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RESPONSIVE ANALYSIS: PUBLIC HEALTH FEDERALISM AND TORT REFORM IN THE U.S. RESPONSE TO COVID-19

*Timothy D. Lytton**

INTRODUCTION

The 27th annual Clifford Symposium (Symposium) on Tort Law and Social Policy features a collection of engaging articles examining the influence of COVID-19 on various aspects of civil litigation—including access to justice, trial practice, negotiation strategy, alternative dispute resolution, insurance coverage, and legal analytics. Contributions also consider legislative and administrative reactions to the pandemic. In this responsive analysis, I draw on several themes developed by the Symposium contributors to raise questions about the role of civil liability in the U.S. COVID-19 response. As a commentator, I do not purport to present the extensive research, carefully crafted claims, and meticulous supporting footnotes that characterize the excellent Symposium articles which prompt this response. Instead, I take the liberty of offering admittedly impressionistic and speculative reflections with the aim of provoking further investigation into the potential value of tort liability in addressing public health crises.

I present my analysis in two parts. In Part I of this Article, I observe that reliance on tort liability to regulate the risk of COVID-19 transmission is consistent with the decentralized approach to public health policy and the aversion to government mandates that have characterized the U.S. pandemic response. In Part II, I argue that shielding business entities from tort liability may be counterproductive in efforts to prevent the spread of COVID-19.

I. PUBLIC HEALTH FEDERALISM

Several of the Symposium contributions highlight the decentralized nature of the government response to COVID-19 in the United States. According to these accounts, a mix of federalism and incompetence explains the lack of a well-organized national policy, in sharp contrast

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to the more energetic and coordinated central government efforts in other industrialized countries.¹ As professor Seth Davis explains, the U.S. public health infrastructure has historically relied heavily on the resources and efforts of local and state authorities.² Professors David Hyman and Charles Silver point to multiple factors that frustrated the performance of the federal agencies responsible for pandemic response: poor planning, inadequate preparation, clumsy implementation, tunnel vision, mission creep, and progressive public health groupthink.³ Davis adds presidential sabotage to this mix of factors.⁴ In addition, one might attribute the lack of a more aggressive government response to popular resistance to public health mandates. For many Americans, this resistance expresses a commitment to individual liberty even at the expense of public welfare.⁵ Lastly, widespread skepticism of policy expertise fueled disdain for public health officials and their opinions.⁶

1. See, e.g., David A. Hyman & Charles Silver, *Regulating Health Care: Perspectives from Government Failure During the COVID-19 Pandemic*, 71 DEPAUL L. REV. (forthcoming 2022) (manuscript at 20–24); Seth Davis, *Uncooperative Presidentialism in a Federal System: Some Lessons from the COVID-19 Pandemic* (May 21, 2021) (unpublished manuscript) (on file with DePaul University Law Review); Daniel Schwarcz, *Redesigning Widespread Insurance Coverage Disputes: A Case Study of the British and American Approaches to Pandemic Business Interruption Insurance*, 71 DEPAUL L. REV. (forthcoming 2022) (manuscript at 2–7). For examples of more energetic and centralized responses to the pandemic, see Seung-Youn Oh, *South Korea's Success Against COVID-19*, REG. REV. (May 14, 2020), <https://perma.cc/3LAH-SYFC>; Trang (Mae) Nguyen, *Vietnam's Astonishing Success at Curbing COVID-19 Outbreaks*, REG. REV. (June 4, 2020), <https://perma.cc/P95J-VZPG>; Kevin Y.L. Tan, *Singapore's Regulatory Response to COVID-19*, REG. REV. (June 15, 2020), <https://perma.cc/2SCC-S5UT>. Of course, not all industrialized countries adopted energetic and coordinated central-government-led responses to the pandemic. See, e.g., Anne Meuwese, *The Disjointed Dutch Policies to Fight COVID-19*, REG. REV. (May 18, 2020), <https://perma.cc/F2DP-MLR5>. I make no claim about the superiority of more energetic or centralized responses compared to less interventionist or decentralized approaches. Criteria for success and failure of COVID-19 responses are highly contested. See Sheila Jasanoff et al., *Comparative COVID Response: Crisis, Knowledge, Politics, Interim Report*, COMP CoRE (Jan. 12, 2021), <https://perma.cc/22A6-MNF2>.

