLEY, *supra* note 184, at 394-690 (reporting decisional law and commentary).

186. Section 823 BGB (The German Civil Code of 1900), reprinted in VON MEHREN & GORDLEY, *supra* note 184, at 557.

cant national posture against codification and the civil law.¹⁸⁷ Scholars have long occupied themselves with the British choice to reject an approach to law that was to win over not only France and Germany but dozens of other national legal systems. Some have even tried to explain the British resistance to codification by distinguishing Britain from other nations, a feat quite beyond my own powers.¹⁸⁸ For present purposes we need only note that Britain refused both to create a new national legal code and to receive the Roman law associated with Justinian, affirming in the process its commitment to its own common law tradition. The British stance poses a dissent from the prescription of masculine order.

To be sure, Britain had its great advocates of codification, notably Francis Bacon and Jeremy Bentham, who sought to clarify and distill the common law.¹⁸⁹ Historians find considerable enthusiasm for a national code in the legal writings of Thomas Hobbes, John Selden, and Matthew Hale.¹⁹⁰ I do not wish to warp history by isolating Englishmen as unique antagonists to codification and civil law. Yet a portrait along such lines would contain some considerable truth, relevant to this discussion of dissent from the prescription of masculine order.

Reading British decisional law in search of relevant expression, Pierre Legrand finds two noteworthy statements. The first comes from Lord Macmillan:

[Y]our Lordships are not called on to rationalize the law of England. That attractive if perilous field may be left to other hands to cultivate. . . . Arguments based

187. Sociological scholar Csaba Varga argues that the lack of reception of Roman law in England was the root of noncodification in common law systems around the world. VARGA, *supra* note 145, at 159.

188. Varga's explanations, for example, strike me as somewhat tautological. See, e.g., *id.* at 159-60 (offering various explanations: English "conservatism," a "national conceit" about ancient and unbroken common law, a national preference for reform over revolution, and an insistence on practical training). See also Legrand, *supra* note 136, at 24-25 (noting that Varga ascribes British noncodification to decentralization, but that decentralization existed also in France and Germany). For examples of other explanations, see JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 17 (1969) (noting that the judiciary in pre-Revolutionary France had been reactionary and therefore feared by progressives, whereas the British judiciary had been progressive); VON MEHREN & GORDLEY, *supra* note 184, at 12 (summarizing the early development of a national judicial system in Britain following the Norman conquest).

189. Bentham was nothing less than a fanatic on the subject of codification. See Weiss, *supra* note 131, at 476-79 (detailing Bentham's efforts, and quoting a historian's assessment that Bentham was "the greatest codification enthusiast of all times and peoples"). See also *id.* at 472-73 (recounting Bacon's efforts); *id.* at 480-81 (describing John Austin's concept of codification); *id.* at 482 (listing nineteenth-century British advocates).

190. See Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, 67 B.U. L. REV. 877, 925-34 (1987) (providing an overview of the perspectives and writings of all these authors).

on consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life. . . .¹⁹¹

The second of Legrand's quotations comes from Lord Griffiths, who noted that

the common law of England has not always developed upon strictly logical lines, and where logic leads down a path that is beset by practical difficulties that courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society.¹⁹²

A meticulous writer might sort out the various strands here, recognizing that empiricist stances in Britain, the common law tradition, hostility to codification, and the absence of receiving Roman law are all distinct phenomena, each one not logically or necessarily requiring any of the others.¹⁹³ Again, however, our present purposes are simple. Under the rubric of a British stance, we see something resembling order in a feminine sense. Compared to a civil law, the common law is an accretion of fact-specific rules, each of them "intrinsically narrower than even the most detailed legal precept found in any statute or code."¹⁹⁴ Compared to his counterpart on the Continent, writes Tony Weir (an accomplished translator of German and French writings about the law), an English lawyer is "more concerned with result than method, function than shape, effectiveness than style: he has little talent for producing intellectual order and little interest in the finer points of taxonomy."¹⁹⁵

