THE YALE LAW JOURNAL

CRISTINA CARMODY TILLEY

Tort Law Inside Out

ABSTRACT. For more than a century, scholars have been looking at tort law from the outside in. Theorists committed to external goals like efficient allocation of resources or moral justice have treated tort as a mere vehicle for the achievement of their policy preferences, rather than as a body of law with a discernible internal purpose. It is time to revisit tort on its own terms.

This Article takes its cue from the New Doctrinalists, who urge that extralegal normative insights from fields such as economics or philosophy aid adjudication only when they are directly tethered to legal concepts; that is, to doctrine. Scrutinizing tort doctrine yields a surprising insight: tort law is not primarily concerned with efficiency or morality, as the instrumentalists have long contended, but with community. A linguistic study of the *Restatement of Torts* reveals that doctrine alludes to community more frequently and more comprehensively than it does to any other justificatory concept. Specifically, throughout the *Restatement*'s discussion of negligence, strict liability, and intentional wrongs, doctrine disfavors stating interpersonal duties in positive terms, preferring to let them float with community values. Consequently, tort operates as a vehicle through which communities perpetually reexamine and communicate their values, encouraging individuals to coordinate private relationships without undue state involvement.

Tort law's stated goal is to construct community. Moreover, tort doctrine acknowledges that two distinct kinds of community—closed and open—can generate the values that govern resolution of interpersonal disputes. Accordingly, tort doctrine embeds a choice between the morality norms of traditional, closed communities and the efficiency norms of the modern, open community, depending on whether the dispute is local or national in scope. So a descriptive account of tort doctrine suggests that morality and efficiency are not mutually exclusive theories of tort, but rather complementary manifestations of tort law's broader community-constructing purpose. A survey of American tort cases confirms that courts have intuitively been fluctuating between local morality norms and national efficiency norms for decades, without fully acknowledging or operationalizing this practice.

Pivoting from theory to practice, the Article suggests that tort law should embrace and refine its ability to toggle between local morality and national efficiency. The Article briefly sketches how the toggle would operate to adjudicate select hot-button issues arising within each type of tort liability: battery (intentional tort), youth football (strict liability), and failure to vaccinate (negligence). On each of these topics, group norms—and therefore liability—would be expected to vary within adjudicative communities. Making this normative toggle explicit would both enhance the internal integrity of tort law and improve tort law's external standing relative to other bodies of law such as the Constitution or federal statutes. Moreover, the Article concludes, understanding tort liability as an expression of particular community values might prevent the constitutional override of injury verdicts arising from protected behavior such as gun ownership or speech.

AUTHOR. Distinguished Scholar in Residence, Loyola University Chicago School of Law. Thanks to Robert Cooter, Richard Epstein, John C.P. Goldberg, Lyrissa Lidsky, James Lindgren, James Pfander, Christopher Robinette, Nadia Sawicki, Marshall Shapo, Catherine Sharkey, Barry Sullivan, Alex Tsesis, Benjamin Zipursky, participants in the American Bar Foundation Research Seminar series, participants in the Chicago Area Junior Faculty Workshop, and participants at the Northwestern University School of Law Legal Scholarship Workshop, and William Stone and participants in the *Yale Law Journal* Reading Group for helpful comments on earlier drafts of this Article. All errors remain my own.

ARTICLE CONTENTS

INTRODUCTION 1324

I. JUSTIFICATIONS FOR TORT LIABILITY 1326
- A. A Brief History of Tort Theory 1327
- B. The Externality of Existing Tort Theories 1331
- C. The Degenerative Results of Competing External Tort Theories 1335
- D. Using Doctrine To Devise an Internal Account of Tort 1336
  - 1. Approach 1337
  - 2. Results 1341
- E. "Community" as the Doctrinal Source of Liability Norms 1343

II. UNPACKING COMMUNITY 1346
- A. Political Community and Public Law 1348
- B. Sociological Community and Tort 1349
- C. Toggling Between Different Sociological Communities 1356
- D. Sociological Community in the United States 1360
  - 1. Early American Community 1360
  - 2. Modern American Community 1361
  - 3. Nested American Community 1363

III. THE DOCTRINAL SIGNIFICANCE OF SOCIOLOGICAL COMMUNITY 1364
- A. Community in Case Law 1365
  - 1. The Colonial and Antebellum Period 1366
  - 2. Doctrinal Pivot Points 1370
  - 3. The Modern Period 1372
- B. Community in the *Restatement* 1376
- C. The Prescriptive Implications of Community in Tort Doctrine 1384

IV. TORT LAW'S COMMUNITY TOGGLE IN OPERATION 1385
- A. Intentional Torts 1386
- B. Strict-Liability Torts 1387
- C. Negligence 1389
- D. Implementing the Toggle 1390

V. COMMUNITY AS A MEANS FOR MEASURING TORT LAW'S OVERLAP WITH OTHER BODIES OF LAW 1393

A. Tort Versus the Constitution 1394

1. Dignitary Torts and Freedom of Speech 1394
2. Negligence and the Right To Keep and Bear Arms 1396
3. Other Potential Clashes Between Tort and Public Law Rights 1398

B. Preemption 1399

CONCLUSION 1403

APPENDIX 1405

INTRODUCTION

For more than a century, scholars have been looking at tort law from the outside in. Theorists committed to external goals like efficient allocation of resources or moral justice have treated tort law as a mere vehicle for the achievement of their policy preferences, rather than as a body of law with a discernible internal purpose. It is time to revisit tort on its own terms.

This Article takes its cue from the New Doctrinalists,[1] who urge that extralegal normative insights from fields such as economics or philosophy aid adjudication only when they are directly tethered to legal concepts—that is, to doctrine. Scrutinizing tort doctrine yields a surprising insight: tort law is not primarily concerned with efficiency or morality, as the instrumentalists have long contended, but with community. A linguistic study of the *Restatement of Torts* reveals that doctrine alludes to the concept of community more frequently and more comprehensively than it does to any other justificatory concept. Specifically, throughout the *Restatement*'s discussion of negligence, strict liability, and intentional wrongs, doctrine disfavors stating interpersonal duties in positive terms, preferring to let them float with community values. Consequently, tort law operates as a vehicle through which communities perpetually reexamine and communicate their values, encouraging individuals to coordinate private relationships without undue state involvement. In short, the goal of tort law is to construct community.

Tort doctrine acknowledges that two distinct kinds of community—closed and open—can generate the values that govern resolution of interpersonal disputes. Accordingly, tort doctrine embeds a choice between the morality norms of traditional, closed communities and the efficiency norms of the modern, open community, depending on whether the dispute is local or national in scope. Thus, a descriptive account of tort doctrine suggests that morality and efficiency are not mutually exclusive theories of tort, but rather complementary manifestations of tort law's broader community-constructing purpose. Furthermore, as a prescriptive matter, this Article suggests that tort should embrace and refine its ability to toggle between local morality and national efficiency. Making this normative toggle explicit would enhance the internal integrity of tort and improve its external standing relative to other bodies of law such as the Constitution or federal statutes.

Part I of this Article rehearses the history of tort theory in the United States, situating its evolution within the wider academic tension between doctrinal formalism and Legal Realism. Broadly speaking, tort theory has split into

1. *See infra* text accompanying notes 76-82.

two camps: economists view tort as a method of encouraging efficient private behavior, while philosophers and political scientists view it as a method of achieving a kind of moral justice. These schools of thought are antagonistic and each levels an effective critique against the other. Part I then shifts from external accounts of tort by these disciplines to an internal view of the law itself, as represented by standard tort doctrine. The Part demonstrates that doctrine is less concerned with efficiency or morality than it is with the concept of community.

Part II unpacks the concept of community. First, it distinguishes between political and sociological versions of community. It demonstrates that while public law "communities" are political organizations, the private law tort community is a sociological organization. It summarizes the devices that sociological communities use to develop and maintain relational norms, and shows how those devices are replicated within the operation of tort. Further, it explains that sociological community can organize itself in either a closed, traditional configuration or an open, modern configuration, and that both types of sociological community can be nested within a single political community. It demonstrates that at the founding, the United States comprised multiple closed communities, whereas by the end of the nineteenth century a unitary open community had been forged atop those many local groups.

Part III shows that, as a descriptive matter, the primary goal of tort doctrine is community construction. Tort has historically served as a means of determining community norms, encouraging observance of those norms to enhance private cooperation, and stigmatizing those who deviate. During the colonial and antebellum periods, most private interpersonal disputes were restricted to closed communities whose values tended to arise from a shared morality that could provide the liability referent in nominate, strict liability, and negligence causes of action. As the nature of American community evolved to comprise both traditional, closed communities and a modern, open community, courts consciously adapted two key tort doctrines, the privity requirement and the equation of custom and reason, enabling tort to draw liability-determining values from the open community when a dispute arose between remote parties or from the closed community when a dispute arose at that level. As a result, courts in the modern period began to move fluidly, drawing liability norms from either the closed or the open community depending on the particulars of the case at hand. Part III suggests that tort doctrine's reliance on community as the source of norms for open-textured liability elements implicitly encourages decision makers to toggle between traditional and modern values—between morality and efficiency. Finally, Part III concludes that tort doctrine has not explicitly acknowledged the capacity to toggle between communities or between norms. Thus, as a prescriptive matter, it argues that acknowledging tort law's

capacity to toggle would clarify the basis of tort liability in individual cases and would reconcile the theoretical impasse between morality theorists and efficiency theorists.

Part IV illustrates how the task of assigning interpersonal liability would be improved by making tort law's historically implicit use of distinct community norms explicit. Using as examples the intentional tort of battery, strict liability for child football injuries, and negligence liability for failure to vaccinate, Part IV demonstrates how tort could impose liability to do "justice" in local disputes and to achieve "utility" in national ones.

Part V sketches how a bifurcated community theory of tort might influence tort law's standing vis-à-vis other bodies of law. First, it proposes that when the Constitution appears to insulate behavior that might otherwise be considered tortious—such as revenge porn or careless gun storage—fixing the community scope of a damage verdict might reduce the need for a robust constitutional override. Second, it suggests that obstacle preemption analysis—governing conflicts between federal regulation and state tort verdicts—would unfold more coherently if courts could better calibrate the community scope of the verdict under review.

I. JUSTIFICATIONS FOR TORT LIABILITY

Tort law is one of the oldest bodies of law.[2] For centuries, tort law's purpose was thought to be "corrective justice"—identifying "wrongdoers" obliged to return victims to a pre-injury position.[3] But in the mid-nineteenth century, many American judges and tort theorists began to describe this theory as overtly moral and therefore incompatible with a liberal democracy designed to ensure fairness rather than goodness.[4] As Legal Realism introduced the idea that judges giving lip service to doctrinal rules were in fact motivated by extralegal concerns, some scholars concluded that tort was better understood as an instrumental scheme designed to achieve social policy goals.[5] Ultimately, the policy

2. *See, e.g.*, M. Stuart Madden, *The Cultural Evolution of Tort Law*, 37 ARIZ. ST. L.J. 831, 831-34 (2005) (tracing the roots of modern tort law to the norms and customs of ancient and primitive cultures); Richard A. Posner, *A Theory of Primitive Society, with Special Reference to Law*, 23 J.L. & ECON. 1, 42-44 (1980) (describing the function of private tort law in deterring interpersonal friction in primitive societies).

3. *See, e.g.*, John Fabian Witt, *Contingency, Immanence, and Inevitability in the Law of Accidents*, 1 J. TORT L. 1, 12-13 (2007); *see also infra* notes 8-10 and accompanying text (identifying the Aristotelian roots of corrective justice).

4. *See infra* notes 12-13 and accompanying text.

5. *See infra* notes 16-19 and accompanying text.

goal that emerged as the favorite of twentieth-century tort theorists was the optimal allocation of accident costs to incentivize care without discouraging socially useful activities.[6] Although this efficiency view of tort has moved into the mainstream, it has not displaced entirely the earlier understanding of tort. In fact, American tort theorists today are "split between two competing conceptions of tort liability. One conception is economic; the other, for lack of a better word, is moral."[7]

A. A Brief History of Tort Theory

Explanations for tort liability dating back to Aristotle have referred to its "distinctive moral structure."[8] The idea that individuals were entitled not to be harmed by their fellows, and that the doing of harm triggered in the doer an obligation to compensate, was termed by Aristotle "corrective justice."[9] The concern of tort law and the basis for the imposition of liability was the moral relationship that arose from the "doing and suffering of harm."[10] Unsurprisingly, then, some of the early tort causes of action were for the most overt doing of harm, through intentional behavior that directly violated the sufferer's right to bodily integrity, such as battery.[11]

In the late nineteenth century, Oliver Wendell Holmes challenged the traditional view of torts, observing that this area of the law was better understood as a means to achieve social policy ends attenuated from individual integrity or notions of morality.[12] He proposed that injurers should *not* be held liable in tort on the theory that any infliction of harm was immoral, but instead that liability should attach only if the injurer's actions were "unreasonable," with "reasonableness" being the product of an external standard derived from social need.[13] Not all of Holmes's contemporaries agreed with his new paradigm. For exam-

---

6. *See infra* notes 20-25 and accompanying text.

7. Gregory C. Keating, *Strict Liability Wrongs*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 292, 292 (John Oberdiek ed., 2014).

8. Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 410 (1989).

9. *Id.* at 410-11 (citing 5 ARISTOTLE, NICOMACHEAN ETHICS §§ 2-4 (c. 350 B.C.E.)).

10. *Id.* at 411.

11. *See, e.g.*, Madden, *supra* note 2, at 832 (identifying one of the earliest justifications of tort liability as a response to the wrongful act of battery).

12. *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 135, 161-62 (Boston, Little, Brown & Co. 1881).

13. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1756-57 (1998).

ple, James Barr Ames argued explicitly that tort liability was premised on finding the defendant's behavior morally blameworthy.[14] Holmes's suggestion gained ground, however, in the early twentieth century. In particular, William Prosser took up the Holmesian mantle in his 1941 treatise on torts, describing tort as a body of law that held individuals to an objective standard of reasonable behavior towards others.[15]

Notably, this evolving approach to the purpose of imposing tort liability played out against the backdrop of a broader movement within the legal academy. In the 1930s, American Legal Realists began to observe that the actual outcomes of lawsuits were often driven not by formal doctrine but by judicial impressions about the social needs presented by the specific facts of the case before them.[16] Put broadly, theorists suggested that courts both did and should go beyond the formal rules bequeathed to them by previous generations to decide cases in a way that would serve the present and the future.[17] Legal realism was the product of "intellectual ferment in the early twentieth century"[18] and was associated with "creative impulses" that would bring a "wholly 'fresh perspective'" to legal practice.[19]

Applying these Legal Realist arguments to the Holmesian tort paradigm led many scholars to investigate how doctrine could best capture public policy

---

14. *See, e.g.*, James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99-100 (1908) (noting that "the ethical quality of the defendant's act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor"). Interestingly, the shift that Holmes advocated from strict liability to "fault" liability has since been described by some theorists as actually *introducing* moral concepts into an area of the law previously immune to them. *See, e.g.*, George P. Fletcher, *Fairness and Utility in Tort Theory*, 84 HARV. L. REV. 537, 564-66 (1972). Considered broadly, it is easy to see how the very suggestion that liability should not follow automatically from the doing of an act introduces the possibility of moral reasoning to determine *when* liability is appropriate. But Holmes himself disavowed the role of morality in this determination and implied that strict liability for injuring acts was itself premised on a morally infused deference to the primacy of the individual. *See* HOLMES, *supra* note 12, at 162.

15. *See* Goldberg & Zipursky, *supra* note 13, at 1757.

16. *See* Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1976-78 (2015).

17. Notably, however, judges have not abandoned at least their superficial commitment to doctrine. *See, e.g.*, Shyamkrishna Balganesh, *The Constraint of Legal Doctrine*, 163 U. PA. L. REV. 1843, 1845 (2015) (citing Emerson H. Tiller & Frank B. Cross, *What is Legal Doctrine?*, 100 NW. U. L. REV. 517, 517 (2006)). Realists dismissed doctrine as overly concerned with formal categories and arbitrary rules that bear no relationship to the reality of the social forces driving the legal system or the lives of those seeking its assistance. *See, e.g.*, Leiter, *supra* note 16, at 1977.

18. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 64 (2003).

19. *Id.* at 64, 74.

goals.[20] Starting in the 1970s, Guido Calabresi suggested that as a normative matter, tort doctrine should aim to reduce the cost of accidents by shifting liability to the least cost avoider.[21] Calabresi's tort theory "[took] strict liability to be the fundamental principle of tort law."[22] A decade later, William M. Landes and Richard A. Posner argued that as a descriptive matter, notwithstanding their stated goals, the effect of many tort doctrines was to assign liability in a way that incentivized the efficient allocation of resources.[23] Posner's tort theory "[took] negligence to be the fundamental principle of tort law."[24] For the remainder of the twentieth century, theoretical momentum gathered behind the notion that tort was a means of regulating social behavior based on any of a menu of resource-allocation commitments.[25]

Despite the profound influence of law and economics theory on tort, it did not entirely wipe out the view that the purpose of tort liability was to render a kind of wrongs-based justice. Some theorists pushed back on the efficiency view contemporaneously, suggesting that it had obscured "precisely those questions that make tort law a unique repository of intuitions of corrective justice."[26] This position gained traction in the 1990s, with Ernest Weinrib, Jules

---

20. *Id.* at 76-77 (discussing LEON GREEN, THE JUDICIAL PROCESS IN TORT CASES (1931)).

21. GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26 (1970); *see also* Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L.J. 469, 470 (2013); Michael L. Rustad, *Twenty-First-Century Tort Theories: The Internalist/Externalist Debate*, 88 IND. L.J. 419, 438-39 (2013).

22. Benjamin C. Zipursky, *Richard Epstein and the Cold War in Torts*, 3 J. TORT L. 5 (2010).

23. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

24. Zipursky, *supra* note 22, at 1.

25. John Goldberg has grouped under this general umbrella the compensation-deterrence camp (those who, like Holmes and Prosser, take the purpose of tort to be the deterrence of antisocial behavior and compensation for those injured by it); the enterprise liability camp (those who see tort as a body of law that can function to provide large-scale social relief for accident victims, including Fleming James, Robert Keeton, and Jeffrey O'Connell); and the economic deterrence camp (including law and economics theorists like Landes, Posner, and Calabresi). *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521-60 (2003). A fourth group of scholars, namely social justice theorists such as Ralph Nader and Michael Rustad, are comfortable with the notion of tort as an instrument of social engineering, but advocate that it work toward a goal of limiting expansive corporate power and investing the general public with more robust rights. *Id.* at 560-63. And libertarian theorists, such as Richard Epstein, suggest that individuals are fully entitled to all the goods they can acquire but responsible for all the harms they inflict. *Id.* at 564-67.

26. Fletcher, *supra* note 14, at 538; *see also* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160, 203-04 (1973) (arguing that tort should hold actors accountable for whatever harms they cause even if the harms resulted from reasonable behavior).

Coleman, and Stephen Perry thoughtfully suggesting that corrective justice, rather than economic efficiency, remained the appropriate justification for imposing on tortfeasors a duty of compensation or repair. For example, Weinrib argued that tort (and private law generally) is an exercise in moral practice.[27] Coleman acknowledged the significance of the market as a mechanism for stabilizing society but contended that it was best sustained by contract law, leaving tort the body of law concerned with repairing wrongful losses.[28] Perry, too, argued for a morally grounded obligation to repair injuries inflicted on others.[29] John Goldberg has described all of these scholars as individual justice theorists intent on returning to the pre-Holmesian era by reconnecting tort "to the doing of justice between the parties to the litigation."[30]

Goldberg himself, along with co-author Benjamin Zipursky, more recently entered the individual justice canon by introducing the "civil recourse" theory of tort.[31] Civil recourse theory relies on some of the same intuitions as corrective justice. It differs, however, by suggesting that tort law's purpose is not to saddle wrongdoers with an obligation to repair, but instead to privilege wrong sufferers with an autonomous right of recourse.[32] More than just a difference in nuance, this unique position says that tort law is less concerned with correcting losses for correction's sake and more concerned with correcting losses as a mechanism for reasserting the relational equality between the injurer and the injured.[33] What corrective justice and civil recourse do share, writ large, is their view of tort law "as about deontological concepts such as right and wrong, in contrast to efficiency accounts that focus on maximizing social welfare."[34]

---

27. *See, e.g.*, Weinrib, *supra* note 8, at 403, 404.

28. JULES L. COLEMAN, RISKS AND WRONGS 11-12 (1992).

29. Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 451 (1992).

30. Goldberg, *supra* note 25, at 564.

31. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 945-47 (2010).

32. *See, e.g.*, Stephen Darwall & Julian Darwall, *Civil Recourse as Mutual Accountability*, 39 FLA. ST. U. L. REV. 17, 29-31 (2011) (discussing the work of Goldberg and Zipursky); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563 (2006) (arguing for a duty-based conception of tort law centered on redressing private wrongs).

33. *See* Darwall & Darwall, *supra* note 32, at 35-36.

34. Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 243 (2011). Note, however, that Goldberg and Zipursky have been said to align corrective justice with other loss-allocating theories. *See, e.g.*, Darwall & Darwall, *supra* note 32, at 29.

B. The Externality of Existing Tort Theories

Notably, both efficiency theorists and fairness theorists are inescapably articulating visions of tort steeped in values that arise outside of the law itself. Some are more explicit about this normative externality than others. Corrective justice, for its part, freely acknowledges that its aims are political and philosophical. These goals are external to the law, strictly speaking, though traditionally recognized as important to it. Coleman has explained that his work is designed to "present philosophical arguments" and to pique an interest in "other areas of the law and political theory,"[35] while Weinrib has described the Aristotelian account of corrective justice as "the beginning of legal philosophy properly speaking."[36] Others have said that Fletcher is espousing a tort theory derived from John Rawls's philosophy and Weinrib is advancing a point of view reflective of Immanuel Kant.[37] Some economists are equally forthright about their commitment to external goals as the rationale for tort. Calabresi's scholarship advocating a strict liability regime for accidents frankly proceeds from the axiom that "the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents."[38] He analyzes existing tort doctrine by asking whether it effectively serves that goal. For example, he concluded in 1961 that strict liability for ultrahazardous activities "has not been brought to its logical conclusion in terms of risk-distribution theories."[39] He observed that tort doctrine fell short by failing to hold actors strictly liable for activities in "common usage" that involved infrequent but nevertheless substantial harms, suggesting that doctrine should be recalibrated to do a better instrumental job.[40]

Other tort theorists eschew the "external" label. Their rejection of externality is certainly plausible, insofar as they each take as their starting point the doc-

---

35. COLEMAN, *supra* note 28, at xi.

36. Weinrib, *supra* note 8, at 410.

37. *See, e.g.*, Patrick J. Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315, 319 (1990). Goldberg has also described corrective justice as the domain of analytic philosophers. *See* Goldberg, *supra* note 25, at 564.

38. CALABRESI, *supra* note 21, at 26. To be sure, Calabresi also mentions the need for such a system to be "just," but explains that justice is not the primary goal of accident law so much as a constraint that comes into play if any particular device within such a system is deemed "unfair." *Id.*

39. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 543 (1961); *see also id.* (noting that consideration of the "grounds for risk distribution" would dictate an "enormous broadening of the extra-hazardous activities doctrine").