2. Davis, *supra* note 2, at 4. See generally JOHN DUFFY, *THE SANITARIANS: A HISTORY OF AMERICAN PUBLIC HEALTH* (1992) (detailing the leading role of local and state governmental bodies from colonial times to the present in controlling infectious disease, improving sanitation, and regulating medical care).

3. Hyman & Silver, *supra* note 2, at 3. The concept of mission creep refers to the expansion of a government agency's activities and programs beyond the scope of its original goals. See *id.* at 11–13 (discussing mission creep at the Centers for Disease Control and Prevention and its impact on pandemic response).

4. Davis, *supra* note 2, at 2.

5. Tommy Beer, *Anti-Mask Rallies Continue in U.S. Amid Rising Coronavirus Cases and Deaths*, FORBES (July 16, 2020), <https://perma.cc/5TQ4-JZZ2>.

6. Ryan Benk et al., *Skepticism of Science in a Pandemic Isn't New. It Helped Fuel the AIDS Crisis*, NPR (May 23, 2021), <https://perma.cc/VXY4-3H98>.

Reliance on tort liability to regulate health and safety risks is consistent with America's public health federalism. To begin with, tort liability is a decentralized means of risk regulation. Tort law is almost entirely state law, not federal law. As such, it features local variation and administration. Tort litigation regulates risk without central coordination. A few high-profile plaintiff victories in scattered jurisdictions can send a powerful signal that prompts and shapes risk management efforts nationwide.⁷

Additionally, reliance on tort liability to regulate health and safety risks is consistent with many Americans' aversion to public health mandates, which they perceive as a threat to personal liberty. Liability exposure encourages precautions through economic incentives rather than administrative agency directives. Moreover, by framing risk regulation in terms of competing individual rights, tort law avoids ideological debates over the proper balance between individual rights and collective welfare.

Finally, reliance on tort liability is consistent with many Americans' reluctance to entrust discretionary policy decisions to unelected experts. Tort law subjects expert opinion to careful scrutiny in the adversary process, and it leaves ultimate judgments regarding risk allocation to generalist judges and lay juries. In the tort system, scientific expertise informs, but does not trump, the judgments of ordinary citizens.

The tort system contributes to risk regulation within the U.S. public health infrastructure by articulating standards of care and incentivizing widespread conformity with them. Negligence doctrine defines reasonable care by reference to health and safety statutes, regulations, and guidance; considerations of cost effectiveness; industry custom and professional standards; and common sense.⁸ A desire to reduce liability exposure incentivizes businesses and professionals to take reasonable precautions.⁹ In addition, liability insurers use risk selection, pricing, contract terms, and loss control to encourage their clients to take reasonable precautions.¹⁰ In contrast to the limited monitoring

7. See, e.g., TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE* 3–5, 172–76 (2008); TIMOTHY D. LYTTON, *OUTBREAK: FOODBORNE ILLNESS AND THE STRUGGLE FOR FOOD SAFETY* 94–101 (2019).

8. DAN B. DOBBS et al., *THE LAW OF TORTS* §§ 127 (reasonable person standard), 146 (statutory standards), 161 (weighing of risks and utilities), 178 (customary standards) (2020).

9. See, e.g., Margo Schlanger, *Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. OF TORT L. 1, 1 (2008).

10. Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1418–22 (2013); see generally Omri Ben-Shahar &

and enforcement efforts of government public health agencies burdened by broad mandates and slim budgets, the fear of tort liability exposure is pervasive and backed by the prospect of lawsuits filed by plaintiffs' attorneys, who eagerly ferret out negligence whenever it causes enough harm to yield an acceptable contingency fee.¹¹

In response to COVID-19, U.S. public health agencies at the federal, state, and local levels promulgated rules and guidelines regarding measures such as mask-wearing and social distancing.¹² However, these agencies lacked resources to monitor compliance, much less enforce mandates.¹³ Senior law enforcement officers in states with mask mandates openly refused to issue citations or impose civil penalties for violations, citing limited resources and ideological objections.¹⁴ Most jurisdictions have relied on education rather than enforcement.¹⁵

Although public health efforts consisted of unenforced mandates and nonbinding standards, they nevertheless prompted vociferous opposition, featuring protests and litigation, alleging that the agencies' actions represented heavy-handed government infringement on individual liberty.¹⁶ In such a context, tort liability can be a useful means by which to translate public health rules and guidelines into pervasive private incentives capable of influencing the conduct of business owners, school administrators, elder care facility operators, religious lead-

Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197 (2012).

