2-13-2017

What Is It Like to Think Like a Pre-modern?

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Date : February 13, 2017

Kenneth S. Abraham & G. Edward White, *The Transformation of the Civil Trial and the Emergence of American Tort Law*, **Ariz. L. Rev.** (forthcoming), available at SSRN.

There are a number of ways to tell the story of the change in American tort law that occurred in the nineteenth and twentieth centuries. Some, like John Witt, Lawrence Friedman, and Mort Horwitz, focus on changes in material conditions. Others, like Richard Posner, Charles Gregory, and Robert Rabin, focus on changes in intellectual or doctrinal beliefs about the nature of tort law, and the best mix of rules to achieve its ends.

In *The Transformation of the Civil Trial and the Emergence of American Tort Law* Kenneth Abraham and Ted White offer a fascinating and, I think, unique explanation for the rise of modern negligence law and the development of doctrines that allowed victims of accidents to collect for their personal injuries.

Abraham and White's thesis is subtle, and so I will present it in two parts. The first part of their thesis is that tort law before 1850 (what they call "premodern" period) was litigated in an evidence regime in which the discovery of "truth" (as we moderns know it) was not central to the civil trial. The second part of their thesis is that modern tort law came about, in part, because of the transformation of the civil trial into a "truth-seeking" process.

The argument for Part I of their thesis is based on a historical account about the law of evidence that may not be familiar to many tort scholars. Central to their historical account is that before 1850 "the plaintiff, the defendant, and other 'interested' witnesses were almost universally prohibited from testifying in civil trials." (P. 4.) The reasons for the remarkable state of affairs are complex, but for the moment, it is important to recognize that Abraham and White have pointed out an important fact about tort litigation before 1850. As they observe, the absence of the testimony of interested parties and witnesses meant that it was not practical to bring certain cases. One class of cases in particular would be extremely difficult to prove in court: "accidental personal injury or property damage cases." (P. 22.)

The argument for Part II of their thesis is based in part on inference and in part on an effort to examine court records from the nineteenth century. Abraham and White infer from the simultaneous change in the law of evidence in the United States— to allow testimony from parties and interested witnesses, as well as to permit cross examination and to limit hearsay— and the rise of modern tort law, with its emphasis on permitting redress for negligence, that the change in evidence law caused the change in tort law.

The article operates at two levels, one of which I find persuasive. I am persuaded by the historical and causal argument. Abraham and White draw attention to a causal factor that is significant. They must be right that changes in how trials were conducted had to affect how torts were heard and who was found liable. This, in turn, would have an effect on the development of the law. Their point is the material and doctrinal changes described by others would have been blunted, if not halted, by the absence of an adequate fact-finding mechanism at trial.

I am less persuaded by Abraham and White's broader theoretical claim, that the rules they identify as negligence-inhibiting reflect a different understanding about the point of civil litigation and tort law. For example, throughout the article, Abraham and White refer to the "epistemology of the civil trial." This concept, which tracks closely George Fisher's 1997 article, *The Jury's Role as Lie Detector*, challenges the idea that the purpose of trials was always to ascertain "objective truth."

Fisher's work is more modest about the reasons for the peculiar rules that characterized trials in England and the American states before the mid-nineteenth century. Fisher emphasized the potentially disruptive conclusions that might be drawn if judges allowed conflicting oaths to be presented to juries; given the claim that oaths were extensions of God's voice, the specter of cacophony seemed to counsel devices to suppress conflict.

But Abraham and White take a rule such as the ban on testimony by an interested party to be more than a device to suppress uncomfortable conflicts that might embarrass those in authority. They take it as evidence of a shared "epistemology": the purpose of a trial was to produce a conclusion that was "spiritually and socially appropriate," and this goal was superior to finding out "what happened." (P. 20.)

Abraham and White return to this theme throughout their article. For example, in explaining why the pre-modern tort trial might have excluded cross-examination and allowed hearsay, they argue that "if one considers the epistemological assumptions of the oath regime, limited cross-examination and the absence of a hearsay rule of evidence can be seen as logically entailed. … [B]oth [of] those evidentiary practices presuppose that the function of a civil trial is to reveal the truth about a dispute." (P. 29.)

The purpose of the civil trial in the pre-modern "oath regime" was to construct a picture of what happened "filtered through spiritual and social lenses" (P. 29) so that the jury could "search for the 'appropriate' social and spiritual resolution of a legal dispute" (P. 70).

Abraham and White's move from rules of evidence that seem wrong-headed to us today to the conclusion that they were a reflection of an "epistemology" that is radically foreign to us strikes me as a bit of an overreach. I have two reasons for being skeptical.

First, as Abraham and White themselves acknowledge, defenders of the witness rules that anchored the pre-modern civil trial sometimes defended them on the ground that they were more likely to produce truth. As Bentham argued at length, the pre-moderns defended these rules on the grounds that they were most likely to produce the truth (since the interested parties are most likely to commit perjury), and on their own terms the pre-moderns were wrong: the best way to get to the truth is not to exclude interested witnesses but to admit them and to allow cross-examination.

Second, it is hard to see how the purpose Abraham and White attribute to the pre-modern tort trial fits with the causes of action that we know existed before negligence allegedly arose in the nineteenth century. Battery, assault, false imprisonment, and trespass to land and chattel are claims by victims of wrongdoing, and it seems odd to think that a plaintiff in these cases would think that any conclusion that did not reflect what *actually* happened could be a correct resolution of his lawsuit. It is hard to understand how the plaintiff's concern for redress contingent on his proof of wrongful intent and causation could be viewed as anything but a claim about the truth of what the defendant did to the plaintiff.

My criticisms should not be taken as more than a disagreement about the conclusions that can be drawn from Abraham and White's historical argument, which I find persuasive. They have identified an important and overlooked feature of the history of tort law, and have made an important contribution to the field.

Cite as: Anthony Sebok, *What Is It Like to Think Like a Pre-Modern?*, JOTWELL (February 13, 2017) (reviewing Kenneth S. Abraham & G. Edward White, *The Transformation of the Civil Trial and the Emergence of American Tort Law*, **Ariz. L. Rev.** (forthcoming), available at SSRN), https://torts.jotwell.com/what-is-it-like-to-think-like-a-pre-modern/.