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## POKING HOLES IN THE FABRIC OF TORT: A COMMENT

*Robert L. Rabin\**

### INTRODUCTION

Ironies abound in the world of tort reform. Indeed, the term itself has been turned inside out. In its early years, tort reform was primarily concerned with remedying systematic shortfalls in providing compensation to injured workers. More recently, tort reform has come to be associated with the excessive generosity of damage awards.

Workers' compensation, the first major movement to address the perceived deficiencies of the tort system, arose out of a continuing concern that tort law was affording inadequate protection to the victims of workplace injuries.<sup>1</sup> The movement led to the wholesale replacement of tort law with legislative compensation schemes offering baseline economic benefits without reference to fault, and without the harsh defenses previously available to employers.<sup>2</sup> Almost a half century later, a persistent pattern of skewed recoveries in auto accident cases—most strikingly the undercompensation of serious injuries, many of which were entirely uncompensated—led to a second major wave of tort reform aimed at replacing the tort system, in part, with a legislative no-fault motor vehicle compensation scheme.<sup>3</sup> Taken together, one could say that tort reform was designed to offer recovery based on an activity-related nexus to victims, including those who fell outside the structure of a fault-based tort system.

Then the tide turned. Beginning in the mid-1970s and building in intensity from the mid-1980s on, successive waves of state legislation addressed the remedial side of tort, establishing ceilings on intangible

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1. See Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

2. See MORTON KELLER, *REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900-1933*, at 197-202 (1994).

3. See Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 15-23 (1988).

losses, punitive damages, and attorney's fees, as well as limiting joint and several liability and collateral source recovery.<sup>4</sup>

A new focal point had been established. Instead of tort being criticized as a lottery in which similarly situated injury victims were treated dissimilarly or failed to recover at all, the focus in the political realm shifted to the unpredictability faced by alleged tortfeasors. With this paradigm shift, the foundational question—whether tort is the most efficacious system for addressing accidental harm—arose once more, but from a sharply different perspective. The question was now whether tort should be diminished in scope, rather than whether compensation schemes should be adopted to fill the gaps endemic to tort.

The reforms of the 1970s diverted attention away from the broader implications of this turnabout, because these strategies merely tinkered with the existing system by chipping away at compensation levels to create greater predictability for risk generators. But regulatory preemption, a development on the current reform agenda, forthrightly presents the tort *replacement* strategy first promoted a century ago in workers' compensation legislation. Has tort reform, in paradoxical fashion, come full circle?

These are some of the foundational concerns that come to mind in reviewing the contributions of Professors Catherine Sharkey and John Witt to this Symposium.<sup>5</sup> At first blush, their papers appear to pursue quite disparate themes, with Sharkey addressing the regulatory preemption strategy and Witt focusing on the role of the plaintiffs' bar. But from one important perspective, the papers raise the same question: What, if anything, does the tort system provide that is both unique and worth preserving?

## II. THE IMPLICATIONS OF AGENCY-INITIATED PREEMPTION

### A. *Preclusion on the March?*

Federal preemption is, of course, not a newcomer to the accident law scene. Since the early 1990s, the Supreme Court has handed down preemption decisions with sufficient regularity that one might

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4. For a brief historical survey, see MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* 809–14 (8th ed. 2006).

5. Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007); John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261 (2007).

fairly say that it is preoccupied with the question.<sup>6</sup> And more than a decade ago, in *Cipollone v. Liggett Group, Inc.*,<sup>7</sup> a case involving the preemptive effect of the Public Health Cigarette Smoking Act of 1969, the Court made clear that congressional preclusion of “requirements” inconsistent with statutory standards could be construed to apply not only to inconsistent state regulatory schemes, but also to state common-law tort decisions.<sup>8</sup> The critical point is that these Supreme Court decisions addressed the issue of whether regulatory standards based on *statutory* preemption provisions preclude more stringent state common-law rulings.<sup>9</sup>

In *Preemption by Preamble*, Sharkey addresses some of the implications of a recent development that could have a critical impact on the tort system: the emergence of an agency strategy of incorporating tort preemption provisions into regulatory standards. In particular, Sharkey notes that the Consumer Product Safety Commission (CPSC), the National Highway Traffic Safety Administration (NHTSA), and the Food and Drug Administration (FDA) have all relied on this strategy in drafting recent health and safety guidelines.<sup>10</sup> Illustrative is the CPSC’s recent fire-resistance standard for bedding mattresses, to which it appended a preemption provision applying to “inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements.”<sup>11</sup>

Sharkey collaborated with Professor Samuel Issacharoff on earlier work that analyzed this phenomenon and broadly addressed a cluster of such “backdoor federalization” provisions from a descriptive perspective.<sup>12</sup> By contrast, in this article, Sharkey poses a succession of inquiries, followed by proposals, which are aimed at addressing whether agency-initiated preemption—that is, preemption invoked by

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6. For a discussion of the leading cases, see Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1223–43 (2006).