40. *Id.* at 542-43.

trinal architecture of the law. But even efficiency theorists and fairness theorists who claim fidelity to doctrine inevitably import external values to fill out tort elements that are open textured or, in the jargon of linguists, "hedges."[41] So, for example, Landes and Posner begin with a nod to the internal by stating that they "accept[] the existence, validity and importance of legal doctrine."[42] They describe their methodology in internal terms, as a canvass of tort rules.[43] And they zoom in specifically on a number of doctrinal matters, including reasonableness,[44] contributory negligence,[45] assumption of risk,[46] strict liability for ultrahazardous activities,[47] defamation and fraud,[48] punitive damages,[49] and causation.[50] But after claiming that their theory is merely a positive description of how tort doctrine operates, they suggest that when inevitable ambiguities arise in the application of doctrine, play in the doctrinal joints invites the efficiency calculus. Thus, for example, although Landes and Posner argue that the positive economic theory of tort law is meant to *explain* doctrine,[51] Posner's seminal article *A Theory of Negligence* states that the purpose of tort "is to *generate* rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety."[52] It is a small but subtle move from an explanatory theory that is agnostic as to the benefits of efficiency to a prescriptive theory that celebrates efficiency and encourages the use of ju-

41. *See, e.g.*, Michel Paradis, *Just Reasonable: Can Linguistic Analysis Help Us Know What It Is To Be Reasonable?*, 47 JURIMETRICS 169, 170 (2007). Paradis explains that broad modifiers that are "referentially vacuous" are known by linguists as "hedges," requiring the reader or listener to engage in the process of interpreting the word. *Id.* at 170 & n.2. Studies show that people reading two identical texts, one with hedge words and one without, retain the material better when their faculties are activated by having to fill in hedge words. *Id.* at 171-72. This has interesting implications for the community-constructing theory of tort. *See infra* notes 345-347 and accompanying text (discussing juries' work to fill out open-textured elements by consulting community norms, an exercise that may deepen their understanding of those norms).

42. LANDES & POSNER, *supra* note 23, at 8.

43. *Id.* at 20. They find these rules in "casebooks, treatises, and the *Restatement of Torts*." *Id.*

44. *See id.* at 123-31.

45. *See id.* at 88-96.

46. *See id.* at 139-42.

47. *See id.* at 111-20.

48. *See id.* at 163-66.

49. *See id.* at 184-85.

50. *See id.* at 228-55.

51. *Id.* at 8.

52. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) (emphasis added).

dicial discretion to mold doctrinal rules to achieve that goal.[53] And this move begets a purely external brand of efficiency theory, the leaders of which claim that "the welfare-based normative approach should be exclusively employed in evaluating legal rules. That is, legal rules should be selected entirely with respect to their effects on the well-being of individuals in society."[54]

Similarly, Goldberg and Zipursky distance themselves from externalists because they derive their civil recourse account primarily from the specifics of tort doctrine itself.[55] They have stated that "analysis of the myriad doctrines that make up tort law" is essential to capturing the "essence of tortiousness."[56] Indeed, they have written specifically about doctrinal issues, including the element of reliance in fraud,[57] assumption of risk as a principled means of relieving actors from duty,[58] and outrageousness in the intentional infliction of emotional distress tort.[59] But their primary project has been to discern the "general features that are constant across tort law" to understand the engine

---

53. *See, e.g.*, J.M. Balkin, *Too Good To Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1450 (1987) (reviewing LANDES & POSNER, *supra* note 23) ("Landes' and Posner's positive theory of tort law looks at first as if it were merely a scientific explanation of the forces that decide tort cases; tort doctrines are crafted so as to increase wealth. However, the book also presents wealth maximization as a unifying normative principle of tort law that could be used by judges to decide future cases, as Landes and Posner clearly think it should.").

54. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 967 (2001). Kaplow and Shavell have been described as "distinguished legal academics [responsible for] a massive project" promoting welfare, rather than fairness, as the appropriate criterion for designing legal policy. *See* Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1511 (2003).

55. *See, e.g.*, Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PA. L. REV. 2131, 2163 (2015) (explaining that Goldberg and Zipursky's theoretical emphasis on the relational nature of tort law arises naturally from "the breach-duty nexus in the analytical structure of negligence law"); *see also* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 462 (2006) (analyzing tort damages using a self-described "internal" approach "operating entirely at the level of lawyerly usage and doctrine").

56. John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569, 570, 578 (2013).

57. *See* John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001 (2006).

58. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 342-51 (2006).

59. *See* Benjamin C. Zipursky, Snyder v. Phelps*, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2011).

that drives particular outcomes.[60] Thus, like the self-described internal theorists of efficiency, they understand "doctrine" at a high level of generality that leans on external disciplines for nuance. For instance, Zipursky's overarching insight is that tort doctrine is "unified" in its requirement across multiple diverse causes of action that the plaintiff and defendant be relationally situated so that a duty is owed from the latter to the former.[61] Further, to come within the tort domain, the failure to observe that duty must culminate in an injury to the plaintiff.[62] These abstract features are found throughout doctrine covering everything from defamation to nuisance to loss of consortium.[63] But like the efficiency theorists who derive their view from doctrinal architecture, the recoursians eventually shift away from doctrine to justify particular instances of tort liability. For example, in explaining why some intentional behavior is considered tortious, Zipursky states that it is "obviously . . . wrong" without explaining why the wrongfulness is obvious or acknowledging the possibility that it might be obvious to some people or groups and unproblematic to others.[64] This move seems to either permit or require reference to some external body of information about wrongfulness. Further, the "relational equity" referred to as the cornerstone of tort liability is understood as a political entitlement,[65] thereby placing tort at the service of an external, political goal.

60. Goldberg & Zipursky, *supra* note 56, at 570.

61. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 15-17 (1998).

62. *See* Goldberg & Zipursky, *supra* note 56, at 571; Zipursky, *supra* note 61, at 16.

63. *See* Zipursky, *supra* note 61, *passim*.

64. Zipursky, *supra* note 59, at 499 ("Battery, conversion, and fraud are the most stark examples" of torts involving intentional wrongs and, "[m]ost obviously, everyone knows that hitting, stealing, and lying are wrong."). To be fair, Zipursky suggests that "wrongs" are reflective of social understandings, but does not indicate how those understandings are arrived at or by whom. *Id.* at 478, 499. And many sympathetic scholars have taken Goldberg and Zipursky at face value in describing their work as representing an "internalist perspective" on tort. *See, e.g.*, Rustad, *supra* note 21, at 421-23.

65. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 531 (2005) (arguing that "legislatures operate under certain affirmative duties, including a duty to provide bodies of law that are integral to liberal-constitutional government," including a body of tort law).

C. The Degenerative Results of Competing External Tort Theories

The divide between the justice theorists and the efficiency theorists has grown more pronounced in recent years.[66] The recourse theorists accuse their instrumental adversaries of neglecting the bilateral, individualized nature of tort causes of action in favor of abstract "macrolevel policy factors."[67] For their part, the efficiency partisans complain that recourse theory focuses on relational wrongs as a means for achieving interpersonal equity without specifying "where . . . we go to find out what is a 'wrong.'"[68]

Both camps agree that a sound theory of tort will explain all three types of liability: intentional, negligence, and strict. But each camp faults their opponents for failing this test. Recoursians contend that efficiency theories are flawed because they assume that tort law's purpose is exclusively the assignment of liability for accidents, and consequently are capable of explaining only negligence or strict liability but not the intentional torts.[69] Instead, efficiency theorists are said to treat intentional wrongs as virtually irrelevant to a body of law they consider "accident-law-plus."[70] For their part, the efficiency theorists charge that even if recourse theory is a plausible explanation for intentional tort liability and negligence, it does not justify strict liability, which involves routinized production of goods distributed to classes of consumers rather than one-on-one interpersonal wrongdoing.[71]

The increasing polarization of torts scholars, and the accelerating myopia of their scholarship,[72] is emblematic of a growing chorus of dissatisfaction with Legal Realism more generally. While realism was originally lauded for its potential to produce creative new ideas about improving the law, some have

---

66. *See id.*; *see also* Zipursky, *supra* note 22, at 2 (discussing the "disdain" that law and economics scholars have expressed for philosophers espousing corrective-justice theories of tort).

67. Rustad, *supra* note 21, at 435.

68. Posner, *supra* note 21, at 473.

69. Goldberg & Zipursky, *supra* note 31, at 953-56, 966-71.

70. *Id.* at 917.

71. Rustad, *supra* note 21, at 439; *see also* Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 533-34 (2011) (observing that civil recourse treats collective injury problems as individual disputes, thereby forfeiting the "larger societal function of general deterrence" that may be served by strict liability).

72. *See, e.g.*, Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523 (1984) (describing economists and jurisprudes as "blind" to the merits of the others' arguments); Rustad, *supra* note 21, at 422 (referring to the academic "war" between efficiency theorists and morality theorists).

charged that the original promise of the "'law and' movement"[73] has grown "stale."[74] They contend that social scientists have subsumed the law into their disciplines and used the law to drive their own scholarship, but they have failed to translate these insights back into a vernacular that can be understood or applied by legal institutions. "Law cannot be fully explained by any other academic discipline, whether economics, political science, sociology, or anthropology," they observe.[75] The limitations of the instrumental study of law are typitypified by the current state of tort theory, as economists and philosophers grow increasingly self-referential and less concerned with each other or with personal injury law as it is practiced in the courts.

D. Using Doctrine To Devise an Internal Account of Tort

Granular doctrinal analysis may provide the theoretical clarity that instrumental analysis has failed to produce. In recent years, there has been a renewed interest in the meaning and role of legal doctrine in the work of courts—a scholarly trend dubbed by some "the New Doctrinalism."[76] This movement rejects the realists' depiction of doctrine as a set of mechanistic, self-referential rules that require specific outcomes,[77] describing it instead as an analytical flowchart whose decision boxes are designed to carry normative considerations.[78] The result is that "[d]octrine is . . . seen as important, not for its own sake, but because of its connection to normative criteria."[79] Consequently, doctrinal "constraints"—far from limiting decision makers to a predetermined outcome—actually liberate them to draw from external bodies of information as

---

73. Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 141, 149 (2014).

74. Marie A. Failinger, *Searching for the Crown of Feathers: An Essay on Psychology, Ethics, and Truth in Constitutional Law*, 9 S. CAL. INTERDISC. L.J. 381, 395 (2000).

75. Nourse & Shaffer, *supra* note 73, at 149.

76. Balganesh, *supra* note 17, at 1857.

77. *Id.* at 1847-48.

78. *Id.* at 1848-49.

79. *Id.* at 1857; *see also* Leiter, *supra* note 16, at 1983-84 (explaining that the Legal Realists likely thought that once they succeeded in exposing the extra-doctrinal factors on which judges rely, doctrine would come to "track[] judicial intuitions about what is normatively important on the facts of the case," thereby eliminating the need for a realist critique of existing doctrine).

they analyze particular elements of a cause of action.[80] So instead of foreclosing external considerations, a New Doctrinal account of tort law may actually open windows through which instrumental concerns enter as analytical aids. In other words, the New Doctrinalism is not the antithesis of Legal Realism so much as it is the tool for "translation between social science and law" necessary to fulfill Legal Realism's early progressive promise.[81] This Article takes its cue from the New Doctrinalism, scrutinizing tort doctrine to see what decision boxes actually have to say about normative criteria.[82]

1. Approach

Legal doctrine is traditionally thought to be found in "the language of judicial opinions."[83] In order to produce a comprehensive internal account of tort without reviewing the entire body of reported American tort decisions, this Article scrutinizes select American torts cases representing all three headings of liability from the antebellum to the modern period. Furthermore, to investigate whether those results are consistent with tort doctrine as represented by the entirety of American case law, it also refers to the American Law Institute (ALI)'s *Restatement of Torts*. To restate particular bodies of law, the ALI calls on a "collective of judges, scholars, and practitioners" to advise a selected reporter as he or she translates case law into a compressed summary of prevailing American doctrine.[84]

---

80. *See* Balganesh, *supra* note 17, at 1848-49 (explaining that doctrine can be understood as a structure that reflects normative considerations and assigns corresponding weights to facts in the record).

81. Nourse & Shaffer, *supra* note 73, at 149 (identifying this failure to translate as one reason to move away from traditional Legal Realism); *see also* Leiter, *supra* note 16, at 1983 (noting that Legal Realism was originally designed to bring existing doctrine "down to earth").

82. Like the works of corrective-justice and efficiency theorists, this Article ultimately shifts from an internal to an external point of view. However, it does so consciously, only after asking whether doctrine itself plainly points to an external value that makes duties "genuine." As discussed in Part I and Sections II.A through II.C, this Article finds that doctrine expresses a primary interest in the construction of sociological community. The Article thus moves from an internal understanding of tort to external considerations, but only because doctrine privileges them. This is a subtle but important difference from beginning with an external commitment and working backwards to ask whether tort law can serve it, or beginning with an internal inquiry and lapsing into external considerations when doctrine loses traction.

83. Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 518 (2006).

84. Ellen M. Bublick, *A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts*, 44 WAKE FOREST L. REV. 1335, 1336 (2009) (praising the ALI restatement process

Restatements are not law. They are, however, "supposed to represent the general law on the subject in the United States."[85] Specifically, the ALI director himself described the purpose and value of Restatements as making "clear statements of the rules of the common law today operative in the great majority of [the] States," based on "the mass of case authority and legal literature."[86] To the extent that Restatements achieve this goal, they are obvious (though admittedly imperfect) candidates to serve as compressed textual summaries of actual court opinions.

Specifically, this Article relies primarily on linguistic analysis of tort doctrine as found in the *Restatement (Second)*. Although this document has been partially superseded by the rollout of several *Restatement (Third)* sections, it serves as the best text for a variety of reasons. Most importantly, the *Restatement (Second)* was conceived as a single project and, when it was completed in 1974, it covered the entirety of American tort doctrine. In contrast, the ALI has undertaken the *Restatement (Third)* as a series of discrete projects, each devoted exclusively to a single segment of tort doctrine.[87] The ALI has published the *Restatement (Third) of Products Liability*, the *Restatement (Third) of Liability for Physical and Emotional Harm*, and the *Restatement (Third) of Apportionment of Liability*, with Restatements yet to come for *Intentional Torts to Persons* and *Liability for Economic Harm*. Therefore, for purposes of comparing the relative emphasis on different theories across multiple unrelated tort-based causes of action, the *Restatement (Second)* was a more reliable document than the still-incomplete *Restatement (Third)*. Given that one hallmark of a persuasive torts theory is its relevance across multiple types of liability[88] and causes of action, it is difficult to conduct a comparative linguistic analysis of a document that treats only some causes of action.

In addition, the *Restatement (Third)* was promulgated during a period of increasing politicization of torts generally and the ALI process tangentially. For

for forcing those involved to "wrestle with problems [i.e., inconsistencies in the law] that might otherwise be finessed").

85. Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 443 (2004) (quoting DeLoach v. Alfred, 952 P.2d 320, 322 (Ariz. Ct. App. 1997), *vacated on other grounds*, 960 P.2d 628 (Ariz. 1998)). Some critics question how neutral a summary of tort law is given by the *Restatement* in general and the *Restatement (Second)* in particular. Those criticisms will be addressed in more depth below.

86. William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law*, *in* RESTATEMENT IN THE COURTS 19 (Am. Law Inst., 1945).

87. *See, e.g.*, Michael D. Green, *Flying Trampolines and Falling Bookcases: Understanding the Third Restatement of Torts*, 37 WM. MITCHELL L. REV. 1011, 1012 (2011).

88. *See supra* notes 69-71 and accompanying text.

example, one of the advisers to the *Restatement (Third) of Products Liability* has written that when the project got underway "the processes of the ALI . . . found themselves enmeshed in interest group appeals" and the group's reporters, despite "doing substantial amounts of case research and analysis on their own . . . had become, perforce, brokers of ideas advanced by contending political forces."[89] Similarly, the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* has "endorsed the economic definition of reasonableness."[90]

In contrast, the *Restatement (Second)* was devised over a period of years from 1954 to 1979. As a result, it represents a moment in time when the Legal Realist search for external justifications was fully underway but before the efficiency theorists had occupied the field.[91] Admittedly, some have accused *Restatement (Second)* reporter Prosser of "bootstrapping"—namely, of citing stray cases, typically those that cited his own work, in order to give an impression of settled doctrine.[92] Critics lodged these accusations particularly in the areas of invasion of privacy, intentional infliction of emotional distress, and product liability where Prosser essentially advocated for new headings of tort liability.[93] The *Restatement (Second)*, however, was not obviously driven by any single instrumental theory, as might be said of the *Restatement (Third)*. Consequently, it is a plausible dataset for reaching a descriptive conclusion about the relative

---

89. Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 645-46 (1995). Shapo's criticisms of the process were accompanied by a frank admission that the ALI's substantive changes to the products-liability *Restatement* overemphasized the requirement that plaintiffs show that a "defective" design could have been replaced with a reasonable alternative design, to the exclusion of a negligence-based approach using the Learned Hand risk-utility test. *Id.* at 662-64.

90. Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 329 (2012) (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. LAW INST. 2010)). Notably, some torts scholars had explicitly urged the reporters on the various *Restatement (Third)* projects to transparently adopt such a theoretical anchor. *See, e.g.*, Keith N. Hylton, *The Theory of Tort Doctrine and the* Restatement (Third) of Torts, 54 VAND. L. REV. 1413, 1414 (2001).

91. *See, e.g.*, Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 696-97 (2002) (explaining that both the *Restatement (First)* and *Restatement (Second)* suggested to courts that economic efficiency and corrective justice were both possible dimensions of reasonableness rather than exclusive determinants of it, and suggesting that "the success of the Restatements has resided, in large measure, in their capacity to encompass this variety of common sense values").

92. *See* Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27, 29 (2013).

93. *See* Anita Bernstein, *How To Make a New Tort*, 75 TEX. L. REV. 1539, 1552-54 (1997) (discussing how Prosser influenced the recognition of new causes of action).

emphasis that tort doctrine itself places on various instrumental theories that justify the assignment of interpersonal liability.

Using the *Restatement (Second)* as its primary dataset, the Article undertakes a rudimentary linguistic analysis, determining the comparative number of times that references to efficiency theory, justice theory, and community appear within the document. Social scientists have recognized that texts can be treated in one of two ways: as "discourses to be . . . understood" or as "collections of word data containing information about the position of the texts' authors on predefined policy dimensions."[94] Understanding the discourse represented by the *Restatement* is a difficult task because of its length and because of the subjective commitments that any reader brings to its meaning. (For example, although Landes and Posner in *The Economic Structure of Tort Law* claim to rely on the *Restatement* as a source of doctrine, the book cites it just eight times for a handful of doctrinal rules.[95]) Treating a text as a dataset overcomes both problems. Among other methods for analyzing lengthy texts is to define policy positions a priori and then search for expressions of those positions within a "virgin text" using predetermined words or phrases derived from "reference texts" and understood to capture the selected positions.[96]

Thus, using the rudimentary technique of "locating" within the *Restatement* words identified with various tort theories, one can expect to learn a great deal about the conscious and unconscious attitudes of the ALI drafters and the judges whose opinions they are referencing regarding the relevance of those theories within tort doctrine. This type of analysis is, of course, limited. Any analysis that relies on preselected values and associated words is, by definition, screening out other values and words.[97] And it is possible that searched words

---

94. Michael Laver, Kenneth Benoit & John Garry, *Extracting Policy Positions from Political Texts Using Words as Data*, 97 AM. POL. SCI. REV. 311, 312 (2003).

95. *See* LANDES & POSNER, *supra* note 23, at 42 & n.13, 49 & n.29, 70, 88 & n.4, 111-12 & n.73, 119 & n.91, 126 & n.9, 298 & n.29 (citing *Restatement* provisions on ultrahazardous activities, contributory negligence, standards of care, products liability, nuisance, and defenses to the use of force).

96. Laver et al., *supra* note 94, at 312-13. In order to conduct an a priori content categorization, one generally begins with "theoretical expectations originating outside of the text in question." Adam F. Simon & Michael Xenos, *Dimensional Reduction of Word-Frequency Data as a Substitute for Intersubjective Content Analysis*, 12 POL. ANALYSIS 63, 64 (2004). Admittedly, failing to count words associated with other tort theories (social insurance or consumer protection come to mind) means the analysis will not produce an account that bears on the importance of those theories.

97. An alternate textual analysis method employed by social scientists is to use specialized software that permits the adoption of categories as they emerge from the text itself rather than beginning with predetermined categories. *See* Simon & Xenos, *supra* note 96, at 64. A full-

may not correlate directly with the theoretical candidates being compared; "community" is used more often as a lay concept than is "efficiency," so it is possible that the word count may not be a perfectly robust representation of the policy weight accorded the theory represented by that word. However, the word count is instructive as a rough tool to compare the relative weights assigned various tort theories, and to confirm an understanding of the doctrinal "discourse" represented by the cases themselves.

2. Results

The digital version of the *Restatement (Second)* was searched for references to various tort theories in its text, comments, and illustrations.[98] The results are instructive. They reveal that tort doctrine is not fully or exclusively committed to any of the broad instrumental schools of thought identified by current scholars. "Utility" and "efficiency" are referenced thirty-seven times altogether (thirty-four references to "utility" and three to "efficiency"). Further, "utility" and "efficiency" are referenced in connection with strict liability and negligence, but not in connection with any of the intentional invasions of interests represented by the nominate torts, except for nuisance. For their part, "morality" and "justice" are referenced twenty-seven times altogether (twenty-four references to "morality" and three to "justice").[99] "Morality" and "justice" are referenced in connection with nominate torts such as intentional harms to personality, misrepresentation, defamation, interference with the marriage relation, interference with contract, nuisance, and interference with interests in the support of land, as well as in connection with negligence, but not in connection with strict liability. In other words, neither the efficiency theory of tort law nor the morality theory of tort law is considered doctrinally relevant to all three categories of tort.

This thumbnail analysis of text describing doctrine simply confirms the intractable split between morality and efficiency. But taking the analysis a step further reveals that an underexamined concept—community—is actually better

scale analysis of the *Restatement* using this method would yield enormous information, but it is outside the scope of this Article.

98. For a discussion of the *Restatement (Second)* as a representation of tort doctrine, see *supra* text accompanying notes 84-87, 91-93. Each concept-specific search was structured to return multiple variations of relevant words; for example, "moral," "morals," and "morality."

99. The *Restatement* references "justice" seven additional times, but all of those references arise in the determinations of liability for the use of force in "bringing to justice" persons sought by the political community. Thus, the "justice" referred to is not the private, interpersonal justice of tort but the public justice of criminal law.

represented in the *Restatement*'s compressed textual summary of doctrine than either of the established theoretical concepts. "Community" is alluded to forty-seven times.[100] Notably, references to community appear in virtually every division of the *Restatement*.[101] "Community" is considered legally relevant to negligence; strict liability; intentional torts including harm to persons, reputation, and privacy; misrepresentation; unjustifiable litigation; interference in domestic relations; interference with advantageous economic relations; invasions of interests in land other than by trespass; and prima facie tort. In this respect, it bests both efficiency and morality, neither of which is considered relevant to more than two categories of tort liability. Thus, textual analysis suggests that whether by intuition or by design, the drafters of the *Restatement* have identified community as a conceptual cornerstone of tort.[102]

The significance of this result is underlined by comparing the appearances of "community" in contract and property doctrine as given in their respective Restatements. The *Restatement (Second) of Contracts* mentions "community" just three times, while the *Restatements (Second)* and *(Third) of Property*, which together comprehensively cover property law, mention "community" sixteen times. This makes broad conceptual sense. Contract governs voluntary duties that individual members of the community elect to adopt toward each other, or the carving out of a bilateral relationship separate and apart from general community expectations, explaining why the *Restatement of Contracts* features the fewest references to "community." Property governs the duties of all com-

100. For a list of *Restatement (Second) of Torts* sections that allude to "community," see *infra* Appendix.

101. The only division that includes no reference to "community" is Division 6, "Injurious Falsehood (Including Slander of Title and Trade Libel)."

