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Kyle D. Logue
University of Michigan Law School, klogue@umich.edu

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Kyle D. Logue*

University of Michigan Law School

I. Introduction

Economic analysts of tort law have always been preoccupied with the incentive effects of alternative tort liability and damage rules. More precisely, economically oriented tort scholars have focused on the question how to design a tort system that gives potential injurers and potential victims the *ex ante* incentive to minimize the costs of accidents, including the costs of preventing accidents as well as the administrative costs of the regulatory regime.¹ Viewed this way, tort law is just another regulatory tool, akin to Pigovian taxes or command-and-control regulations, which policymakers can deploy to help manage the problem of negative externalities.²

* Wade H. McCree Jr. Collegiate Professor of Law, University of Michigan Law School. The participants at the Duke Law School Legal Theory Workshop and the University of Chicago Law and Economics Workshop provided helpful comments on an earlier draft of this Article, for which I am grateful. I also appreciate the financial support provided by the University of Michigan Law School's Cook Fund.

¹ The canonical formulation of the cost-minimization goal of tort law comes from GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: AN ECONOMIC ANALYSIS* (170); *see also* WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); STEVEN SHAVELL, *THE ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW & ECONOMICS* (2003).

² Some economic analysts are famous for making the descriptive claim that the common law of tort, like the rest of the common law, tends towards efficiency. R. Posner, *Economic Analysis of Law*. This positive project has largely fallen out of favor among scholars working in law schools, although some economists still pursue the hypothesis. *See, e.g.,* Nicola Gennaioli & Andrei Shleifer, *The Evolution of Precedent* (NBER working paper, 2005), available on line at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=687801. In this Article I do not claim that the common law has a general tendency towards efficient outcomes, although I do point out a few tort doctrines that are at least consistent with efficiency norms.

Viewing tort law as a system of deterrence or regulation is now standard within the legal literature. This regulatory/deterrence perspective has even been expanded to encompass non-legal forms of social control. In recent years, legal scholars have come to view non-legal social norms and informal non-monetary sanctions as an alternative to formal legal rules when it comes to optimizing private incentives.³ Under this regulatory account of social norms, just as a potential injurer's *ex ante* harm-avoidance incentives can be altered by the threat of *ex post* tort liability or by Pigovian taxes, those same incentives can be affected by the knowledge that the breach of a social norm may result in a loss of valuable reputation in the community, perhaps accompanied or anticipated by personal feelings of shame or guilt. This idea – that social norms can regulate behavior, creating “order without law” – has been the subject of considerable attention among legal scholars for many years.⁴ Indeed, there are now competing theoretical accounts as to when social norms will tend to be more or less efficient or welfare-maximizing than formal legal rules.⁵

The foregoing summary of the standard L&E deterrence/cost-internalization framework will be familiar to most readers.⁶ What may

³ For recent scholarly attention to social norms, see Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. Legal Stud. 537 (1998); and Symposium *Law, Economics, & Norms*, 144 U. Pa. L. Rev. 1643 (1996).

⁴ See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55 (1963); ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

⁵ Ellickson, *supra* note __ (emphasizing importance of close-knit groups and absence of externalities to formation of efficient norms); Eric Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. Chi. L. Rev. 133 (1996) (); Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 Am. L. & Econ. Rev. 227 (2002); Paul Mahoney & Chris Sanchirico, *Competing norms and social evolution: Is the fittest norm efficient?*, 149 U. Penn. L. Rev. 2027 (2001).

⁶ Some commentators draw a terminological distinction between “deterrence” and “cost internalization.” See, e.g., Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523 (1984). When policy makers can identify a standard of behavior that it regards as socially desirable (presumably because the total social benefits exceed the social costs), then those policy makers would simply seek to *deter* any behavior that diverges from that standard. On this view, we might speak of tort law as *detering* negligent behavior or the criminal law *detering* crime. However, when there is an activity that is known to produce external social costs (but is not known necessarily to be socially undesirable overall), then society may decide to *internalize* that external cost to the party engaging in the activity and then allow that party to equate marginal benefit and marginal cost. More often than not, this technical distinction between deterrence and cost-

be surprising, however, is the relative lack of scholarly attention devoted to figuring out how these various alternative, often overlapping, and potentially conflicting systems of regulation are, or should be coordinated, with each other. After all, if an external harm is being internalized or deterred by one regulatory tool, it need not, and often should not, be internalized or deterred *again* by another regulatory tool.

Take the quintessential example of a negative externality – some activity that spews CO₂ into the atmosphere thereby contributing to the global problem of climate change. If a fully cost-internalizing Pigovian tax (say, a carbon-based tax of the sort that many commentators have recently proposed) were imposed on domestic companies by the U.S. government, there obviously need not (and, from an efficiency perspective, should not) be a state-level carbon-based tax on the *same* polluters for the *same* carbon emissions. Nor should there be any overlapping command-and-control regulations or any other sort of regulation (including tort liability) designed to regulate the same conduct. It – the external harm caused by CO₂ emission – has, by assumption, already been fully regulated. Redundant regulation represents unnecessary administrative costs and potentially excessive deterrence. The same analysis can be applied to torts. Consider automobile accidents or product-related injuries or medical malpractice harms. All theoretically are potentially affected by the same problem of overlapping, uncoordinated, and thus potentially redundant sanctions, which means either over-deterrence or duplicative and therefore excessive administrative costs, or both. Again, this is a subject that has been largely neglected in the literature.⁷

internalization gets ignored in the literature; and the terms get used synonymously. In this Article, I use the terms interchangeably unless the context clearly calls for one or the other.

⁷ There are some notable exceptions. Shavell has provided the most comprehensive and systematic economic account of how to choose the optimal tool or combination of tools for regulating risk; and my analysis, especially in Part __, will borrow from his. See, e.g., SHAVELL, *supra* note __, at 277-90 (Ch. 12; “Liability versus Other Approaches to the Control of Risk.”); and Steven Shavell, *Liability for Harm versus Regulation of Safety*, 13 J. Legal Stud. (1984). This Article differs in that it approaches the deterrence question from a torts perspective in the sense already discussed: taking all non-tort systems of regulation as given or fixed and imagining how tort law should respond to the existence of alternative non-tort systems of risk regulation. In addition, this article focuses on the problem of redundancy of overlapping regulatory regimes, which is an emphasis found in none of the prior work on deterrence. As for the overlap between legal and non-legal regimes of deterrence, Shavell, Polinsky, and Kaplow have written on the optimal mix of monetary and non-monetary sanctions (*see infra* sources