11. On the use of contingency fees in tort litigation, see Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 754 (2002).

12. ANNA PRICE & LOUIS MYERS, CONG. L. LIBR., UNITED STATES: FEDERAL, STATES, AND LOCAL GOVERNMENT RESPONSES TO COVID-19, No. 2021-019570, at 1, 17–20 (2020), <https://perma.cc/R9HS-DBGL>.

13. See, e.g., Johanna F. Still, *County Health Officials, Law Enforcement Aren't Enforcing the Mask Mandate. So Who Is?*, PORT CITY DAILY (Aug. 25, 2021), <https://portcitydaily.com/local-news/2021/08/25/county-health-officials-law-enforcement-arent-enforcing-the-mask-mandate-so-who-is/> (noting that local public health agencies must rely on law enforcement agencies to enforce mask mandates because public health agencies lack capacity to do so themselves); Caroline La Rochelle, *The Tangled Issue of Masking Enforcement: What are States and Cities Trying?*, POLICYLAB, CHLD. HOSP. TO PHILA. (Aug. 31, 2020), <https://policylab.chop.edu/blog/tangled-issue-masking-enforcement-what-are-states-and-cities-trying>.

14. Philip Jacobs & Arvi P. Ohinmaa, *The Enforcement of Statewide Mask Wearing Mandates to Prevent COVID-19 in the US: An Overview*, F1000RESEARCH (Sept. 7, 2021), <https://doi.org/10.12688/f1000research.25907.1>.

15. *Id.*

16. Beer, *supra* note 6; Owen Dwyer, *COVID-19: Trump Stokes Protests against Social Distancing Measures*, BMJ (Apr. 21, 2020), <https://doi.org/10.1136/bmj.m1596>; Rebekah Millard, *Freedom Foundation Lawsuit Briefs Argues Mask Mandate Exceeds Authority*, FREEDOM FOUND. (Oct. 28, 2020), <https://www.freedomfoundation.com/covid-19/freedom-foundation-lawsuit-briefs-argues-mask-mandate-exceeds-authority/>; Steven Allen Adams, *Lawsuit Filed Over Mask Mandate*, WEIRTON DAILY TIMES (Nov. 21, 2020), <https://www.weirtondailytimes.com/news/local-news/2020/11/lawsuit-filed-over-mask-mandate/>.

ers, and others who are well-positioned to reduce the risk of COVID-19 transmission.

I do not mean to suggest that a large volume of negligence claims for COVID-19 transmission is or ever was likely. To the contrary, viable claims have been rare for several reasons. First, the difficulty of proving causation and the defense of assumption of risk present formidable doctrinal obstacles.¹⁷ Second, only cases involving permanent disability or death would offer the prospect of sufficient damages to make it worthwhile for a plaintiff's attorney working for a contingency fee to file a lawsuit. Eighty percent of those who died from COVID-19 in the United States were sixty-five or older, and wrongful death damages for elderly victims are typically much less for those with little or no unrealized future earnings.¹⁸ Third, workers' compensation provides an exclusive remedy in many jurisdictions for employees who contract COVID-19 on the job.¹⁹ Fourth, anecdotally, many businesses, schools, elder care facilities, and religious organizations diligently follow public health guidelines out of a sense of civic duty.²⁰

Fortunately, the potential impact of tort liability does not rest on the volume of litigation but rather on the anxiety that liability exposure provokes. It is the prospect of being sued for negligence that motivates efforts to avoid liability by exercising reasonable care. A few successful claims are enough to sustain this anxiety.

As I cautioned at the outset of this Article, this analysis is impressionistic and speculative. Measuring the general deterrent effect of tort liability is difficult and, to my knowledge, no empirical studies of the impact of liability exposure on reducing COVID-19 transmission exist at the time of this writing.²¹ More broadly, empirical studies of tort liability for other risks to health and safety suggest that the general deterrent effects of liability exposure are highly context-depen-

17. See Timothy D. Lytton, *Why Shielding Businesses from Coronavirus Liability is a Bad Idea*, THE CONVERSATION (Dec. 10, 2020, 8:36 AM), <https://theconversation.com/why-shielding-businesses-from-coronavirus-liability-is-a-bad-idea-151823>.