7. 505 U.S. 504 (1992).

8. *Id.* at 530–31.

9. This datum probably goes a long way in explaining the Supreme Court’s “preoccupation,” as I put it above, with preemption. Congress is notoriously vague about indicating its intent to preempt, and the Court is in every instance engaged in a particularized exercise of discerning legislative intent. So, there is virtually no carry-over from one ruling to another in establishing generally applicable guidelines.

10. Sharkey, *supra* note 5, at 230–42.

11. *Id.* at 227 (quoting Final Rule: Standard for the Flammability (Open-Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496 (Mar. 15, 2006) (to be codified at 16 C.F.R. pt. 1633)).

12. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006).

agencies in the process of formulating regulatory standards—will create deep inroads in the scope of the common-law tort regime.<sup>13</sup>

At the outset, there is the question of whether Congress has, in fact, provided the regulatory agency with the authority to preempt. If it has, that is the end of the matter: under the Supremacy Clause, federal enactments override any state law addressing the same subject matter.<sup>14</sup> But Congress has been notoriously vague in indicating its intention to preempt, let alone its intention to delegate this power to an agency pursuant to the creation of regulatory authority.<sup>15</sup> As a consequence, the threshold inquiry is a subtle one. How much judicial deference is due to an agency when it asserts authority to “preempt by preamble”? Does the agency receive traditional *Chevron* deference or something less?<sup>16</sup> As Sharkey indicates, this remains a contested question. One can argue, as in *Geier v. American Honda Motor Co.*, that the agency is uniquely positioned to assess the impact of potentially competing tort case law on its regulatory program.<sup>17</sup> But one can also argue that this agency expertise, if it has any real substance, was presumably not lost on Congress. Thus, one would have expected Congress to clarify its intentions regarding the proper level of judicial deference due to the agency.

However one resolves this question of deference, there is a correlative question, also posed by Sharkey, about private enforcement.<sup>18</sup> Assuming the federal standard is the only game in town, and state tort law is entirely displaced, does the federal standard itself create an independent fount of tort law? Here Sharkey points out a potential asymmetry suggested by *Alexander v. Sandoval*,<sup>19</sup> where the Supreme

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13. By definition, of course, these Supremacy Clause-based inroads in tort will be limited to areas of potential conflict between federal regulatory and state common-law rules. *See supra* note 9 and accompanying text (highlighting the products liability regime as a prime target for displacement).

Still more salient is the question whether the agencies are inclined to adopt such limitations in the first instance—a question inextricably linked to the disposition of the Chief Executive. The link is sharply underscored by President George W. Bush’s avowed intent to rein in the tort system. *See, e.g.*, Bernard Black et al., *False Diagnosis*, N.Y. TIMES, Mar. 10, 2005, at A27; Robert Pear, *In a Shift, Bush Moves to Block Medical Suits*, N.Y. TIMES, July 25, 2004, at 1.

14. U.S. CONST. art. VI, cl. 2.

15. *See supra* note 9. Congressional ambivalence over adopting an express commitment to preempt is perhaps most starkly evident in cases like *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) in which the Court faced the unenviable task of reconciling provisions of a statute, the National Traffic and Motor Vehicle Safety Act of 1966, that contained both a preemption provision and a tort “saving” clause.

16. *See Sharkey, supra* note 5, at 242–47 (discussing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

17. 529 U.S. at 883.

18. Sharkey, *supra* note 5, at 247–50.

19. 532 U.S. 275 (2001).

Court indicated in no uncertain terms that a private right of action can be implied only where Congress has clearly expressed its intent to allow such claims. If *Chevron* deference is paid to agency-initiated preemption and stringent limitations are placed on implied rights of action to enforce the federal standards, the aggregate effect is that regulatory enforcement is truly the only game in town.<sup>20</sup> Tort goes by the boards.