In theory, the problem of redundant regulation is just as damaging to the goal of efficiency and social welfare maximization (or cost minimization) as are the negative externalities that these regulatory tools are designed to counter-act. This is why it just as important that a carbon-based tax not be set too high as that it not be set too low – or not enacted at all. How do we avoid the problem of redundant regulation? Ideally, there would be some central, intra-jurisdictional policy planner who would harmonize the various systems of deterrence, choosing the particular system or combination of systems that is most efficient for the purposes at hand. And this sort of centralized harmonization sometimes happens. For example, when Congress enacts a given regulatory regime it sometimes makes explicit the extent to which overlapping state law regulations (including common law tort claims) are to be displaced or, to use a narrower and more specialized term, preempted. Unfortunately, as recent Supreme Court preemption decisions make clear, Congress often fails (or declines) to be explicit about this displacement or pre-emption question, thus leaving courts hearing tort cases to determine when common tort actions been impliedly preempted and when not.⁸ Similarly, when the alternative non-tort system of regulation is not a federal regulatory law but something else (state regulatory law or even social norms), the regulatory coordination decision is nevertheless left to

cited in notes ____). But again, they have not focused on the problem of redundant sanctions. Also, within the literature on norms and law, there are the occasional discussions of how one or the other system of social control gets called into action. For example, in Ellickson's elaborate taxonomy of the types of rules, types of sanctions, and types of "controllers" (parties who either apply the rules or impose sanctions or both), he discusses what he calls "controller-selecting rules," which are rules (for example, social norms) that govern whether or not, and under what conditions, parties will resort to the formal legal system in the first place. See ELLICKSON, *supra* note ___, at 134-35. But Ellickson does not focus on the question addressed here: assuming the existence of a tort system, and assuming that system has been invoked, how should a court (one type of government controller) coordinate the existence of legal and non-legal rules and sanctions? There has been some scholarship on the interplay between custom and tort law, the most famous example of which is Richard Epstein's article on the *T.J. Hooper* case. See Richard A. Epstein, *The Path to T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. Legal Stud. 1 (1992) (arguing that in general courts should defer to custom in negligence analyses). The present Article provides a more general framework for understanding the role of custom in tort law, again within the standard deterrence picture, and it argues for a different conclusion than the one reached by Epstein. See *infra* text accompanying notes ____.

⁸ See the discussion of the Supreme Court's preemption rationale in *Wyeth v. Levine* (USSC 2009) in Part IV below.

the common law courts adjudicating tort claims applying traditional tort doctrines.

In this Article, working from within this L&E deterrence tradition, I sketch out a general framework for understanding how tort law might be coordinated or harmonized with overlapping alternative systems of deterrence or regulation. Again, the ideal solution would be for a central policy maker to choose the optimal combination of regulatory tools, using tort law when that regulatory tool is optimal but substituting direct regulation or Pigovian taxes when those tools make more sense – or various combinations of all three, depending on the situation.⁹ This Article takes a different approach. It works from the perspective of tort law, taking all non-tort systems of regulation as given or fixed. What does this mean? One way to think of it would be to imagine a common law court that (a) is deciding a tort case, (b) must take as given the existence of overlapping non-tort system of regulation, (c) must (obviously) abide by any explicit legislative pronouncement on how overlapping laws are to be coordinated, but (d) in the absence of such explicit pronouncement wishes to apply a coordination principle that optimizes *ex ante* incentives to minimize accident costs, including (importantly) the administrative costs of the system. This version of the tort-law perspective on the optimal regulation question focuses on the individual court (probably appellate courts, but conceivably trial courts) applying state common law principles of tort law, while simultaneously (through common law coordination principles discussed below) taking into account the wider regulatory world. And again, the overarching Calabresian goal is that of minimizing the costs of accidents. The point of this perspective is engage in a thought experiment to see how a tort court seeking to minimize the cost of accidents should take into account the existence overlapping regulatory regimes.

Alternatively, the tort-centric perspective could focus on the role of legislatures (state or federal) in designing tort-reform legislation to guide the decisions of tort courts in coordinating common law tort principles with non-tort systems of regulation. Again, the idea would be to hold non-tort regulatory regimes as fixed and then to see how tort law should respond to the existing non-tort regulatory regime, assuming a goal of welfare maximization and efficient accident-cost minimization.¹⁰

⁹ This is essentially the approach of Shavell and others. See sources cited *supra* note 7.

¹⁰ One might complain that, if we are talking about a legislature (at least if we are talking about Congress) choosing optimal tort/non-tort regulatory coordination rules,

This tort-centric approach in one sense embodies a combination of policymaking ambition and modesty: It is ambitious in that it imagines those who “make” tort law (judges or legislators) as trying to achieve some version of accident-cost minimization and can choose among versions of tort liability rules and damages measures to as to best achieve that goal; it is modest in that it does not assume that all policy tools are up for grabs, but rather that non-tort regulation must be accepted and assumed to be an optimal within its domain.

Part II lays the groundwork for the Article’s analysis by reviewing some of the basic principles and assumptions of economic tort theory and regulatory theory. Part III then builds the basic framework for how tort law should be coordinated or harmonized with various non-tort systems of regulation. To build the framework, that Part uses the example of a negligence-based tort regime overlapping with command-and-control agency-based regulation. Part IV then gives some flesh to this framework by applying it to a particularly salient example of the tort/regulation overlap problem: the example of federal preemption of state products liability law. Rather than do an exhaustive review of the preemption cases and literature (which would take us well beyond the scope of this Article), this Part uses a few recent Supreme Court preemption cases as a lens through which to view the broader questions of institutional cooperation between common law courts and other regulators. Part V then broadens the analysis by sketching out how the analysis gets more complicated when other types of tort/non-tort overlap, such as when Pigovian taxes overlap with strict liability. One of the Part V also considers how the framework might apply when the non-tort system of regulation is some type of social norm the breach of which gives rise to informal (nonmonetary) sanctions. Part VI concludes.

II. Recap of a Few Principles (and Assumptions) of Tort (and Regulatory) Theory

For some readers, it will be useful to review the highpoints of economic theory of tort and regulatory theory. For others, this review

then it makes less sense to treat the non-tort regulatory regimes as fixed. And that is why, as I talk about federal regulation below, I sometimes consider the possibility of altering the non-tort regulatory regime. However, even when the tort lawmaker is Congress, there will often be times when the non-tort regulatory regime is best understood as fixed, either because that regime is politically difficult to change or because it is optimal.

will be unnecessary and maybe even a waste of time. The latter group (if you know who you are) may want to skip to Part III.

The Rationality Assumption and the Exclusive Focus on Efficiency

A key assumption underlying the economic analysis of law generally and torts in particular is the view that individuals and firms for the most part behave rationally, that the relevant parties can and do weigh the costs and benefits of their actions and make choices that on balance tend to maximize their own expected utility. As behavioral researchers have exhaustively documented in recent years, and as many others have suspected for decades before that, this rationality assumption is often unrealistic.¹¹ Individuals frequently exhibit behavior that diverges demonstrably and systematically from what has traditionally been considered rational. Nevertheless, at least in areas in which the regulated parties are likely to be knowledgeable and sophisticated (and especially when they are subject to the evolutionary pressures of market competition), the classical conception of rationality still seems a decent starting point for analysis. Thus, for the remainder of the Article, I will proceed as if optimizing *ex ante* incentives through tort law, as well as through other forms of regulation, is both feasible, in the sense that the relevant actors behave rationally, and desirable, in the sense that doing so would tend to maximize social welfare.¹²

One assumption that is standard in the economic analysis of torts is that accident law should be concerned with providing compensation to injured victims only insofar as doing so furthers the instrumental goal of deterrence. There is no intrinsic value, on this view, in compensating injured plaintiffs through the tort system. The standard justification for this seemingly cold-hearted perspective is that compensation for harms of all sorts, including harms caused by others' torts, can almost always be more efficiently and comprehensively provided through some form of

¹¹ For a review of some of the most interesting findings of the behavioral turn in L&E, see BEHAVIORAL LAW & ECONOMICS (2000) (Sunstein, Cass R., ed.).

¹² Most normative law-and-economics scholarship adopts, explicitly or implicitly, some version of welfarism. I follow that approach in this Article, although I occasionally address in welfarist terms considerations that some would regard as strictly deontological or nonconsequentialist. For an extended development of a theory of "weak welfarism" that combines welfare maximization with other non-welfarist criteria, see MATTHEW ADLER & ERIC POSNER, NEW FOUNDATIONS OF COST BENEFIT ANALYSIS (2006).

private or public first-party insurance.¹³ Under the L&E approach, then, other than the deterrence function, there is no independent value of having injurers pay damages to their victims.

