TORT LAW IN AMERICA

An Intellectual History

G. EDWARD WHITE

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for Alexandra Valre White

Preface

There are some books that I suppose one expects to write, but this was not one of them. I have been teaching tort law for several years, but I have not contributed any "orthodox" scholarship to the field and have not regarded Torts as my principal area of scholarly interest. Over time, however, the possibility of applying techniques of intellectual history to a private law subject engaged me, and the subject that naturally came to mind was the one with which I had a passing familiarity.

The experiences of looking at Torts from a different vantage point and reacquainting myself with intellectual history have been sources of considerable stimulation and pleasure to me. This is one instance where an author may well have learned more from a book than his readers. While I am certainly not anxious to deter prospective readers from attempting that comparison, should my intuitions be verified I will not feel unrewarded. The possibilities for continued work on the relationship between private law and ideas in American history now seem varied and exciting to me; it has been gratifying to see them opening up firsthand.

Part of my educational experiences in writing this book have come through the conversations and the aid of others. Tyler Baker, Richard Epstein, Thomas Haskell, James Henderson, Charles McCurdy, Harvey Perlman, Stephen Presser, Calvin Woodard, and Jamil Zainalden have read the entire manuscript and have given probing and helpful commentary. Thomas Bergin, George Fletcher, and Dorothy Ross have read various drafts of individual chapters and have improved

upon my language even when they were not always convinced by my arguments. Debra Willen, Nancy Hudgins, and Elizabeth Kemper have given excellent editorial assistance—as has Carol Franz, who also checked sources and prepared the index. Diane Moss and the secretarial staff at the University of Virginia School of Law have provided typing services in several stages. Susan Rabiner of Oxford University Press has done her usual professional job of seeing the manuscript through production. The book was completed sooner than it otherwise would have been because of the generous support of the National Endowment for the Humanities and the University of Virginia Law Foundation.

Alexandra White has seen this book take shape and has been a fine companion to the writer; this book is for her. Elisabeth White and Susan Davis White have also made significant contributions to the writer's well-being. None of the above persons, of course, can be held responsible for any difficulties the book may present (especially Elisabeth White, who is not yet three), but perhaps the critical reader will bear so broad-ranging a list in mind.

G.E.W.

Charlottesville
May, 1979

Introduction

Tort law * is a field that encompasses material of considerable breadth and diversity and whose existence, as reflected in individual actions seeking civil redress for injuries not arising out of contractual relations, can be traced back to primitive societies. It would therefore be a staggering task to write the history of tort law, and, if some of my subsequent observations about the nature of the subject of Torts in America are accurate, much of that history before 1850 would be difficult to generalize about. My focus in this book is on the intellectual history of tort law in America, and my coverage is limited largely to those years during which Torts has been conceived of as an independent common law subject.

It might be more accurate to say, in fact, that this book is not so much a history of tort law as a history of the way the subject of Torts has been conceived. Although I trace the development of the rules and doctrines that lawyers currently consider staples of tort law, my interest is less in narrating changes in those rules and doctrines than in speculating about why they changed and who did the changing. I see the shifting character of tort law in nineteenth and twentieth century America as deriving from the shifting ideas of legal scholars and judges—especially ideas about the civil responsibilities of a person to his or her neighbors in society and about the manner in which society should respond to injuries and injured people.

* A "tort" is simply the Norman word for a "wrong," but "torts" have typically been distinguished from crimes and from "wrongs" identified with contractual relations. Tort law, then, is concerned with civil wrongs not arising from contracts.

My focus in this study thus differs not only from that of most scholars concerned with the contemporary features of tort law but also from that of historians who have previously approached the subject.[1] This book has sought to combine four perspectives: one from intellectual history, somewhat modified for my own purposes; one from scholarship on the sociology of knowledge; one from scholarship on the phenomenon of professionalization in late nineteenth- and early twentieth-century America; and one from the recurrent concerns of tort law during its history as a discrete field.