Clearly this prospect troubles Sharkey, although she never quite comes out and says why.<sup>21</sup> She would blunt the force of agency-initiated regulatory preemption through consultative procedures. She proposes “a federal-state dialogue,” drawing on extant executive orders mandating consultation by federal agencies with state and local authorities, and an assessment of the federalism impact of regulatory action.<sup>22</sup> Perhaps, she suggests, there might even be resort to the relative formality of notice-and-comment procedures as a prelude to anticipated preemption.<sup>23</sup>

These suggestions seem perfectly sensible to me, but I am nonetheless skeptical about whether they would make much of a difference. Where there is a will, there is a way. Agencies’ pro forma compliance with procedural requirements could be achieved with relative ease. Surely, the now-familiar concerns of tort critics regarding uniformity, predictability, and interstate impacts under a decentralized liability system cannot be lightly dismissed. Although these concerns are not new, they have not been treated in the past with the salience for agency-initiated preemption that they now engender. If these concerns undergird a deeper hostility to the tort system that is pervasive in the current administration, then process-oriented consultative norms are not likely to be given serious weight.<sup>24</sup>

As Sharkey notes throughout, and with particular reference to her tale of three agencies, the emergent proactive stance by the federal agencies vis-à-vis tort law, which views the latter as competitive rather than complementary, is a distinct departure from the past. But why might one urge a cautious approach to overriding tort?

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20. As Sharkey mentions, this conclusion rests on a third premise as well—that is, that an independent state tort negligence per se action, based on the federal regulatory standard, is similarly rebuffed. Sharkey, *supra* note 5, at 250.

21. *See id.* at 228–29 (referring to the substitution of exclusively public remedies for private rights of action as a “troubling asymmetry,” and as “a disconcerting scenario”).

22. *E.g.*, Exec. Order No. 12,988, 61 Fed. Reg. 4729, 4731 (Feb. 7, 1996); Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999).

23. Sharkey, *supra* note 5, at 257.

24. *See* Black et al., *supra* note 13 (discussing Bush’s tort reform efforts); Pear, *supra* note 13 (same).

### B. *What Might Be Lost?*

Let me begin from a historical perspective. Witt offers the interesting thesis that the early organizational success of the tort plaintiffs' bar turned on a sustained critique of the unchecked discretionary character of alternatives to the tort system in "the welfare state"—in particular, the workers' compensation system—while the present character of the plaintiffs' bar, and tort law in action, stands this critique on its head.<sup>25</sup> It is the plaintiffs' bar that now exercises virtually unchecked private (as opposed to public) discretion in shaping accident law through the various features of its organization and settlement practices.<sup>26</sup>

What relevance do these observations have for my discussion here? In my view, Witt's thesis in amended form contributes to the foundational critique of tort replacement efforts. As he sees it, the private bar waged a largely successful campaign to promote the virtues of tort law through a sustained attack on the administration of public bureaucracies mandated to compensate injury victims.<sup>27</sup> My own take distinguishes between the workers' compensation system—a creature of the Progressive era—and the regulatory agencies established a generation later under the New Deal.

As Witt suggests, the fledgling National Association of Claimants' Compensation Attorneys (NACCA), the forerunner of today's Association of Trial Lawyers of America (ATLA), surely attacked the inequities of the workers' compensation system. Their efforts, however, were largely aimed at the *legislative* forum in which benefit levels had fallen woefully out-of-date, rather than at administration per se.<sup>28</sup> By

25. Witt, *supra* note 5, at 261–63; see also JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 211–78 (forthcoming 2007) (providing a more expansive treatment in his chapter "The King and the Dean: Melvin Belli, Roscoe Pound, and the Common-Law Nation").

26. See Witt, *supra* note 5, at 271; see also Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

27. Witt, *supra* note 5, at 267–71.

28. The first volume of the *NACCA Law Journal* states the organization's position:

The workmen's compensation acts have many defects, and plaintiff's attorneys owe it to injured workers and their dependents to help remedy the defects . . . .

NACCA members have already succeeded in helping to improve acts in various states. In Massachusetts and Oregon they successfully supported amendments increasing worker's rights. NACCA members can be particularly effective in plugging legal loopholes, as many members of legislatures are lawyers, and understand the need of such changes.

. . . .

