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*

I. WHAT IS A GENERAL PRINCIPLE? .............................................1371
   A. Some Omissions from the General Principles:
      Alternative Principles .............................................1372
         1. Citizen Initiative and Expressions Build Law ..................1372
         2. Professionals Share Authority With Non-Professionals ..........1374
         3. The Pecuniary Nature of Remedies Does Not Deny Emotional and Dignitary Harm ..... 1376
         4. Parties Are Situated in Communities ..................1377
         5. Action is Presumptively More Desirable Than Inaction ..........1380
         6. Peaceful Coexistence is Encouraged, Where Feasible ..............1381
   B. The Alternative Principles in Contrast to the General Principles ..................................1382

II. RESTATEMENTS AND THE GENDERED UNIVERSAL ............1391
   A. The Method: Order Emergent from Observation ................1391
   B. The Method Practiced in Restatements .............1394
      1. Order Through Codification ..................................1395
      2. A Prescription of Masculine Order in the General Principles ........1399

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III. A CONTRARY TRADITION .............................................................. 1403
A. Specifics Within the General Principles ...................... 1403
B. A British Stance ................................................................. 1404
C. Jurisprudential Assessments of the Judge .............. 1407
IV. CONCLUSION ........................................................................ 1409

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).


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. Soon after the May publication, the General Principles project took several turns, including personnel shifts and rethinkings of the endeavor within the ALI. 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." 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. 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 educing 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

10. See infra Part II.
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’ts 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 con-
sider 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 disor-
der—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 numer-
ous eminent jurists—including the Reporters who wrote the draft
*General Principles*—as contrary to this prescriptive stance, sug-
prising 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 dec-
larations as flat-out attacks on the material studied. I intend no
attack on the *General Principles*. My reading of what is excluded
and included in the *General Principles* is extended instead to ex-
plor the question of how to classify propositions as either suited or
not suited to *Restatements*, and the implications of this classifica-
tion. 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 ex-
    isting 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
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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{17}

The modern plaintiff will often evaluate her injury under the influence of Torts concepts,\textsuperscript{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 \textit{vi et armis}, or force and violence, in order to obtain this writ, which gave

\textsuperscript{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 . . . .").
\textsuperscript{16} Not everything goes, as I have remarked elsewhere. See generally Anita Bernstein, \textit{How to Make a New Tort: Three Paradoxes}, 75 \textsc{Tex. L. Rev.} 1539 (1997) (noting that new tort causes of action are hard for plaintiffs to form). Here I am advert ing only to the paucity of formal requirements that are necessary to initiate an action, which suggests that the complaint itself is relatively central.
\textsuperscript{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., \textsc{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.
\textsuperscript{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, \textit{Auto No-Fault and First-Party Insurance}, 73 \textsc{S. Cal. L. Rev.} 611, 635 n.102 (2000) (citing Harald Schrader et al., \textit{Natural Evolution of Late Whiplash Syndrome Outside of the Medicolegal Context}, \textsc{Lancet}, May 4, 1996, at 347 (noting that whiplash appears unknown in Lithuania)).
them access to the royal courts. 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") and then by retreating from the forms of action in favor of code-based procedure. 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. 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. 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.

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19. See Morris Arnold, Select Cases of Trespass from the King's Courts 1307-99 (1985).
focus on the content of stories rather than the fact of their existence, Torts has not seemed central to this literature; 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. 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. 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, 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-


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").

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. 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. 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. Other customs keep jurors in the dark: Trial judges often do not permit them to take notes; jury instructions are written to get past appellate review as statements of the law rather than to enlighten; when jurors ask questions of trial judges to clarify their


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").


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).

understanding of the law, these judges frequently refuse to answer. 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. 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, 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 costly—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).


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.

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

39. *Id.*
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.").
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. 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. Commentators defend this result with various rationales, 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. Blind people are aggregated with fellow blind people to yield a sense of what the reasonable person would do if he were blind. The literature on subjective deviations from the objective standard based on mental impairment stresses integration of distinct, separate groups into the larger collective.

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) ("If 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).
49. See DOBBS, supra note 20, at 281-84.
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. In medical malpractice actions in particular, custom is well-nigh dispositive. 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; the two devices point in opposite directions. An inefficient custom can command respect in tort law; the practices of communities can outweigh aggregate utility.

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. 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. A bigoted notion of rape vic-
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. Invasion of privacy also situates plaintiffs as members of groups. “Intrusion upon seclusion” and “false light” are incoherent concepts in a vacuum; in order to consider them, a factfinder must acknowledge the existence of collective-based sources of identity. 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 Inaction