102. A study of select *Restatement (Third)* projects confirms that community is a major referent. For example, the black letter, comments, and Reporters' Comments of the *Restatement (Third) of Products Liability* refer to "efficiency" and "utility" four times (Introduction and sections 4, 20, and 16); to "morality" and "justice" three times (sections 1, 2, and 19); and to "community" four times (sections 1, 2, 4, and 6). All references to "distributive justice" were stripped from word counts as the phrase represents a concept distinct from the "corrective justice" theory of torts. A similar count is found in the *Restatement (Third) of Liability for Physical and Emotional Harm*, with twenty references to "efficiency" and "utility"; twenty-three references to "morality" and "justice"; and twenty to "community." While these counts do not reflect a role for community as primary as found in the *Restatement (Second) of Torts*, they confirm that it stands on equal footing with other concepts contending for theoretical dominance. Further, as the ALI has yet to produce volumes on other segments of tort law, particularly liability for intentional harms, the dataset from which the count is drawn is incomplete in some significant ways. In addition, the *Restatement (Third)* project has more explicitly embraced efficiency theory, which may account for the diminished role of community.

munity members to a particular property holder and the reciprocal duties of that property holder to various members of the community, explaining why the *Restatement of Property* finds an intermediate number of references to "community." In sum, within private law, the duty "of all to all," or the duty of every member of a relevant community to every other member of that community, is the unique province of tort law.[103] Therefore, references to "community" within tort doctrine not just are frequent and present within each heading of liability, but also serve a systematic purpose.

E. "Community" as the Doctrinal Source of Liability Norms

Tort doctrine as summarized by the *Restatement* uses "community" as a transom through which decision makers can import extralegal norms to determine liability for injuries. Specifically, at least one doctrinal element within all three kinds of tort liability incorporates a degree of indeterminacy.[104] These indeterminate or "open-textured"[105] elements function as "placeholders" into which normative preferences can be inserted.[106] As summarized below, tort doctrine instructs that the normative preferences to be imported into all three classes of liability are those of "the community."

Intentional / Nominate Tort Liability. The intentional torts involve behavior that some would describe as self-evidently wrong, which suggest that they are the least subjective or open textured.[107] But even these torts cannot be reduced to purely positive requirements; rather, most of them have at least one "placeholder" element that is left to be filled in with information about community norms. So even for such "objective" torts as trespass and interference with contract, doctrine directs the decision maker to consult the community for infor-

---

103. *See, e.g.*, Oliver Wendell Holmes, Jr., *The Theory of Torts*, 7 AM. L. REV. 652, 660 (1873) (endorsing the idea that tort law contains "duties of all the world to all the world").

104. According to some New Doctrinalists, all common law concepts operate in a similar fashion, having both a structural analytical meaning which remains consistent over time and an open-textured, normative meaning that can "accommodate changes in . . . values and goals" over time. Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1244 (2015).

105. Zipursky, *supra* note 59, at 475.

106. *E.g.*, Goldberg, *supra* note 25, at 576 (describing the concept of a wrong as a placeholder in corrective-justice theory).

107. *See, e.g.*, Zipursky, *supra* note 59, at 499 (describing various intentional torts as "plainly conceived of as wrongs in a more full-blooded sense"). *But see* Posner, *supra* note 21, at 473 (questioning whether "everyone" can agree that anything is wrong).

mation about interpersonal behavioral expectations.[108] For example, liability for nondisclosure causing pecuniary loss turns in part on "the ethical sense of the community" as to the legitimate advantage one can gain from superior skills or knowledge.[109] Liability for interference with contractual relations depends on "community custom," which, if not clear to the judge, will be allocated to the jury with its "common feel for the state of community mores."[110] Community plays a similar role in intentional torts involving interference with the ownership or use of land. For example, using a public highway that crosses private land is not tortious if "reasonable," with "reasonable[ness] . . . depend[ent] upon the usage of the community."[111] Private nuisance liability is a question of reasonable land uses, determined in accord with the "interests of the community as a whole."[112] Reasonable uses of water are a question of social values determined with reference to community.[113]

Doctrine also points the decision maker to community norms in cases involving intentional assaults on social institutions like marriage. Liability for interference with the marriage relationship will not be assigned if the defendant believed "in view of the social and moral standards generally accepted in the community" that she was promoting the alienated spouse's "happiness."[114] The prima facie tort allows for liability outside of strict tort categories when "culpable," "[un]justifiable" conduct—defined as behavior out of step with the community sense of "right"—demands it.[115] Moreover, the decision maker must consult community norms to measure not just the plaintiff's case, but also the defendant's position: when an intentional tort defendant claims that the plaintiff is not entitled to recovery because he consented to the contested behavior, consent may be found based on community custom, even in the absence of verbal agreement.[116]

Doctrine again leaves liability decisions to community norms in the most "socially constructed" intentional torts—those involving injuries to reputation,

108. "Community" operates to reconcile the Zipursky view of "wrongfulness" and the Posner critique by simultaneously reducing the hyperbole of "everyone" to an identifiable group and providing a basis for understanding what that group would agree is a "wrong."

109. RESTATEMENT (SECOND) OF TORTS § 551 cmt. *l* (AM. LAW. INST. 1977).

110. *Id.* § 767 cmt. *l*.

111. *Id.* § 192 cmt. e.

112. *Id.* § 826 cmt. c.

113. *Id.* § 850A(d) cmt. f.

114. *Id.* § 686 cmt. f.

115. *Id.* § 870 cmt. e.

116. *Id.* § 892 cmt. d.

privacy, and emotional well-being. For example, liability for the tort of outrage turns on whether the actor behaved in a way "utterly intolerable in a civilized community," so that "an average member of the community" would, upon hearing of the behavior, exclaim "[o]utrageous!"[117] Whether profanity used by a public utility to a customer, for example, can ever meet this test depends on whether such speech is "customary in the particular community."[118] Liability for giving unwanted publicity to private life takes into account that the public can have a "legitimate concern" with "news," based on "the mores of the community."[119] So, too, with liability for placing a plaintiff in a false light—the depiction must be "highly offensive," which the *Restatement* notes "applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity."[120]

Negligence Liability. The *Restatement*'s discussion of negligence refers to "community" more than a dozen times, always as a source of liability standards. First, the *Restatement* squarely indicates that the duty a defendant owes a plaintiff is contingent on the community in which the dispute takes place.[121] Further, in its discussion of the standard of conduct for the "reasonable man," the *Restatement* explains that "negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk."[122] It specifies that actors are negligent if they do not know the qualities of humans, animals, things, and forces "in so far as they are matters of common knowledge at the time and in the community."[123] The utility of the actor's conduct is determined with reference to the benefits it provides to the community.[124] A property owner may be deemed liable for injuries to one who has entered onto his land if the entry accords with community custom.[125] The reasonableness of the danger posed by a consumer product is determined based on the "ordinary knowledge common to the community" as to the item's characteristics.[126] The liability of an employer for the acts of his independent con-

117. *Id.* § 46 cmt. d.

118. *Id.* § 48 cmt. c.

119. *Id.* § 652D cmt. g.

120. *Id.* § 652E cmt. c.

121. *Id.* § 328A cmt. c.

122. *Id.* § 283 cmt. c.

123. *Id.* § 290(a).

124. *Id.* § 292 cmt. a.

125. *Id.* § 330 cmt. e.

126. *Id.* § 402A cmt. i.

tractor is said to be contingent on whether the work subcontracted poses risk beyond those "usual in the community."[127]

Strict Liability. In strict liability, where a defendant's activity is tortious if "abnormally dangerous," the *Restatement* considers community norms crucial. It balances the threats associated with the activity against "any usefulness it may have for the community."[128] It also considers whether the activity is one of "common usage," defined to mean one carried on "by many people in the community."[129]

In sum, tort doctrine describes interpersonal duties in open-textured terms and then points to the concrete institution "community" whose norms are to close those gaps in specific cases. To understand how tort law's doctrinal focus on community allows the importation and reconciliation of various instrumental concerns, one must first unpack what the law means when it uses the word.

II. UNPACKING COMMUNITY

"Community" is referenced throughout the law.[130] It is "one of those words—like 'culture,' 'myth,' 'ritual,' 'symbol'—bandied around in ordinary, everyday speech, apparently readily intelligible to speaker and listener," but difficult to deploy with precision.[131] Perhaps for this reason, very little effort has been made to define concretely what "community" means when used in legal doctrine.[132] As a result, the term can connote groups ranging from the or-

127. *Id.* § 416 cmt. d.

128. *Id.* § 520 cmt. f.

129. *Id.* cmt. i.

130. *See, e.g.*, Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1 (1996); Mark Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927 (2002).

131. ANTHONY P. COHEN, THE SYMBOLIC CONSTRUCTION OF COMMUNITY 11 (1985).

132. *See, e.g.*, Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1320–21, 1345 (1994) (describing community as one of the contending "first principles" for developing tort doctrine and suggesting that tort liability should be a function of two intersecting variables: first, whether an actor can be said to have caused an injury; and second, whether "the community's norms," which he does not define concretely, approve of imposing liability on the causing actor). Patrick J. Kelley has written extensively on the theoretical importance of community in determining tort liability norms. *See, e.g.*, Kelley, *supra* note 37. Kelley has identified doctrinal concepts that are designed to import social policy. In determining this policy, judges do not consult their own preferences, but rather "the customs and conventions that people in the community follow in order to safely coordinate their conduct with the conduct of others." *Id.* at 319. Robert Post has also written thoughtfully about the nature and role of community in the liability determinations that most directly implicate communi-

ganized state to ad hoc collectives of like-minded neighbors. Unsurprisingly, its invocation in legal discourse is just as likely to obscure as it is to illuminate. This Part attempts to sharpen the understanding of what tort doctrine means when it refers to community. Legal scholars often use the term "community" to refer to a Lockean polity, thus impliedly referring to a group that is political in nature and design. However, in tort, "community" is better understood as a sociological unit of organization separate and apart from the political unit of organization represented by the state.

Sociological communities are groups of people with shared interests or circumstances who coordinate their relationships and lifestyles privately outside the political processes of the state. In doing so, they rely on the informal development of social norms rather than the political promulgation of state positive law. Furthermore, social scientists have long distinguished between different tiers of sociological community. Community may be constituted in a traditional fashion, among a group of geographically compact and culturally unified people. In addition, community may also be constituted in a modern fashion, among a group of geographically diffuse and culturally heterogeneous people. Traditional communities tend to generate social norms that reflect shared values and morals and are closed to external normative influences. In contrast, modern communities tend to generate social norms that are more efficient be-

---

ty norms: the dignitary torts of defamation and invasion of privacy that require a third-party witness to complete the injury. *See, e.g.*, Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 713 (1986) [hereinafter Post, *Defamation*]; Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989) [hereinafter Post, *Privacy*].

However, despite their identification of "community" in the process of determining liability norms, these scholars have tended to invoke "community" without seriously considering the composition or operation of the organization they are referring to, or what the precise nature of "community" might mean for their vision of tort. Kelley has noted in passing that there may be a disconnect between the "composite" community standard and that of a "subsegment of society," but has failed to expand on the dichotomy between these community norms. *See, e.g.*, Kelley, *supra* note 37, at 381-82. Post, too, has acknowledged the heterogeneous nature of sociological community, but he has treated the reality as a problem rather than an opportunity. Specifically, he has raised the possibility—especially troubling in speech torts—that where the norms of two communities are competing for superiority in a given case, the more populous or culturally powerful community will "effac[e]" the other. *See* Post, *Privacy*, *supra*, at 977 & n.104. In sum, even those who recognize that "community" is relevant tend to treat it as yet another "hedge" within tort doctrine, missing an opportunity to consider its more generative possibilities. A more thorough understanding of the sociological communities that are the site of norm development, as attempted in this Article, would both provide a principled basis for selecting between "composite" and "subsegment" norms and prevent the effacement of small group norms in some cases.

cause their members lack shared morality and are therefore open to a plurality of normative influences.[133]

Importantly, the two kinds of community can coexist within a polity. This means that individuals who belong to more than one community activate morality norms when participating in closed community decision making and activate efficiency norms when participating in open community decision making. The United States originated as a collective of traditional communities, eventually developed an overarching modern community, and currently nests multiple traditional groups subsidiary to the single modern group. This development demonstrates that private interactions may take place either within closed or within open groups, and that expectations about relational duties in those interactions can be expected to toggle between morality norms and utility norms. This, of course, has implications for tort liability, as will be discussed in Part III.

A. Political Community and Public Law

Legal scholars often understand "community" as a unit of political organization in a Lockean sense. Locke recognized that individuals who wished to pursue individual economic ends while securing a civil society "willingly accept[ed] . . . limitations on their liberty and property in return for the benefits they receive[d] 'from the labour, assistance, and society of others in the same Community.'"[134] These limits are imposed through positive regulations passed by a government that represents the community.[135] Further, individuals "invest[] [government] with the outward force needed to compel compliance" with these directives.[136] Lockean "community" is synonymous with a polity that is represented by and has agreed to abide by the commands of some formal government, be it federal, state, or local. In exchange for accepting these limits, political communities expect the state to use its authority to maximize their health, safety, and welfare. So, for example, criminal law promulgated by political communities (which compel compliance to maximize safety) identifies

133. *See infra* notes 183-184 and accompanying text.

134. *See* Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 305 (2014) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 130 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698)).

135. *See, e.g.*, *id.* at 304-05.

136. *Id.* at 306; *see also* JOHN LOCKE, *A Letter Concerning Toleration*, *in* A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 7, 12 (Mark Goldie ed., 2010).

conduct as "impermissible"[137] or "forbidden."[138] And those who engage in behavior the political community has identified as threatening are generally incapacitated in order to neutralize the perceived threat. The commands are derived through a democratic process and can be adapted from time to time to reflect changing public preferences as expressed through popular elections. So when the political community is dissatisfied with the state's provision of these services, it can alter the composition of state bodies in hopes of striking a better exchange. It is the political community that is referred to in public law discourse because public law is, as a rule, adopted by a political process and administered by the state.[139]

B. Sociological Community and Tort

"Community" may also be used to refer to a group of individuals who interact for purposes unrelated to securing state-sponsored benefits. These sociological communities coalesce because the state is incapable of "meet[ing] the psychic demand of individuals because . . . it is too large, too complex, too bureaucratized, and altogether too aloof . . . . The state can enlist popular enthusiasm, can conduct crusades, can mobilize on behalf of great "causes," . . . but as a regular and normal means of meeting human needs . . . it is inadequate."[140]

Instead, sociological communities are the loci of the private, interpersonal relationships of daily life. They encourage the desirable private behavior that may simply be "too costly a project for the state to undertake relative to the benefits," as Posner has observed.[141] Further, they account for cultural variations within political boundaries that are beyond the reach of positive law (at

---

137. Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 723 (2008) (emphasis omitted).

138. Cooter, *supra* note 72, at 1525.

139. For example, the constitutional doctrine addressing the permissibility of government limits on "obscene" speech defers to "contemporary community standards" regarding prurience and indicates the national polity. *See* Miller v. California, 413 U.S. 15, 24, 32-34 (1973). Statutes like the federal Emergency Planning and Community Right-To-Know Act typically equate "local communities" with political subdivisions of the state. *See* 42 U.S.C. § 11001(b) (2012).

140. DENNIS E. POPLIN, COMMUNITIES: A SURVEY OF THEORIES AND METHODS OF RESEARCH 7 (1979) (emphasis omitted) (quoting Robert A. Nisbet, *Moral Values and Community*, 5 INT'L REV. COMMUNITY DEV. 77, 82 (1960)).

141. Richard A. Posner, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 370 (1999).

either the state or federal level).[142] Finally, they have the capacity to channel interpersonal tensions into resolutions that preempt the need for state peacekeeping.[143] Thus, in a number of ways, sociological communities relieve political communities of law-promulgating and law-enforcing obligations and thereby serve an indispensable and unique function. Communities do this important work by identifying and signaling interpersonal expectations or social norms. Unlike the positive laws of political communities, sociological norms are not typically "promulgated" in a single transparent vote sponsored by the state apparatus.[144] Instead, they tend to "result from (and crystallize) the gradual emergence of a consensus" among group members over time.[145] Adjudication of private disputes through common-law courts is one way that communities develop these critical "social rules."[146]

Sociological community may be defined as "an aggregate of people who share a common interest"[147] taking part in a "network of social relations

---

142. *See, e.g.*, MONTESQUIEU, THE SPIRIT OF THE LAWS 9 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) (explaining that the best laws are tailored to the circumstances of those who are expected to be guided by them: "They should be related to the *physical aspect* of the country; to the climate, be it freezing, torrid, or temperate; to the properties of the terrain, its location and extent; to the way of life of the peoples, be they plowmen, hunters, or herdsmen; they should relate to the degree of liberty that the constitution can sustain, to the religion of the inhabitants, their inclinations, their wealth, their number, their commerce, their mores and their manners . . . .").

143. *See, e.g.*, Mathias v. Accor Econ. Lodging, Inc. 347 F.3d 672, 677 (7th Cir. 2003) ("[A]n age-old purpose of the law of torts is to provide a substitute for violent retaliation against wrongful injury . . . .").

144. *See* Posner, *supra* note 141, at 370.

145. *Id.*

146. Adams, *supra* note 85, at 446-47 (quoting ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 3 (1966)). One might argue that allowing for more heterogeneity in the development of common law-liability expectations within a unitary political entity is actually consistent with a liberal democratic theory seeking maximum autonomy of individuals within the structure of the state. *See, e.g.*, Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44 (2010).

147. THOMAS BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 5 (1978). Typically, community is thought to arise "in a particular locality," *id.*, but of course the common interest that serves as the organizing catalyst need not be geographic. It may be professional or, in the age of electronic activity, virtual. For example, tort doctrine has been made available to instantiate the values of professional communities (for example, in linking medical malpractice liability to the standard of care of similarly situated physicians) and could readily be used to instantiate the values of online communities (for example, to determine whether members of a social media platform would consider particular language to have defamatory implications). Although this Article's discussion is limited to sociological communities that arise geographically, its attempt to address the difficulties that arise when members of insular communities are forced into an interpersonal relationship with nonmembers is an unavoid-

marked by mutuality."[148] Within community, as sociologists describe it, group members "participate together in discussion and decisionmaking."[149] Two characteristics essential to any group that is to be deemed a sociological community are a sense of "solidarity" and a sense of "significance" among members.[150] "Solidarity" can be described as "social unity, togetherness, social cohesion or a sense of belonging. It encompasses all those sentiments which draw people together (sympathy, courtesy, gratitude, trust and so on) . . . ."[151] In short, "solidarity" is achieved by the observance of whatever norms are established to govern relationships among members. "Significance" can be described as the sensation that "each person feels he has a role to play, his own function to fulfill in the reciprocal exchanges of the social scene."[152] Notably, sociological studies have observed that in order to identify with a community, members must perceive that they have influence over community norms; at the same time, the solidarity that marks communities depends on the ability of the group to influence its members.[153] The cohesion evident in communities is not

able issue in the non-geographic community context as well. The most pointed and current example of this configuration arises in the online speech context, where a particular virtual community may generate speech based on a common norm that targets a nonmember whose different norms render the speech injurious. *See, e.g.*, Chris Suellentrop, *Can Video Games Survive?: The Disheartening GamerGate Campaign*, N.Y. TIMES (Oct. 25, 2014), http://www.nytimes.com/2014/10/26/opinion/sunday/the-disheartening-gamergate-campaign.html [http://perma.cc/3HYH-C5R4] (describing the threatening remarks that members of online gaming communities have made about female game developers who work outside of those communities). The same dynamic is on display when the medical community coalesces around a professional standard of care. Although addressing the dissonance of non-geographic communities within tort law is not the focus of this Article, some of the proposals herein might effectively map onto disputes that arise within and among those communities.

148. BENDER, *supra* note 147, at 7. As will be discussed in detail below, *see infra* Section II.D.3, a single individual can belong to more than one community depending on the capacity in which she is acting.

149. ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 333 (1985). However, sociologists who have studied "community" agree that it defies easy definition. *See, e.g.*, David W. McMillan & David M. Chavis, *Sense of Community: A Definition and Theory*, 14 J. COMMUNITY PSYCHOL. 6, 6-9 (1986). In fact, one 1955 study identified ninety-four different definitions of the word "community" used in various contexts. George A. Hillery, Jr., *Definitions of Community: Areas of Agreement*, 20 RURAL SOC. 111 (1955).

150. *See* David B. Clark, *The Concept of Community: A Re-examination*, 21 SOC. REV. 397, 404 (1973).

151. *Id.*

152. *Id.* (quoting R.M. MACIVER & C.H. PAGE, SOCIETY 293 (1961)).

153. McMillan & Chavis, *supra* note 149, at 11.

solely a product of group pressure on individuals, but also of opportunities for individuals to exert pressure on the group.[154]

Communities construct themselves by "mak[ing] members . . . . [They] create a sense of belonging among their inhabitants that draws people in, binds them together, and fosters a collective identity."[155] This "solidarity" is cultivated in large part by maintaining boundaries that distinguish between belonging and isolation, thereby reinforcing the cohesion of those within the boundary.[156] Group members generate "shared expectations or rules, some tacit, some explicit, about how one ought to act in particular contexts," otherwise known as social norms.[157] Social norms serve multiple purposes: for example, they control interpersonal behavior without extracting the costs associated with private violence or the invocation of state power.[158] Furthermore, they reinforce the "sense of mutuality" among community members.[159] Social norms are shared by a plurality of community members and are "sustained by [their] approval and disapproval."[160]

One leading mechanism for creating community boundaries and cultivating social norms is to identify certain acts as "deviant."[161] When deviants "venture out to the edges of the group" they are confronted by community members concerned with "the cultural integrity" of the group, and the group at large participates in that confrontation to inform one another about where they wish the group's boundaries to be placed.[162] Confrontations over boundary placement are essential and welcomed because "[e]ach time the community moves to censure some act of deviation . . . and convenes a formal ceremony to deal with the responsible offender, it sharpens the authority of the violated norm and restates where the boundaries of the group are located."[163] Notably,

---

154. *See id.*

155. NAN GOODMAN, BANISHED: COMMON LAW AND THE RHETORIC OF SOCIAL EXCLUSION IN EARLY NEW ENGLAND 1 (2012).

156. See, for example, *id.* at 2, where Goodman claims that the very act of excluding some people reinforces the cohesion of those who remain within the community boundary (citing CHARLES TILLY, IDENTITIES, BOUNDARIES, AND SOCIAL TIES 174 (2005)).

157. NICK CROSSLEY, KEY CONCEPTS IN CRITICAL SOCIAL THEORY 8 (2005).

158. *See* Norbert L. Kerr, *Norms in Social Dilemmas*, *in* SOCIAL DILEMMAS: PERSPECTIVES ON INDIVIDUALS AND GROUPS 31, 33 (David A. Schroeder ed., 1995).