This view rather famously conflicts with the corrective justice account of tort law. According to corrective justice theorists, when an individual wrongfully harms another (that is, she harms someone under circumstances in which it was her duty not to harm that party), the injurer then incurs an obligation to repair that harm; and tort litigation provides a means of enforcing this obligation.¹⁴ On the corrective justice view, then, there is an intrinsic value to the “bilateral structure” of tort litigation under which the victim seeks recovery from the injurer. The idea is that justice requires that a party who wrongfully caused the harm be the one to make the injured party whole. Furthermore, under corrective justice, it is of no independent significance – indeed, it is irrelevant – whether tort law does or does not create optimal *ex ante* accident-avoidance incentives. By contrast, under the economic perspective, as mentioned above, there is nothing intrinsically important about forcing a particular tort defendant to pay a particular victim a particular amount. The bilateral structure of tort litigation, where the victim sues the injurer for recovery, is merely instrumental to the goal of optimizing *ex ante* accident-avoidance incentives. Thus, under the economic approach, if overall social welfare were maximized (and costs minimized) by having a system in which no direct compensation is paid by injurer to victim (in which there are no tort claims), that would be fine.

¹³ There is nothing inconsistent with using tort law to regulate behavior and having injured victims seek compensation for their injuries in the first instance from their first-party insurers (whether it is a private company or the government). Double recovery is avoided, and causal responsibility properly assigned, through the interplay of the subrogation doctrine and the collateral source rule. By paying for the tort victim’s losses, the first-party insurer becomes “subrogated to” the tort victim’s claim against any tortfeasors. The traditional collateral source rule, which forbids tort courts from taking into account the tort victim’s payments from “collateral sources” such as insurance, protects the first-party insurer’s subrogated tort claim against the injurer. Subrogation clauses are usually found in first-party insurance contracts; however, even if no contractual provision is present, the doctrine of equitable subrogation serves largely the same function.

¹⁴ See, e.g., JULES COLEMAN, *RISKS AND WRONGS* (1992); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1998); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *Iowa L. Rev.* 449 (1992).

There is in fact an efficiency argument for adopting a regulatory regime that makes injurers pay damages to their victims – an efficiency story that explains the bilateral structure of tort law. Under such a system, tort victims, who have important information about the nature and extent of the harm caused to them, have an incentive come forward and initiate the regulatory machinery. In that sense, the corrective justice story and the deterrence story would point in the same direction. That will not always be the case, however. And when there is divergence between the efficiency and corrective justice, the policy maker – whether it is a legislature or a court in a tort case – will have to choose which vision of tort law to endorse. This point will be important below when we examine the Supreme Court’s recent pronouncements on coordinating tort law with federal safety regulation.

Choosing the Optimal Liability Rule: Negligence v. Strict Liability

According to the standard deterrence framework, there are two basic issues in the design of an efficient tort regime: choosing the optimal liability rule and choosing the optimal level of damages.¹⁵ As to the liability-rule question, the choice is generally between some version of negligence and some version of strict liability.¹⁶ The economic advantages and disadvantages of a negligence rule have been exhaustively rehearsed in the literature. Under a negligence rule, the injurer is let completely off the hook for any of the harm that she causes if she can show that she was not negligent, that she behaved reasonably, that she took what the doctrine calls “due care.”¹⁷ And if we assume that the court defines the due care standard at the efficient level (that is, that courts get the negligence analysis right, from an efficiency perspective), then the negligence rule, backed up by a sufficiently large sanction, will induce potential injurers to behave efficiently in terms of care levels. This is because potential injurers can avoid any responsibility for whatever harm they might cause if they act with reasonable care. Due care,

¹⁵ All of what follows in this section of Part II can be found in the systematic work of Steven Shavell, Mitchell Polinsky, and Richard Posner. *See supra* sources cited in note 1.

¹⁶ This is a vast oversimplification of the theoretical literature on liability rules, as there are numerous other alternatives to straight negligence and strict liability, including most obviously regimes that take into account in some way the behavior and potential fault of the victim in causing the accident. But again, I am trying to avoid these complications by focusing on situations in which only the injurer can affect the probability or severity of the external harm.

¹⁷ Other elements of a tort claim, in addition to causation, include a showing that the injurer owed a duty to avoid the harm that the victim sustained.

in a sense, is a sort of universal safe harbor for avoiding tort liability. So, as a simple illustration, if a potential injurer could spend \$30 on risk reduction and by so doing avoid any possible responsibility for the \$100,000 harm that her behavior might cause (with, say, a probability of 1 in 1000), then that care-level investment would look pretty attractive. This is why, in the theoretical deterrence literature on torts, a negligence rule is thought to optimize potential injurers' *ex ante* "care levels." This is the L&E way of saying that negligence induces potential injurers to take all cost-justified steps to avoid, or minimize the risk of, harm to third parties.

That's the upside of negligence. There are downsides as well. One is that while negligence can optimize potential injurers' care levels, it also tends to produce excessive potential injurer activity levels.¹⁸ What are "activity levels"? Think of it this way: With most risky activities, there will always be some residual (not-cost-justifiably-avoidable) risk of harm, even if the potential injurer makes all optimal investments in care. Driving a car, for example, entails a certain amount of residual risk even if one observes all traffic laws and generally takes all appropriate safety precautions. The same point could be made about medical treatments or consumer products or prescription drugs or most anything that can cause harm. The problem is that, for any such activity, if the potential injurer complies with the negligence standard, she thereafter does not bear (and hence, under traditional theory, she will externalize) the cost of third-party harms that occur as a result of the residual risk inherent in the activity. Under a negligence regime, in other words, this risk of unpreventable harms is externalized to the third-party victim, causing an efficiency problem.¹⁹ Hence, if a product manufacturer satisfies the risk-benefit product-defect test, it can safely ignore the possibility of harms caused by its products.²⁰ The resulting excessive injurer activity levels are, again, a sort of negative externality.

¹⁸ For the original and still authoritative analysis of the care-level/activity-level distinction, see Steven Shavell, *Strict Liability versus Negligence*, 9 J. Leg. Stud. 1 (1980).

¹⁹ For a recent discussion of how negligence law tries to sort out unpreventable harms from preventable harms (or harms caused by negligence), see Grady, Mark F., *Unavoidable Accident* (January 1, 2009), UCLA School of Law, Law-Econ Research Paper No. 09-01. Available at SSRN: <http://ssrn.com/abstract=1337288>.

²⁰ Most versions of the "design defect" doctrine in products liability law approximate a negligence standard. Cases involving "manufacturing defects" come closer to strict liability.

This negative externality is in theory corrected by strict liability. Strict liability, from the perspective of the injurer, can be understood as a type of Pigovian tax that is implemented by a court (rather than by an agency) after an injury occurs and after suit is brought by the injured victim. As with other Pigovian taxes, however, it has the effect of internalizing external harms. Under strict liability, the potential injurer is not only induced to take optimal care, since doing so will reduce the size of her *ex post* liability, but also is encouraged to engage in the activity only if the benefits exceed the full social costs, including the costs of the tax. This is because the residual risk is shifted from the potential victims to the potential injurers.²¹

Another drawback of negligence is the amount of information that it requires of courts. To do the analysis properly, the court must have an enormous amount of data, considerably more than is required to do strict liability. To apply a strict liability rule, the court need only determine the amount of the harm actually caused to the victim by the injurer. To apply the negligence standard, by contrast, the court must not only do the causation and damages analysis, but must also have information about the cost of the precaution to injurer (that is, it must be able to calculate the “B” in Learned Hand’s famous “BPL” negligence test), as well as information about the precise effect of the safety investments on the expected harm to third parties (“PL”).²² And if the precaution reduces the benefit of the activity itself to the potential

²¹ Just as negligence has a problem dealing with injurer activity levels, strict liability has a problem optimizing victim activity levels, and for the same reason: If injurers are strict liability for harms, there is no reason for victims to take care; and this problem remains even if a contributory negligence defense is introduced to the strict liability rule, which would induce victims to take due care but not to optimize activity levels. In sum, the standard conclusion in the literature then is this: A negligence rule (or a rule of negligence with contributory negligence) optimizes injurer and victim care levels and victim activity levels, but not injurer activity levels. And strict liability (with a defense of contributory negligence) optimizes both sides’ care levels and injurer activity levels, but not victim activity levels. Shavell. In this Article, for simplicity I ignore victim care levels.