Of all the scholars who have expressed this British stance, one may deserve particular mention here. More fundamentally than any other writer, Sir Edward Coke equated law with its professionals: a well-trained, reasoning judge, aided by lawyers who lay the groundwork for judicial decisions.¹⁹⁶ Consistent with his written views, Coke looked James I in the eye, bravely telling the King that as a nonlawyer he was incompetent to adjudicate; the civil law tradition, in contrast to Coke's view, has applauded national codes (particularly the French Civil Code) for their accessibility to laymen. Coke's rivalry with Francis Bacon, though multifaceted, can be seen as another illustration of the dichotomy: one man an advocate of keeping power in the hands of judges and lawyers, the other

191. Legrand, *supra* note 136, at 25 (citing *Read v. J. Lyons & Co.*, 156 A.C. 175 (H.L. 1947)).

192. *Id.* (quoting *Regina v. Deputy Governor of Camphill Prison*, 735 Q.B. 751 (C.A. 1998)).

193. See Weiss, *supra* note 131, at 438-39.

194. Cappalli, *supra* note 139, at 99.

195. See Legrand, *supra* note 136, at 25 (quoting Tony Weir, *The Common Law System*, in *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 2* (René David ed., 1971)).

196. See Allen Dillard Boyer, "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review, 39 B.C. L. REV. 43, 48-58 (1997).

an ambitious protégé of James who sought to write the laws of England into codifications.¹⁹⁷

Like other traditions surveyed in this Essay, the British stance continues to flourish. One exemplar of the stance is the Australian scholar of private law and Wade conference participant Jane Stapleton. Stapleton's ventures at improving products liability law, as well as private law generally, address particulars.¹⁹⁸ When Stapleton explores a big topic, such as causation in fact, she keeps the general principles to a minimum; her analysis dissects and micro-divides rather than synthesizes.¹⁹⁹ Although the ever-tightening integration of Britain into the European Union and other European entities may limit British exceptionalism in the future, the tradition continues to state a powerful alternative to the prescription of masculine order.

C. Jurisprudential Assessments of the Judge

Although a few assessments of the role of a common-law judge ascribe masculinity to this figure,²⁰⁰ within jurisprudence the judge often signifies order in a contrasting or feminine sense. Classifying their writings variously under "dynamic statutory interpretation,"²⁰¹ the common law method,²⁰² "the nature of the judicial process,"²⁰³ the "common law in the age of statutes,"²⁰⁴ pragmatism

197. See Barbara Shapiro, *Codification of the Laws in Seventeenth Century England*, 1974 WIS. L. REV. 428, 438-45 (describing Bacon's agenda); VARGA, *supra* note 145, at 146-47 (describing resistance to Bacon's efforts). Allen Boyer notes the theme of gender in the lives of Bacon and Coke: "[O]f the two women who ever had to choose directly between Bacon and Coke—Queen Elizabeth, choosing an attorney general, and Lady Elizabeth Hatton, choosing a husband—both chose Coke." Allen D. Boyer, *Light, Shadow, Science, and Law*, 92 MICH. L. REV. 1622, 1633-34 (1994) (book review). I am grateful to Ben Zipursky and John Goldberg for reminding me of the Coke-Bacon rivalry and pointing out its relation to this Essay.

198. Five years ago I had occasion in this publication to study Stapleton's text on products liability law, published around the same time as the earliest portion of the *Restatement (Third)*. See Bernstein, *supra* note 93 (reviewing JANE STAPLETON, *PRODUCT LIABILITY* (1994)). Stapleton's major insight in *Product Liability* was that the entire category of products liability asserts a false coherence. According to Stapleton, a true restatement of products liability cannot be written because the boundaries of the doctrine are unstable. *Id.* at 1691-92.

199. See generally Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941 (2001).

200. See Karen Busby, *The Maleness of Legal Language*, 18 MANITOBA L.J. 191, 203 (1989) (faulting Ronald Dworkin for naming his ideal judge Hercules when Greek mythology already contained a judge, the female Athena; in Greek lore "Hercules" stands for characteristics other than judicial virtue); Resnik, *supra* note 122, at 948-53, 956-64 (associating the Article III judge with masculine authority).