159. KAI T. ERIKSON, WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE 4 (1966).

160. JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER 103 (1989).

161. ERIKSON, *supra* note 159, at 4.

162. *Id.* at 11.

163. *Id.* at 13. Kelley has observed that when people "opt out of . . . general social constraints and individually tailor their particular interactions by mutual consent . . . [t]he community ben-

however, the definition of "deviance" is endogenous to the group; it "is not a property *inherent in* any particular kind of behavior; it is a property *conferred upon* that behavior by the people who come into direct or indirect contact with it."[164]

Importantly, deviance is "a relevant figure in the community's overall division of labor."[165] It formalizes a "degree of diversity . . . to survey [the community's] potential [and] measure its capacity"[166] to cope with evolving circumstances. That is, the community *needs* confrontations over contested behavior to decide what it wishes to label deviant. Consequently, when community circumstances change, responding to deviants gives the opportunity to redefine the significance of behavior, thus adapting boundaries to keep pace with current community needs. Further, the opportunity to participate in formal ceremonies to deal with offenders and to confer the status of deviance or compliance on contested behavior invests group members with the influence over norms that is essential to community maintenance.[167]

Tort law replicates the processes that sociological communities use to cultivate, reshape, and signal social norms in areas where the political community at large has expressed no specific outcome preference.[168] A defendant engages in

efits . . . [because] avenues for experimentation and change are opened up; and the common good is promoted because members of the community are free to adopt specially-tailored patterns of interaction to achieve their perceived goods." Kelley, *supra* note 37, at 333-34. Or, as George Bernard Shaw put it: "The reasonable man adapts himself to the world: the unreasonable one persists in trying to adapt the world to himself. Therefore all progress depends on the unreasonable man." GEORGE BERNARD SHAW, MAN AND SUPERMAN 238 (Cambridge Univ. Press 1915) (1903).

164. ERIKSON, *supra* note 159, at 6.

165. *Id.* at 19.

166. *Id.*

167. *See* McMillan & Chavis, *supra* note 149, at 11.

168. This Article describes this process as one of "community construction," specifically of identifying, applying, and signaling norms in an individual verdict and then allowing the response to that verdict outside of the legal mechanism itself to add to the normative information that will be identified and applied in subsequent, related cases. Although describing a concept as "socially constructed" is often a political wedge to question the legitimacy of the concept, *see* Paul A. Boghossian, *What Is Social Construction?*, TIMES LITERARY SUPPLEMENT (Feb. 23, 2001), http://www.the-tls.co.uk/articles/private/what-is-social-construction [http://perma.cc/DP9X-4PVF], I do not intend the word to be used in that sense here, but rather as a shorthand for the operational role of tort in the sociological community. Of course, *any* community at any point in time is dependent on contingencies and thus "constructed" in the more political sense of the word. The fact that tort specifically provides liability "placeholders" prevents it from privileging any contingent construction that is out of keeping with evolving community needs.

some type of behavior that need not be *inherently* deviant, but regarding which some plaintiff—claiming an injury based on his understanding of the integrity assigned to him by the community—confronts him. Jurors are drawn from the community to participate in the confrontation and to either approve or disapprove of the defendant's behavior. Jury verdicts confer upon the defendant's behavior the status of deviancy or compliance.[169] Finally, individualized ver-

---

Further, although tort law in specific cases provides justice as between individuals, over time its function is to allow for community construction. That is, a particular verdict not only resolves a dispute between plaintiff and defendant, but also drives a dialectic among those outside the dispute. To use an analogy suggested (though not endorsed) by John Goldberg, tort law can be likened to a bulletin board, with individual verdicts acting as bills posted thereon, which informs viewers of their peers' intuitions about interpersonal behavioral obligations. *Cf.* John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1348 (1990) (explaining that Judge Cardozo thought judges "serve[d] their communities by helping the citizenry elaborate, order, and examine prevalent moral intuitions, even as those intuitions [were] in dispute and in a state of flux").

169. Scholars have acknowledged the unique competence of the jury to infuse the law with "the community climate of values." Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 436 n.128 (1999) (quoting Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 483 (1956)). The jury is also a vehicle for the importation of "popular culture" into legal processes. *Id.* (citing Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 685-87 (1949)). In early American history, the jury was given significant latitude in adjudicating cases because it was seen as "embodying the common sense of ordinary members of the community." Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 445 (1996). Jury instructions were vague, broad, or nonexistent. *Id.* at 441-42. Directed verdicts were rare. *Id.* at 443-44. Perhaps most important, American juries were often authorized—by state constitution, by statute, or by judicial decision—to resolve both factual issues and legal issues. *Id.* at 446-48. It is no surprise that as tort theory veered toward instrumentalism, procedural changes enhanced the judicial role. "Between 1850 and 1931, courts in at least eleven states rejected the notion that juries had the power to pass on issues of law as well as issues of fact." *Id.* at 451. Despite this evolution, juries still hold considerable power to weigh in on whether contested behavior is normatively acceptable. For example, juries are generally instructed that negligence results when behavior diverges from that of a "reasonable person" in the situation, inviting them to announce what the community expects from its members. Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633, 649-651 (2003).

If, as a descriptive matter, tort law is best understood as a device for constructing community then, as a prescriptive matter, refining the procedure that governs the jury's role might improve the operation of tort. *See, e.g.*, *infra* notes 345-349 and accompanying text. Of course, it is entirely possible that a jury will signal "incorrectly" in a given case, so that its apprehension of the community norm provokes hostility when announced. It is not necessarily an indication that the jury has failed in its community-constructing job just because the flawed signal demands a corrective response, which can take the form of public dialogue (for instance, news coverage and public response thereto) or a contrary jury verdict in a sub-

dicts are arrived at and announced publicly, messaging to those similarly situated how the community expects them to act in similar circumstances.[170] Importantly, tort—unlike criminal law promulgated by the political community—stops short of identifying behavior as impermissible. And unlike the criminal law, it does not physically remove even liable defendants from the community. Instead, it attaches a price to the defendant's behavior but permits him to remain at large. He can repeat his act if he feels circumstances warrant it, and is willing to forfeit a money payment if community members disagree with him in an eventual lawsuit. This flexible response of private law to sociological deviancy incentivizes mavericks to "venture out to the edges of the group," thereby raising opportunities to reconsider social norms over time.[171] Allowing private contestations to send normative signals to the community means that tort law can be more agile than the cumbersome machinery of the state in keeping pace with change, be it moral, economic, or technological.

Robert Post has observed this precise dynamic as both a function and a consequence of defamation doctrine.[172] One dimension of the right to reputation enshrined in defamation law is a right to dignity. Because dignity is, in large part, contingent on the regard of third parties for the plaintiff, a plaintiff suing for defamation is essentially polling the community about their relative tolerance for each party's behavior. That is, did the defendant break community codes by spreading a falsehood to community members that would cause them to exile the plaintiff, or did the plaintiff break community codes with behavior that justified his exile? Regardless of the outcome, the verdict "will demarcate the boundaries of community membership."[173] While the process is especially prominent in defamation because the injury by definition requires a third-party

sequent and similar case. In fact, such a signal allows the community or legislature to collectively revise their norms. Of course, appellate judges can also override jury verdicts they perceive as clearly "incorrect." Although judicial review may "fix" a specific verdict, it might simultaneously diminish the community-constructing potential of tort because it short-circuits the opportunity and responsibility of the community to weigh in on the appropriate norm. *See, e.g.*, *supra* note 168 (referring to Goldberg's description of jury verdicts as posts on a community "bulletin board").

170. *See, e.g.*, Scott Hershovitz, *Tort as a Substitute for Revenge*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 86, 96-98 (J. Oberdiek ed., 2014) (explaining that one purpose of tort law is to enable an injured plaintiff to send a message to society at large that the defendant acted wrongfully and must recognize the plaintiff's relational standing by compensating him for the wrong).

171. ERIKSON, *supra* note 159, at 11.

172. *See* Post, *Defamation*, *supra* note 132, at 713.

173. *Id.*

community witness to the tortious behavior, the same essential pattern is on display throughout tort.

Similarly, tort for centuries recognized causes of action for "alienation of affection," "seduction," and the like.[174] Over time, most American communities grew more tolerant of infidelity and similar behavior. If this behavior had been relegated solely to criminal law treatment, legislators facing re-election might have been reluctant to formally condone it by changing the criminal law. But because it was treated primarily through tort, juries could, on an individual and incremental basis, simply find for defendants, thus accreting to a new social norm that lifted the taboo on extramarital relationships. Once the stigma on the behavior had faded, many legislatures acceded to the new norm by disabling these common law causes of action.[175] However, so-called "heartbalm" causes of action remain viable in North Carolina, where the sociological community continues to prefer a norm against this behavior and the political community has remained inert. And the process may work in the inverse: political communities may grow disenchanted with an outdated social norm that has become entrenched as a matter of tort doctrine assigned to the court (and thus resistant to community input), and they may respond by promulgating a public law that takes the matter out of the common-law realm. Prime examples include statutory abrogations of the fellow servant rule[176] and the adoption of so-called guest statutes[177] to govern liability of car drivers to injured passengers.[178]

C. Toggling Between Different Sociological Communities

Tort law is a formal device by which the state provides a procedural apparatus for sociological communities to construct themselves by identifying and communicating interpersonal behavioral norms. As a result, the operation of tort law is best understood by considering the various types of configurations sociological communities can take. Sociologists have identified two distinct types of community. "Traditional" groups are marked by familiar, interpersonal

---

174. *See, e.g.*, Jean M. Cary & Sharon Scudder, *Breaking Up Is Hard To Do: North Carolina Refuses To End Its Relationship with Heart Balm Torts*, 4 ELON L. REV. 1, 12-14 & n.86 (2012).

175. *See id.* at 14 & nn.82-86 (detailing the legislative and judicial dismantling of these torts).

176. *See, e.g.*, Ala. Great S. R.R. Co. v. Carroll, 11 So. 803, 805 (Ala. 1892).

177. *See, e.g.*, Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969).

178. It is no accident that classic choice-of-law cases often feature disputes over emerging economic or technological realities that two states are adapting to at different speeds. Note, *Bundled Systems and Better Law*, 129 HARV. L. REV. 544, 552 (2015).

relationships based on shared values. "Modern" groups are marked by impersonal relationships based on rational consensus.[179]

Ferdinand Tönnies denoted the traditional community as Gemeinschaft and the modern community as Gesellschaft.[180] Emile Durkheim suggested a similar dichotomy between community types in *The Division of Labor in Society*. He observed that "undifferentiated" communities—where each member self-sufficiently took care of most food, clothing, and shelter needs on his own—thwarted division of labor and specialization. Members were forced into "multiplex" relationships that spanned numerous endeavors such as trade, farming, worship, and family.[181] In contrast, "differentiated" communities were premised on the development of specialized means of economic support, the development of impersonal, transaction-specific relationships, and the latitude to hold pluralistic points of view.[182] Traditional communities premised on sameness and multiplex relationships typically share religious or moral orientations. They coordinate private relationships through social norms derived from a shared intersubjective notion of the good.[183] In contrast, modern communities are premised on specialization of labor and relationships, and on a plurality of cultural and value orientations. As a result, modern communities coordinate through "rational" or efficient behavioral norms.[184]

Interestingly, because sociologists began to theorize "community" during the Industrial Revolution, the rapid changes of the period influenced the way that they categorized different groups. The structural characteristics that

---

179. *See, e.g.*, FERDINAND TÖNNIES, ON GEMEINSCHAFT AND GESELLSCHAFT (Charles Loomis trans., 1957), *reprinted in* MARCELLO TRUZZI, SOCIOLOGY: THE CLASSIC STATEMENTS 145-54 (1971).

180. *Id.*

181. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 70-110 (George Simpson trans., 1933).

182. *See id.* at 111-33.

183. *See, e.g.*, Jonathan Haidt & Jesse Graham, *Planet of the Durkheimians: Where Community, Authority, and Sacredness Are Foundations of Morality*, *in* JOHN T. JOST ET AL., SOCIAL AND PSYCHOLOGICAL BASES OF IDEOLOGY AND SYSTEM JUSTIFICATION 371 (2009) (explaining that a key component of closed Gemeinschaft communities was "shared mind or belief"); *see also* C.J. Calhoun, *Community: Toward a Variable Conceptualization for Comparative Research*, 5 SOC. HIST. 105, 106 (1980) (explaining that early sociologists understood Gemeinschaft-type communities to be "moral in that people were . . . better integrated into webs of social commitments, rules and relations," even if they were not paragons as individuals).

184. *See* Max Weber, *Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 127 (H. Gerth & C. Wright Mills eds., 1948). Legal anthropologist Henry Sumner Maine referred to closed communities as societies of "status," which he contrasted with modern communities known as societies of "contract." HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 151 (1861).

seemed to be determinative of Gemeinschaft communities—geographic insularity, population density, the built environment—may have been overemphasized because of "connotations specific to [the] historical context."[185] Many sociologists now agree that communities are a function of substantive factors: dense social networks, small group size, a perceived similarity of life experience, and "common beliefs in an idea system, a moral order, an institution, or a group."[186] Common sense suggests that some of these substantive characteristics are more likely to flourish in tandem with structural factors, such as geographic insularity and economic simplicity. And typically, these insular and simple communities precede their more complex successors. So the labels "traditional" and "modern" have been affixed to them, although the animating difference between them seems to be how they integrate inconsistent values and points of view. In other words, a Gemeinschaft organization is comparatively closed to external influences that could disrupt its shared values, while a Gesellschaft organization is open to the inputs and to the fluidity of group values.[187] This distinction between "closed" and "open" communities has been documented in anthropological literature and captures both the structural and substantive characteristics of the two types of community that sociologists have identified.[188] Consequently, this Article will refer primarily to "closed" and "open" communities to signify traditional, local groups and modern, national groups, respectively.

Although Durkheim, Tönnies, and others recognized that a community could organize in two distinct fashions, they did not see the two types of sociological configurations as mutually exclusive. Rather, they were merely "contrasted tendencies within society at any one time."[189] Many sociologists agree that closed communities may be "nested" within open communities. So while

185. Calhoun, *supra* note 183, at 105; *see also* Stephen Vaisey, *Structure, Culture, and Community: The Search for Belonging in 50 Urban Communities*, 72 AM. SOC. REV. 851, 853-54 (2007). More important than structural factors, Vaisey suggests, are substantive dynamics, namely "ideas, culture, and identity." Vaisey, *supra*, at 54.

186. Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, 19 SOC. THEORY 1, 3-4 (2001).

187. *See, e.g.*, Vaisey, *supra* note 185, at 854 (citing Amitai Etzioni, *Is Bowling Together Sociologically Lite?*, 30 CONTEMP. SOC. 223, 223-24 (2001)).

188. *See, e.g.*, Dick A. Papousek, *The Openness of a Closed Community*, 1 IBERO-AMERIKANISCHES ARCHIV 245, 246 (1975) (positing that open and closed communities exist on a spectrum and can be best measured in terms of their "external relations").

189. COHEN, *supra* note 131, at 24. Anthony Cohen explains that the ascendance of sociologists participating in the "Chicago School" used Durkheim's distinction to further their agenda of separating urban and rural societies and thus described the two types of community as mutually exclusive rather than complementary.

the superficial homogeneity within an open community may lead to the assumption that closed communities have become "redundant and anachronistic," national orthodoxy may actually "mask[] real and significant differences at a deeper level."[190] Indeed, it may become more important for closed communities to reassert their coherence in the face of this external pressure.[191] Further, because closed and open communities can coexist, sociologists have explained that both kinds of sociological norms—moral and efficient—must be freely available in cases of interpersonal conflict in order to incentivize appropriate behavior within different kinds of community.[192]

---

190. *Id.* at 44.

191. *Id.*

192. Cohen explains that, according to Weber, "[e]fficiency, the 'ethic of ultimate ends', must be tempered by, and married to, compassion, 'an ethic of responsibility,'" and that these two ethics "are not absolute contrasts but rather supplements." *Id.* at 24 (quoting Weber, *supra* note 184, at 127). The sociological observation of a "situational toggle" used to flip between different normative orientations is congruent with recent neuroethical findings. Scientists have tested subjects using multiple variations of the so-called Trolley Problem, a well-known device for exploring the spectrum of neuroethical responses to human conflict. *See, e.g.*, Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985). The basic premise of the problem is that an out-of-control trolley is on a collision course to hit five workmen; if the trolley continues on its track, the five men will be killed. Researchers have found that if subjects are asked whether they would push onto the track a person standing next to them on a bridge in order to halt the trolley and save five lives (at the expense of one), most will decline. JOSHUA GREENE, MORAL TRIBES 120-22 (2013). However, when asked if they would flip a switch to divert the train down a sidetrack holding a single person, most answer yes even though the net result is the same: one life taken and five lives spared. *Id*. Finally, when bilingual subjects are asked whether they would push someone onto the tracks, they are more likely to answer "yes" when they read the problem in their second language than when they read the problem in their native language. Albert Costa et al., *Your Morals Depend on Language*, 9 PLOS ONE e94842 (2014). In short, when the decision maker has a more proximate relationship to the decision, he is likely to invoke morality norms, but as he grows remote from the decision, he toggles to utility norms.

Neuropsychologists have explained these responses as a result of brain function. The dorsal lateral prefrontal cortex of the brain handles cognitive control, while the ventromedial prefrontal cortex of the brain enables emotional response. Studies using MRI scanning have shown that when the Trolley Problem is presented as a "personal" dilemma, the ventromedial cortex shows increased activity and the individual experiences an emotional response—namely, that pushing an individual to his death is morally wrong. Joshua Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105 (2001). But when the Trolley Problem is presented as an "impersonal" dilemma, the dorsal lateral cortex activity spikes and yields a less emotional and more purely cognitive response—forfeiting one life to save five is an efficient use of the resources at hand. *Id.* In a similar experiment comparing the response of patients with frontotemporal dementia—a condition impairing the ventromedial cortex—against those of Alzheimer's patients and healthy patients, only twenty percent of Alzheimer's and healthy patients would physically push the single man to

D. Sociological Community in the United States

The development of sociological community in the United States has followed the classic path described by sociologists. In the colonial and antebellum period, the United States was a collective of traditional, closed communities. By the close of the nineteenth century, economic and technological changes spurred the development of an overarching open community. By the twentieth century, it became clear that closed communities would continue to exist, nested within the open community. Many Americans belong simultaneously to the national, open community and to one or more closed communities.

1. Early American Community

In the colonial and antebellum period, multiple traditional communities developed in the United States. Their economies were largely agricultural; they were highly insular, with little interaction outside their immediate boundaries; and they tended to be organized around a shared purpose that dictated a cohesive set of values, whether that purpose was religion or enterprise.

Most of the colonial economies were "overwhelmingly agricultural."[193] As a result, concentrated urban settings were scarce, land ownership was a crucial component of community membership and movement away from inherited land was uncommon. These towns were "self-consciously" founded as communities, with "town fathers" distributing land only to those who had

save the five, while sixty percent of frontotemporal dementia patients would do so. Mario F. Mendez et al., *An Investigation of Moral Judgement in Frontotemporal Dementia*, 18 COGNITIVE & BEHAV. NEUROLOGY 193 (2005).

Notably, studies suggest that "utilitarian judgments made in the face of competing emotional responses require the application of (additional) cognitive control," because "[o]ne has to apply a decision rule in the face of a competing impulse." GREENE, *supra*, at 127. Not surprisingly, "people who generally favor effortful thinking over intuitive thinking are more likely to make utilitarian judgments, and . . . utilitarian judgment is associated with better cognitive control abilities." *Id.* at 128. Jonathan Haidt and coauthors have documented that individuals who are identified as political liberals or libertarians are more comfortable with moral trade-offs like those highlighted in the Trolley Problem, while political conservatives "are more often drawn to deontological moral systems in which one should not break moral rules even when the consequences would, overall, be positive." Jesse Graham, Jonathan Haidt & Brian A. Nosek, *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. PERSONALITY & SOC. PSYCHOL. 1029, 1037 (2009).

193. WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 1 (1975).

"demonstrat[ed] the requisite fitness of character and belief," while preventing the sale of land to outsiders.[194]

This structure resulted in great insularity. Social and economic relationships were largely confined within the community.[195] Residents tended to operate according to existing status hierarchies[196] and because of limited communication channels were largely unaware of how life unfolded in other groups.[197] Residents rarely sought to alter their lots in life by moving, preferring instead to work within existing structures and boundaries.[198]

Finally, individual communities tended to share cohesive sets of values unique to their groups. Interpersonal friction was managed largely by reliance on "local customs and standards of neighborliness," which were often unwritten and therefore not understood or followed by outsiders.[199] For example, Massachusetts merchants were expected to charge prices considered "just" by communal standards,[200] whereas the prevailing ethic in Virginia emphasized seeking individual commercial advantage.[201] In sum, American "communities" in the antebellum period were organized as closed groups; there was a great homogeneity of values *within* each community but a great heterogeneity of values *between* them.

2. Modern American Community

Not long after the Revolution, the United States entered a period of profound modernization. The economy shifted its emphasis from agriculture to commerce, the population began to migrate and reduce the insularity of local communities, and as select hubs grew more heterogeneous and communications technology improved, the paradigm of unified community values weakened.

---

194. Bruce H. Mann, *Rationality, Legal Change, and Community in Connecticut, 1690-1760*, 14 LAW & SOC'Y REV. 187, 208-09 (1980).

195. Bruce H. Mann, *Law, Legalism, and Community Before the American Revolution*, 84 MICH. L. REV. 1415, 1436 (1986).

196. RICHARD D. BROWN, MODERNIZATION: THE TRANSFORMATION OF AMERICAN LIFE 1600-1865, at 55 (1976).

197. *Id.* at 53.

198. Mann, *supra* note 194, at 193.

199. DAVID THOMAS KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692, AT 68 (1979).

200. BROWN, *supra* note 196, at 37-38.

201. *Id.* at 37, 43-44.

Ten new states joined the union between 1790 and 1820, easing access to vast fertile expanses of land.[202] Farms in the newly opened Western region sparked the demand for transportation such as railroads and canals to take goods to market, which in turn led to "market farming" and price competition.[203] New Englanders began to shift from agriculture to manufacturing.[204] The advent of the assembly line changed production of goods such as textiles, clocks, nuts, bolts, typewriters and sewing machines. As a result, the American economy grew increasingly specialized and a mass market for consumer goods developed.[205]

Means of communication also evolved rapidly. Newspapers multiplied, from seventeen operating in the colonies in 1760 to ninety-two in 1790.[206] These newspapers tended to focus on state, national, and international news, with local news still transmitted through "traditional, face-to-face conversation."[207] Telegraphs were introduced in the mid-nineteenth century, making possible instantaneous communications across large distances between people in markedly different circumstances.[208]

By the 1830s, "new social patterns" in the country reflected the emergence of a modern American personality, marked by social, economic, and political ambition and a declining deference to traditional authority structures.[209] This new American personality translated into a new tier of American community, one whose shared practices and relationships spanned geographic, religious, and cultural boundaries.[210]

---

202. *Id.* at 106-07.

203. *Id.* at 124.

204. *Id.* at 127.

205. *Id.* at 136-37.

206. *Id.* at 109.

207. *Id.*

208. John Robinson Thomas, *Legal Responses to Commercial Transactions Employing Novel Communications Media*, 90 MICH. L. REV. 1145, 1145 (1992).