18. John Elflein, *Number of Coronavirus Disease 2019 (COVID-19) Deaths in the U.S. as of June 9, 2021, by Age*, STATISTICA (June 9, 2021), <https://perma.cc/59VT-UW9H>; *Wrongful Death Damages for Children & Elderly*, LAWINFO (last viewed June 21, 2021), <https://perma.cc/BFA9-XTCY>.

19. Although workers' compensation does not typically cover routine community-spread illnesses, executive orders and legislation in many jurisdictions have extended workers' compensation to cover COVID-19. See Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. ST. LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>.

20. See, e.g., Jenna Cao, *Why I'm Reopening My Georgia Nail Salon*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/opinion/coronavirus-reopening-georgia.html>.

21. For an economic analysis, see Daniel J. Hemel & Daniel B. Rodriguez, *A Public Health Framework for COVID-19 Business Liability*, 7 J. OF L. & BIOSCI. 1 (2020).

dent.²² Admittedly, the jury is still out on whether tort liability can enhance public health efforts to combat the spread of COVID-19—or to address future pandemics—in the ways that I have suggested.

II. TORT REFORM

In the early months of the COVID-19 pandemic, tort reform advocates warned of a coming flood of litigation. “The trial lawyers are sharpening their pencils to come after health care providers and businesses,” alleged Senate majority leader Mitch McConnell.²³ The American College of Physicians asserted that “physicians and other clinicians face the threat of medical liability lawsuits,” and advocated unqualified “immunity from civil liability for harm . . . caused in the course of providing medical services in response to the COVID-19 outbreak.”²⁴ Business groups cited an “emerging threat” of “unfounded lawsuits against them alleging that their customers and employees were infected with COVID-19.”²⁵

Available data do not support these dire predictions. By the end of April 2020, when tort reformers were making headlines with warnings of a coming “avalanche” of tort claims against businesses and doctors, 1,295 civil lawsuits had been filed related to COVID-19.²⁶ Only *two* of those were personal injury claims by business patrons for COVID-19 exposure.²⁷ Twenty-six were claims by employees against companies for inadequate protection from infection in the workplace, personal injury, or death.²⁸ An additional thirteen lawsuits, a mix of medical

22. Compare Y. Tony Yang et al., *Does Tort Law Improve the Health of Newborns, or Miscarry? A Longitudinal Analysis of the Effects of Liability Pressure on Birth Outcomes*, 9 J. LEG. STUD. 217 (2012) with LYTTON, HOLDING BISHOPS ACCOUNTABLE, *supra* note 8, at chs. 7–8.

23. Jim Tankersley & Charlie Savage, *Businesses Seek Sweeping Shield from Pandemic Liability Before They Reopen*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/business/businesses-coronavirus-liability.html>.

24. *Medical Liability Protection During COVID-19*, AM. C. PHYSICIANS (Apr. 17, 2020), <https://www.acponline.org/advocacy/state-health-policy/covid-19-action-toolkit/medical-liability-protection-during-covid-19>.

25. Jeff Stein & Josh Dawsey, *White House Faces Internal Debate over “Liability Shield” for Firms Seeking Protection from Coronavirus Lawsuits*, WASH. POST (Apr. 24, 2020), <https://www.washingtonpost.com/business/2020/04/24/liability-shield-white-house-coronavirus/>.

26. Tankersley & Savage, *supra* note 24 (quoting Senate majority leader Mitch McConnell predicting an “avalanche” of tort claims for COVID-19 transmission). *COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH (May 26, 2021) 1, archived at <https://perma.cc/B9MA-DYK5> (total of all claims filed from January to April 2020, in chart labeled “Complaints by Month”).

27. *COVID-19 Complaint Tracker*, *supra* note 27, at 2 (consumer and miscellaneous tort claims filed in April 2020 in chart labeled “Complaints by Month”).

28. *Id.* at 3 (labor & employment claims filed from January to April 2020, in chart labeled “Complaints by Month”). Pandemic-related lawsuits against employers that are not precluded by workers’ compensation include claims premised on violation of health and safety regulations,

malpractice and wrongful death claims, were filed against healthcare providers.²⁹ By contrast, 303 claims were lawsuits brought by business owners against their insurers for business losses,³⁰ and 249 claims were for alleged civil rights violations filed in response to mask mandates, social distancing requirements, and closure orders.³¹ To my knowledge, tort reform advocates have produced no evidence of disciplinary actions against attorneys for frivolous litigation in any of these lawsuits, nor have they pointed to jury verdicts or settlements that are disproportionate to harms suffered.

