How Important is Community to Tort Law?

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Christina Carmody Tilley, *Tort Law Inside Out*, 126 **Yale L. J.** 1321 (2017).

Christina Tilley's new article on the purpose of tort law is audacious. It boldly claims that other tort theorists have got it wrong: tort law is not primarily concerned with efficiency or morality but instead (spoiler alert!) is all about constructing community. Aligning herself with a group of scholars called the New Doctrinalists, she purports to find this overarching community-constructing purpose embedded within tort doctrine itself and in the process contends that other theories, including civil recourse theory, are really external theories (hence the title, *Tort Law [From the] Inside Out*). She canvasses tort cases from the colonial period to the present in an attempt to demonstrate that "community" has always played a central role in tort law, even as communities in the U.S. have undergone dramatic changes.

Christina Tilley's article is also very creative. To prove the centrality of "community" in tort law, she conducts a "rudimentary linguistic analysis" (p.1340) of the digital version of the Restatement (Second) of Torts and discovers that references to community (47 times) are more plentiful than utility (34), efficiency (3), morality (24), or justice (3). To unpack the meaning of "community" most relevant to tort law, she draws upon classic works in sociology and political theory to make intriguing distinctions between sociological and political communities and closed versus open communities. And she peppers her article with examples of contemporary controversies (parents opposed to vaccination, football concussion injuries, texting while driving) where outcomes in tort cases are likely to differ, depending on which community has its say. The sheer breadth and sophistication of the article gives readers much to admire and much to contest. At the end of 80 pages, I was not entirely persuaded, but I suspect that Tilley's paean to community will have real staying power.

Paradoxically, Tilley contends that the concept of community in tort law is crucial in large part because it is ill-defined and indeterminate and operates as a "transom though which decision makers can import extralegal norms to determine liability for injuries." (P.1343.) Elsewhere in the article, Tilley refers to community as a "placeholder," or, as linguists call it, a "hedge," i.e., an open-textured element that invites a reader to fill in the blanks. (P. 1332.) In the operation of tort law, it is most often the jury who fills the void and decides a case according to community values and norms.

Tilley reminds us that resort to community norms in tort law occurs repeatedly across each of the three main theories of liability. For example, in intentional torts, community norms are used to determine whether a touching is offensive, whether consent should be presumed or whether conduct is outrageous. In negligence law, community norms may be a reference point for deciding whether a defendant's conduct poses an unreasonable risk. In strict liability, the appropriateness of the activity to a community and whether the activity is one of common usage helps determine whether it qualifies as abnormally dangerous.

Resort to "community" covers a lot of ground in Tilley's analysis. It comes into play when a tort doctrine explicitly requires an assessment of the norms of a specified community, such as the "locality rule" in medical malpractice claims that requires proof that a physician breached professional standards in the local community. (P.1381.) But importantly, Tilley also regards "community" as coming into play in a wide range of cases, notably negligence claims, in which juries are asked to evaluate a party's action by the reasonable person standard, presumably because juries will be guided by the standard "demanded by the community for the protection of others against unreasonable risk." (P. 1345.) Thus, Tilley's broad role for "community" in tort law encompasses explicit resort to custom in particular torts as well as discretionary judgments made by decision makers called upon to fill in the content of other abstract concepts

such as reasonable care.

Tilley maintains that through these multiple doctrines “community” has become a privileged source of tort liability norms, even though she contends that the concept has been under-theorized in legal scholarship. Thus, when myriad decisions about liability are made by jurors in tort cases on the basis of community norms, over time they have the effect of “constructing” community, signaling what is acceptable and unacceptable behavior, creating mutual bonds and cohesion among community members, and attaching a price to deviant behavior. In this sociological account, tort litigation is valuable precisely because it gives a community what it needs: orderly confrontations over contested behavior. For Tilley, this process of community construction is the whole point of tort law, allowing the community to consider and re-consider its norms, without resort to “the cumbersome machinery of the state” that characterizes criminal and regulatory law. (P. 1355.)

A pivotal part of Tilley’s theory is the distinction she makes between closed and open communities, which roughly maps onto a difference between local and national communities. Going back to the classic distinction between Germeinschaft (traditional community) and Gesellschaft (modern community), Tilley explains that sometimes decision-makers decide cases according to local norms, while at other times, they reach for national norms. She regards this “toggle” between local and national norms as a good thing, primarily because it reflects her vision of the United States as “multiple traditional communities nested within a single modern community.” (P.1364.)