209. BROWN, *supra* note 196, at 95.

210. "In the middle decades of the century, from the 1820's through the 1860's, [Americans'] turn to supralocal, and especially national, involvement was to accelerate sharply. Economic changes gave a new relevance to thinking on a national scale. By means of the revolution in transportation the integration of the United States economy across regional lines was substantially completed during these years. A national structure of production, marketing, and consumption became dominant. This modernization of the economic structure promoted a more complete realization of the modern personality among Americans." *Id.* at 123.

3. Nested American Community

By early 1861, "all geographic sections [of the country] shared a wide variety of common attitudes and interests."[211] "[C]ommon American values and patterns of behavior were emerging."[212] At the same time, however, traditional communities with a range of insular cultural preferences continued to exist.[213]

Unsurprisingly, the coexistence of an open national community with closed local communities was most pronounced in the South. While the nationalization of the economy, transportation, and community did reach the region, it did not penetrate as fully as in the North. This was a product of both geography and culture. Because Southern products were not high-volume goods, the region did not construct as many railroads and thus did not fully integrate within the national economic network.[214]

Further, the kinds of population-diverse and communication-rich urban centers that typically sprung up at commercial ports were less common in the South. Consequently, "[t]he mass of the Southern white population remained comparatively ignorant and isolated from knowledge of the world outside their own county."[215] Southern communities were more apt to be organized traditionally, with clearly defined and entrenched status roles.[216]

In short, while an open community was clearly ascendant, closed communities persisted, relying on their own intersubjective notions of "the good life."[217] The national ethos tended to value productivity through rational calculation, and many local communities followed suit. But some communities retained a "subculture" premised on distinct values, including the more traditional idea that privileged members of society were entitled to honor and were

---

211. *Id.* at 148.

212. *Id.* at 149.

213. *Id.* at 147. Of course, one malignant example of this nesting was the persistence of slavery in local enclaves. The "sectional political crisis" that led to the Civil War has been attributed in part to increasing sociological modernization and the move towards an anti-slaveholding culture in the North. *Id.* at 123; *see id.* at 170-73. The abolition of slavery and the subsequent passage of statutes to protect civil rights are examples of the political community exercising its authority to adopt positive law that supersedes sociological community practices.

214. *Id.* at 143.

215. *Id.* at 141-42.

216. *See id.* at 144 (indicating that low literacy rates in the South "supported deferential behavior" and that farmers "often relied on merchants to keep track of their credit").

217. *Id.* at 146-47.

bound to extend protection to those who depended on them.[218] In short, community in the United States was, by the twentieth century, a two-tier proposition.

To summarize, when individuals conduct private interpersonal relationships where the state has no direct stake, their behavior is shaped in large part by social norms. These norms tend to be developed over time by sociological communities. But sociological communities can take either an open or closed configuration, and the resultant norms tend to be either efficient or moral, respectively. Sociology suggests that individuals who may belong to more than one community employ a situational toggle to choose between morality and utility norms when making interpersonal behavioral choices, and neuroethicists have confirmed this intuition. In the United States, which comprises multiple traditional communities nested within a single modern community, individuals participate in both types of community and adjust their behavior accordingly to comply with relevant norms.

III. THE DOCTRINAL SIGNIFICANCE OF SOCIOLOGICAL COMMUNITY

Tort law is one mechanism by which communities survey their membership for consensus on emerging issues and crystallize those views by announcing a verdict. It invites members of the community sitting as jurors to assign liability based on their normative assessment of whether a duty was owed and was delivered, and to signal that norm to other group members. As similar verdicts accrete or diverge over time,[219] the common law tort system establishes just the kind of sociological dialectic that communities depend on to retain their consensus about interpersonal behavioral expectations.[220]

---

218. *Id.* at 143-44, 147, 186. Brown observes that "[o]nce a national representative government existed and geographic mobility was such a prominent element of common experience, the question of identity assumed new urgency for groups and individuals . . . . Some could be satisfied with political boundaries, but there were always many who looked to religious and ethnic ties or to common features of class, life style, and attitudes." *Id.* at 120.

219. *See* Balganesh & Parchomovsky, *supra* note 104, at 1267 (explaining that the common law is able to adapt to social needs because judges "restat[e] the 'correct' version of the common law [to achieve incremental changes] rather than . . . actively altering the law to create altogether new rules").

220. *See* CROSSLEY, *supra* note 157, at 322 (explaining the sociological theory that socio-cultural systems are "constituted through 'communicative action[,]'" by which members generally abide by shared social norms until they reach a point where they "turn back upon their habits and assumptions to subject them to a communicatively rational interrogation and evaluation [otherwise known as discourse]," through which actors attempt to persuade other community members to shift to a different norm).

This Part describes how tort doctrine allows the construction of both closed and open communities. First, it examines American cases from the antebellum to the modern period to reveal a body of law that prizes normative flexibility. Early cases rely on community morality to supply normative information about interpersonal duties, while later cases move fluidly between local morality and national utility to reflect the configuration of the community where the disputed injury arose. As a descriptive matter, tort doctrine deployed in individual cases has implicitly encouraged decision makers to toggle between the norms of closed and open communities from case to case to reflect the group within which the injury was inflicted.

The *Restatement* features the same consistent deference to "community" as the source of normative expectations about interpersonal behavior. By conceptualizing community as sociological, rather than political, the *Restatement* invites decision makers to draw information from whichever tier of community is the site of the dispute. 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).

Unfortunately, by obscuring this process of normative toggling, doctrine has perpetuated the theoretical confusion about tort law's purpose. Consequently, this Part concludes by suggesting that tort doctrine should highlight its capacity to toggle between community norms. Embracing the normative toggle offered by doctrine would resolve the intramural debate over tort law's purpose by recognizing the legitimacy of both moral justice and economic efficiency as tools of constructing different communities.

A. Community in Case Law

Cases decided by American courts from the colonial period through the modern period reveal that community has consistently been the source of information about interpersonal liability norms. Without explicitly recognizing or operationalizing the process, the cases reflect a commitment to sociological community and an understanding that it can exist in two distinct configurations. While the early cases reference community and default to an application of local norms, the modern cases reference community and then intuitively reach for either local norms or national norms depending on the scope of the injury involved.

1. The Colonial and Antebellum Period

Colonial and antebellum communities tended to be agricultural and insular, with highly developed customs and norms that reflected shared morality, religion, or social values.[221] Tort adjudication during this period contributed to the solidarity of these communities by discerning and announcing norms while allowing for continual reevaluation of whether the norms remained desirable as circumstances evolved. Contrary to the popular account,[222] there was a substantial tort docket in the colonies and the post-Revolutionary states.[223] These

221. *See, e.g.*, *supra* Section II.D.1.

222. *See, e.g.*, WHITE, *supra* note 18, at 3 (explaining that the standard account holds that tort emerged as an independent branch of law in the late nineteenth century, as a response to industrialization, but that the process was more complex than that account suggests); *see also* Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 641-42 (1989) (explaining that many tort historians claim that "nineteenth-century tort law witnessed a major vindication of negligence . . . to provide subsidies for emerging industry").

223. *See, e.g.*, Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1128 (1990) (documenting that a "fault-based system of tort law was established by the eighteenth century"). Notably, the prevalence of "tort" has been obscured because private injury cases had for some time been categorized according to the writ by which a plaintiff would sue. The writ of trespass became the primary means for complaining about non-contractual injuries. *See* EDWARD J. KIONKA, TORTS IN A NUTSHELL 15 (3d ed. 1999). Three types of trespass writ eventually developed: *vi et armis* (generally dealing with injuries caused by the use of physical force), *de bonis asportatis* (generally dealing with injuries caused by the taking of goods), and *quare clausum fregit* (generally dealing with injuries caused by trespass to land). *Id.* at 16. Later, for those injuries that did not fit within any of the trespass categories, individuals were allowed to bring actions for "trespass on the case." *Id.* The "case" writ was the forum for most actions alleging compensable wrongs that modern American law would describe as torts. Within case are found many of the nominate or intentional torts, such as deceit, nuisance, defamation, interference with economic relations, malicious prosecution, and some complaints about abnormally hazardous activities. *Id.* at 17-18. Trover later developed to address conversion and certain kinds of damage to chattels. *Id.* at 18. Case also housed causes of actions that were essentially premised on negligence. *Id.* A subset of case, assumpsit, dealt in part with careless execution of a promised undertaking. *Id.* at 17. Thus, "[a]s early as 1374, a defendant's liability in assumpsit was predicated on his failure to act with the care or skill the community expected of him." Kaczorowski, *supra*, at 1131. American states formally adopted or "received" the English common law, including the law governing injury actions, through constitutional provisions or by statute. *See* Andrew J. King, *The Law of Slander in Early Antebellum America*, 35 AM. J. LEGAL HIST. 1, 6 n.18 (1991). The difficulty in devising a justificatory theory of U.S. tort law has likely been aggravated by an historical account that omits the first century of information about its practice. Kaczorowski's study of common-carrier liability is illuminating in tracing the multiple causes of action during the pre-Industrial period that assigned liability based on a determination that interpersonal duty had been neglected, but which are not typically slotted as "tort" cases in part because scholars had not yet grouped the various writ-based causes of action into a single doctrinal category.

cases involved highly personal disputes between litigants known to each other and to their neighbors. In fact, during this formative period when state government was in its infancy, local courts were deputized to mediate in accord with "the general popular sense of right."[224] Tort served as a stabilizing force because "[c]ommunities, organized in terms of mutual responsibilities, used courts to punish social deviance."[225] Tort doctrine invoked "community" as the source of liability norms across all three liability headings: nominate, strict, and negligent.

a. *Intentional Tort.* Although the intentional torts can be described as the most "formal" and constrained of the three tort categories, their open-textured elements still required the importation of "community" values in order to determine liability. For example, in an assault case where the defendant attacked a man for turning his "employer and patron" against him, the court limited the plaintiff to nominal damages because the community disapproved of his manipulative behavior.[226] In trespass torts, too, liability was contingent upon a violation of community values. Where a hunting party rode across "an old uncultivated field, around which there had been a fence, but which was then down in many places," the court declined to find a trespass.[227] It acknowledged that traversing unoccupied land would be considered a trespass in England, where "almost every foot of soil is appropriated to some specific purpose," and therefore required protection from intruders.[228] But in South Carolina, "the greater part consists in uninclosed and uncultivated forest," and condoning suits for every unauthorized crossing would "overwhelm us in a sea of petty litigation, destructive of the interests and peace of the community."[229] In a case where a creditor repossessed land that the borrower had been leasing to a third party and gave the third party permission to remain, the borrower was found liable

---

224. Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, *in* SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 412 (Ass'n of Am. Law Schs. ed., 1907).

225. King, *supra* note 223, at 6.

226. Dinkins v. Debruhl, 11 S.C.L. (2 Nott & McC.) 85, 87 (1819). Notably, in this case the victim pressed state criminal charges and the assailant was imprisoned and fined; the victim then brought the tort suit for assault. *Id.* at 85-86. The diverging results—a guilty verdict followed by a specified punishment compared with a liability verdict in which the judge essentially excused the assailant—illustrate the use of public law to express a political community's abstract intolerance of assaults and the use of private tort law to express a sociological community's tolerance for assaults provoked by malicious interference with the employment relationship.

227. Broughton v. Singleton, 11 S.C.L. (2 Nott. & McC.) 338, 338-39 (1820).

228. *Id.* at 340.

229. *Id.*

for trespass when he subsequently went onto the land and tried to evict the tenant.[230] The court affirmed the liability, finding that the trespassers knew the "rule[] of the law which is clear and generally understood in the community" that they were barred from the property but that they thought they could enter "with impunity on account of the poverty of the [tenant]."[231] These cases illustrate how tort doctrine was used to let communities identify deviancy and signal behavioral boundaries to group members.

b. *Strict Liability.* The use of "community" as a liability determinant also appears in the antebellum strict liability context. The most common strict liability cases arose out of claims for damage and loss of goods shipped by common carriers. Common carriers were said to be liable for all such harms to chattels regardless of their care. But community values were relevant even in this category of tort liability—both to determine who should be categorized as a common carrier and to determine when a loss was an "act of God" excepted from strict liability. For example, where a local man contracted to carry some goods on his wagon from the local rail depot to another location, the court found he was not a common carrier because he was not in the regular business of transporting goods. "An occasional undertaking to carry goods will not make a person a common carrier; if it did, then it is hard to determine who, in a planting and commercial community like ours [where most planters own wagons], is not one," the court concluded.[232] "Such a rule would be exceedingly inconvenient to the whole community."[233]

In addition to defining the activities to be included in the strict liability category, community practice and values also informed the scope of exceptions to the strict liability rule for common carriers. Tort doctrine provided that common carriers were not strictly liable for damages to chattels resulting from "acts of God." The rule itself was clear, but as one judge explained, "[t]he difficulty [was] in the application, and much of that ar[ose] from confusion of ideas, as to what is meant by the act of God."[234] He defined the exception to strict liability to include "physical causes . . . such as winds, waves, lightnings, rocks and shoals," but continued that the carrier would revert to liability if "proper prudence and skill has [not] been exercised to avoid the effect of these physical

230. Reed v. Davis, 21 Mass. (4 Pick.) 216, 226 (1826).

231. *Id.* at 227.

232. Fish v. Chapman & Ross, 2 Ga. 349, 353-54 (1847).

233. *Id.* at 354; *see also* Alexander v. Greene, 7 Hill 533, 551 (N.Y. 1844) (noting that determining whether steamboats are common carriers is of "great and increasing importance to the interests of the whole community").

234. Reaves v. Waterman, 29 S.C.L. (2 Speers) 197, 209 (Ct. App. 1843) (Evans, J., dissenting).

causes."[235] Determining whether a loss occasioned by physical causes should be defined as a liability-free act of God or as a liability-triggering instance of failure to avoid an act of God often boiled down to questions of community custom and practice. For example, where a cotton shipment was lost after a campfire was carried fifteen feet with the wind and ignited bales that had been "partially burst[] open,"[236] the court acknowledged that fire was a physical cause, but that:

> [i]t cannot be seriously contended that an ordinary wind blowing this fire on the cotton is such an act of God as will exempt the carrier . . . [because] the blowing of the wind is one of the most ordinary operations of nature, and its springing up suddenly is of constant occurrence throughout the world, and in no country more frequent than in Texas,

so that it could have been "easily resisted" by a community member expected to know about wind and cotton.[237]

Similarly, in a 1790 South Carolina case, a shipper argued that he should be absolved of liability for damages to tobacco lost when his boat took on water during a trip.[238] He contended that "tempestuous weather" was the unavoidable cause of the boat's mishap.[239] But the jury rendered a verdict for the plaintiff-merchant, finding that "the breeze was not more than every man of common foresight could have guarded against," and that the shipper explicitly disregarded the advice of journeymen at port that most shippers in the community used heavier anchors and placed tarps over the tobacco to make the journey around Pinkney's Island successfully.[240] Again, it appears that even in antebellum strict-liability cases, doctrine allowed liability to fluctuate in tandem with the specific geographic and commercial needs of different communities.

c. *Negligence.* Finally, "community" is found to be a significant source of liability information in the earliest negligence cases. For example, a plaintiff was driving about ninety "fat cattle for the Boston Market" over a bridge in Ver-

---

235. *Id.*

236. Chevallier v. Straham, 2 Tex. 115, 116 (1847).

237. *Id.* at 124-25.

238. McClures v. Hammond, 1 S.C.L. (1 Bay) 99, 97 (Cts. Com. Pl. & Gen. Sess. 1790).

239. *Id.* at 97.

240. *Id.* at 98 (affirming jury verdict).

mont, and lost several animals when the bridge gave way.[241] In determining whether the company that operated the bridge was liable in negligence for the farmer's loss, the court said the question was whether the bridge was "sufficient."[242] The open-textured standard of sufficiency was to be construed by assessing whether the bridge "stands secure . . . for the purpose of passing, in transacting any of the usual business of the community."[243] This, in turn, raised the questions whether it was usual for farmers in this community to drive ninety cattle over the bridge at a time, whether the usual practice in such cases called for limiting the number of cattle crossing at any one time, and whether this farmer followed that practice.[244] In a case of industrial accident, the New York Supreme Court defended the fellow servant rule preventing a finding of employer negligence in the case of negligence by one worker that injured another.[245] The court reasoned that "when the rule is examined in the light of expediency, in connection with the business interests of the community, its necessity and wisdom, as applied to strangers, are manifest . . . ."[246] Finally, in a medical malpractice case, the Supreme Judicial Court of Maine determined the scope of a negligent surgeon's liability to his patient in part by considering that "[t]he practice of surgery is indispensable to the community," and that the rate of pay in Maine was less than "what is paid in cities for similar services," justifying a more modest verdict for acknowledged negligence.[247]

In sum, during the colonial and antebellum periods, American courts consistently recognized that interpersonal tort liability was a product of sociological community norms. Further, they were readily able to identify those norms. Most interpersonal interactions took place within sociologically traditional communities where values and culture were homogenous and easily discernible by both the plaintiff and defendant, as well as the judge and the jury.

2. *Doctrinal Pivot Points*

After the Civil War, communication and transportation systems modernized profoundly. As a result, individuals who lived in insular local communities had increased opportunities to exchange information and goods with those in

241. Richardson v. Royalton & Woodstock Tpk. Co., 5 Vt. 580, 580 (1833).

242. *Id.* at 585.

243. *Id.*

244. *See id.* at 587.

245. Coon v. Syracuse & Utica R.R. Co., 6 Barb. 231, 238 (N.Y. Gen. Term 1849).

246. *Id.*

247. Howard v. Grover, 28 Me. 97, 101 (1848).

other communities.[248] This process led to a burgeoning sense of national identity.[249] Further, it grew increasingly common for remote parties to join in interpersonal transactions within this emerging national community. Tort doctrine might have been reduced to near irrelevance as a mechanism for identifying behavioral expectations in these "modern" disputes if not for two landmark opinions that adapted tort to this new layer of community. First, in *MacPherson v. Buick Motor Co.*,[250] Judge Cardozo wiped out the requirement that a plaintiff suing for injuries caused by a product be in privity with the maker of that product. Cardozo observed that within traditional closed communities, where artisans typically sold goods they had made or were familiar with, a conversation at the point of sale highlighting flaws or dangers was sufficient to discharge community expectations of fair dealing and care.[251] If the item were eventually resold, the remote purchaser could not sue the original seller for the intermediate owner's failure to pass on any warnings. But, he explained, it was increasingly common for actors to sell items with the "added knowledge that [they would] be used by persons other than the purchaser."[252] In those cases, both the original producer-seller and the ultimate purchaser or user were participating in a relationship that gave rise to interpersonal obligations despite their physical disconnect. Adapting tort doctrine to permit injury suits among strangers allowed tort to continue determining social, interpersonal duties of care even in the modern, open community.

---

248. *See supra* Section II.D.2.

249. *See supra* text accompanying notes 209-210.

250. 111 N.E. 1050 (N.Y. 1916). The traditional privity requirement is illustrated by an 1845 Massachusetts Supreme Judicial Court case that declined to hold a stagecoach owner liable for injuries that resulted when a defective axle in his rig caused an accident. Ingalls v. Bills, 50 Mass. (9 Met.) 1 (1845). The court reasoned that "in a community like ours," it was not practical to expect the artisan who crafted an axle to have any responsibility for a remote stranger who eventually rode in the coach where the axle had been installed, and not practical to expect the coach operator to assume liability for the artisan's work. *Id.* at 14. But over a series of cases involving injuries inflicted through more multiparty, mechanized economic transactions—including telegraph transmission, *see* Thomas, *supra* note 208, at 1171; wholesale-retail distribution of medicine, *see* Thomas v. Winchester, 6 N.Y. 397 (1852); and mass-production and distribution of consumer goods such as coffee urns, *see* Statler v. Ray Mfg. Co., 88 N.E. 1063, 1064 (N.Y. 1909)—courts had begun to manipulate that requirement in order to allow plaintiff recovery for egregious harms. *MacPherson* did away with judicial dissembling by striking down the requirement altogether and courts across the nation followed suit. In this respect, the common law outpaced the legislative process of devising auto safety regulations.

251. *MacPherson*, 111 N.E. at 1051-52.

252. *Id.* at 1053.

A second crucial opinion, *The T.J. Hooper*,[253] recognized that there might be more than one "community" capable of supplying the social values that determined interpersonal duties of care. There, the owners of commercial goods sued towboat owners for damaging their goods by negligently operating their crafts during a storm. The court held that although the custom in the traditional, closed shipping community was not to equip all towboats with radio receivers that would intercept foul weather warnings, following that custom did not insulate the owner from negligence liability.[254] Observing that the law might require more care than was customarily observed by a particular subset of actors, the court essentially bifurcated the care question. It suggested that where interpersonal behavior crossed outside of the closed community—as here, where the shippers' decision ultimately harmed multistate commercial interests—the relevant interpersonal value might be supplied by the modern, open community. *The T.J. Hooper* can be understood as creating space for the application of either closed community or open community values to determine interpersonal liability, depending on the scope of the injurious behavior at issue.

Taken together, these two cases expanded tort law's capacity to render interpersonal liability decisions. They permitted tort to adjudicate disputes whether they were geographically proximate or geographically remote, and they permitted tort to select from among more than one value norm as necessary to set culturally appropriate behavioral expectations.

3. The Modern Period

By the mid-twentieth century, the United States had reached a fully modern period, in which most Americans identified with two tiers of community.[255] Information and goods moved freely between people who were otherwise strangers to each other, allowing for a vibrant national community. At the same time, many individuals retained roots in a local community, living much of their daily lives with and among people who shared geographic circumstance, culture, and values. During this period, as in earlier historical periods, tort doctrine was deployed to allow members of community to resolve disputes in a way that both drew from and contributed to the solidarity of those communities. As in the antebellum period, modern courts used "community" to locate interpersonal liability norms in nominate, strict, and negligence and torts. But

253. 60 F.2d 737 (2d Cir. 1932).

254. *Id.* at 739-40.

255. *See supra* Section II.D.3.

in the modern period, courts found within doctrine the room to make intuitive choices about *which* community is to supply the relevant liability norm—the local or the national.

a. *Intentional Tort.* Community has continued to be used as a liability metric in modern intentional tort cases. But modern courts have intuitively toggled between the norms of the traditional community and the modern community to fit the scope of the case at hand. For example, a group of seven adult males sued the Oregon school district where they had attended fifth grade between 1968 and 1984 on a respondeat superior theory for battery.[256] The plaintiffs alleged that the teacher had gained their "trust, admiration and obedience, and condition[ed] them to respect [him] as a person of authority."[257] He eventually fondled their genitals in front of the classroom, "assist[ed]" them in urinating," and touched them both inside and outside their clothing.[258] In their attempt to pursue the claim despite the expiration of the statute of limitations period, the plaintiffs maintained that they had not "discovered" the battery until years later because they did not fully appreciate at the time that it was offensive.[259] The court observed that "the line between offensive and socially acceptable touching . . . may be difficult to ascertain," and that offense is in part a function of community values.[260] The court then explained that the teacher had "befriended" the boys' families, and "gained their trust, their permission to spend substantial periods of time with plaintiffs, and the benefit of their instruction to their sons to respect and comply with [his] authority and requests."[261] In essence, the court suggested that the boys' local community at the time was not alert to the offensive nature of the teacher's relationship with the boys. The court went on to identify the teacher's alleged behavior as "grooming," a tactic that has come to widespread national attention in recent years.[262] Applying the current values of the national community that recognize how grooming can distort the perceptions of child sex abuse targets, the court determined that the plaintiffs could not have identified the touching at issue as offensive at the time.[263] The court concluded that although the discovery rule to determine the date a plaintiff should have known of his injury employs an objective standard, the injury

256. Doe 1 v. Lake Oswego Sch. Dist., 297 P.3d 1287, 1290 (Or. 2013).

257. *Id.*

258. *Id.*

259. *Id.* at 1292.