²² *United States v. Carroll Towing Co.* 159 F.2d 169 (2d Cir. 1947). In that case, Judge Learned Hand introduced the “BPL” formula that became synonymous with the economic approach to negligence law. In that formula, “B” is the burden or cost of the precaution that the injurer in the case failed to take; “P” is the *ex ante* probability of that particular type of loss occurring; “L” is the loss itself, such that PL is the reduction in expected harm that would have occurred had the injurer invested *ex ante* in B. Thus, under the Learned Hand test, the injurer will be deemed negligent (or will be found to have taken less than due care) when $B < PL$. See Posner, *supra* note ____.

injurer, that fact has to be taken into account as well, as part of the cost of precaution. This is a lot of information to expect a court to acquire and process accurately.

Despite the relative simplicity of the strict liability analysis, it is sometimes said that negligence may have lower administrative costs than strict liability, for two different reasons. First, under a negligence standard, although each case may be relatively costly to administer (because of the higher information burden associated with the BPL analysis), there should be fewer actual trials than with strict liability, as any cases involving clear compliance with the negligence standard (clear absence of fault on the part of the injurer) will not be brought at all. Under the strict liability standard, by contrast, the injured victim need not show fault and therefore will have an incentive to bring a suit whenever he believes he can demonstrate that the injurer caused his harm (and when the likely damage award exceeds the victim's costs of litigation). Thus, the question is whether the higher-administrative-cost-per-case effect of negligence is overwhelmed by the larger-number-of-cases effect of strict liability.²³

Optimal Damages

In addition to choosing the optimal liability rule, the designer of an efficient tort regime must choose the optimal level of damages. In general, the conventional wisdom is that sanctions equal to the harm caused will generally produce efficient *ex ante* risk-reduction incentives. In the case of a negligence rule, a threatened sanction equal to the harm caused will usually be enough (sometimes more than enough) to induce *ex ante* compliance with the efficient due care standard, as the potential injurers will happily spend a little on precautions *ex ante* to get the large benefit of freedom from all damage liability. (As in the example above, the \$30 investment eliminates a cost with an expected value of \$100. A no-brainer for the potential injurer.) The optimal sanction under a negligence regime, however, need not necessarily be exactly equal to the harm caused; it can be higher or lower, just so long as that sanction is enough to induce compliance with the efficient standard of care. Indeed, the threatened sanction can be almost infinite, so long as due care is

²³ SHAVELL, *supra* note __, at 264 (“Although the volume of claims should be greater under strict liability, the average administrative cost per claim should be higher under the negligence rule.”).

sufficient to eliminate all liability and there is no risk of judicial error and no risk aversion.²⁴

Under strict liability, it is important that damages be set at the amount of the harm caused, or set so that the expected value of the sanction experienced by the potential injurer is equal to the expected value of the external harm. In some cases this means the sanction should equal the harm. That assumes, however, that the likelihood that the sanction will in fact be imposed is one-hundred percent in the event of the harm. That is, the sanction should equal the harm when there is no possibility that the harm will go undetected and thus unsanctioned. Of course, if there is some possibility that the harm will go undetected, then the sanction imposed on the injurer will need to be increased so that the expected value of the sanction is equal to the expected value of the external harm.²⁵ If the damages under strict liability are set too low (so that their expected value is less than the expected value of the external harm), then potential injurer activity levels will be too high, as the external costs will not be fully internalized. If the strict liability sanction is set too high, there will be over-deterrence and the potential injurer activity levels will be too low. Both are inefficient outcomes.

Tort Law vs. Agency-Based Ex Ante Regulation

Because tort law can be viewed as a form of regulation, it can therefore be compared and contrasted with other forms of regulation. For example, tort law is sometimes characterized as an *ex post* system of regulation, in the sense that the tort system is called into action only after some harm occurs.²⁶ By contrast, most regulation, or what the average lay person would call regulation, takes place *ex ante*, before the harm occurs. The quintessential form of *ex ante* regulation is agency-based command-and-control regulation. Under classic command-and-control regulation, the regulating agency instructs the regulated parties precisely what risk-reducing steps must be taken for the parties to be allowed to

²⁴ The sanction in some cases could be lower than full damages and still induce optimal care. In the example in the text, any damages over \$30,000 would be sufficient to do that.

²⁵ The standard way of dealing with a less than certain sanction is to add a kicker, enough to make the expected value of the sanction equal to the expected harm from the activity. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968); A. Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 Am. Econ. Review. 880 (1979).

²⁶ Shavell, *supra* note __.

engage in the activity in question. Examples of command-and-control regulation include various types of environmental rules, the regulation of automobile design safety, as well as the regulation of medical technology (including drugs and medical devices). Command-and-control regulation in the U.S. often entails the participation by the regulated parties in the process of administrative rulemaking and thus in the design and selection of particular regulations. Ultimately, however, it is the regulatory authority (legislature or agency) who must decide *ex ante* (again, before the harm occurs) what activities will be permitted and what safety precautions will be taken to minimize harms.

Another type of *ex ante* regulation is a Pigovian tax. The paradigmatic Pigovian tax is imposed up front: when the risky or harm-causing activity is engaged in but before the harm associated with the activity is fully realized. One example is the economists' preferred solution to global warming: the carbon-based tax.²⁷ Such a tax would in theory be collected at the point of production (or, somewhat less efficiently, at the point of sale to consumers), but in any event – with almost every proposal for a carbon tax I have seen – the tax would be collected before the actual harm to the environment takes place.²⁸ The amount of the tax would be based on an *ex ante* estimate of the external environmental harm that a given unit of carbon would contribute.²⁹ Presumably, the tax would be adjusted as the environment improves (or worsens) or as scientists revise their estimates of the effect of carbon on the atmosphere and on overall welfare.

In sum, tort law can be distinguished from non-tort regulation in terms of who the regulator is (court rather than agency) and in terms of the timing of the regulatory in-put (*ex post* rather than *ex ante*).³⁰ It

²⁷ James Poterba, *Tax Policy to Combat Global Warming: On the Designing a Carbon Tax*, in GLOBAL WARMING: ECONOMIC POLICY RESPONSES (200?) (Dorbusch, Rudiger & James M. Poterba, eds.).

²⁸ At least one commentator has suggested using tort law as a sort of *ex post* carbon-based judicially imposed tax. Jonathon Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. Rev. 1827 (2008).

²⁹ Gilbert E. Metcalf and David A. Weisbach, Design of a Carbon Tax (January 8, 2009), U of Chicago Law & Economics, Olin Working Paper No. 447; U of Chicago, Public Law Working Paper No. 254. Available at SSRN: <http://ssrn.com/abstract=1324854>.