My point of view assumes that the ideas of certain elite groups within the legal profession have had an influence disproportionate to the numbers of persons advancing these ideas. I devote considerable attention, for example, to the educational and jurisprudential theories of law professors at elite law schools such as Harvard, Columbia, Yale, and the University of Pennsylvania. Where I have singled out judges for special treatment, the judges have been members of visible and prominent state courts, such as those of New York and California. The different theories of tort law described in this study are those advanced by selected individuals who occupied high-status and high-visibility positions in the legal profession—not those of the great bulk of lawyers. The implicit argument in this study is that, to an important extent, dominant theories of tort law can be identified with the theories of a small but influential group of persons.

I have assumed that proof of the breadth and representativeness of ideas is not necessary if proof of their prominence among influential figures in legal education is available. I have equated influence with institutional affiliation, assuming that by the late nineteenth century law schools had begun to occupy a significant role in the legal profession's training patterns and that a status hierarchy among law schools had emerged, with Harvard occupying a position of prominence. This assumption seems reasonable given the abundant evidence that several aspiring law schools self-consciously modeled themselves after Harvard [2] and since Harvard graduates and former members of the Harvard faculty proliferated in the profession of law teaching in the early twentieth century.

I have postulated that the ideas of certain scholars at prominent law schools have had considerable influence on the legal profession as a whole. I believe the ideas have been "representative" of influential thought among lawyers and legal scholars even though they have

reflected the perspectives of a narrow stratum of the American legal profession. I view the influence of these ideas as a sociological phenomenon, linked not to the inherent soundness of the ideas but to the institutional context in which they have appeared. In this sense my approach to intellectual history resembles that of the sociologist of knowledge.

Recent scholarship has revealed the sociological dimensions of the process by which knowledge is acquired and communicated. Thomas Kuhn and others [3] have shown that even in fields such as the physical sciences, where the personal predilections of scholars are not commonly supposed to play a part in shaping the direction of research, scholarship is implicitly directed toward areas about whose relevance and soundness a tacit consensus exists and away from areas tacitly judged to be unpromising. The direction of research is a function of largely unarticulated value choices made by influential scholars.

The emergence of the "case method" of instruction in American law schools illustrates the sociological dimensions of communicating knowledge. Its original advocates, such as Christopher Columbus Langdell, dean of Harvard Law School from 1870 to 1895, supported the case method because they believed that law should be studied through firsthand exposure to original sources, that appellate cases were the "original sources" of the legal profession, that cases were sources of general rules and principles, and that the articulation of rules and principles would make law more "scientific." All of these beliefs ran counter to the prevailing wisdom of legal education before 1870, and none of them was susceptible to proof. The case method triumphed, however, because a relatively small group of persons at influential law schools came to accept these beliefs. These persons encouraged case analysis in teaching, discouraged other forms of communicating knowledge, and produced scholarship which reinforced their beliefs and which conveyed them to a wider audience of persons in the legal profession. These beliefs were also consistent with the broader thrust of late nineteenth-century educated thought in America.[4]

The sociological dimensions of acquiring and conveying knowledge are most readily discernible in the professionalization of educational institutions. The phenomenon of professionalization in late nineteenth-century America was crucial to the emergence of tort law as an independent subject.[5] Professionalization, which affected all fields of knowledge, wrought three major changes in the practice of law. First,

it transformed law schools from optional features of a well-rounded "liberal" education into a necessary step for entering the legal profession. Secondly, it created a class of professionals—law professors—who were distinguishable from practicing lawyers and who evolved into lawmakers through their scholarship. And, finally, it changed the character of legal subjects such as Torts by implicitly delegating their composition to professors, who would shape the subjects in accordance with their own prevailing values.