201. See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

202. See generally Cappalli, *supra* note 139.

203. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

204. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

or practical reason in the judicial context,²⁰⁵ inductive reasoning,²⁰⁶ judicial review,²⁰⁷ procedural justice,²⁰⁸ substantive due process,²⁰⁹ or a host of other rubrics, an array of scholars in the late twentieth century built an enormous literature that lines up more or less with what I have called dissent from the prescription of masculine order.²¹⁰ Because the common-law judge often takes center stage in these writings, we can use this construct to explore the common theme of "order in the feminine sense" that unites them.

This jurisprudence regards the judge as having a chance to achieve wisdom or even heroism through the work of adjudication.²¹¹ It admits that biases, errors, and misplaced heuristics often cause the judge to fail. Political obstacles can negate judicial achievements. Unjust rules about access will in any case keep meritorious complaints out of the docket. Furthermore, not every controversy belongs in the judge's court. Notwithstanding these and other infirmities, writers celebrate the common-law judge for his power and potential—a force denied to the judiciary in (pure or strict versions of) the civil law system, as well as in legal systems that do not foster a mature and independent bench.

Standing at the center of the common law, the judge eschews various aspects of masculine order. Consider several players and elements from the jurisprudential literature. In contrast to the civilian and code-related trait of completeness, Edward Coke—"the

205. See Nancy Levit, *Practically Unreasonable: A Critique of Practical Reason*, 85 NW. U. L. REV. 494, 495-96 (1991) (book review) (referring to "the current wave of practical reason, pragmatism, or common sense" as approaches to the problem of judicial decision-making).

206. See JAMES G. APPLE & ROBERT P. DEYLING, *A PRIMER ON THE CIVIL LAW SYSTEM* 37 (1995) (associating inductive reasoning with the common law method).

207. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

208. See, e.g., ROBERT M. COVER & OWEN M. FISS, *THE STRUCTURE OF PROCEDURE 2* (1979) (using the rubrics of procedure and procedural justice to cover a variety of topics pertaining to judicial power); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379-80 (1992) (arguing that the Civil Justice Reform Act arrogates to Congress power that ought to be held by federal judges).

209. See Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 943-48, 987-99 (using originalism to argue that judges have the power to protect individuals from encroachment by the federal government).

210. Without praising "feminine order," or condemning "masculine order," as such, John Goldberg describes Cardozo as a judge and legal theorist who expresses the feminine half of the dichotomy. Cardozo regarded the sources of the common law as fluid and pluralistic; norms, "neither fully shared nor static," work together with precedent to determine the outcomes of cases. John C.P. Goldberg, Note, *Community and the Common Law Judge: Restructuring Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1327 (1990).

211. See RONALD DWORKIN, *LAW'S EMPIRE* 243-61, 354 (1986).

paradigm of the independent judge"²¹²—was notoriously unreliable when he tried to declare the content of English law,²¹³ and contradictory on the question of whether new statutes made new law.²¹⁴ Similarly William Eskridge denies that the content of a statute is fixed at publication;²¹⁵ it would follow that all compendia, at least those in the United States, are by definition never complete.²¹⁶ Lon Fuller's contention that the common law consists of a combination of "reason and fiat" posits a past (expressed as precedent) that works with a present and future elaboration of the law;²¹⁷ here again, completeness remains metaphysically elusive.

The notion of "system," associated with German legal science,²¹⁸ can describe the common law contrast only if the word is interpreted laxly: A common-law judge is a constituent of a system, to be sure, but this person does not work within "an elaborated, complex system" set up for "strict logical-axiomatic deduction."²¹⁹ Similarly, reform may be present in this judge's world, but the common law tradition, having proceeded by increments, lacks the element of sweeping jettison that has characterized the common-law alternative.²²⁰ The common-law judge finds order in facts, details, particulars, and other small units, rather than general principles.