It is suggested that for the coming year, members concentrate (1) on bringing up weekly payments to subsistence levels . . . (2) on giving the injured worker unlimited

contrast, the broader attack on lawless administration waged by ATLA-associated luminaries like Roscoe Pound was targeted at New Deal agencies, which regulated under vague mandates to pursue “the public interest.”<sup>29</sup> But these latter agencies had very limited, if any, intersection with the operation of the tort system.

In my view, Witt’s observations about the comparative institutional competence of private and public bureaucracies have real bite one generation later, in what I have referred to elsewhere as the Public Interest Era.<sup>30</sup> It was then, beginning in the late 1960s, that agencies like the CPSC and the NHTSA were established, agencies whose regulatory authority intersects with the domain of tort law.<sup>31</sup> At that point, it seems to me, Witt’s reservations about jettisoning tort—from

medical payments . . . (3) on securing complete occupational disease coverage, and (4) complete compulsory coverage of all workers . . .

*Legislation: Workmen’s Compensation*, 1 NACCA L.J. 114, 114 (1948).

29. See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557 (1996). Professor Shepherd recounted the history:

[E]mploying rhetoric that likened opposition to administrative reform to communism and fascism, Pound’s committee attacked the New Deal agencies and their “Administrative Absolutism”—the title of the central section of the ABA Committee’s July 1938 report. . . . [T]he committee endorsed strong judicial controls of agency action because “an administrative agency is not unlikely to have been set up to get things done in the interest of one side which controls or has the favor of the executive for the time being.”

*Id.* at 1590–91 (alteration omitted) (quoting *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 342 (1938)); see also WITT, *supra* note 25, at 231–33.

30. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1278–95 (1986).

31. The predecessor agency to the FDA was established a half century earlier, but its regulatory mandate was not sufficiently expansive to intersect with products liability law until roughly the same period. See Richard A. Merrill, *The Architecture of Government Regulation of Medical Products*, 82 VA. L. REV. 1753, 1757–68 (1996) (providing a historical summary of the expansion of FDA authority from 1906 to 1962). Professor Merrill observed that the early incarnation of the FDA relied on court actions to enforce specific prohibitions mostly targeting deceptive labeling practices, whereas in the 1938 Federal Food Drug and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938), Congress required premarket notification to the FDA, and in the 1962 amendments to the Act, Congress finally imposed FDA premarket approval requirements on drug manufacturers. *Id.*; see also PETER BARTON HUTT & RICHARD A. MERRILL, *Preface to the 1980 Edition of FOOD AND DRUG LAW: CASES AND MATERIALS* xxi (2d ed. 1991). Professors Hutt and Merrill discussed the history of food and drug law:

The 1906 [Food and Drug] Act predated by nearly a decade creation of the Federal Trade Commission and by a full half-century the establishment of other agencies—such as . . . the Consumer Product Safety Commission—that have a consumer protection role.

. . . .

[But] until the 1970’s food and drug law did not command the attention of a large number of lawyers. . . . [This was due in part to] the comparatively modest resources of the Food and Drug Administration.

*Id.*



his vantage point, not through preemption, but by draconian restrictions on the plaintiffs' bar—become salient.<sup>32</sup>

Witt addresses his critique primarily to public compensation alternatives to the tort system, rather than to administrative regulation (that is, the current preemption context). But it resonates nonetheless:

The private tort system may be more flexible than public compensation programs. [Consider, on this score, public regulatory systems, as well.] With its decentralized system of judges, juries, lawyers, and insurance adjusters, it may also be less susceptible to capture by well-organized interest groups. Public compensation values are set by a political process that has proven itself susceptible to dysfunctional interest group politics . . . . [The damage values in tort] are continuously tested and retested in courtrooms, which serve as price coordinators for the private administration of claims.<sup>33</sup>

Rather than pressing Witt's observations further beyond the public compensation context, let me turn to a set of reservations about diminishing the scope of tort that I offered in an article a few years ago.<sup>34</sup> As I suggested there, the regulatory compliance defense is a close cousin to preemption.<sup>35</sup> Regulatory compliance is a common-law tort defense that allows a court to defer to agencies as a matter of comity, and absolves a defendant of liability when there has been compliance with regulations addressing the subject matter of the plaintiff's claim, even when there is no explicit or implicit legislative mandate to preempt. In short, the practical impact of recognizing a regulatory compliance defense would be precisely the same as a successful interposition of a preemption claim. Tort would be displaced; the rationale would simply differ. Judicial deference would serve as the underpinning, rather than judicial obligation based on constitutional dictates of the Supremacy Clause.<sup>36</sup>