³⁰ The *ex ante/ex post* distinction between command-and-control regulation and tort law is somewhat overstated in the text. In fact, although many of the most important command-and-control regulatory decisions occur before any actual harm occurs from the activity in question (as with pre-market approval for certain types of products or

should also be noted, however, that negligence and strict liability each have their agency-based *ex ante* equivalent. That is to say, a fault-based tort regime can be understood as an *ex post* version of command-and-control regulation implemented through the court system, one that is initiated or triggered by those who have been harmed. And a strict liability tort regime can be understood as a particular type of *ex post* Pigovian tax.

Given the preceding analysis, it makes sense that there would be a standard normative framework for evaluating alternative regulatory tools, including tort law, and for deciding which tool is most efficient for which situation. And there is.³¹ Thus, *ex ante* agency-based regulation is considered preferable to *ex post* tort liability when the regulatory agency is thought to have superior (or cheaper access to) information regarding the risks of the regulated activity than does the regulated party and when there are concerns about insolvent or judgment proof injurers.³² Alternatively, *ex post* tort liability may be preferable when judgment-proofness is not an issue and when potential injurers have better *ex ante* information about the potential harms than do the regulators. And so the argument goes.

Criminal Law and other Non-Monetary Sanctions

Note that if the risky activity in question has a socially optimal level of zero (that is, the activity should simply be banned), then the efficient penalty under the traditional economic analysis would be large

product-safety innovations), it is not as if, once the agency has approved the activity/product, it can never revisit its decision or make adjustments to take into account new information, including information about actual post-approval loss experience. But many agencies are notoriously bad at acting aggressively on new negative information regarding previously approved activities, which is part of the reason that the tort suits arise, of course. This suggests, however, that the *ex post/ex ante* distinction does capture something of continuing significance in the world.

³¹ Donald Wittman & Michelle White, *A Comparison of Regulation and Liability Rules Under Imperfect Information*, J. Legal Stud. (1983); Shavell, *supra* note __; Charles D. Kolstad, Thomas S. Ulen and Gary V. Johnson, *Ex Post Liability for Harm versus Ex Ante Safety Regulation: Substitutes or Complements?* 80 Am. Econ. Rev. 888 (1990). For a more recent application of this framework within the economic literature, see Joshua Schwartzstein & Andrei Shleifer, *Litigation and Regulation* (Feb. 19, 2009) (unpublished manuscript, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1344505).

³² *Ex post* regulation works only if the regulated party anticipates having sufficient assets to pay the full harm caused by its activity *ex post*. Shavell, *supra*.

– large enough to fully deter the activity in question at the lowest administrative cost.³³ This analysis suggests that this extreme sort of deterrence is one role for the criminal law: to identify behavior whose optimal activity level is zero and then, at the lowest administrative costs possible, deter the behavior completely – or come as close as reasonably possible to doing so. Consider, for example, intentionally caused harms. These are considered socially undesirable, either on intrinsic grounds or because they are thought to undermine social-welfare maximization; and therefore those who cause intentional harms face the prospect of criminal sanction, in addition to potential tort liability. Of course, even if the ideal level of some activity is zero, the administrative costs necessary to achieve that ideal may not be cost-justified. Put differently, given the administrative/enforcement costs associated with any regulatory or law enforcement regime, the truly (all-things-considered) optimal level of even socially undesirable activities may be positive. This is the familiar point that, in a sense, the globally optimal level of crime – given enforcement costs (and given human nature) – is probably not zero.

I should also point out another standard conclusion in the L&E deterrence literature: that criminal sanctions will not always be the most efficient way to deter even clearly undesirable behavior. This is true for a bunch of reasons, but let's focus on one: Insofar as criminal sanctions involve non-monetary sanctions (again: prison), such sanctions are inherently less efficient than monetary sanctions – not because prisons are more costly to run than are systems of monetary transfers (though that is almost certainly true most of the time), but because there is a fundamental theoretical asymmetry between monetary sanction and non-monetary sanctions. This asymmetry is that monetary sanctions involve transfers whereas non-monetary sanctions generally do not.³⁴ Thus, when a criminal spends time in jail and is deprived of his liberty and his ability to produce income, it causes him to experience a reduction in utility, which is the source of the desired deterrent effect.

A monetary sanction that reduces the criminal's utility by the same amount in theory has the same deterrent effect. The difference is that with the monetary sanction there is also a commensurate increase in someone else's utility, whoever enjoys the benefit of the cash transfer.

³³ This is how economists tend to understand the line between what behaviors are criminalized and which are not. See, e.g., Becker, *supra* note, __; Shavell, *supra* note __; and Polinsky, *supra* note __.

³⁴ Becker, *supra* note __.

For example, although tort damages lower the injurer's utility (that's what makes them a sanction), they also increase the money available to the victim (or to her first-party insurer if it is a subrogation suit). A similar point could be made about Pigovian taxes or government fines generally: Because they are transfers, they do not entail any necessary net loss of utility, as the tax dollars can be spent on something. With a non-monetary sanction, however, there is no necessary offsetting benefit to anyone else in society – other than the deterrence effect itself. Hence, the general preference among economists for monetary sanctions over non-monetary sanctions, such as a jail sentence.³⁵

Of course, monetary sanctions are not always feasible. Indeed, that conclusion serves as the basis for the standard economic argument for the all-things-considered second-best efficiency of non-monetary sanctions in some settings. For example, if a potential injurer is judgment proof, the argument goes, non-monetary sanctions may be the only, or the least-cost, way to provide optimal deterrence. This is the standard economic account for why we need criminal penalties other than mere monetary sanctions.³⁶ Along the same lines, for many types of relatively minor but incredibly numerous offenses, it would obviously be too costly to involve the legal system. Instead, society regulates such everyday behavior with non-legal norms that are backed up by informal non-transfer sanctions. Sometimes those sanctions are external, imposed by the relevant community; other times – when the social norms have, by nature or nurture, been “internalized” by the parties – the sanctions are internal in the form of guilt or shame.

These conclusions regarding non-monetary sanctions, among the most basic points in the standard economic deterrence theory, have been made clearly and repeatedly with respect to criminal sanctions in particular.³⁷ Interestingly, however, the very same point could be made (but never is) about most informal non-legal sanctions. That is, in the

³⁵ This analysis also assumes that there are no third-party “psychic benefits” enjoyed by those who get pleasure from knowing that criminals are languishing in prison, or at least knowing that they are not roaming the streets. It also ignores any intrinsic value society might place on punishing criminals for wrongdoing. As discussed more fully in Part V below, this assumption has implications for how systems of non-monetary sanctions should be coordinated with tort law.

³⁶ *Id.*

³⁷ See, e.g., Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 Am. Crim. L. Rev. 409 (1980) (arguing for replacing jail sentences with criminal fines when feasible).

large L&E literature on social norms and informal sanctions as an alternative to legal rules and formal sanctions, nothing is said about the fact that most informal sanctions have the same inherent efficiency drawback as criminal sanctions: in that informal sanctions are, for the most part, non-transfer sanctions. So, when scholars writing about the efficiency (or lack of efficiency) of social norms, the sanctions they generally have in mind are such things as loss of reputation, public shaming or humiliation, or perhaps ostracism from the community – all non-transfer sanctions.³⁸ But the scholars do not talk about the fact that such sanctions are, in this one arguably narrow respect, inferior to transfer sanctions (in the very same way that jail sentences are inferior to fines), and for the same deadweight-loss reason.³⁹ I will have more to say on this subject in Part V.

The Benefits of Regulatory Coordination

If we think of tort law as a system of regulation, we can compare it with other regulatory approaches, including command-and-control and Pigovian *ex ante* regulation. Further, insofar as the criminal law and informal social norms have the effect of altering *ex ante* incentives, those “systems of regulation” (if we can call them that) should also be taken into account as well. More generally, given that different regulatory approaches have different strengths and weaknesses in different situations, the social planner who is seeking to minimize overall social costs and while maximizing overall social benefits should in theory design a overarching regulatory strategy that takes all of these various factors into account.