The picture a year later similarly belies the alarmist rhetoric of tort reform. As of the end of May 2021, 10,670 complaints had been filed, 110 of which were personal injury claims by business patrons and 200 of which were claims by employees against their employers.³² An additional 270 were medical malpractice and wrongful death claims against healthcare providers.³³ Insurance claims for business losses reached 1,873,³⁴ and civil rights claims reached 1,740.³⁵ Thus, the only sizable categories of civil claims arising out of the COVID-19 pandemic were those filed by business owners and civil libertarians, not tort claimants.

Although at the time of this writing McConnell has been unable to pass a federal COVID-19 liability shield, medical providers and business groups successfully lobbied for tort immunity in thirty-six states via executive orders and legislation.³⁶ In almost all of these states, few or no COVID-19-related personal injury claims had been filed prior to the grant of immunity.³⁷ In this Symposium, professor Anthony

claims alleging reckless or intentional misconduct, and claims by workers in occupations not covered by workers' compensation statutes. See, e.g., Fisher Phillips, *COVID-19 Employment Lawsuits Premised on State Law Violations*, INSIGHTS (Apr. 14, 2021), <https://perma.cc/XX2G-89SN>; Fisher Phillips, *Employers Face Increase in COVID-19 Wrongful Death Lawsuits*, INSIGHTS (Aug. 7, 2020), <https://perma.cc/4QMC-6FNE>.

29. *COVID-19 Complaint Tracker*, *supra* note 27, at 4 (medical malpractice and wrongful death claims filed in April 2020 in chart labeled "Complaints by Month").

30. *Id.* at 5 (insurance claims filed in March and April 2020, in chart labeled "Complaints by Month").

31. *Id.* at 6 (civil rights claims filed from February to April 2020, in chart labeled "Complaints by Month").

32. *Id.* at 1 (total of all claims in table labeled "Category").

33. *Id.* at 4 (total of medical malpractice and wrongful death claims in table labeled "Category").

34. *Id.* at 5 (total of insurance claims in table labeled "Category").

35. *Id.* at 6 (total of civil rights claims in table labeled "Category").

36. See generally Anthony Sebok, *The Deep Architecture of American COVID-19 Tort Reform in 2020–21*, 71 DEPAUL L. REV. (forthcoming 2022).

37. See *COVID-19 Complaint Tracker*, *supra* note 27, at 2 (breakdown of personal injury claims by state), 3 (breakdown of labor & employment claims by state), and 4 (breakdown of wrongful death and medical malpractice claims by state).

Sebok's careful analysis of these laws maps variations and suggests that some immunity advocates appear to have been motivated by a desire to better serve the compensation and deterrence goals of tort law, while others appear to have had a desire to "block the operation of tort and to impose the cost of injuries that otherwise would be remedied by the defendant on the victim."³⁸ However, as Sebok points out, in light of the available data, there appears to be "no plausible story to tell of why social welfare or larger social goals would be served by removing COVID-19 injuries from the tort system (especially with no substitute compensation for the victims)."³⁹

Let me suggest two factors that help explain how the specious narrative of a coming flood of frivolous litigation succeeded in convincing governors and state legislators to enact sweeping limitations on liability for negligent disregard (and, in some jurisdictions, even for reckless disregard) of cost-effective, common sense public health guidelines.⁴⁰ First, COVID-19 liability shields continued a pre-existing trend of inserting tort immunity into emergency preparedness legislation. For example, Symposium contributor Allison Whelan's detailed analysis of the Public Readiness and Emergency Preparedness (PREP) Act of 2005 explains how the law's sweeping immunity provisions were justified by unsupported assertions that tort litigation is "one of the greatest obstacles to domestic vaccine production."⁴¹ As many of the articles from this Symposium demonstrate, the COVID-19 pandemic response accelerated pre-existing trends in the civil litigation system.⁴² The same is true when it comes to tort immunity for businesses and professionals.