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. Universal inaction—everybody staying home doing nothing—would greatly reduce the quantity of tortious conduct and the social cost of inju-

\[v. \text{Tribune Co., 214 U.S. 185, 190 (1909), of a “substantial and respectable minority” community in which the plaintiff could be defamed.}\]


\[59. \text{See RESTATEMENT (SECOND) OF TORTS § 952B (1977) (describing a cause of action for intrusion upon seclusion); id. § 652E (referring to “publicity placing person in false light”).}\]

\[60. \text{For instance, the privacy tort is probably not available for a husband or wife to sue a spouse for walking into the household bathroom without knocking when the husband or wife inside has protested this practice—even though bathroom invasions would constitute “intrusion upon seclusion” if done between strangers and even though the abrogation of most intraspousal immunities has meant that spouses can usually sue each other as if they were strangers. See Ira Mark Ellman & Stephen D. Sugarman, \textit{Spousal Emotional Abuse as a Tort?}, 55 M.D. L. REV. 1268, 1331-32 (1996) (discussing this example).} \]

\[Cf. \text{Lidsky, supra note 57, at 1-4 (noting the impossibility of defamation law without a sense of identity emergent from group membership).}\]

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

\[62. \text{One prominent casebook begins with Hammontree v. Jenner, a decision that rejected strict liability for injuries attributed to an unexpected epileptic seizure. See MARC A. FRANKLIN \\
\& ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 1 (6th ed. 1996).} \]

\[\text{The plaintiffs in Hammontree were perfectly innocent, whereas the defendant had driven a car while aware that he suffered from epilepsy. Hammontree v. Jenner, 20 Cal. App. 3d 528, 529 (1971).} \]

\[\text{The Franklin and Rabin book uses the case to illustrate the overriding need to permit human mobility, even though innocents will suffer unremedied injuries in consequence.}\]
ries, but tort law does not endorse this outcome. 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.

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. 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. Although the rubrics vary—"proximate cause," "policy," "affirmative defenses," and so forth—a unifying 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 and "live and let live" to express this approach to Torts disputes. The tort of intentional infliction of emotional distress is home of both Calvert Magruder's infa-

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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).


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" 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, at the other. In scholarship, George Fletcher situates Torts as occupying a central point between Contracts and Criminal Law; similarly, Jay Tidmarsh describes Torts as simultaneously "conceptualist" and "anti-conceptualist," suggesting centrism. Lay participation in Torts decisionmaking brings a commonsense perspective to disputes.

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. 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

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.\textsuperscript{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.\textsuperscript{76} Other citations have filled string cites, adding no independent strength to an assertion. Perhaps the most useful provisions make litigation go away.\textsuperscript{77} The

\textsuperscript{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.

\textsuperscript{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. 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)).

\textsuperscript{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, 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; he thereupon spent “every bit of time and energy” that he possessed for the next ten years working on the Code. 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.

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 . . . .

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."—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, 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. 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 care 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 "primary 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 black-letter 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 black-letter 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

90. See Abel, supra note 88, passim.
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 Blecak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem," 46 FLA. L. REV. 97, 91 (1994) (contending that because it is a less elite organization, the American Bar Association rather than the ALI should handle discovery reform).
The dangers of restating the law of politically fraught contexts, such as consumer banking, without due regard for the interests of weaker sectors.\textsuperscript{92} The Alternative Principles invite the ALI to contemplate the tension between elitism and the subject under consideration in the \textit{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 description\textsuperscript{93} 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 \textit{Restatement (Third)}—written by both Gary Schwartz in the \textit{General Principles} and Aaron Twerski and James Henderson in the Products Liability comments—already move in this direction. In the \textit{General Principles} Schwartz writes about "Joanne, a physician,"\textsuperscript{94} and "Sharon," a driver who injures "Dan" and "Nate."\textsuperscript{95} Schwartz reserves "A" and "B" to stand for nonhuman hypotheticals, such as possible causes of an injury.\textsuperscript{96} In moving away from \textit{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.\textsuperscript{97} It may be time to go further and acknowledge the web of relationships that brings people together.\textsuperscript{98} Stating that "parties are situated in


\textsuperscript{94} Id. § 7 cmt. a, illus. 5.

\textsuperscript{95} Id. § 15 cmt. g.

\textsuperscript{96} Id. § 15 cmt. g.


\textsuperscript{98} This argument is stated in Leslie Bender, \textit{An Overview of Feminist Torts Scholarship}, 78 \textit{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 what they were and what they were looking at. The subject is the restater himself; his object is a small percentage of reported judicial


105. See generally Tidmarsh, supra note 72, at 1331 (describing Torts “as being in perpetual process, a timeless battlefront 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, a newspaper clipping, a veterinary text for clinicians, Sports Illustrated, and other eclectic sources. Professors Henderson and Twerski looked at state statutes in compiling their products liability Restatement (Third) of Torts: Products Liability.

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" 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," 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. 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 Réné 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.


\(^{116}\) See Karl Stern, *Descartes, in Feminist Interpretations of Réné 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.").


\(^{119}\) See, e.g., Thomas E. Wartenberg, *Descartes's Mood: The Question of Feminism in the Correspondence with Elisabeth*, in *Feminist Interpretations of Réné 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,\(^{\text{m}}\)* 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,
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.\footnote{CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 24-39 (1982).}

Order in the masculine sense thinks big, rather than small, and seeks an overwhelming command.\footnote{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).} 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 \textit{positing out}. For centuries male and female readers of Descartes have been struck by the tendency of \textit{cogito, ergo sum} to exclude.\footnote{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.} In achieving order by assertion, this seventeenth-century method denies the existence of inconvenient conditions, especially those that bespeak subjectivity.\footnote{DONNA J. HARAWAY, SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 187-88 (1991).} 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.
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). 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. 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.