³⁸ Of course, in some cases, informal social sanctions will have the quality of a transfer. For example, when one firm suffers a loss of profits due to its loss of reputation in the community for the breaching some social norm, if other firms in the same business then experience a commensurate increase in profits (because of the shift in customers from the sanctioned firm), then the reputational sanction is essentially the same as a fine, in the sense of creating no necessary social waste. Of course, the incidence of this sort of fine will likely be different from that of tort damages or of a Pigovian tax, but that is a different issue. The one article I have found that discusses the possibility that informal social sanctions might have fine-line qualities is Cooter & Porat, which I discuss at some length below.

³⁹ Indeed, just as Judge Posner argues for using criminal fines to replace jail sentences (in situations in which the judgment-proofness of the criminals does not make fines ineffectual), one could argue for substituting transfer sanctions for non-legal informal sanctions when possible.

For example, we might imagine that, for a given type of risky activity, the optimal regulatory regime would include all of the following: (a) agency-based command-and-control regulations requiring some minimal safety measures that are efficient for all potential injurers engaged in this type of activity; (b) an additional *ex ante* Pigovian tax that represents the agency's best estimate of the residual risk of the unpreventable harm likely to be caused by the activity; (c) *ex post* strict tort liability for the actual harm caused to particular injured parties (with an offset for the amount of the *ex ante* Pigovian tax already paid by the manufacturer); and (d) criminal responsibility if a regulated party actually intentionally violates the command-and-control regulations or in some other way causes intentional harm. I do not mean to suggest that this is necessarily the best mix of regulatory approaches; it is just one possibility. The point here is only that it clearly makes sense to have *some* sort of regulatory coordination so as to take advantage of the strengths of the different approaches, to avoid over-deterrence, and to minimize the overall administrative costs of the system. Ideally, such coordination would come from the legislature or from an agency that has been delegated this role by the legislature.

As mentioned in the introduction, this Article will take a somewhat different approach. Rather than take the position of a legislature or agency seeking to achieve optimal regulatory coordination by manipulating a range of regulatory tools, I adopt here a tort-centric perspective: that is, the perspective of tort lawmakers (whether common law court or tort-reformist legislature) that are trying to develop a set of principles that rationally coordinate existing (assumed to be fixed) non-tort regulatory rules with tort law so as to achieve the overall goal of creating optimal *ex ante* risk-reduction incentives at the lowest possible administrative costs.⁴⁰ In the next two Parts, I use the example of two particular overlapping regulatory instruments to sketch the basic normative framework of the piece. The two instruments that require coordination are tort law (where the operative liability rule is assumed to be negligence) and command-and-control agency-based regulation. I begin with these two regulatory instruments in part because one has to start somewhere, but also because it is this particular coordination issue that courts are actually (and currently) trying to figure out. To simplify

⁴⁰ Do I think this is what tort courts are actually doing? One can certainly find language in published tort opinions expressly adopting a deterrence or regulatory type of framework, especially in products liability cases. However, one can also find language suggesting that other considerations, such as corrective justice, are also at work.

the analysis, I assume in Parts III and IV that the only deterrence variable is potential-injurer care levels. In part V, I reintroduce the activity-level variable and consider other tort/regulatory coordination problems, specifically those involving criminal law and social norms.

III. Tort Law and Overlapping Command-and-Control Regulation

Fully Optimizing Command-and-Control Regulation : Absolute Displacement

We begin this Part with a rather extreme example. Imagine a hypothetical in which tort law must coordinate with a command-and-control regulatory regime that is “fully optimizing” in the sense that it gives potential injurers the *ex ante* incentive to take all cost-justified steps to minimize third-party harms. Put differently, the regulatory agency in question is able to identify (with perfect accuracy) the specifically efficient (or “precisely efficient”) level of safety investment for each regulated party – not just the “efficient floor” (in the sense of the minimal level of safety investment that should be required of all regulated parties) or the “efficient ceiling” (in the sense of the maximum level of safety above which no regulated party should invest, or be required to invest).⁴¹

These concepts can best be explained through a series of simple examples. Suppose there is a class of potential injurers who engage in an activity that the regulator has determined poses a 1 in 1000 chance of causing a \$100,000 harm to some third-party victim. Assume also that there is a \$30 precaution that each potential injurer could take that would

⁴¹ I am using the terms “floor” and “ceiling” in similarly idiosyncratic way. In the preemption literature, these terms refer usually to the limits imposed on state regulations that overlap with federal regulations. On this view, a federal regulatory *floor* would prevent a state regulator (legislature, court, whatever) from permitting the regulated party to invest *less* than the federally mandated minimal level of care. Likewise on this view, a federal regulatory *ceiling* would prevent the state regulator from requiring the regulated party to invest in level of care that is higher than the federally mandated maximal level of care. And I sometimes use the terms floor and ceiling this way; however, I also use them to refer to the requirements imposed by the regulator (whether that regulator is a federal or state agency) *on the regulated parties themselves*. Thus, if a given regulatory standard (whether adopted at the state or federal level, whether a legal rule or an informal norm) were to require that all regulated parties invest in some minimal level of safety, I would call such a requirement a regulatory floor. And if the regulatory standard set a cap on how much the regulated party is allowed to invest in safety precautions, that would be a ceiling.

completely eliminate this \$100 risk. (This \$30 safety investment could be a particular safety feature on, say, a motor vehicle or medical device; or it could be a more detailed or sophisticated warning label for a particular consumer product). And assume that there is no other precaution that could be taken that would produce a cost-justified reduction in expected harms. Under these assumptions, then, the \$30 precaution represents the precisely efficient level of care on the part of the potential injurers; all regulated parties should take this, and only this, level of care; it is both the efficient floor and the efficient ceiling of care. If they spend less or more than this on safety, they are wasting resources.⁴²

Given all of these assumptions, the efficient command-and-control regulatory response would be for the regulator simply to require all potential injurers to make the \$30 safety investment to be allowed to engage in the activity. That is, unless this safety investment was made, the activity would be banned. The regulator would then back up this command-and-control requirement with a threatened sanction, something that was (in terms of disutility to the potential injurer) enough to induce the potential injurer to make the obviously efficient safety investment. In this example, any sanction imposing a cost greater than \$30 would do the trick.

Again, this non-tort command-and-control regulatory regime fully optimizes potential injurer care levels under the assumptions of the example. Given that fact, what regulatory role should tort law play? The answer is none. Tort law as a regulatory regime here would be redundant, in which case there is no need to incur the famously high administrative costs of running the tort system. Put differently, if deterrence is already being handled efficiently by some non-tort regulatory regime, then, under the economic view of tort law, there is no need to allow tort causes of action in those cases. Does this mean that I am arguing for the elimination of tort law? Of course not. The conclusion one should draw from this analysis depends on one's view of the various assumptions in particular contexts – the assumptions of the

⁴² The analysis in the text assumes that the benefit of the activity to the potential injurer is greater than \$30; otherwise, the activity would simply be banned. It also assumes that this benefit is not affected by the investment (or non-investment) in the \$30 safety precaution. Note also that, if due care is taken in this case, there are no activity level issues, as I have assumed there is no residual risk associated with the activity. Activity-level issues are taken up in Part V below.

fully optimizing nature of the non-tort system of deterrence, for example. As discussed in greater detail below, if the regulatory regime is less than fully optimizing, tort law should play an important deterrence/regulatory role.⁴³