Professionalization is a socialization process: one does not merely learn specialized material, one learns it in a distinctive, "professional" way. There were several educational options available to the Harvard Law School faculty after 1870 when Langdell became its dean. Courses could have been taught through lectures or through "Socratic discussion; either Massachusetts law or the law of numerous jurisdictions could have been taught; individual law cases could have been treated either as discrete entities or as manifestations of broad legal principles; law school could have been considered either ancillary to apprenticeship training or an alternative to it. For each of these alternatives Langdell and his contemporaries eventually chose the latter option, the option ultimately consistent with their conception of law and notions of professional training. The Harvard faculty thus attempted to equate becoming a lawyer with a particular mode of acquiring knowledge.

For professional training to be effective, of course, the "trained" students have to be accepted by the profession as eligible candidates. The phenomenon of professionalization therefore imposes some limits on the educational theories of members of a professoriat. Nonetheless, the autonomy given professors to shape the materials of legal study is considerable, and it is one of the principal themes of this book. While Langdell assumed that the courses he taught at Harvard were relevant preparation for law practice, he did not expose his students in Contracts to situations comparable to ones they were likely to encounter as practitioners. On the contrary, he exposed them to English cases decided well before they were born. Langdell conceived of "contract law" as an aggregate of those rules, principles, and theories about contractual relations that he thought sound. Such rules, principles, and theories did not have to be derived from contemporary experience.

The autonomy of law professors to shape their subject matter has extended well beyond the classroom. Law professors at elite law

schools have been expected to be scholars as well as teachers; since their scholarship has been largely directed toward synthesizing and articulating the rules of common law subjects, their unarticulated convictions have affected the staple materials of the legal profession. The appearance of scholarly treatises on legal subjects and the use of treatises as sources of "law" had preceded the late nineteenth-century professionalization of law,[6] but with professionalization treatise writing was delegated largely to law professors and an interface between educational training and treatise writing resulted. A set of cases, examined in the classroom, revealed themselves as manifestations of principles synthesized in a treatise. The case collector and synthesizer were often the same person. Under these circumstances, legal subjects easily became organized around and equated with the views of professors.

While one cannot adequately discuss the history of tort law in America without taking note of the fact that Torts was not taught as a subject in law schools until 1870, my focus in this book is not exclusively on the role of Torts in legal education. The intellectual history of Torts extends beyond the academic community, not only because a significant group of persons who make tort law—the judiciary—is not precisely part of that community, but also because tort cases raise recurring legal issues whose resolution has been affected by trends in American society at large. From the original emergence of Torts as a discrete common law subject, tort law has been regularly concerned with the problem of determining civil responsibility for injury. The attitudes of educated Americans toward injuries have changed dramatically over the past hundred years. A widespread attitude which associated injury with bad luck or deficiencies in character has been gradually replaced by one which presumes that most injured persons are entitled to compensation, through the legal system or some other mechanism. This transformation in what I have called the prevailing ethos of injury in America has been an important determinant of the state of tort law.

This book follows a general thematic structure; its concluding segments leave the realm of history to enter the realm of contemporary theory. The thematic structure juxtaposes the *subject matter* of tort law —which I believe has remained relatively constant, if diffuse, throughout the period under consideration—against changing *conceptions* of tort law. I have found that those conceptions have been self-sufficient and internally coherent, but they have been based on unprovable,

though widely shared, philosophical assumptions. Throughout the history of tort law in America creative scholars and judges have sought to shape tort law to approximate their ideal conceptions of the field. But the subject matter of tort law has proved sufficiently amorphous to resist that shaping, so that a fresh supply of material has always existed for new generations of scholars and judges, and the relationship between changing ideas and changing legal doctrines has sometimes been obscured.

Different comprehensive standards of liability in tort (negligence, strict liability) have been formulated at different times. Competing central purposes for tort law (admonishing blameworthy conduct or compensating injured persons) have been articulated. The ambit of tort law's coverage has been expanded theoretically (to include "traditional" areas of the law of sales) and contracted (to exclude areas superseded by constitutional law). Tort law has been thought of as essentially a private law subject or as "public" law in disguise. The image of the subject of Torts has varied from that of a unified collection of comprehensive and interlocking principles of civil liability, embodied in appellate cases, to that of a grab-bag collection of diverse judgments by individual courts. Yet none of these changing intellectual developments has affected the integrity of tort law itself. Tort law's integrity has come from a recurrent need in American society for some legal response to the problem of responsibility for civilly inflicted injuries. In the last hundred-odd years Americans have been injured in all sorts of diverse ways; in that time secular explanations for, and responses to, the problem of injuries have predominated. Tort law has been a major explanatory and responsive device. Its integrity, and its amorphousness as well, can be linked to the place of injury in American life.