But courts have, in fact, been quite leery about recognizing a regulatory compliance defense for reasons, in my view, that carry over to unease about agency-initiated preemption.<sup>37</sup> Those who extol the vir-

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32. Interestingly, California's widely noted and highly influential set of restrictions on plaintiff attorney's fees was enacted roughly contemporaneously with the new era of expanded regulatory authority. California Medical Injury Compensation Reform Act (MICRA), CAL. CIV. PROC. CODE § 667.7 (West 1987).

33. Witt, *supra* note 5, at 272.

34. Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049 (2000).

35. *Id.* at 2053-60.

36. Note that agency-initiated preemption by preamble would have consequences similar to congressional/legislative preemption: where applicable, it would obviate the need for a regulatory compliance defense.

37. It is critical to keep in mind that preemption by preamble, or agency-initiated preemption, is not an *obligation* of the regulatory agency—it is a policy choice rather than a mandate. As

tues of regulatory preemption tend to ignore the costs. Most obviously, victims are left without compensation when the defendant's conduct conforms to regulatory standards but causes injury nonetheless.<sup>38</sup> Indeed, in the absence of a private right of action—sharply circumscribed by Supreme Court rulings, as discussed above<sup>39</sup>—victims may be left without recompense even when regulatory standards are *not* met, if the scope of agency authority is taken to “occupy the field.”

Moreover, if the regulatory standards are underenforced or the regulatory penalties are minimal, there may be a shortfall not only in compensation, but in deterrence as well. Unless it operates in tandem with a legislative compensation scheme, regulation promotes only deterrence. Tort, whatever its shortcomings, does double-duty: it is an engine of compensation as well as deterrence.<sup>40</sup>

The deterrence side of the ledger requires further discussion, because regulation in practice frequently suffers from structural infirmities. Witt notes in passing that tort is less susceptible to capture by well-organized interest groups.<sup>41</sup> Beyond that long-standing *realpolitik* observation, however, are more subtle considerations. There is the all-too-familiar pattern of underfunded or myopic regulators who fail

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Sharkey points out, in earlier years, the three agencies that she discusses largely favored treating tort as a complementary rather than a competitive regime; i.e., they disavowed any preemptive intent. Sharkey, *supra* note 5, at 229–42.

38. One might argue that compliance with regulations creates a presumption—or per se case—of due care. See, e.g., Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167 (2000) (discussing the proposal for “carefully tailored” recognition of a regulatory compliance defense in the American Law Institute’s report on enterprise responsibility for personal injury). But from a federalism perspective, in my view, this is an inadequate supporting rationale for the defense. A state might decide, in the absence of constitutionally based preemption, that its citizens should have a strict liability claim to compensation and protection from injury, whatever the correspondence of a negligence inquiry with the regulatory standard-setting process. See, e.g., *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542–43 (D.C. Cir. 1984) (articulating this federalism argument). In fact, with important qualifications, strict liability is the evolutionary path that products liability law has taken. See DAN B. DOBBS, *THE LAW OF TORTS* § 353 (2000) (providing succinct treatment).

39. See *supra* notes 17–20 and accompanying text.

40. Regarding those shortcomings, the criticisms of the tort system are of course voluminous. See, e.g., STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 1–72 (1989) (presenting a systematic catalogue). A principal focus has been the strikingly high costs of delivering tort dollars to injury victims. See, e.g., JAMES S. KAKALIK & NICHOLAS M. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* (1986). Witt’s article offers an interesting slant on this concern, focusing on the “price stickiness” of plaintiff attorney’s fees, and providing a historical view of past efforts to adopt lay claims brokers systems. See Witt, *supra* note 5, at 279–80; see also *infra* notes 56–58 and accompanying text.