IV. CONCLUSION

The summary of tort law that Gary Schwartz and Harvey Perlman presented in the first publications of *Restatement (Third) of Torts: General Principles* offers considerable gratification to the Torts community. Our ragged subject, notorious for lacking a clear

212. Boyer, *supra* note 196, at 45. See also Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 62 (2000) (noting that whereas the British perspective on Coke's insights juxtaposed the judge against the king and thereby permitted Parliamentary supremacy, in the United States Coke was read to have celebrated the judiciary as a bulwark against legislative as well as executive encroachment).

213. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1678-94 (1994) (noting uncertain role of custom in Coke's jurisprudence).

214. See GLENN BURGESS, *THE POLITICS OF THE ANCIENT CONSTITUTION* 27 (1993) (claiming that Coke described the role of statutes "half-heartedly and with a notable lack of success").

215. See ESKRIDGE, *supra* note 201, at 199.

216. See Weiss, *supra* note 131, at 517 (asserting that the United States Code is "a mere compendium" because it lacks "sophisticated systematic ambition").

217. Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 391-95 (1946).

218. See Blackwell, *supra* note 144, at 245.

219. Weiss, *supra* note 131, at 464.

220. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 90 (2d ed. 1985) (asserting the inverse, "any fresh start demands codification").

definition of what it covers, younger and less elegant than other categories of the common law, seldom able to deliver on its big promises (compensation, deterrence, corrective justice, allocative efficiency), eternally flawed and improvised, certainly cries out to be put in order. Despite my conclusion that this order will remain elusive, I nevertheless applaud the masterful effort in the *General Principles* to create stability and systemization.

In this Essay, I have associated the *General Principles* with other great restatements, especially the codifications associated with the civil law. Anglo-American law and lawyers are much enriched by this basis for comparison with the common law tradition, even if they are not entirely conscious of how codification has influenced their own legal system.²²¹ By linking the *General Principles* with such "restatements" as the Articles pertaining to "delicts and quasi-delicts" in the French Civil Code,²²² I intend to express both admiration and caution. I admire the ambition to distill the essence of American tort law into a short volume, the breadth of scholarly knowledge that Gary Schwartz and Harvey Perlman bring to the project and convey separately in their portions of the *General Principles* and, perhaps most of all, the audacious presentation of a big subject. My sense of caution derives from these very characteristics: Big comprehensive treatments are smaller and more particular than they strive to be. Any grand, overarching, comprehensive description will omit various truths.

The omissions of the *General Principles* may be seen through different devices, some of which I have noted in this Essay. A set of Alternative Principles, for example, suggests that the *General Principles* leave out several descriptive assertions about American tort law; because these Alternative Principles would help to fulfill the American Law Institute's goals of reconciliation and reform, their exclusion raises questions about the completeness of the *General Principles*. A summary of what I have called order in the feminine sense returns to the same theme by different means. This approach finds tort law united in its separate increments rather than its generalities. Common-law adjudication offers yet another way to look at the phenomenon. By tradition the common law emphasizes variable conditions—the judge, the lawyers, the facts, traditions of reasoning, norms, social conditions—rather than an unvarying larger

221. See Weiss, *supra* note 131, at 437 n.3 (noting that the influence of codification on the civil law "has been neglected" in legal scholarship).

222. See *supra* note 184 and accompanying text.

system, or what I have called the prescription of masculine order.²²³ Although the solutions, methods, and taxonomies of masculine order built the ALI's first document titled, and other grand structures, these constructs will always be partial.²²⁴

223. Lance Liebman spoke to me of the need to understand the law of colliding with a chicken in the road. Other legal systems and approaches to the law may look to a jurisprudence of encounters or collisions, he said, but "we say you've got to start with the chicken." Telephone Conversation with Lance Liebman, Director, American Law Institute (Dec. 20, 2000).

224. Admirers of feminine order will understand that the word "partial" is not in the least pejorative. See HARAWAY, *supra* note 126, at 190 ("[O]nly partial perspective promises objective vision.").