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 on-going 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 \textit{codex} or \textit{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 Justianian, of Frederick the Great, of Napoleon; even in common law jurisdictions like England and the

\begin{footnotes}
\item[132.] Cf. \textsc{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").
\item[133.] Letter from David Dudley Field to the California Bar (Nov. 28, 1870), \textit{quoted in Lewis Grossman, Essay, Codification and the California Mentality, 45 Hastings L.J.} 617, 628 (1994).
\item[134.] Francis Bacon, \textit{Novum Organum, quoted in Merchant, supra note 129, at 171.}
\item[135.] See generally James Gordley, \textit{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).
\item[136.] See Pierre Legrand, \textit{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. \textit{See Weiss, supra note 131, at 448. Several actual codes preceded the formation of this word. Id. at 449.}
\end{footnotes}
United States where codification, as understood by civilian jurists, has not taken hold, it evokes the names of Bentham and Field. But the association is there, embodied in various male figures. 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." 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 comparativist Gunther Weiss, the defining elements of codification include "completeness" (the code must be "exclusive," "gapless," and "comprehensive"); "system," "reform," "national legal unification," and "simplicity." 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." This version of order puts forward a relatively small document to stand in microcosm for a
larger whole.\textsuperscript{142} The two European codes that serve as precedents to American restatements establish competing methodologies—stark simplicity \textit{à la mode française} versus "complicated terms and abstract concepts" or "the work of scientists" as in the German alternative\textsuperscript{143}—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.\textsuperscript{144} Both types of code aspired to a comprehensive order.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{142} See Mario Ascheri, \textit{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").

\textsuperscript{143} Moréteau, \textit{supra} note 137, at 279.


\textsuperscript{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).

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


\textsuperscript{148} Id. at 766, 782.

\textsuperscript{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." Following a masculine design that asserts birth-from-no-mother, codifications typically deny their pasts and invalidate their anterior sources. It is thus unsurprising that rhetoric about the new republic and its new needs was central to the formation of the French Civil Code. 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?" 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. 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." 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." One recalls the psychologist Lawrence Kohlberg, foil and nemesis to Carol Gilligan,

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.
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.\textsuperscript{157}

The relationship between quasi-scientific neutrality and codification has a long pedigree. Although the common law is not free of this ambition,\textsuperscript{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,\textsuperscript{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."\textsuperscript{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."\textsuperscript{161} Other nineteenth-century American proponents of codification made similar assertions about codes as science;\textsuperscript{162} the notion endures.\textsuperscript{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-
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).
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.\(^\text{169}\) Whether Perlman’s list is accurate as a summary of tort rules has been questioned,\(^\text{170}\) 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.”\(^\text{171}\) While the game of positing-out in order to form a unified restatement has stuck many observers as not worth the candle,\(^\text{172}\) 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 rename 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

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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. 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, and Section 15, on res ipsa loquitur, and Section 16, on negligent failure to warn, 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).


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, 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)* as does Section 104 on special relationships as a source of obligation. 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, 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. 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.” 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-
cant national posture against codification and the civil law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{189} Historians find considerable enthusiasm for a national code in the legal writings of Thomas Hobbes, John Selden, and Matthew Hale.\textsuperscript{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:

\begin{quote}
[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
\end{quote}

\begin{footnotes}
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).

\end{footnotes}
on consistency are apt to mislead for the common law is a practical code adapted to
deal with the manifold diversities of human life....

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 tra-
dition, hostility to codification, and the absence of receiving Roman
law are all district 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 “in-
trinsically 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 Ger-
man and French writings about the law), an English lawyer is
“more concerned with result than method, function than shape, ef-
ficiveness 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 profession-
als: 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 tra-
dition, in contrast to Coke’s view, has applauded national codes
(particularly the French Civil Code) for their accessibility to lay-
men. Coke’s rivalry with Francis Bacon, though multifaceted, can
be seen as another illustration of the dichotomy: one man an adva-
cate 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)).
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
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...
or practical reason in the judicial context, inductive reasoning, judicial review, procedural justice, substantive due process, 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. 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. 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


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"—was notoriously unreliable when he tried to declare the content of English law, and contradictory on the question of whether new statutes made new law. Similarly William Eskridge denies that the content of a statute is fixed at publication; it would follow that all compendia, at least those in the United States, are by definition never complete. 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; here again, completeness remains metaphysically elusive.

The notion of "system," associated with German legal science, 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." 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. 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).


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").


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


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
evasive, 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 en-
riched by this basis for comparison with the common law tradition,
even if they are not entirely conscious of how codification has influ-
enced 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 Prin-
ciples 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 de-
scription 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 Prin-
ciples 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 gen-
eralities. Common-law adjudication offers yet another way to look
at the phenomenon. By tradition the common law emphasizes vari-
able conditions—the judge, the lawyers, the facts, traditions of rea-
soning, 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. 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.

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.").