41. Witt, *supra* note 5, at 272; see also Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1064–70 (1990).

to monitor effectively once regulatory standards have been set.<sup>42</sup> And there is the pervasive reliance by agencies on industry data in setting standards, data that are at times insensitive to long-term risks.<sup>43</sup> Agencies also sometimes engage in what might be termed boot-strap certification, which relies largely on prior approval of supposedly similar risk-bearing products as a shortcut around meaningful cost-benefit analysis of a “me-too” submission.<sup>44</sup>

There is also the educational effect of tort. Pretrial discovery has frequently unearthed both industry and regulatory agency practices that might otherwise never have seen the light of day.<sup>45</sup> This was true in the modern era of mass tort products litigation with asbestos, and has carried through to tobacco and other widely noted recent controversies over industry concealment of information about risk (breast implants, Vioxx, antidepressants, among others). The short of it is that “tort-as-compared-to-what” turns out to raise a complicated set of concerns about comparative institutional competence.

### III. CONCLUDING THOUGHTS

In our system, the principal instance in which tort has been replaced by complementary regimes—regimes promoting respectively compensation and deterrence—is the realm of industrial injuries, where state workers’ compensation programs displace tort in providing monetary benefits to injured workers, and the Occupational Health and Safety

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42. See, e.g., DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., STATE REFERRAL OF NURSING HOME ENFORCEMENT CASES (2005), available at <http://oig.hhs.gov/oei/reports/oei-06-03-00400.pdf> (detailing the inadequate enforcement of regulatory standards for nursing home care); INST. OF MED., THE FUTURE OF DRUG SAFETY: PROMOTING AND PROTECTING THE HEALTH OF THE PUBLIC (2006) (discussing internal management conflicts at the FDA between officials responsible for initial and postmarketing review of new drugs, and criticizing in particular, postmarketing surveillance).

43. See *Lawyers Argue Merck Concealed Vioxx Risk*, N.Y. TIMES, Mar. 7, 2006, at C4 (citing Merck’s lead lawyer in the Vioxx litigation, who stated that “[t]his was no rush to market,” and noting that “Merck willingly provided data from its clinical studies of Vioxx to the [FDA], which approved it as ‘safe and effective’ on four occasions”). Implicitly, of course, the FDA had to rely on the data it received from Merck. See Editorial, *Looking for Adverse Drug Effects*, N.Y. TIMES, Nov. 27, 2004, at A14 (criticizing as “problematic” that “the prime responsibility for collecting and evaluating data from postmarketing studies rests with the [drug] manufacturers”).

44. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (discussing a case brought under the Medical Device Amendments of 1976, which provide a fast-track process where approval is sought for a “substantially equivalent” product to one already on the market).

45. See Rabin, *supra* note 34, at 2068–70. More generally, a counterargument to the legitimate concern that early tort awards in a mass injury context may trigger spurious claims is that large-scale coverage in the popular press may alert affected people to watch for signs of illness, and to seek redress for injury while the evidence of wrongful conduct is still fresh and the defendant has resources to pay judgments.

Administration (OSHA) addresses workplace safety from a regulatory perspective.<sup>46</sup>

Replicating this dual model elsewhere would pose major difficulties.<sup>47</sup> To stay with Sharkey's cases, the CPSC cannot conceivably monitor the entire universe of consumer products for safety. Indeed, CPSC promulgations of design standards for specific products have been few and far between.<sup>48</sup> Nor is it clear how a broad-based, product injury, no-fault compensation scheme would deal with the countless instances in which injured consumers misuse products or are simply inattentive to commonplace risks.

Comprehensive auto design regulation by the NHTSA is not politically feasible and would straitjacket consumer choice in a fashion that would be universally regarded as unacceptable. On the compensation side, victims of motor vehicle accidents arising out of auto defects are compensated under no-fault auto legislation—where it has been adopted—like any other auto accident victims. But even the most generous of these schemes supplements tort rather than replaces it, and most provide only minimal benefits.<sup>49</sup>

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46. Even here, tort plays an important continuing role, in particular, for third-party litigation against manufacturers of injury-producing machinery found defective. See FRANKLIN, RABIN & GREEN, *supra* note 4, at 628–48. And workers' compensation regimes do provide a measure of deterrence (that is, incentives to promote safety), entirely apart from OSHA. See *infra* note 54.

47. Note that this complementarity is not by virtue of a grand design. Workers' compensation statutes were enacted state by state; in contrast, OSHA is a federal scheme. Moreover, OSHA was enacted in 1970, a half century after most states had adopted workers' compensation plans.