260. *Id.* at 1295-96.

261. *Id.* at 1290.

262. *Id.*

263. *Id.* at 1294-95.

at issue was in part a function of community expectations.[264] Intuitively gravitating towards the expectations and knowledge of the national community with regard to the nature of child sex offenses, the court concluded that the plaintiffs had no objective basis for appreciating the offensive nature of the touching until years later.[265]

b. *Strict Liability.* Courts adjudicating modern strict-liability cases also toggle between different communities to determine the scope of interpersonal liability. For example, a plaintiff in the timber-rich state of Washington sued a local timber mill for losses at his mink farm resulting from explosions necessary to the construction of an access road for logging operations.[266] The court held that the explosions were not "ultrahazardous activity" subject to strict liability because the timber-related blasting was "no more than a usual incident of the ordinary life of the community."[267] Similarly, parents who sued butane suppliers and deliverers on a strict-liability theory after a deadly cabin explosion lost because the court drew the liability norm from the local community.[268] The court reasoned that where "[t]here were over 200 customers of such butane gas in [the King's County] community, and on ranches and outlying homes not accessible to a natural gas system[, t]his commodity has come into popular use and is a necessity in such localities," meaning that it could not be considered ultrahazardous for the locale.[269] In contrast, when asked to hold that an oil company's duty to handle its gasoline with care was not delegable to an independent contractor delivering the commodity, a Kentucky court declined.[270] Deciding whether a duty was nondelegable involved asking whether the responsibility in question "is so important to the community" that the employer cannot transfer it to a third party.[271] The court reasoned that gasoline had become commonplace in modern life, so the producer could therefore delegate its duty of care.[272]

That the "community" relevant to assessing strict liability could be either a closed community or an open community is underlined by a 1994 case where a

264. *Id.* at 1295-97.

265. *Id.* at 1297.

266. Foster v. Preston Mill Co., 268 P.2d 645, 645 (Wash. 1954).

267. *Id.* at 648.

268. Ambriz v. Petrolane, Ltd., 312 P.2d 11, 16 (Cal. Dist. Ct. App. 1957), *vacated on other grounds*, 319 P.2d 1 (Cal. 1958).

269. *Id.*

270. Collins v. Liquid Transporters, 262 S.W.2d 382 (Ky. 1953).

271. *Id.* at 383.

272. *Id.* at 382-83.

motorcyclist argued that landowners should be held strictly liable for the placement of their standard mailbox near the edge of a highway drainage ditch.[273] The court explained that the riskiness of locating the box there was contingent on "patterns of utility and morals in the life of the community."[274] The court's allusion to both utility and morality suggests that it recognized two possible communities whose values could supply the rule of interpersonal liability—the closed community and the open community. The court identified the "rural nature of the accident site, construction of the mailbox, and location of the mailbox in relation to the highway, shoulder, and drainage ditch" as the relevant factors in community life.[275] In effect, it defaulted to the liability norms of the closed community without making this choice explicit.

c. *Negligence.* Modern cases also use community expectations as the metric for liability in negligence. Here, too, they toggle between closed and open communities when seeking the social norms that inform the assessment of interpersonal liability. For example, when a man walking on a highway shoulder "ordinarily used by pedestrians" was struck by the trailer of a truck going forty-five miles per hour, the court had to determine whether that speed was reasonable.[276] The court found the answer by looking to the social norms of "the settlement of Scottlandville, . . . a thickly settled community."[277] Because pedestrians were known to use the road regularly, it was "the duty of the truck driver" to keep the vehicle from the shoulder, the court concluded.[278] Conversely, a similar case from the same year elected the national community as the source of liability norms.[279] There, a pedestrian in Baltimore was using a "well worn" and long-used footpath across the railway in another "thickly settled" community.[280] The court refused to find the railroad negligent when a train struck him without warning. It acknowledged that some courts required railroads to exercise care in these circumstances, but suggested that interstate railroads should be considered members of the national community and consequently subject to more of an efficiency norm. "If [the railroad] owes a duty to every bare licensee to run its trains with reference to him . . . it can do little else, its trains cannot

273. Olivier v. Boudreaux, 649 So. 2d 629, 629-30 (La. Ct. App. 1994).

274. *Id.* at 630 (quoting Entrevia v. Hood, 427 So. 2d 1146, 1150 (La. 1983)).

275. *Id.*

276. Cooper v. Kennard, 192 So. 534, 534 (La. Ct. App. 1939).

277. *Id.*

278. *Id.* at 536.

279. Jackson v. Pa. R.R. Co., 3 A.2d 719 (Md. 1939).

280. *Id.* at 720.

be on time and the traveling public must suffer," the court reasoned.[281] In neither case did the court explicitly acknowledge that it was choosing between the closed and open communities as the source of liability norms, even though the election of the relevant community was dispositive of liability in both cases.

B. Community in the Restatement

American courts have long viewed tort as a community-constructing enterprise. Yet theorists have largely overlooked the role of community within this body of law. This may be because a focus on tort outcomes and general liability rules has obscured consideration of "the terms in which [courts] themselves thought and wrote."[282] Courts invoke the concept of community throughout their analyses, even when that concept does not directly translate into outcomes or rules. Therefore, one might ask whether the references to community unearthed throughout American tort cases are replicated in a more comprehensive representation of tort doctrine. The linguistic analysis of the *Restatement* set forth in Sections I.D and I.E confirms that they are. This Section examines in more depth precisely how tort doctrine, as represented by the *Restatement*, privileges community as the source of liability norms. Further, it demonstrates how doctrine has used references to community to allow for the importation of either sociologically closed or sociologically open community norms as required by the particulars of individual cases.

As explained above, tort doctrine is replete with "placeholder" words—"reasonable," "offensive," "ultrahazardous," and the like. Linguists describe these "hedges" as devices to delegate to someone other than the writer or speaker the job of interpreting what a word means in the abstract and, more importantly, in application.[283] The most common use of "community" in the *Restatement* suggests that decision makers can concretize the meaning of these doctrinal "hedge" words in their application to actual cases. For example, the

---

281. *Id.* at 722.

282. LANDES & POSNER, *supra* note 23, at 22. Posner acknowledges in *The Economic Structure of Tort Law* that in analyzing his dataset of appellate court opinions in an earlier project, he had considered just the outcome and the rule that could be extracted from the case. *Id.* (citing Posner, *supra* note 52). He deepens his analysis in *Economic Structure* by expanding the scope of research to include other secondary materials like the *Restatement of Torts* "as a source of authoritative cases and doctrines." *Id.* at 20. But because "community" is often referenced in opinion passages removed from the actual holding of cases, even this expanded project was not well positioned to capture these references.

283. *See, e.g.*, Paradis, *supra* note 41, at 170 ("'Reasonable' and various other modifiers that can be broadly classed as 'hedges,' . . . delegate not only the extension of a word but its intension, the criteria that define it in the abstract." (footnote omitted)).

Restatement instructs that a defendant is not liable for use of a public highway that crosses private land if his use was "reasonable," and then directs the decision maker to determine the concrete meaning of "reasonable" by comparing it with the community's typical use of the same highway.[284] Thus, doctrine delegates to decision makers from the community the authority to ask how members generally understand their obligations to share or refrain from sharing public roads on private lands. The answer to this question will generally be more accurate, and therefore better allow peaceful private ordering of interpersonal relationships, if it is the result of an on-the-ground calculus rather than a top-down, one-size-fits-all rule given by the state. If county roads in the region are plentiful and accessible, the community norm might view the use of public highways that cross onto private land as intrusive. If alternate routes are less attractive, the community may over the years have informally accepted that neighbors who use the public roadway mean no intrusion, and such behavior would not be understood as unreasonable.

Community is also invoked to extend the "hedge" word of negligence. For example, the *Restatement* specifies that actors are negligent if they do not know the qualities of humans, animals, things and forces "in so far as they are matters of common knowledge at the time and in the community."[285] In a recent example, a New Jersey court determined that an individual who sends text messages to a recipient known to be driving may be liable for injuries that result from the driver's distraction.[286] Here, the placeholder term "negligence" was applied to import the increasingly common knowledge in the national community that phones (things) distract drivers (humans) at the wheels of speeding automobiles (things and forces).[287] But on a different topic, it is both possible and appropriate that two distinct local communities would arrive at two different decisions as to whether a particular behavior is negligent. For ex-

284. RESTATEMENT (SECOND) OF TORTS § 192 & cmt. d (AM. LAW INST. 1965).

285. *Id.* § 290.

286. Kubert v. Best, 75 A.3d 1214, 1229 (N.J. Super. Ct. App. Div. 2013).

287. Of course, "common knowledge" in any particular community develops on an informal basis and therefore cannot be tested against a rule supplied by the state, the market, or any deontological authority. Interestingly, this case highlights questions about the comparative institutional competence of judges and jurors. In some instances, the very characteristics that qualify judges to determine the law (advanced education and long-term, remunerative employment) inhibit their appreciation of community mores and render their determinations on such questions more akin to state-supplied rules. But in other circumstances, they are as well positioned as jurors to participate in "common knowledge." Here, where all of the judges likely drive, use cell phones, and read news reports increasingly documenting the incompatibility of the two, they were more likely acting as typical community members than state rule givers.

ample, a driver who collided with a chair left near the curb of a public street might be found non-negligent in most communities, where chairs are understood to have no place on the road, but negligent in Chicago during February, where chairs are commonly understood as a valid method of claiming a shoveled parking space after a snowstorm.[288]

In short, whenever the *Restatement* invokes community, it is seeking information about what group members expect of one another in their interpersonal relationships. This information can only be accessed if doctrine specifies the groups whose expectations are relevant, and the majority of references to "community" in the *Restatement* do just that. The *Restatement* never gives a single explicit definition of "community." That kind of unitary definition would defeat the intentional indeterminacy of the many adjectives that are used to set liability standards ex ante. Neither does it leave community completely undefined. That vagueness would make it impossible for decision makers to weigh liability ex post in a given case. Instead, the *Restatement* alludes to different kinds of communities that may be consulted as sources of normative expectations for interpersonal behavior. First, the *Restatement* suggests that the "community" relevant to tort law is a sociological, rather than political, organization. Next, the *Restatement* acknowledges that community may take shape locally or nationally. Consequently, by referencing different kinds of communities as the source of liability norms for different torts, doctrine invites tort decision makers to toggle between the norms of different communities depending on the interpersonal conflict being adjudicated.

1. *Political Community.* Among the *Restatement*'s forty-seven references to community, a mere four are invocations of political community. In those four references, the *Restatement* makes clear that what it is discussing is not a standard "community" for tort purposes, but something exceptional and different. For example, in its treatment of intentional torts, the *Restatement* discusses state legislation governing the appropriate private response to fires, observing that these statutes may entitle private property owners to receive compensation from "the *organized* community," a clear reference to the state as a political enti-

288. Commentators have suggested that negligence must be governed by a preexisting norm to avoid "different conclusions as to the reasonableness of the same conduct." *E.g.*, Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1202 (2001). But this insistence overlooks the fact that conduct accepted by the community of a particular time and place would be frowned on by the community of a different time or place. In other words, uniformity of result across distinct sociological communities might actually detract from the interpersonal coordination function of tort within those communities.

ty governing allocations from the public fisc.[289] In its treatment of negligence, the *Restatement* specifies that tort does not adopt as its "reasonableness" standard any statute or regulation that is strictly meant to serve the state, its subdivisions, or individuals in their capacity as "members of the public."[290] It explains that many state laws are designed to protect "the community *as such*," and therefore "create an obligation only to the state, or to some subdivision of the state."[291] It further explains that some statutes are meant to protect individuals in their role as members of the public, rather than in their role as private individuals. When the violation of such a statute interferes with the rights of all individuals as members of the public, it cannot be the basis of a tort claim. If, however, one suffers a harm "distinct from that suffered by the rest of the community," he may be entitled to a tort remedy.[292] Equating a "community" protected by legislation with "the state or any subdivision of it," and stressing that this community does not automatically hold a tort right to private compensation for injury, [293] indicates that the "community" under discussion in this section, unlike the one referenced in others, is the political community.

In just two other sections, the *Restatement* specifically refers to "community" as a unit of political organization. In the public nuisance section, the *Restatement* explains that the tort originated as a common-law crime responding to interference with "the interests of the *community at large*," or with the "general public."[294] It then explains that as a rule, private individuals cannot recover in tort for actions on the land that invade "purely public" rights because "[r]edress of the wrong to the *entire community* is left to its *duly appointed representatives*."[295] These two sections make clear that communities "at large" or "entire" communities are purely political organizations where rights and remedies are governed by positive law adopted through a public choice mechanism. That the balance of the *Restatement*'s forty-three references to "community" do not refer to the community "as such," "at large," or "in its entirety," or to states, state subdivisions, or "the general public," indicates that most references to

289. RESTATEMENT (SECOND) OF TORTS § 196 cmt. g (AM. LAW INST. 1965) (emphasis added). Where the *Restatement* discusses "public necessity" as the basis for a privilege to enter land without incurring liability for invading the right of the property holder, it observes that many states have passed legislation addressing response to fires. *Id.* cmts. g, h.

290. *Id.* § 288.

291. *Id.* cmt. b (emphasis added).

292. *Id.* cmt. c.

293. *Id.* § 288.

294. *Id.* § 821B cmt. b (emphasis added).

295. *Id.* § 821C cmt. a (emphasis added).

community are *not* to the political community, but to community at a subpolitical or apolitical level—to sociological community.[296]

2. *Sociological Community.* Tort doctrine seems to prioritize "community" as the source of liability norms in part because communities can take a variety of shapes and thus allow adaptation of liability standards to a variety of circumstances. The *Restatement* makes this point explicit in its explanation of the "reasonable man" standard crucial to negligence liability (and also relevant in intentional and strict torts). It says that negligence is a "departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk."[297] Using "community" as the source of the standard

> provides sufficient flexibility, and leeway, to permit due allowance to be made for such differences between individuals as the law permits to be taken into account, and for all of the particular circumstances of the case which may reasonably affect the conduct required, and at the same time affords a formula by which, so far as possible, a uniform standard may be maintained.[298]

Applying this sophisticated understanding of "community," tort doctrine deftly invokes different dimensions of community as the sources of norms for different causes of action or liability elements. In doing so, it acknowledges that community can be organized along a spectrum: some communities comprise likeminded, geographically compact social groups, while others comprise diverse, geographically decentralized social groups; some comprise members of a specific profession or trade, while others comprise lay individuals. When the *Restatement* considers a distinct type of community an authoritative source of liability norms for a specific cause of action or liability element, it explicitly identifies that precise community.

a. *Closed communities*. For example, in a number of negligence doctrines, the *Restatement* points to closed, local communities as the source of information about "reasonableness." In defining a "licensee" to whom a landowner owes a

---

296. The *Restatement* underlines this interpretation at one point: the general rule regarding trespass by livestock is one of strict liability against the livestock owner, but the drafters explain that in some states the rule has been adapted in response to conditions "within [the state] *or some part of it*," where because of local geography or economic development "the interest of the community" necessitates that livestock "be permitted to 'graze at large.'" *Id.* § 504 cmt. k (emphasis added). This commentary specifically acknowledges that the "community" relevant to tort liability is not coterminous with the "state" as a whole, but instead is a product of apolitical mechanisms like geography and lifestyle priorities.

297. *Id.* § 283 cmt. c.

298. *Id.*

duty of care, the *Restatement* explains that one may have "consent" to enter land even in the absence of verbal agreement if community custom favors free entry under the circumstance.[299] The *Restatement* specifically points to the custom of "local" community,[300] noting that if in a particular town the custom is to let people freely cut across vacant lots, the property owner has impliedly assented to such access. The *Restatement* requires professionals and tradespersons to use the skill and knowledge of their peers "in similar communities."[301] The *Restatement* explains that the standards of professional and trade communities may fluctuate with the realities imposed by different geographic locales: "[a] country doctor cannot be expected to have the equipment, facilities, experience, knowledge or opportunity to obtain it, afforded him by a large city."[302]

So, too, in strict liability. Liability for abnormally dangerous activities turns in part on the value of the activity to the "community," with community conceptualized as geographically local. The *Restatement* explains that a dangerous activity may become "abnormal" if it is inappropriate for the locality where it is undertaken.[303]

Definition of the "community" as a geographically local entity is found within intentional torts as well. For example, consideration of the "gravity of the harm" in private nuisance depends in part on how suitable the contested activity is to "the character of the locality."[304] Utility of nuisance activity, too, is a function of the suitability of the activity to the locality.[305] In fact, the comments to the section specifically state that liability turns on "the community standards of relative social value prevailing *at the time and place*," suggesting that those standards are built to fluctuate depending on the composition of the nuisance-hosting community.[306]

---

299. *Id.* § 330 cmt. e; *see also id.* § 892 (discussing consent generally).

300. *Id.* cmts. e, f, h.

301. *Id.* § 299A.

302. *Id.* cmt. g.

303. *Id.* § 520; *see also id.* § 509 cmts. d, e (explaining that an animal is "abnormally" dangerous when it is one unusual in the community, and giving a bull as an example of a *normally* dangerous animal, which members of a farming community know to be dangerous and is therefore usual); *id.* § 930 cmt. b (explaining that a recovery of future damages may be preferable to an injunction where an otherwise liable harm may be "economically beneficial to the community" and should not be shut down, suggesting a plant or factory crucial to a geographic community).

304. *Id.* § 827.

305. *Id.* § 828.

306. *Id.* cmt. b (emphasis added).

b. *The open community*. On the other hand, the *Restatement* occasionally recognizes that "community" may be organized on a far broader, less personal scale. Discussing the standard of conduct for negligence, the *Restatement* states that "recognizing [the] existence of risk" is a key consideration.[307] It goes on to distinguish between what is expected of "the average man in the community" and what is expected of a man confronted with atypical circumstances that require more care than the average man would owe.[308] It then gives as an example of the "average man in the community" a "traveler[] upon the highway"—someone who would seem to belong to a community that spans multiple localities.[309] His atypical counterpart is a driver crossing a railroad track with limited visibility, an act that generally arises during local driving.[310]

Similarly, when discussing the "utility" of an actor's conduct for purposes of determining the standard of care, the *Restatement* alludes to a broad, diverse, national community as the source of liability standards.[311] Utility, for tort purposes, is found where a private endeavor provides benefit to those not directly involved in it. The drafters offer as an example manufacturing, where some risk is tolerated not because manufacturing benefits those directly involved in it, but because it benefits "the whole community," presumably including consumers of goods and those who profit indirectly from manufacturing by producing parts, selling at the retail level, or marketing mass-produced goods.[312] The *Restatement*'s discussion of product liability can be understood as referring to this same national community.[313] Product liability is found where a chattel for sale

---

307. *Id.* § 289.

308. *Id.* cmt. i.

309. *Id.*

310. *Id.* The commentary is an obvious reference to the debate between Justices Holmes and Cardozo over the wisdom of imposing a uniform "stop, look, and listen" rule of conduct to all drivers crossing railroad tracks. *Compare* Balt. & Ohio R.R. Co. v. Goodman, 275 U.S. 66 (1927), *with* Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934). Notably, this debate crystallized their split on how to incentivize efficient allocation of resources, which they both identified as the purpose of tort law. (Holmes wished to relieve railroads of remote liability in order to allow them to transport goods and people, while Cardozo resisted the notion that railroads were per se free of any duty of care in traveling through populated areas.) The *Restatement* position—that there can be more than one standard of care depending on the circumstance—is a direct outgrowth of the doctrinal emphasis on community and the implication that it may be either national and impersonal or local and personal in different injury settings.

311. RESTATEMENT (SECOND) OF TORTS § 292 (AM. LAW INST. 1965).

312. *Id.* cmt. a.

313. *Id.* § 402A.

is "unreasonably dangerous."[314] Unreasonable danger is defined as danger "to an extent beyond that which would be contemplated by the ordinary consumer who purchases [the item], with the ordinary knowledge common to the community as to its characteristics."[315] The community of "consumers" of mass-produced goods is necessarily a community that exists outside specific geographic boundaries—it is likely to be national or at least regional in nature.

c. *The toggle between closed and open*. The *Restatement* suggests in its negligence discussion that tort doctrine encourages decision makers to toggle between different communities when assessing the duties that private people owe to one another. First, in outlining the plaintiff's burden of proof for a negligence cause of action, the *Restatement* provides that the plaintiff must prove that the defendant owed him a duty to act reasonably.[316] The *Restatement* further provides that "[t]his standard of conduct may vary" in accordance with circumstances and community customs.[317] Echoing this message is the *Restatement*'s provision that individuals who interact with other private people are expected to know the qualities and habits of humans, animals, things, and forces "in so far as they are matters of common knowledge at the time and in the community."[318]

The drafters then observe that "a man living in the northern part of Minnesota is required to expect extremely cold temperature in early winter," whereas one "in the tropics is required to expect hot weather, even in winter."[319] Further, the drafters give examples of common local knowledge and common national knowledge as the sources of different liability standards. The drafters explain that where a driver is operating a car, one of whose tires "is worn down to the fabric," the danger is "a matter of common knowledge in the community," and he is negligent.[320] Clearly, the "community" referenced is the open community of drivers, all of whose cars have the same mass-produced tires. The drafters then explain that where a driver is speeding on an icy road and the propensity of cars to skid at high speed is common knowledge in the community, the driver who speeds and skids is negligent even if he was unaware of the risks of skidding.[321] The "community" referenced here is a local community

314. *Id.* cmt. i.

315. *Id.*

316. *Id.* § 328A.

317. *Id.* cmt. c.

318. *Id.* § 290(a); *see also supra* notes 285-288 and accompanying text.

319. RESTATEMENT (SECOND) OF TORTS § 292 cmt. c (AM. LAW INST. 1965).

320. *Id.* illus. 2.

321. *Id.* illus. 4.

familiar with ice. This statement could be understood to imply the inverse as well: a driver in a local community *un*familiar with ice would *not* be liable for failing to use tactics his cold-weather counterpart would know. For example, if a Nashville driver lost control of his car while driving in a freak snowstorm, the Restatement does not suggest that he would be expected to know how to steer into the skid, and consequently his failure to do so would likely not be negligent. However, if the same driver moved to Albany the next year and failed to steer into the skid during the season's first snowstorm, the Restatement indicates that the failure would be negligent because part of belonging to that community is knowing how to cope with snowy roads.

C. The Prescriptive Implications of Community in Tort Doctrine

As a descriptive matter, it is clear that tort doctrine points to "community" as the source of interpersonal liability norms. The *Restatement* repeatedly directs that open-textured liability elements in the nominate, negligent, and strict-liability torts operate as portals through which decision makers are to import the external social norms of the community. Further, the *Restatement* acknowledges the reality that in the United States, sociological community may develop in both closed and open configurations. Case law confirms that American courts have from the colonial period considered doctrinal elements in the nominate, negligence, and strict-liability torts to be vehicles for the importation of community behavioral norms. In the early period, courts looked without question to the cohesive norms of the closed community within which injuries were most likely to be inflicted. In the early twentieth century, two landmark tort cases adapted doctrine in a way that allowed for the bringing of tort suits within the open community. Thereafter, courts continued to use community as the source of interpersonal liability norms but toggled between the closed and open community in their search for the relevant norms in particular cases. In other words, courts have for decades moved fluidly between assigning liability in a way that instantiates morality and doing so in a way that achieves efficiency.