A crucial (if highly contestable) analytical move Tilley makes is to align local norms with “morality” and national norms with “efficiency.” She reasons that closed, traditional communities are most often premised on sameness and “multiplex relationships that typically share religious and moral orientations.” Modern, open communities, by way of contrast, are “premised on specialization of labor and relationships,” characterized by “a plurality of cultural and value orientations” and typically “coordinate through rational or efficient behavioral norms.” (P. 1357.) In Tilley’s dichotomy, there is not much room for national norms premised on morality or local communities marked by a diversity of viewpoints.

As a descriptive matter, Tilley asserts that tort doctrine has “implicitly encouraged” decision makers to shift between local or national norms depending on “where the disputed injury arose.” She finds the same injunction throughout the Restatement (Second) of Torts: “injuries inflicted within closed communities are to be assessed based on that community’s norm (typically moral in nature), while injuries inflicted within the open community are to be assessed based on that community’s norm (typically efficient).” (P.1365.) As a prescriptive matter, Tilley goes on to argue that contemporary courts should make this process explicit and that “tort should embrace its capacity to toggle between morality and efficiency.” (P.1385.) In Tilley’s mind, this account of tort law also reconciles the current standoff between economic theorists and corrective justice/morality theorists by showing that each has a place in tort law.

Applying Tilley’s local/national (morality/efficiency) distinction, however, can be tricky and might not be as intuitive as she suggests. For example, Tilley analyzes one 2013 Oregon case alleging that a teacher had sexually abused the plaintiffs when they were primary school students nearly thirty years ago. The issue in the case was whether the discovery rule ought to be applied to toll the statute of limitations because only recently did the plaintiffs fully appreciate the offensive nature of the defendant’s behavior. One might have thought that under Tilley’s scheme the case would be categorized as local and governed by morality norms, given that all the parties resided in the same local community and that sexual behavior and the care of children are often approached as issues of private morality. Yet Tilley explains that the court in that case identified the teacher’s behavior as “grooming” and noted that grooming is a tactic that has received widespread national recognition in recent years. She regards the ruling for the plaintiffs in that case as an example of a court “[i]ntuitively gravitating towards the expectations and knowledge of the national community with respect to the nature of child sex offenses.” (P.1374.) It is not clear, however, why the availability of expert knowledge on a subject should transform a local controversy into a national one or whether Tilley would be happy with classifying such as case as either local or national.

Added to the problem of boundary-drawing, application of the local/national distinction might yield results that are

unjust simply because like injuries are treated so differently. Thus, Tilley discusses a poignant case involving a twenty-six-year old man who committed suicide after suffering from multiple concussions while playing youth and high school football. The legal claim in the case was whether the football league should be subject to strict liability because the activity was abnormally dangerous. As Tilley sees it, because "abnormality" results partly from community values, "the cultural resonance of amateur football within the relevant community must be assessed." (P.1388.) She hypothesizes that if the case had taken place in West Texas where football "plays a crucial role in the social infrastructure," denying recovery would be justified because it would reflect the preference of the local community. However, because the actual case took place in Wisconsin and involved a claim against Pop Warner football, a national corporate defendant, Tilley believes that it was appropriate for the court "to toggle to an efficiency approach, asking whether the benefit of Pop Warner and youth football nationally outweighed its capacity to harm." (P.1389.) It is not clear to me why expert knowledge on concussion injuries, if offered into evidence by the hypothetical Texas plaintiffs, would not or should not push the case into the national category. More fundamentally, should such a case turn on the perceived social benefit of football to the community rather than on the science behind concussion injuries?

On a broader level, Tilley's fascinating article left me wondering whether her account of community's role in tort law, particularly her local/national distinction, might have been more accurate in 1975 than it is today. Unfortunately, Tilley decided not to use the Restatement (Third) as a basis for her linguistic analysis of the concept of community. She reasoned that because the project is still incomplete and has been broken up into separate parts (e.g., separate Restatements for Products Liability, Apportionment, etc.), any linguistic analysis would not show the relevance of the concept across multiple types of liability. She also expressed concern that the Restatement process has become politicized and dominated by an economic, instrumental orientation. (Pp.1338-39.) Regardless of the validity of her concerns, by relying on the Restatement (Second), Tilley may have painted a portrait of tort law that overstates the continuing relevance of community. A great number of courts, for example, have followed the course of the new Restatements and may have diminished the role of community in important areas of tort law, for example, rejecting the consumer expectation test in products liability, employing economic cost/benefit analyses to determine reasonable care in negligence cases, and placing less emphasis on locational appropriateness in abnormally dangerous activities cases. Since the 1980s, there has also been a decidedly neoliberal turn in U.S. public policy and discourse that has had the effect of infusing market values and market rationality into all institutions and social action, tort law included. Particularly when this transformation of values is added to the reality of vanishing juries, it's really hard to say just how important community is to tort law.

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