48. See Teresa M. Schwartz & Robert S. Adler, *Product Recalls: A Remedy in Need of Repair*, 34 CASE W. RES. L. REV. 401, 462 (1984) (recounting the formative years and noting that "[r]ecalls have virtually supplanted standards as the primary regulatory tool of the CPSC"). This is hardly surprising, as the CPSC was, from the outset, ineffective at promulgating regulatory standards. Indeed, the act establishing the CPSC also put in place such a problematic administrative procedural framework that the agency had little chance to carry out its mission until Congress changed that framework in 1981, at which point the Reagan administration's push for less regulation ensured that the CPSC would have a modest role in ensuring consumer product safety through affirmative regulation. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 181–82 (1997) (observing that the CPSC was badly handicapped from doing much of anything during the first decade of its existence because Congress imposed mass participation requirements on the agency that were not abandoned until 1981). See generally Geraint G. Howells, *The Relationship Between Product Liability and Product Safety—Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. Position*, 39 WASHBURN L.J. 305 (2000).

49. There is a *realpolitik* concern here that leads back to the origins of the NACCA—lack of legislative generosity on compensation levels and the failure to update them. Consider the New York no-fault statute, where the comparatively generous basic economic loss coverage is \$50,000. N.Y. INS. LAW § 5102(a) (McKinney 2000). That figure has not been adjusted for changes in the cost of living since the statute was first enacted in 1973.

In contrast to the CPSC and the NHTSA, FDA regulation is comprehensive, at least as far as prescription drugs are concerned.<sup>50</sup> Agency approval is required before new prescription pharmaceutical products are marketed, and the certification process is meant to assure rigorous cost-benefit analysis along the dimensions of safety and efficacy. But injuries occur nonetheless. In some cases, drugs have side effects that were unanticipated by the agency when they were approved for sale, even if they should have been anticipated by the drug manufacturer.<sup>51</sup> In such cases, the absence of recourse to tort would mean no recovery for drug-related harm. A no-fault compensation scheme for prescription drug-related harms would fill the gap, but this possibility has never been taken seriously in the legislative arena.<sup>52</sup> Indeed, the character of drug-related injuries, which are frequently incurred by individuals who are very sick, would often require proof-intensive causation controversies to establish eligibility for no-fault compensation, and would mirror tort in that regard.

Rather than comprehensively addressing the goals of tort, agency-initiated preemption simply pokes holes in the fabric of the tort system on a case-by-case basis; this is not a very satisfying approach from a horizontal equity perspective—entirely apart from the intrinsic merits of retaining tort discussed above. Do considerations of uniformity, predictability, and expertise nonetheless warrant the override of the complementarity between regulation and tort? A stronger case can be made for injury compensation schemes than for preemptive regulatory regimes, because the no-fault model does in fact address, to some extent, both compensation and deterrence.<sup>53</sup> Consider, for example, the childhood vaccine compensation scheme.<sup>54</sup> But in my view, the

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50. Drug Amendments of 1962 to the Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 87-781, 76 Stat. 780 (1962) (codified as amended at 21 U.S.C. §§ 301-397).

51. For a more detailed analysis of the drug approval scenarios that undermine the case for preclusion of tort law, see Rabin, *supra* note 34, at 2074-84.

52. For a proposal of a prescription drug no-fault scheme, see Richard A. Merrill, *Compensation for Prescription Drug Injuries*, 59 VA. L. REV. 1 (1973). The fact that such a scheme has never received serious consideration from legislators is evident in the relative uniqueness of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (1986) (codified as amended at 42 U.S.C. §§ 300aa-1 to -34 (2000)) [hereinafter *Childhood Vaccine Injury Act*]. The vaccine compensation system has never been expanded to any other area of products liability or medical-related injuries. Indeed, only in a very few situations, including most recently the 9/11 attacks, has Congress created some form of no-fault compensation system. See Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 703-13 (2005) (discussing some of the major no-fault legislation and proposals adopted since 1970).

53. No-fault benefits, such as workers' compensation insurance coverage, obviously constitute a cost of doing business for the risk-generating firm.

54. *Childhood Vaccine Injury Act*, 42 U.S.C. § 300aa-22(b)-(d) (providing a limited tort option for claimants, rather than strictly replacing it).

costs—in departure from horizontal equity among categories of accident victims, in failure to provide adequate compensation, and in sub-optimal deterrence—suggest placing the burden on reformers to make the case for displacing tort.