Notably, modern courts have been shifting between applying closed and open norms on an ad hoc basis from case to case with little analysis of how and why they are selecting between the two for purposes of particular cases. In other words, the unacknowledged duality of the "community" concept has obscured the fact that tort has been operating simultaneously as a law of morality and as a law of efficiency throughout the entire modern period. Scholars who have become mired in the morality-versus-efficiency debate have missed the

opportunity to theorize tort at a higher level of generality.[322] If tort law is recognized as the law of community norms, it is neither necessary nor desirable to pick between morality and efficiency. In fact, the descriptive account of tort as the law of community forces a prescriptive imperative: tort should embrace its capacity to toggle between morality and efficiency.[323] Specifically, tort doctrine and procedure should guide courts in selecting the community whose norms are relevant to the assignment of liability in any given case.

IV. TORT LAW'S COMMUNITY TOGGLE IN OPERATION

Modern courts have been intuitively toggling between the morality norms of closed communities and the efficiency norms of the open community. Acknowledging tort law's capacity to toggle and developing doctrine to guide the toggling process would lead to a more predictable body of tort law that sends cleaner sociological signals and that takes a sturdier place in relation to other bodies of law. This Part illustrates how an explicit tort toggle would operate given that intentional, negligent, and strict-liability injuries arise in both local and national communities. When an injury is inflicted within a closed community, that community would supply the sociological norms sought by the open-textured element of the relevant tort. This could dictate different—but equally legitimate—outcomes for torts brought within different communities, even if those communities exist within the same state. Further, when an injury is in-

322. Some theorists have acknowledged that tort serves multiple purposes, but they have not identified a single unified theory that accounts for these dual purposes. *See, e.g.*, Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329 (2007); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997). That Schwartz was the first Reporter for the *Restatement (Third) of Liability for Physical and Emotional Harm* may explain the fairly even division among theoretical references within that document. *See supra* note 102.

323. Admittedly, to prescribe a change in tort that reflects observations about human psychology may look like yet another "external" theory of tort. To be clear, the Article does not urge a toggle model of tort liability for the purpose of conforming tort to the realities of human psychology. Quite the opposite. It is because individuals intuitively adapt their normative preferences to their social contexts that tort doctrine has embedded devices that invite context-sensitive assignments of liability. Judges have for years been using those devices to render both justice-driven verdicts and efficiency-driven verdicts as circumstances have required, and drafters of the *Restatement* have captured this practice. In short, the toggle is already present within tort doctrine. What has been absent is a frank acknowledgment that decision makers deploy the toggle. Acknowledging the ability to toggle and the reality that toggling is already underway both honors the existing structure of the law and simultaneously reveals that the availability of multiple norms is essential to the achievement of its unitary, community-constructing purpose.

flicted within the open community, that community would supply the sociological norm sought by the open-textured element of the relevant tort. It is possible that the modern community shares some moral values, but it is far more likely that the members of the modern community hold a plurality of values. In that typical case, an efficiency norm would be imported to the liability assessment. The same pattern would apply in all three headings of liability.

A. Intentional Torts

Battery is, on its face, an uncomplicated intentional tort. The defendant is liable for any unconsented touching of the plaintiff that is harmful or offensive.[324] However, "offensive" touchings are those deemed to "offend[] a reasonable sense of personal dignity" in light of the "social usages prevalent at the time and place at which it is inflicted."[325] It is no surprise, therefore, that the question of "offense" may not be subject to a unitary answer when the same behavior takes place within different communities. When plaintiffs have brought battery claims premised on their inhalation of smoke emitted by defendants, it is to be expected that different results would follow.

For example, a North Carolina postal employee allergic to smoke sued his supervisor for smoking a cigar during meetings in a confined office despite the supervisor's awareness of the plaintiff's condition.[326] Tobacco has "traditionally been one of the most important industries in North Carolina and a backbone of the state's agricultural heritage."[327] A North Carolina appellate court found that absent evidence of actual sickness resulting from the smoke, the plaintiff's distress from inhaling the smoke was insufficient to find the smoker liable for battery.[328] It was to be expected that the court would hesitate to empower community members to recover for battery simply by expressing an aversion to tobacco. Similar facts led to a different result in Ohio, where there is virtually no tobacco farming industry.[329] There, the court found that a radio host who intentionally blew cigar smoke into the face of an antismoking activist who ap-

324. *See* RESTATEMENT (SECOND) OF TORTS §§ 18-20 (AM. LAW INST. 1965).

325. *Id.* § 19 cmt. a.

326. McCracken v. Sloan, 252 S.E.2d 250, 251-52 (N.C. Ct. App. 1979).

327. Duke Ctr. on Globalization, Governance, & Competitiveness, *North Carolina in the Global Economy: Tobacco*, N.C. GLOBAL ECON., http://www.ncglobaleconomy.com/tobacco/overview.shtml [http://perma.cc/YW8G-BW9B].

328. *McCracken*, 252 S.E.2d at 252.

329. *The Shrinking Role of Tobacco Farming and Tobacco Product Manufacturing in Ohio's Economy*, CAMPAIGN FOR TOBACCO-FREE KIDS (Oct. 7, 2015), http://www.tobaccofreekids.org/research/factsheets/pdf/0351.pdf [http://perma.cc/V38U-QQC4].

peared on his show could be held liable for battery.[330] In both cases, courts drew from closed community norms to decide whether the private decision to expose an unwilling person to smoke would be understood as an affront to the non-smoker's dignity, with predictably different results given the traditional communities within which the alleged batteries took place.

When similar claims are made within the open community, typically framed as battery and assault lawsuits against tobacco companies by individuals complaining about the health effects of second-hand smoke, courts, without a unitary national norm against smoking and without reliable evidence that a liability rule would efficiently deter smoking injuries,[331] have rejected them as untenable.[332]

B. Strict-Liability Torts

The same dynamic is relevant to strict-liability litigation. Defendants are strictly liable for injuries caused by "abnormally dangerous activity."[333] "Abnormal" danger turns on the high degree of risk of harm, the gravity of that harm, the "inability to eliminate that risk," the uncommonness of the activity, the poor fit between the activity and the place it occurs, and whether the activity's "value to the community" is outweighed by its danger.[334] The last three of these factors tie the "abnormality" of an activity to its role in community life. Of course, different activities play vastly different roles in different communities. Thus, strict liability should require the decision maker to identify the precise community whose norms are relevant to the determination of "abnormality."

---

330. Leichtman v. WLW Jacor Commc'ns, Inc., 634 N.E.2d 697, 698, 700 (Ohio Ct. App. 1994) (per curiam).

331. *See* Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1175-76, 1260-62 (1998).

332. *E.g.*, Shaw v. Brown & Williamson Tobacco Corp., 973 F. Supp. 539, 548 (D. Md. 1997) (rejecting a battery claim based on exposure to second-hand smoke, and stating that "[i]t is unsurprising that neither plaintiffs nor the Court have been able to unearth any case where a manufacturer of cigarettes or handguns was found to have committed a battery against those allegedly injured by its products"); Tijerina v. Philip Morris, Inc., No. CIV.A. 2:95–CV–120–J, 1996 WL 885617, at *4-6 (N.D. Tex. Oct. 8, 1996) (finding that battery claims based on injury from fibers and chemicals inhaled during smoking were "novel," and denying class certification to plaintiffs).

333. RESTATEMENT (SECOND) OF TORTS § 519(1) (AM. LAW INST. 1977).

334. *See id.* §§ 520(a)-(f).

For example, the mother of a twenty-six-year-old man who took his life after suffering multiple concussions while playing youth and high school football recently sued a youth football organization for her son's wrongful death and her own loss of his companionship.[335] She alleged that the football league should be strictly liable because youth football is "abnormally dangerous."[336] As "abnormality" results in part from community values, the cultural resonance of amateur football within the relevant community must be assessed—and that is likely to vary from community to community.

In West Texas, high school football plays a crucial role in the social infrastructure.[337] In contrast, school officials in Missouri and Maine have recently shut down their football programs because students have so little interest in the game that officials fear they cannot safely field a team.[338] Explicit application of the tort toggle would dictate a finding of liability—of abnormality—where both plaintiff and defendant are members of a Maine community that does not assign social importance to football, but a finding of no liability—of normality—where both plaintiff and defendant are members of a West Texas community that assigns great social importance to football. The mere fact that the liability outcomes are different would not necessarily render either of them incorrect. They would each be correct because they would each reflect the endogenous, intersubjective preferences of their respective communities, and would not infringe on the contrary intersubjective preferences of other closed communities.

However, Pyka's suit involved a plaintiff from rural Wisconsin and a national corporate defendant, Pop Warner Football. In this circumstance, the

335. Complaint, Pyka v. Pop Warner Little Scholars, Inc., No. 15-CV-57 (W.D. Wis. Feb. 5, 2015).

336. *Id.* at 20-21.

337. *See* Len Hayward, *Football Defines West Texas Towns*, ESPN (Oct. 14, 2008), http://www.espn.com/highschool/rise/football/news/story?id=3642102 [http://perma.cc/6RN3-QPWW] ("The area's general isolation is a major reason. Excluding the sprawling and growing metropolis of El Paso, there is no city in West Texas with more than 300,000 people. Dotted across a landscape larger than many states in the Northeast are a number of small towns and cities that in many cases are 50 miles apart—and sometimes 100 or more miles apart. And the centerpiece of the towns is the school, because many of the town's [sic] economies are based on the boom and bust nature of oil, farming and ranching. The school is sometimes a city's or county's largest employer, and it is the gathering place for nearly everyone in those communities. Even in the larger cities, the happenings at the local school district will dominate news, and that has bled over to the football team through the years. 'Oil may go up and down and cotton may go up and down, but the schools and football will always be there,' said Abilene High coach Steve Warren. 'More than anything else, it gives the community something to rally around.'").

338. Stan Grossfeld, *Fearful of Injuries, a Maine High School Cancels Football*, BOS. GLOBE (Oct. 16, 2015), http://www.bostonglobe.com/sports/2015/10/16/fearful-injuries-maine-high-school-cancels-football/1Yax9bOA9XtW5fiNzCg8uI/story.html [http://perma.cc/V5C7-2SU2].

plaintiff and defendant did not belong to a single closed community, and therefore the decision maker could not determine liability based on shared intersubjective values. Instead, the decision maker would have to toggle to an efficiency approach, asking whether the benefit of Pop Warner and youth football nationally outweighed its capacity to harm. This could well require an examination of the economic benefits of the activity and the cost associated with the injuries, perhaps through introduction of expert testimony.

C. Negligence

The toggle works equally well in the negligence setting where norms may fluctuate between communities. The 2015 measles outbreak in California is a case in point. At the time, California had a positive law requiring parents to follow a standard immunization schedule before enrolling their children in school, but it had carved out a liberal exception to the requirement for parents who claim a "personal belief" that prevents immunizing.[339] In 2013, fewer than three percent of incoming California kindergartners declined vaccination for reasons of "personal belief."[340] However, in Northern California's Mill Valley almost nine percent of kindergartners were unimmunized; and in the suburb's Greenwood School, about two-thirds of incoming kindergartners had not been immunized.[341] In other words, the political community of the state left a gap between preferring vaccinations and mandating them in its legislation. Within that gap, different communities generated different social norms.[342]

---

339. Jim Welte, *Mill Valley Parents Reject Vaccines at a Higher Rate than State and Marin County Averages*, MILL VALLEY PATCH (Aug. 19, 2013, 8:43 PM), http://patch.com/california/millvalley/mill-valley-parents-reject-vaccines-at-a-higher-rate-than-state-and-marin-county-averages [http://perma.cc/ZW3M-TWMG].

340. *Id.*

341. *Id.*

342. Notably, when that gap left state children vulnerable to measles, the California legislature could not act fast enough to thwart the spread of the disease. Instead, the sociological community took immediate steps to both educate and stigmatize anti-vaccination parents. Erin Allday & Victoria Colliver, *Vaccine Efforts Focus on Shot-Shy Parents*, S.F. CHRON. (Feb. 1, 2015, 9:30 PM), http://www.sfchronicle.com/health/article/Vaccine-efforts-focus-on-shot-shy-parents-6055677.php [http://perma.cc/T6JP-6CCC] ("[I]n California, about 92 percent of children are fully vaccinated by kindergarten, although those rates vary widely from county to county."). Many parents publicly complained that unvaccinated children in their local schools were endangering public health. Local news outlets published lists of local schools with the highest populations of unvaccinated children, essentially shaming parents toward a more vaccine-friendly norm without relying on the political community to change the current regulatory scheme. *See, e.g.*, Lauren M. Whaley, *Measles Outbreak: Bay Area Day Cares Show High Rates of Unvaccinated Kids*, MERCURY NEWS (Mar. 6, 2015, 8:47

A parent whose child contracted measles from a Greenwood School student might sue that student's family for negligence. [343] The reasonableness of declining to vaccinate could be contingent on the norms of the community within which the interpersonal dispute arose. Thus, if both the infector and infectee attended the Greenwood School, the school community's norm—against vaccination—would dictate a finding of no negligence. Conversely, if the infector attended anti-vaccine Greenwood and the infectee attended a pro-vaccine public school outside of Mill Valley, there would be no common cultural norm and the decision maker would toggle to an efficient outcome. The benefit of protecting personal belief would be weighed against the risk of infecting the herd, and liability would likely be imposed.[344]

D. Implementing the Toggle

Toggling in this explicit fashion is admittedly a novel exercise for which there is no established model. A comprehensive treatment of the procedural and substantive innovations needed to fully implement a tort toggle are beyond the scope of this Article. However, a few points bear mention. First, empirical evidence suggests that juries are typically instructed to trust and apply their own intuitions about what care the community expects in a given circumstance,[345] but that juries find these instructions confusing because they conflict with admonitions to restrict jurors' deliberations to evidence introduced in

---

AM), http://www.mercurynews.com/health/ci_27659828/measles-outbreak-bay-area-day-cares-show-high [http://perma.cc/5HDS-WEHK]. Had a negligence lawsuit been brought by parents outside the anti-vaccination Mill Valley community against Mill Valley parents who had declined to vaccinate, it would have presented an opportunity to discern and announce a pro-vaccination norm among the wider community, reinforcing the sociological norms symbolized by these informal efforts. It took the political community six months to mobilize lawmakers to eliminate the personal belief exemption.

343. *See, e.g.*, Dorit Rubinstein Reiss, *Compensating the Victims of Failure To Vaccinate: What Are the Options?*, 23 CORNELL J.L. & PUB. POL'Y 595, 597-98 (2014).

344. Notably, in any of these situations, if a majority of the political community agreed that the contested behavior posed the kind of threat to health, safety, or welfare that warranted a state-sponsored prohibition, they could urge representatives to redistrict the behavior from private law treatment to public law treatment and promulgate positive law accordingly. For example, the political community in California eventually mobilized to eliminate the personal belief exemption from mandatory vaccinations. *See* Phil Willon & Melanie Mason, *California Gov. Jerry Brown Signs New Vaccination Law, One of Nation's Toughest*, L.A. TIMES (June 30, 2015, 9:11 PM), http://www.latimes.com/local/political/la-me-ln-governor-signs-tough-new-vaccination-law-20150630-story.html [http://perma.cc/3Q69-M3FM].

345. *See, e.g.*, Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 620-21 (2002).

court.[346] In order for the toggle to work most effectively, particularly in the jury setting, juries would have to be explicitly instructed that their personal experience of community care expectations is a relevant and permissible basis for giving meaning to open-textured liability elements such as "reasonable," "outrageous," "defamatory," and "ultrahazardous."

Second, where a community has a strong identity and readily discernable norms, the process of importing those norms into the liability decision would pose few problems. So, for example, if a plaintiff who crossed a union picket line sued for defamation after having been called a "scab" publicly, it is fairly self-evident that jurors in the union-rich Detroit community might find the word likely to lower the plaintiff's estimation in the community, while jurors in a state without deep union activity might find the word unlikely to do so. Community norms would yield a "defamatory" finding in the former instance and a "not defamatory" finding in the latter. But the toggle is admittedly harder to operationalize when communities or community norms are less definite. Not only would the scope of the community have to be determined, either through a judicial finding or through the introduction of evidence and a jury finding, but the jury would also have to articulate its understanding of a norm that might be inchoate. Importantly, the role of the jury in community construction is arguably even more important in these difficult cases. The act of expressing this norm publicly begins the process of construction, as it opens an opportunity for community response through public discussion and possibly a contrary decision in a subsequent related case.

Notably, juries already seem to intuit that one dimension of their role is to communicate expectations about the care that community members owe to one another and to the public at large. Oftentimes during deliberations, jurors discuss the fact that their liability determinations "send a message" or a "wakeup call" to those situated similarly to the plaintiff or the defendant.[347] At the same time, individual jury verdicts are inherently constrained in their reach by virtue of their decentralized and fact-specific nature.[348] This structural constraint

---

346. *See, e.g.*, Shari Seidman Diamond, Beth Murphy & Mary R. Rose, *The "Kettlefull of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1573-74 (2012). Diamond and her coauthors studied actual jury deliberations in Arizona cases, finding that in automobile accident cases, for example, "[s]ome jurors who conscientiously focused on the admonition to decide only on the evidence were unsure whether or not their personal experiences as drivers or accident victims could be discussed during deliberations." *Id.* at 1574.

347. *Id.* at 1582-83.

348. The same cannot be said of appellate court opinions addressing the legitimacy of the jury verdict or the processes that produced it. Many appellate court holdings read like generally

minimizes the impact of any one verdict later determined to be a poor representation of preferences within either the sociological or the political communities. Further, the public nature of jury verdicts means that even "erroneous" verdicts serve the purpose of alerting communities to the existence of a sentiment that may require override. So jury verdicts identified by community members as dissonant with prevailing norms may ultimately be contradicted by subsequent verdicts.

Similarly, the availability of tort as a method for publicly articulating sociological community norms can alert the political community to groups whose private norms require a forceful public response. How so? Some jury verdicts may accurately represent a sociological community norm, and be doctrinally correct as a reflection of that community's intersubjective values. Nevertheless, they might offend the preferences of the political community. This type of verdict operates as a red flag, alerting the political community that it needs to act collectively to dismantle a particular sociological community preference by promulgating contrary positive law. Tort law's unique and primary competence is in nurturing mechanisms for private coordination that relieve the political community of lawmaking and peacekeeping obligations. But when private coordination trespasses on the political community's shared desire for safety or health in some discernable fashion, positive lawmaking is necessary and beneficial. Aberrant tort verdicts provide information about these sociological community trespasses.

For example, as the existence of sociological preferences against vaccination in outlier communities has drawn more public attention, the political community preference in favor of mandatory vaccination has grown more robust. When California learned about pockets of community resistance to vaccines during its 2015 measles outbreak, the political community mobilized to limit its statutory "personal belief exception" to vaccine requirements.[349] But several months elapsed between the outbreak and the eventual political response. Had an anti-vaccination family been sued and exonerated by an insular anti-

applicable rules that would hold across multiple times and circumstances. This is one reason that the shift in tort law's center of decision-making gravity from the jury to the judge is a dubious development, at least within a community-constructing account of tort. *See, e.g.*, Smith, *supra* note 169, at 445 (tracing the latitude enjoyed by the jury in the antebellum period and its erosion as the country industrialized). Further, whether judicial rulemaking within tort law is desirable has been the subject of longstanding debate. *See, e.g.*, *supra* note 310 and accompanying text (discussing Justice Holmes's effort to establish a uniform "stop, look, and listen" obligation on all drivers crossing railroad tracks and the eventual success of Justice Cardozo in dismantling that rule in favor of a more open-textured, context-sensitive approach).

349. *See* Willon & Mason, *supra* note 344.

vaccination community prior to the massive outbreak, news of the verdict would have publicized the existence of this aberrant community and the political process might have been activated sooner.

Although implementing a community toggle is not without concrete challenges,[350] it is nevertheless promising for several reasons. First, it would improve the internal coherence of tort by emphasizing tort law's function of analyzing whether contested behavior is welcome or unwelcome in particular communities that depend on private coordination of interpersonal relationships. Further, it would clarify the appropriate use of insights from non-legal disciplines. For example, it would allow economic analysis to be leveraged towards determining the optimal conduct of youth football nationally, but would discourage such efficiency metrics to resolve a defamation case between two autoworkers who clash at the union hiring hall during a labor strike. Finally, using the toggle to clarify the community reach of particular verdicts could also clarify the role of tort in relation to other bodies of law. This possibility is discussed below.

V. COMMUNITY AS A MEANS FOR MEASURING TORT LAW'S OVERLAP WITH OTHER BODIES OF LAW

Aside from improving the internal coherence of tort law, the toggling approach has important practical implications when tort interacts with other bodies of law. These interactions tend to arise when the deeply held values of local communities are at odds with those of the national political community, typically on controversial topics such as the regulation of cyber harassment or gun ownership. As long as the purpose of tort remains ambiguous, the process of resolving conflicts between tort and public law is vulnerable to outcome-driven analysis. But placing tort on a firmer footing can improve the consideration of these conflicts. For example, when a constitutional principle appears inconsistent with a tort verdict, or when federal regulation is in tension with a tort verdict, clarifying the underlying purpose served by the verdict at issue may dictate whether it must give way to the contrary federal value. Put simply, the extent of overlap between a tort adjudication and positive public law generated

350. Operationalizing the tort toggle might require procedural refinements in tort cases. For example, litigants might have to specify in their pleadings the scope of the community relevant to the injury at issue, and might have to introduce evidence as to the norms of that community. Further, if cases were decided by a jury, the court might have to instruct jurors as to the scope of the relevant community as a matter of law, or instruct jurors to delineate the scope of the community themselves as a matter of fact.

at the federal level may vary depending on the community reach of a particular verdict.

In fact, the friction between state private law and federal public law may be conceptualized as no more than a standard choice of law question. The dilemma posed when two bodies of law are competing to govern a given set of facts can be reduced to a pair of questions.[351] First, what is the scope, or reach, of each contending law? If the two contending regimes' scopes do not in fact overlap, there is no conflict to resolve. If the two regimes' scopes do overlap, however, then the court selecting between them must ask a second question: which takes priority?[352] In the case of conflicts between state private law and the Constitution or between state private law and federal statutes or regulations, the answer to the "priority" question is predetermined by the Supremacy Clause. But the priority question may never require an answer if a nuanced approach is taken in answering the "scope" question. If state private law is, in a particular case or circumstance, constructing only a traditional closed community, its scope may not intrude at all upon federal regimes. If so, there is no need to choose between the two, and they may operate concurrently without raising Supremacy Clause concerns. Conversely, if state private law is, in a particular case or circumstance, designed to construct norms for the modern, open community, its scope may overlap considerably with federal regimes. In those cases, the court must assign priority to one of the candidates and the Supremacy Clause mandates that the federal regime take priority.

A. Tort Versus the Constitution

Although the dynamic has been underexamined, select constitutional provisions seem to pose at least a theoretical conflict with the operation of tort. Among these are the guaranteed freedoms of the First and Second Amendments, along with some dimensions of the guaranteed due process of law.