But again, at least in theory (and perhaps occasionally in practice), when there is fully optimizing agency-based *ex ante* safety regulation (and the various assumptions of the analysis apply), the fact that tort law may be redundant of already existing non-tort regulation should not be ignored. And just to be clear, the concern in this idealized example is not with excessive deterrence *per se*. Assuming both standards are set and applied optimally, we would not be worried that a C&C regulatory regime and an overlapping negligence standard in tort would lead to excessive investment in care by the regulated parties. If we assume that courts and agencies both reach roughly the same conclusion in terms of what level of safety investment would be optimal for the regulated parties (and they both get this determination roughly right), then imposing a negligence regime on top of the *ex ante* command-and-control regulation would produce the same optimal *ex ante* investment in safety as would either of those regulatory instruments by themselves. If tort law, for example, threatens to impose damages of, say, \$100,000 if the injurer failed to make the \$30 safety investment and the harm occurred, and the agency threatened to impose a fine of \$100 if the same safety investment were not made, what would happen? The potential injurer would indeed spend the \$30, but no more than that. This is just the nature of a discontinuous – all-or-nothing – regulatory standard such as negligence.⁴⁴ The problem in the example, then, is not over-deterrence but the duplicative and unnecessary administrative costs

⁴³ Although beyond the scope of the current analysis, my own view is that in many contexts (including many contexts involving consumer product safety regulation), non-tort safety regulation is far from fully optimizing and tort law should play an important regulatory function. For an argument that enterprise liability can be an efficient form of product market regulation, for example, see Hanson & Logue (1990).

⁴⁴ Just as the all-or-nothing trigger within negligence law is the concept of “due care” (either the potential injurer has taken due care and is therefore immune from liability or she has not and is not), the all-or-nothing trigger within command-and-control regulation tends to be something like the pre-market approval process for a new drug or new medical device under the Food, Drug, and Cosmetics Act. Either the drug/device is approved, or it is not.

of the two systems, costs for which there would be no offsetting deterrence benefit.⁴⁵

At this point, it bears reminding that we are assuming no compensatory or corrective justice role for tort law. For those commentators, policymakers, judges (and readers of this Article) who do not accept that assumption, these administrative expenses may be worth the cost. Indeed, if corrective justice through tort law is something society cares about, then the administrative costs of running the tort system in this example are not duplicative at all. Rather, they are paying for something that the C&C agency regulation is not providing. However, if tort law is exclusively about deterrence (cost-internalization/regulation), such deterrence in this example is being accomplished fully by other means. Therefore, the optimal rule of coordination in this case would be one that called for full displacement or preemption of tort law.⁴⁶

⁴⁵ Overlapping tort sanctions and regulatory sanctions can, of course, produce over-deterrence, if we change the assumptions a bit. That is, if we imagine that there is potential error in the decisions of courts handling tort cases (perhaps in the determination of negligence or in the calculation of damages), then regulated parties – potential injurers – may in fact take greater than optimal care. That is, they may over-comply or invest too much, more than is cost-justified, in accident prevention in order to eliminate the possibility of liability. On the other hand, the presence of such uncertainty also creates an incentive to under-comply, as there is the possibility of the court making a mistake in the other direction. Which effect will dominate depends on the situation. In any event, these effects are present whether or not there is an overlapping non-tort sanctioning regime that is already, either fully or partially, regulating the conduct in question. See generally John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 Va. L. Rev. 965 (1984) (showing how uncertainty may influence parties' incentives to invest in harm prevention); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. Econ. & Org. 279 (1986) (exploring the effects of uncertainty under various penalty regimes).

⁴⁶ “Displacement” is the term I am using for either when the tort system borrows the standard of liability from some non-tort system of regulation (e.g., when it borrows the standard of care from a regulation or from custom) or when the tort system declines to impose a sanction because of an existing non-tort sanction. The concept of “preemption,” therefore, is a particular type of displacement. In the legal literature, the word preemption generally is used to refer to when there is conflicting federal and state law and, owing to the Supremacy Clause of the U.S. Constitution, federal law displaces the conflicting state law. Displacement more generally, however, includes not only displacement of state tort law principles by federal law but also of displacement of tort law principles by other non-tort regulatory regimes, such as state safety regulations or criminal law or even social norms. Thus, for example, when a state legislature passes a law eliminating a class of tort claims in situations in which there has been compliance

What would this conclusion look like in practice? For one thing, if the agency regulation (the standards and the enforcement of those standards) is fully optimizing, not only should *compliance* with the agency's promulgated standard displace tort liability, but also *non-compliance* with that standard should *not* give rise to tort liability. Indeed, both compliance and non-compliance with the non-tort regulatory standard should be considered entirely irrelevant to the torts analysis. I call this extreme scenario, when a non-tort regime completely supersedes or displaces the tort regime, "absolute displacement" or "full displacement," meaning that the non-tort regulatory regime displaces tort law both in cases of compliance and in cases of non-compliance with the non-tort regulatory standard.

Does this sort of absolute displacement exist anywhere in the law? There are areas where Congress has in effect replaced all (or almost all) state tort law claims with some other regime of regulation and compensation. Examples include the areas of nuclear energy,⁴⁷ childhood vaccines,⁴⁸ and even 9/11-related claims.⁴⁹ There are also areas in which state legislatures have taken the lead in preempting common law tort actions, areas such as workers' compensation (where workplace tort claims against employers have largely been replaced by a no-fault insurance regime) and automobile accidents (where a few U.S. states have moved in the direction of a no-fault or modified no-fault compensation scheme). In all of these fields, lawmakers have essentially eliminated tort law as a system of regulation, and they have done so in part because of the existence of some non-tort system of regulation. For example, the U.S. Nuclear Regulatory Commission imposes strict *ex ante* command-and-control regulatory specifications on all nuclear power facilities in the U.S. The other important common feature of these examples is the belief that there already exists, or there will be provided as part of the new regulatory regime, an adequate form of direct compensation for victims.

I should emphasize that what I am calling absolute displacement (i.e., when tort law is completely displaced by a given non-tort

with relevant federal safety standards, that would be displacing of tort law in the sense in which I am using the term.

⁴⁷ Price-Anderson Nuclear Industries Indemnity Act.

⁴⁸ The National Childhood Vaccine Injury Act of 1986.

⁴⁹ September 11 Victim Compensation Act.

regulatory regime such that tort remedies are not available) would be efficient only if two conditions are simultaneously present: first, the non-tort regulator must set a standard of care that is precisely efficient for all regulated parties; second, the regulator must have in place an effective means of monitoring and enforcing those standards. The second part of this formula can raise its own special issues. Not only must the regulator be able to deal with unintentional noncompliance (i.e., regulated parties who, in good faith, believe they are in compliance with the standards but, in the regulator's view, are not);⁵⁰ the regulator must also deal with intentional noncompliance. For example, the regulator must be able to detect and punish parties who are engaging in an unregulated black-market version of a regulated activity. These parties are simply bypassing the regulatory process and hoping to elude detection. In addition, a fully optimizing regulatory regime must be able to deal with parties who *do* procure regulatory approval but who do so through the use of fraud or deceit. In both types of non-compliance, a fully-optimizing regulator would have the ability to detect the wrongdoing and, through the threat of monetary sanctions and criminal penalties, deter it.