Incremental reform of the sort discussed by Witt is another matter. His initial premise is that tort has many virtues from a comparative institutional perspective.<sup>55</sup> But like all thoughtful observers of the tort system, Witt is also keenly aware of its shortcomings. Indeed, his focal point is the long-standing and widely shared criticism that “the virtues of tort law are enormously expensive.”<sup>56</sup> At the same time, his path to reform is one that is seldom taken. Rather than joining the refrain for capping plaintiff attorney’s fees,<sup>57</sup> Witt would address the price-stickiness of contingency fees—clustering at one-third of recovered damages, when unconstrained by caps—by promoting lay claims brokers.<sup>58</sup> Ideally, these intermediaries would break down the informational asymmetries that limit the market power of injury victims seeking legal representation.

I have no quarrel with Witt’s proposition that lay claims brokers, like mortgage brokers, might well “open the system up” by providing more meaningful data to injury victims on attorney competence, and thereby possibly stimulating some degree of price competition. However, systemic factors, such as the attorney-client privilege, and political realities—namely, the powerful resistance of the organized bar—sharply limit the prospect for any such reform.

If arming prospective tort plaintiffs with more information on attorney competence would be a salutary move, it nonetheless seems to me a second-best, and rather indirect, strategy for addressing the rents, to the extent they exist, in contingency fee pricing, let alone for addressing the more foundational concerns about the strikingly high costs of delivering tort compensation. The crux of the matter, in my view, is the imprecise standards that characterize the law of tort—even under

55. Witt, *supra* note 5, at 262.

56. *Id.* at 277.

57. See, e.g., Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 *CARDOZO L. REV.* 65 (2003) (arguing that there is inadequate price competition among plaintiffs’ attorneys, resulting in contingency fees that are too high); Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers’ Rates of Return*, 15 *CARDOZO L. REV.* 1755, 1776 (1994) (“To focus attention on lawyers’ rates of return and their effects on tort litigation is to at least implicitly suggest the possibility that too high a reward structure can yield socially undesirable results. This Article explicitly states that thesis.” (citation omitted)).

58. Witt, *supra* note 5, at 289–90.

the private administrative regime of structured negotiation and high volume settlement described by Witt.

If the fact-intensive, case-by-case standards of accident law were to be reconstituted—in particular, open-ended discretion in determining fault, monetizing intangible harm, and assessing causal responsibility—the costs of tort administration would fall dramatically. Indeed, there are working models such as airplane crash litigation, where determinations of fault, causation, and intangible loss are relatively routinized, and correspondingly, contingency fees and administrative costs of the system are far less than in other mainstream categories of tort cases.<sup>59</sup>

Needless to say, it would be a tall order to overhaul all of accident law to eliminate discretionary determinations of fault and causation. But just such an overhaul has taken place in many states with respect to monetizing intangible harm.<sup>60</sup> The problem is in the tort reform strategy that has been employed in doing so. Just as Witt refers to the perverse effects of capping attorney's fees, I have serious reservations about the fairness of capping pain and suffering damages—and, as a consequence, discriminating against recoveries in the most serious injury cases—rather than adopting a scheduling approach that would rely on discrete categories of specified harms with presumptive upper and lower limits on recovery. But expansion on this point is beyond the scope of this Article.<sup>61</sup>

Suffice to say that the old saw applies here: the baby should not be thrown out with the bathwater. Before tort is disassembled, one should count the costs. If the costs seem high, then one should look for ways of improving the system before eliminating it. Finally, as in the case of a robust auto no-fault system, the game is not necessarily zero-sum; it may be that in some categories of accidental harm, a substantial baseline no-fault system, supplemented by tort for especially grievous harms, offers a satisfying approach to the vexing problem of addressing the costs of accidental injury.

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59. See JAMES S. KAKALIK ET AL., *COSTS AND COMPENSATION PAID IN AVIATION ACCIDENT LITIGATION* (1988).

60. In 2005, twenty-five states imposed some type of cap on noneconomic loss in medical malpractice cases, and twenty-five states (not all the same ones) capped punitive damages in such cases. See HENRY COHEN, *CRS REPORT FOR CONGRESS, MEDICAL MALPRACTICE LIABILITY REFORM: LEGAL ISSUES AND FIFTY-STATE SURVEY OF CAPS ON PUNITIVE DAMAGES AND NONECONOMIC DAMAGES* app. at CRS-11 (2005), available at <http://shelby.senate.gov/legislation/MedicalMalpractice.pdf>.

61. For more detailed discussion and references, see Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 373–77 (2006).