1. Dignitary Torts and Freedom of Speech

The most obvious, and most well-developed, example of this conflict arises in the context of dignitary torts. In 1964, the Supreme Court announced for the first time that the defamation tort was state action subject to the First Amendment as incorporated against the states.[353] In *New York Times Co. v. Sullivan*,

351. *See* KERMIT ROOSEVELT III, CONFLICT OF LAWS 1-2 (2010).

352. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

353. *Id.*

the Court conceptualized defamation as an ex ante rule which, by invoking the threat of damages in response to injurious words, amounted to an abridgment of speech. The Court held Alabama's defamation tort unconstitutional[354] and in a series of cases over the next two decades crafted a defamation scheme of its own,[355] designed to protect democratically relevant speech while permitting private figures to recover when injured. This scheme has also been held to apply to the torts of false light invasion of privacy[356] and intentional infliction of emotional distress.[357]

In rendering these opinions, the Court seemed to conceptualize these nominate torts as ex ante regulatory rules that had the potential to externalize local speech norms onto the pluralistic national community. For example, in *Sullivan*, Justice Black observed that the Alabama jury verdict in favor of a local sheriff, who complained that a *New York Times* advertisement accused him of brutality during civil rights protests, was sending a message to "outside agitators" in the Northern media.[358] The Court seemed alarmed that a closed local community could set speech norms for the open national community, and held that the First Amendment superseded tort rules to prevent that result.[359] But in a later case, the Court overrode a local jury's finding that a suburban newspaper's reference to a community businessman as a "blackmailer" would be understood as a charge of criminal behavior.[360] In doing so, the Court again

---

354. *Id.* at 283-84.

355. *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Supreme Court's Stealth Return to the Common Law of Torts*, 65 DEPAUL L. REV. 433, 439-40 (2016) (tracing cases over a two-decade period that reconceived defamation liability by distinguishing between public and private plaintiffs; requiring each category to prove a different level of defendant *scienter*; and shifting the burden of proof on falsehood from the defendant to the plaintiff (among other changes)).

356. Time, Inc. v. Hill, 385 U.S. 374 (1967).

357. Snyder v. Phelps, 562 U.S. 443 (2011); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988). Because some courts have expanded the category of "public figure" to include those with a significant social media following, this scheme presents obstacles to dignitary tort suits seeking remedies for cyber harassment and revenge porn. *See*, *e.g.*, Paul J. Larkin, Jr., *Revenge Porn, State Law, and Free Speech*, 48 LOY. L.A. L. REV. 57, 99-111 (2014) (summarizing the First Amendment objections to tort claims for revenge porn).

358. 376 U.S. at 294 (Black, J., concurring).

359. *See, e.g.*, Cristina Carmody Tilley, *Tort, Speech, and the Dubious Alchemy of State Action*, 17 U. PA. J. CONST. L. 1117 (2015).

360. *See* Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler, 398 U.S. 6, 14 (1970) (holding that no reasonable reader in Greenbelt, Maryland could have understood a newspaper story as imputing a criminal activity when it circulated exclusively within Greenbelt a report of a speaker's comments that a Greenbelt real estate developer was "blackmailing" the city—although a ju-

seemed to conceptualize tort as an ex ante regulatory body of law concerned with finding norms for the national community even though the verdict at issue would have had no impact outside the Maryland suburb where it was rendered.[361]

Activating the toggle approach to tort might allow the Court to reach a more nuanced accommodation of both freedom and dignity in speech injury cases. That is, if the Court were to look closely at the community being constructed by a particular tort action, it could ask whether the verdict amounted to an efficient calculation of speech value on a national basis or to a closed community effort to indicate that legally permissible speech was socially unappealing. The broad scope and regulatory nature of the former verdict is a more pronounced threat to speech freedom than the modest scope and remedial nature of the latter, and thus might warrant a more categorical application of the First Amendment.

2. *Negligence and the Right To Keep and Bear Arms*

Although the constitutional conflict in the speech tort arena is well-trodden ground, a second conflict appears to be looming on the horizon now that the Court has incorporated the Second Amendment against the states.[362] Specifically, if a tort verdict rendered for a plaintiff injured by careless speech is state action subject to the First Amendment, it is plausible that a tort verdict rendered for a plaintiff injured by careless storage or brandishing of a gun is also state action subject to the Second Amendment. If so, the Court would have to determine to what extent Second Amendment rights to keep and bear arms foreclose tort rights to recover for injuries inflicted by those arms. Here, too, a toggling approach to tort has something to offer. If tort verdicts against gun owners are conceptualized as ex ante and regulatory, then they categorically infringe on Second Amendment rights and are arguably foreclosed by constitutional principles. But if they are conceptualized as ex post and remedial, then they may coexist with Second Amendment rights. So, for instance, a negligence case brought by parents of a child who accidentally grasps and shoots a gun left unattended in the home of a neighbor, in a community where gun ownership is

ry composed of local residents had decided that the word was capable of just that construction).

361. *Id.*

362. McDonald v. City of Chicago, 561 U.S. 742 (2010).

widespread, would be an instance of closed community construction.[363] In such a case, whether the particular method of gun storage in the case was "reasonable" would be informed by community gun storage customs. In fact, the verdict in the case would reinforce community solidarity by making explicit the group's understandings about how guns are to be stored and maintained. But its identification of deviance for purposes of constructing local community would not be designed to erect ex ante regulatory norms for those outside the community.

In contrast, a tort case brought by a nine-year-old tourist against an Arizona shooting range for negligent supervision while she mishandled an Uzi would be an instance of open community construction.[364] Here, the litigants would not belong to a single closed community with shared values about gun storage and brandishing. A decision maker attempting to incorporate community norms about the reasonableness of the supervision would not have recourse to a unitary set of social expectations. Instead, she would have to toggle to a purely efficiency-based inquiry into the general benefit served by the operation of shooting ranges versus the cost associated with them.

The first case, which incorporates local community norms in deciding whether one community member owed an interpersonal duty to another, has a reach limited to the closed community involved in the dispute. Thus, it is less likely to pose a categorical threat to gun rights enjoyed by the national polity, and it is not as clear a candidate for invalidation on Second Amendment grounds. The second case, however, is designed to apply gun supervision norms across multiple communities and to strike an efficiency norm, because there is no single community with shared circumstances or values that can supply the rule of decision. If the decision maker in that case determined that the shooting range should be liable to the child shooter and her victim because the national benefit of guns was outweighed by their potential for harm, that decision is far more likely to have an ex ante regulatory impact than the first verdict. Thus, it would pose a more categorical threat to Second Amendment

363. *See, e.g.*, Dylan Baddour & Monica Rhor, *A Mother's Anguished Cry: "My Baby Is Gone*," HOUS. CHRON. (Mar. 1, 2015, 11:18 PM), http://www.houstonchronicle.com/news/houston-texas/houston/article/A-mother-s-anguished-cry-My-baby-is-gone-6109286.php [http://perma.cc/6KX4-L2VG]; T. Rees Shapiro & Jim Tankersley, *Guns Are Deep in the Culture of Oregon Town Beset by School Shooting*, WASH. POST (Oct. 2, 2015), http://www.washingtonpost.com/business/economy/guns-are-deep-in-the-culture-of-oregon-town-beset-by-school-shooting/2015/10/02/c1e8078c-693f-11e5-9ef3-fde182507eac_story.html [http://perma.cc/S7L5-DCKG].

364. *See, e.g.*, Dave Hawkins, *Shooting Instructor Dies After Being Accidentally Shot by Girl*, LAS VEGAS REV.-J. (Aug. 26, 2014, 9:24 AM), http://www.reviewjournal.com/news/nevada/shooting-instructor-dies-after-being-accidentally-shot-girl [http://perma.cc/2QZT-MNGW].

rights and would be a more obvious candidate for override by a constitutional rule prohibiting the imposition of liability.

3. Other Potential Clashes Between Tort and Public Law Rights

The potential for tort liability to pose an arguable overlap with the enjoyment of constitutionally guaranteed freedoms is not limited to the two examples discussed in detail above. The multiple guarantees found in the First Amendment arguably complicate the process of tort liability that would appear to burden the exercise of these rights. For example, tort liability against activists for injuries that bystanders suffer during public protests could be said to burden the right to freedom of assembly.[365] In all of these instances, understanding the sociological preferences that produced the relevant tort verdict would help courts delineate the scope of the verdict and decide whether effectuating the superior public law guarantee of a right requires a complete override of the verdict or a more deferential treatment of it.

In addition, the Court has in recent years taken an intense interest in the due process rights of defendants ordered by juries to pay punitive damages.[366] In these cases, community determinations that a defendant has breached sociological norms in a way that requires stigmatization clash with the public law guarantee of due process of law. The Court has to date hesitated to explicitly displace state mechanisms for allowing communities to devise stigmatization measures they deem appropriate, while strongly suggesting that such mechanisms must comply with public law directives found within the Fourteenth Amendment.[367] Acknowledging the community-constructing dimension of the damages calculation may be helpful in the process of concretizing the kind of process that is "due" to defendants who are required to participate in this private law exercise.

---

365. *See, e.g.*, Maxwell v. S. Christian Leadership Conference, 414 F.2d 1065, 1067-68 (5th Cir. 1969) (applying the First Amendment to shield an advocacy organization from negligence liability when a bystander was injured by gunfire that a private individual aimed at protesters as he tried to break from the crowd).

366. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424-26 (2003) (analyzing the point at which the ratio of punitive damages to compensatory damages ceases to satisfy due process).

367. *See, e.g.*, *id.* at 425 (noting that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process").

B. Preemption

Toggling between community norms could also contribute to a more nuanced doctrine of preemption when federal statutes or regulations are in tension with individual tort verdicts. The Supremacy Clause of the Constitution provides that federal law takes priority over inconsistent state law, and preemption doctrine operationalizes the prioritization process. State law is considered expressly preempted "when Congress includes an explicit preemption provision in a statute."[368] State law is impliedly preempted when one can infer from a federal statutory or regulatory scheme that Congress intended the federal law to deactivate the state law.[369] Federal law may impliedly preempt state law either when it "so dominates an area such that there is no room left for state law to operate"[370] (field preemption), or when state law and federal law are so at odds that they cannot comfortably coexist. This "conflict preemption" is found "when an actor could not follow the dictates of state law while complying with federal law"[371] (impossibility preemption), or when "the state law obstructs or frustrates the purposes of the federal statutory or regulatory scheme"[372] (obstacle preemption).

In express preemption and implied field preemption, the federal government has legislated in a way that categorically disables any role for state law. In implied conflict preemption, particularly that branch of the doctrine that displaces state law because it is thought to pose an insurmountable "obstacle" to the purposes of federal law, the basis for disabling state law is not a categorical expression of supremacy by federal legislators but a determination by the court that the federal law is incompatible with a role for the states.[373] When the state action alleged to be inconsistent with federal legislation is a statute, the domains of the respective enactments are easy for the court to discern and compare.[374] When the state activity alleged to be inconsistent with federal legislation or regulation is derived from a common-law tort verdict, the court is left to

---

368. Catherine M. Sharkey, *Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle*, 61 DEPAUL L. REV. 643, 643 (2012).

369. *See id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J. L. & LIBERTY 63, 84 (2010).

374. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 544-51 (2001) (comparing the provisions of the Federal Cigarette Labeling and Advertising Act with Massachusetts's comprehensive regulation of cigarette, smokeless tobacco, and cigar advertising).

its own devices in delineating the scope of the "tort law" it is attempting to square with federal law.[375] Because of the unresolved tension between instrumental views of tort as an efficient body of law and as a moral body of law, the court has some latitude in implied conflict preemption cases to describe tort as it wishes before examining whether it is incompatible with federal law.

In a series of recent cases, the Court has been inconsistent in characterizing the purpose and scope of the tort action that is alleged to conflict with federal law. These cases illustrate that mediating conflicts between federal positive law and state common law is not just a question of assessing the federal side of the scale, but also of more fully theorizing the nature of the tort scheme that is alleged to pose an obstacle to the realization of federal purposes.

For example, in the 2013 case *Mutual Pharmaceutical Co. v. Bartlett*, the Court was asked to decide whether a tort design defect verdict in favor of a woman injured by a generic anti-inflammatory drug was preempted by a Food and Drug Administration (FDA) regulation barring generic drug manufacturers from making changes to either the chemical composition or the label of the originally patented drug they sell.[376] The five-Justice majority held that the FDA regulation preempted the verdict. This holding was, in part, the product of the majority's conceptualization of the body of law that produced the verdict. For example, the majority explained that "a tort judgment . . . establishes that the defendant has violated a state-law obligation," and therefore imposes "affirmative duties" that are "regulatory" in nature.[377] The majority explicitly stated that for preemption purposes, there was no difference between a common law principle which, when applied to specific facts, exposed a defendant to ex post financial liability and a statutory "legal mandate" that would draw a fine or sanction.[378]

The dissent, in contrast, conceived of tort very differently. First, it acknowledged that tort law can play a deterrence role, but described that role as less than regulatory: while a mandate leaves a defendant "no choice" about how to behave, private law liability gives a defendant an incentive to adjust behavior to avoid ex post liability or elect behavior that could expose him to ex post liability.[379] Further, the dissent noted that the nature of private law tort verdicts, in

---

375. Sharkey, *supra* note 368, at 653.

376. 133 S. Ct. 2466, 2470 (2013).

377. *Id.* at 2474 n.1; *id.* at 2488 (first quoting Riegel v. Medtronic, Inc., 552 U.S. 312, 323-24 (2008); then quoting Cipollone v. Liggett Grp., 505 U.S. 504, 522 (1992); and then quoting Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185-86 (1988)).

378. *Id.* at 2479.

379. *Id.* at 2488 (Sotomayor, J., dissenting).

which abstract principles requiring compensation from those who market products that are "unreasonably" dangerous or that carry "insufficient" warnings are applied to individual fact patterns, complicates the process of identifying "what, if any, specific requirement a state common-law claim imposes."[380] In this respect, a common-law cause of action is different from a regulation or statute, which specifies behavior that is either required or prohibited (e.g., a drug label *must* contain certain language or *cannot* contain certain language).

The same debate came out the opposite way four years earlier in *Wyeth v. Levine*.[381] In that case, the Supreme Court upheld a Vermont tort verdict for a woman whose forearm was amputated after an intravenous injection of an antinausea drug despite an FDA decision approving a label that seemed to condone IV injection.[382] There, the Court indicated that the tort verdict at issue was not regulatory, in the sense that it did not "mandate a particular replacement warning, nor did it require [language contraindicating IV-injection of the drug] . . . ."[383] Instead, the verdict merely indicated that the warning as it appeared was insufficient and that an injury resulting from that insufficiency had to be compensated. The dissenting Justices, in contrast, described the tort verdict as a device for regulating prescription drug labels.[384] The verdict, according to the dissent, "countermand[ed]" the FDA's drug label.[385]

In sum, the stark contrast in tort conception dictated opposite outcomes for the two otherwise similar cases of *Wyeth* and *Bartlett*, just four years apart. Moreover, these cases continue a zigzag pattern begun two decades ago, with the Court veering from a "regulatory-utilitarian" view of tort to a "compensatory-justice" view of tort and varying the preemption outcomes accordingly.[386]

---

380. *Id.* at 2489 & n.5.

381. 555 U.S. 555 (2009).

382. *Id.* at 568-70.

383. *Id.* at 565.

384. *Id.* at 605 (Alito, J., dissenting).

385. *Id. Compare* Riegel v. Medtronic, Inc., 552 U.S. 312 (2008) (holding that FDA's premarket approval of a medical device, combined with the manufacturer's compliance with the terms of the approval, barred a common-law claim that challenged the safety and effectiveness of the medical device), *with* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 447 (2005) (remarking that the Federal Insecticide, Fungicide, and Rodenticide Act's labeling requirements would preempt only state statutes or common-law rules that would establish labeling mandates that diverge from the Act's provisions).

386. *See, e.g.*, PLIVA, Inc. v. Mensing, 564 U.S. 604, 610-13, 616-19 (2011) (finding that state tort law required manufacturers aware of dangers to adopt a label that exceeded FDA requirements, but found federal law conflicted with state law and thus preempted the state tort claim); *Bates*, 544 U.S. at 445 (explaining that when a tort verdict operated as an incentive to adopt a safety measure rather than a requirement to do so, preemption was not warranted);

Rethinking tort as neither per se efficient nor per se justice-driven, but rather as a device for constructing community that allows room for both efficiency and justice approaches (depending on the community involved in the case), may improve on the current approach.

For example, when individuals serving on a state jury in Vermont determined that the generic anti-inflammatory prescribed for Diana Levine was unreasonably dangerous as administered, the first question to ask was whether the jury was constructing a national, efficient, or a local, moral, community.[387] If the jury was trying to construct an open national community by determining the relational obligations of all pharmaceutical companies to all members of the national community—not with reference to shared values but by optimizing the value of a drug with side effects—then the tort scope of the case would have overlapped with the FDA regulation. It would have essentially replaced the FDA's cost-benefit judgment with an alternate efficient judgment, and posed an obstacle to the goals of Congress in deputizing the FDA to set safety requirements for drugs. But if the jury was trying to construct a local community to reinforce shared values used to negotiate life in Vermont, then the scope of the verdict was considerably smaller and posed far less of an obstacle to the FDA's goal of striking a cost-benefit balance for the entry of a drug onto the national market.

Admittedly, acknowledging the tort "toggle" would not guarantee uniform outcomes when tort verdicts are alleged to pose an obstacle to federal regulation. Nonetheless, the use of an explicit toggle in the rendering of a tort verdict would serve two goals. First, it would provide a more consistent and principled basis for assessing the scope of the tort verdict at issue and the extent to which it overlaps with and is therefore preempted by federal law. Second, a mechanism that emphasizes the community-constructing significance of private injury verdicts makes clear exactly what is being lost when other bodies of law are aggrandized at the expense of tort.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 500 (1996) (finding victims' state-law claims of defective design and negligence not preempted despite federal approval under a substantially similar law). Catherine M. Sharkey has observed and commented on the same pattern. *See* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 459-66 (2008).

387. Carrying out this inquiry is not without challenges. One possible approach is to focus on jury instructions to determine the extent to which the court prescribed a specific rule of decision that would be broadly applicable to future cases presenting distinct fact patterns, as opposed to giving the jury discretion to determine "reasonableness" or "defect" based on the precise facts before it. In the former case, the verdict rendered would provide future actors a generalized signal; in the latter case, a specific behavioral rule.

CONCLUSION

A century ago, Legal Realists disrupted the study of tort law, suggesting that if it took account of the world outside the courtroom, it could contribute to revolutionary social changes. But the instrumental approaches designed to add value to this ancient body of law have actually started diminishing its perceived worth relative to other legal regimes. Tort law's legitimacy is increasingly seen as contingent on its capacity to realize extralegal goals such as efficiency or morality. New Doctrinalism promises to reinvigorate tort. Once a set of abstract rules unconnected to the realities of the parties it governed, doctrine is now being reimagined as a sort of analytical conveyor belt that routes instrumental insights to institutions that can deploy them for the unique purposes of the law. Taking a New Doctrinal approach to tort suggests that efficiency theorists and morality theorists have become so mired in their disciplinary preferences that they have missed the uniquely legal goal of tort: to construct a sociological community within which individuals can coordinate private relationships at a negligible cost to the state.

Doctrine clearly indicates that tort law is a body of law about community, about setting expectations for private interpersonal behavior at a subpolitical level. It has performed this function since the founding period. However, American community has evolved considerably since then. While the country was originally home to a multiplicity of closed communities featuring personal ties and moral solidarity, by the end of the nineteenth century, a second tier of community had developed. This open community was heterogeneous and migratory, and lacked moral solidarity. Closed communities adjudicating tort causes of action have recourse to shared morality regarding expected interpersonal behavior but open communities rarely do. As a descriptive matter, tort doctrine implicitly encourages decision makers to toggle between a moral conceptualization and an efficiency conceptualization depending on the tier of community that is under construction in a particular dispute.

Making this implicit toggling capacity explicit, and refining its operation, resolves the longstanding theoretical instability that has plagued tort. It legitimizes both efficiency and morality as manifestations of tort law's broader purpose. As important, clarifying the function of private personal injury law may also lead to a more coherent analysis when tort law is in tension with federal public law. Courts have been confounded by how to address tort verdicts that clash with federal constitutional freedoms, statutes, or regulations. This difficulty arises in part from theoretical angst over tort law's purpose. Once tort outcomes are more accurately categorized as constructions of either closed community or open community, courts will find it much easier to determine

whether a particular verdict poses a threat to federal prerogatives on hot-button issues like free speech and gun control. When sociological communities are encroaching on the singular mission of the state by devising quasi-regulatory national norms, courts can and should respond vigorously. But when tort law is operating within its unique competency by constructing self-sustaining private communities, public law overrides may do more harm than good.

APPENDIX

Restatement (Second) of Torts Sections Referring to Community

Division One: Intentional Harms to Persons, Lands, and Chattels

46: Outrageous Conduct Causing Severe Emotional Distress
48: Special Liability of Public Utility for Insults by Servants
192: Use of Public Highway
196: Public Necessity

Division Two: Negligence

283: Conduct of a Reasonable Man: The Standard
283A: Children
288: When Standard of Conduct Defined by Legislation or Regulation Will Not Be Adopted
289: Recognizing Existence of Risk
290: What Actor Is Required To Know
292: Factors Considered in Determining Utility of Actor's Conduct
295A: Custom
299A: Undertaking in Profession or Trade
302: Risk of Direct or Indirect Harm
302A: Risk of Negligence or Recklessness of Others
328A: Burden of Proof
330: Licensee Defined
402A: Special Liability of Seller of Product for Physical Harm to User or Consumer
416: Work Dangerous in Absence of Special Precautions
496D: Knowledge and Appreciation of Risk

Division Three: Strict Liability

504: Liability for Trespass by Livestock
509: Harm Done by Abnormally Dangerous Domestic Animals
520: Abnormally Dangerous Activities

Division Four: Misrepresentation

545A: Contributory Negligence
547: Recipient Relying on His Own Investigation
551: Liability for Nondisclosure

Division Five: Defamation

559: Defamatory Communication Defined
564A: Defamation of a Group or Class
568: Libel and Slander Distinguished

571: Slanderous Imputations of Criminal Conduct
580A: Defamation of Public Official or Public Figure
580B: Defamation of Private Person
595: Protection of Interest of Recipient or a Third Person
614: Determination of Meaning and Defamatory Character of Communication
621: General Damages

Division Six-A: Privacy

652D: Publicity Given to Private Life
652E: Publicity Placing Person in False Light

Division Seven: Unjustifiable Litigation

670: General Damages

Division Eight: Interference in Domestic Relations

686: Privilege of Parent or Other Person

Division Nine: Interference with Advantageous Economic Relations

767F: Factors in Determining Whether Interference Is Improper
771: Inducement To Influence Another's Business Policy

Division Ten: Invasions of Interests in Land Other than by Trespass

821B: Public Nuisance
821C: Who Can Recover for Public Nuisance
822: General Rule
826: Unreasonableness of Intentional Invasion
827: Gravity of Harm
828: Utility of Conduct—Factors Involved
850A: Reasonableness of Use of Water

Division Eleven: Miscelleneous Rules

870: Liability for Intended Consequences—General Principle

Division Twelve: Defenses Applicable to All Torts Claims

892: Meaning of Consent

Division Thirteen: Remedies

930: Damages for Future Invasions
942: Interests of Third Persons and of the Public