Second, in one respect, predictions of tort reform advocates were a self-fulfilling prophecy. These advocates argued that business owners

38. Sebok, *supra* note 37 (manuscript at 23).

39. *Id.* (manuscript at 23–24).

40. *Id.* (manuscript at 20 tbl.).

41. Allison M. Whelan, *The PREP Act and Injury Compensation: Past, Present, and Future*, 71 DEPAUL L. REV. (forthcoming 2022) (manuscript at 22) (quoting speech by President George W. Bush justifying the tort immunity provisions of the PREP Act).

42. See, e.g., Paula Hannaford-Agor, *Our New Normal? How COVID Accelerated Pre-Pandemic Trends in State Court Civil Litigation*, 71 DEPAUL L. REV. (forthcoming 2022) (manuscript at 2) (types, disposition, and case management of civil claims); Valerie P. Hans, *Virtual Juries*, 71 DEPAUL L. REV. (forthcoming 2022) (manuscript at 15) (use of online trial proceedings); David Freeman Engstrom, *Future Litigation: From Day in Court to Data Governance*, 72 DEPAUL L. REV. (forthcoming 2023) (manuscript at 6–9) (digitization and datafication of civil justice); see generally Kenneth S. Abraham & Tom Baker, *What History Can Tell Us About the Future of Insurance and Litigation after COVID-19*, 71 DEPAUL L. REV. (forthcoming 2022) (reinsurance and financialization of insurance); Jean R. Sternlight & Jennifer K. Robbennolt, *High-Tech Dispute Resolution: Lessons from Psychology for a Post-COVID-19 Era*, 71 DEPAUL L. REV. (forthcoming 2022) (the use of communications technology in ADR).

would be hesitant to reopen for fear of litigation.⁴³ Their relentless insistence that business owners would face a flood of frivolous lawsuits upon reopening, despite the absence of any evidence, *created* this fear which, in turn, justified tort immunity as a means of eliminating the fear, whether it was well-founded or not.⁴⁴ Thus, tort reform advocates infected the business community with a highly contagious panic about frivolous litigation as a pretext for launching a successful tort immunization campaign to save it.

When it comes to health and safety, the U.S. style of risk regulation can be conceptualized as a three-legged stool supported by government regulation, private industry risk management efforts, and the civil liability system.⁴⁵ Tort reform kicked out one of these legs, depriving the United States of a means of incentivizing reasonable precautions to prevent the spread of COVID-19. Of course, there is no guarantee that tort liability would have effectively played this role, and there is also the possibility that, left unchecked, liability exposure would have discouraged desirable business activity and medical services.⁴⁶ However, given the slow pace of litigation, there is no reason why governors and state legislatures could not have waited to enact liability shields if and when meritless or widespread litigation arose.

Tort reform advocates might respond that, absent state immunity provisions, the wave of litigation they predicted would have appeared and that it was better to act before medical providers and business owners incurred significant losses. However, as this Article illustrates, available data do not support these predictions. Moreover, anxiety among medical providers and business owners regarding liability exposure gives them a powerful incentive to implement common sense, cost-effective precautions endorsed by public health officials, professional organizations, and trade associations. At the very least, the burden of proof in the debate over tort immunity for COVID-19 transmission should be on those seeking to enact radical changes to a prominent component of the U.S. public health infrastructure during a pandemic.

43. Tankersley & Savage, *supra* note 24.

44. Paul Dowdell, *Immunity from Liability in the Age of COVID-19: A New Reality for Trial Lawyers?*, ABA (Aug. 31, 2020), <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2020/immunity-from-liability-covid-19-trial-lawyers/> (state tort immunity legislation passed in response to business owners' fears of liability claims for COVID-19 transmission).

45. See, e.g., LYTTON, *OUTBREAK*, *supra* note 8, at 9–23 (analyzing food safety governance in the United States as a system that includes interaction between government regulation, industry supply chain management, and civil liability).

46. Hemel & Rodriguez, *supra* note 22, at 2–3.

CONCLUSION

This Symposium has convincingly demonstrated that the COVID-19 pandemic has had a significant impact on the U.S. civil liability system. However, whether the reverse is true remains entirely unclear. We do not know whether the civil liability system had or could have had an impact on the COVID-19 response or whether it has a valuable role to play in confronting future pandemics. One thing does seem clear: influential organizations in the medical and business communities do not wish to find out.