My hope is that on completing this book one will have learned something about the changing ethos of injury in America, about the history of a common law subject, and about the ways that legal scholars interact with more orthodox lawmakers—especially judges—and function as lawmakers themselves. Finally, I hope the book contributes to an understanding of the complex relationship between law and ideas in American society.

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The Intellectual Origins of Torts in America

The emergence of Torts as an independent branch of law came strikingly late in American legal history. Although William Blackstone and his eighteenth-century contemporaries, in their efforts to classify law, identified a residual category of noncriminal wrongs not arising out of contract,[1] Torts was not considered a discrete branch of law until the late nineteenth century. The first American treatise on Torts appeared in 1859;[2] Torts was first taught as a separate law school subject in 1870;[3] the first Torts casebook was published in 1874.[4]

A standard explanation for the emergence of an independent identity for Torts late in the nineteenth century is the affinity of tort doctrines, especially negligence, to the problems produced by industrialization.[5] The process by which Torts emerged as a discrete branch of law was more complex, however, and less dictated by the demands of industrial enterprise than the standard account suggests. Changes associated with industrial enterprise did provide many more cases involving strangers, a phenomenon that played a part in the emergence of Torts as an independent branch of law. But even this new increase in cases in which the litigants had had no prior relationship would not have been sufficient had it not come at a time when legal scholars were prepared to question and discard old bases of legal classification. The emergence of Torts as a distinct branch of law owed as much to changes in jurisprudential thought as to the spread of industrialization.

Historical events as well as ideas played a part in creating the climate of intellectual legal opinion that spawned Torts an an independent category of law. This chapter's emphasis, however, is on events

only as they were used by intellectuals in the legal profession to formulate new legal doctrines and theories. My intent is to detail the influential role of certain lawyer-intellectuals in the development of legal doctrine in America. These intellectuals—who were primarily academicians after 1870—fulfilled their professional roles, in important part, through their efforts to derive and articulate theoretical justifications for their working rules of law that had current acceptance. In the process they significantly affected the content of tort rules and doctrines and consequently affected the changing state of tort law in America.

Conceptualism in Late Nineteenth-Century American Thought

Between 1800 and 1850, as Americans became increasingly enamored of such New World privileges as individual freedom, social equality, and occupational mobility, an eighteenth-century European-derived conception of society as an ordered community with designated social roles to each member and relatively limited mobility for all was called into question. Alongside a relatively static hierarchical vision of man's place in society had emerged in America a new dynamic atomistic vision, which emphasized man's potential to alter the conditions under which he might exercise his capacity for achievement.[6] For a time, these visions apparently were not perceived as contradictory. Leading literary figures espoused both the ideal of communal life and individual freedom.[7] National politicians simultaneously portrayed themselves as guardians of a simpler, more orderly republican society and as apostles of democratic progress.[8] The influential Unitarian theologian William Ellery Channing, asserted that the universe was ordered by God's law and then applauded " 'question[ing] [of] the infinite, the unsearchable, with an audacious self reliance.' " [9]

Perhaps the most striking indication that early nineteenth-century legal scholars were similarly affected by these divergent visions was their articulation of both synthetic and atomistic views of law. Blackstone, in his eighteenth-century synthetic view, had seen the "Law of England" as a unified entity, its components distinguishable but nonetheless interdependent.[10] By the early nineteenth century, James Kent's and Joseph Story's treatises primarily conceived of law as the sum of its parts (the "law" of bailments, the "law" of agency, etc.) but still