Partially Optimizing Regulation

If the existence of a fully optimizing – i.e., precisely efficient, fully enforced – non-tort system of regulation would mean that tort law should be fully displaced, when should tort law still play a deterrence/cost-internalization role, even when there is a pre-existing non-tort regulatory regime that applies to the activity in question? The answer is straightforward, at least in theory: whenever the existing non-tort system of regulation is only *partially optimizing*, in either of two senses. First, partially optimizing can mean that the non-tort regulatory standard (e.g., the care level being enforced by the agency) is only *minimally efficient*, in that it calls for only that investment in risk-reduction that *all* potential injurers engaged in the activity should make, but that may not be sufficient for some subset of potential injurers. This is what is sometimes meant by the term “efficient floor.” Second, partially efficient could mean that the regulatory standard (or care level) is *precisely efficient* (both floor-and-ceiling efficient, as defined above),

⁵⁰ Noncompliance of this sort can result when there is substantive uncertainty as to precisely how the regulatory standard should be applied to a given party's particular situation.

but is not optimally enforced by the regulator.⁵¹ The following sections discuss how tort law should be, and in some cases may already be, coordinated with these two types of partially optimizing regulatory regimes.

Minimally Efficient Regulatory Standards: No Displacement

Using the example from above, consider the following picture of what a minimally efficient regulatory standard might look like and how tort law might coordinate with such a standard. Imagine that there is a \$5 investment that all potential injurers (i.e., all parties engaged in the risky activity) could make that would reduce the expected harm associated with the activity by \$20. (Say it would reduce the probability of the \$100,000 harm from .001 to .0008.) For some subset of potential injurers, however, assume that an additional \$25 investment should also be made because that additional investment would reduce the risk even further, from an expected harm of \$80 to zero (from probability .008 to nothing). For those potential injurers, \$30 is the precisely efficient level of investment in care. For the remaining potential injurers, it would cost more than \$80 to eliminate the residual \$80 risk; thus, for them, \$5 is the precisely efficient level of care. Let us also assume that, although the agency regulator can identify *ex ante* the general class of potential injurers, it cannot distinguish the \$30-efficient-care folks from the \$5-efficient-care folks. As a result, the best the regulator can do is require all potential injurers to make the \$5 safety expenditure and leave the courts (applying a negligence analysis *ex post*) to determine which injurers should have made the additional \$25 investment.

⁵¹ It is also theoretically possible that the federal regulator could set an *efficient ceiling only*, in the sense of establishing a standard of care that regulated parties are not allowed to exceed and that state regulators, including state tort law qua regulation, may not require the regulated parties to exceed. Such a ceiling might make sense if additional expenditures on enhanced safety beyond the ceiling were clearly socially wasteful, perhaps because they substantially undermined the value of the regulated activity. An example would be where requiring manufacturers of a given product to include an especially expensive safety feature that made the device essentially unusable for its designed function or too costly for anyone to afford. Because the standard would be a ceiling only, however, investing less in safety than the ceiling provides would presumably not be considered *noncompliance* with the standard. Thus, so long as the regulated party invested less than the maximal amount, there could still be room for a negligence suit. If, however, if the regulated party made the maximally efficient investment (invested up to the ceiling), state tort claims would be preempted.

Examples of this sort of minimally efficient safety investment are easy to imagine. For example, the Department of Transportation might determine that the benefits exceed the costs for all cars and trucks be equipped with frontal airbags, which therefore could be made a minimal requirement for all cars and trucks. However, it might be determined that the overall efficiency of passenger-side airbags depends on a number of factors that are better left open to the discretion of the auto-makers but subject to the after-the-fact regulation of potential products liability suits against auto manufacturers. Likewise, we might imagine a similar sort of story applying to labeling requirements for prescription drugs: certain minimally informative labels might be required, leaving the possibility of additional warnings to the interplay of the marketplace and the tort system.⁵²

This scenario, then, obviously anticipates an important complementary *ex post* deterrence role for tort law. In such cases, although the agency regulation may give all potential injurers the incentive to make the minimally efficient care-level investments, only the threat of *ex post* tort liability would induce the low-avoidance-cost potential injurers to make that efficient additional \$25 safety investment. Thus, compliance with a minimally efficient regulatory standard of care should clearly not, from regulatory perspective, be preemptive of state tort law claims.

This conclusion, again, depends on a number of key assumptions. For example, the analysis assumes not only that courts can recognize when the universe of potential injurers potential injurers but also, critically, that courts can, in their *ex post* negligence analysis, accurately sort the \$5- from the \$30-efficient-care injurers, in a way that the agency cannot *ex ante*. In addition, as with the economic analysis of torts generally, this conclusion assumes that potential injurers themselves are perfectly informed and perfectly rational. What that means in this context is that potential injurers themselves can figure out *ex ante* which category they fall into (the \$5 care-level category or the \$30 care-level category) and that they believe that if they under-invest in safety (spend \$5 when they should spend \$30) they will, in the event of an injury, be held liable *ex post* by a court for the full harm they cause. If these assumptions do not hold, tort law cannot be assumed to have a beneficial

⁵² One special concern with warnings, of course, is the problem of warning overload. If a warning label contains too many listed hazards, the effect can be to overwhelm the intended audience and even to cause them to ignore the warnings altogether.

ex ante deterrence effect on care levels. If these assumptions do hold, then the threat of such complementary tort liability will give potential injurers the overall efficient *ex ante* care-level incentives – and with no problems of redundant sanctions.⁵³

As most lawyers will recognize, the common law of tort actually has a tort doctrine that is roughly (or at least potentially) consistent with the conclusion that regulatory compliance should not be displacing (or preemptive) of tort law in this setting. According to the Third Restatement of Torts, the doctrine of statutory or regulatory compliance provides that, although compliance with a statute or regulation is of evidentiary value to the question of negligence, it does not preclude a finding of negligence in a tort case.⁵⁴ Thus, assuming of course there is no express preemptive language in the relevant statute or regulation, regulatory compliance is generally not considered preemptive or displacing of a tort law claim under the basic common law doctrine. A similar statement of this soft regulatory compliance principle can be found in the Products Liability Restatement.⁵⁵ Thus, although courts generally suggest that regulatory compliance is relevant to the negligence question (in the sense that the fact finder is not forbidden from taking such regulatory compliance into account), the general rule in a majority of states seems to be that the court is free in such cases to apply something like the Hand BPL analysis or its equivalent to evaluate the efficiency of the care taken by the particular injurer in the suit before it.⁵⁶

⁵³ Even if the non-tort regulator has in place sufficient sanctions to induce compliance with the minimal standard, allowing the tort system to be a “backup” will not lead to excessive care-levels, for the reasons discussed in the previous section: Potential injurers will be induced to take optimal care in order to avoid all possibility of having to pay the \$100,000 damage awards. Of course, the conclusion that tort law has an important role to play in this type of situation also depends on the size of the universe of \$30 efficient-care potential injurers. That is, if in the example in the text, 99 percent of potential injurers are \$5 potential injurers and only 1 percent \$30, the administrative cost of having the tort system sort out that 1 percent would probably not be worth the candle.

⁵⁴ Restatement (Third) of Torts: Liability for Physical Harm § 16 (2005).

⁵⁵ Restatement (Third) of Torts: Products Liability § 4 (1998).

⁵⁶ As will be discussed in greater detail below, courts applying the regulatory compliance principle will look to legislative intent to determine if there is implied preemption. The point here is that the common law doctrine itself does not, in the absence of such implied or expressed legislative intent, treat compliance as preemptive.

Is this doctrine in fact being applied by courts in a way that optimizes the deterrence goal? Maybe. Maybe not. To answer that question would take us well beyond the scope of the current project. The point here is just that there is a tort doctrine on the books that is at least consistent with the efficient approach to overlapping tort and non-tort sanctions in the context of minimally efficient regulatory standards (where the issue is injurer care levels).

Although most states have taken the approach of treating regulatory compliance as merely relevant, some states have gone further towards favoring the regulatory choices of regulatory agencies over common law courts. Specifically, with respect to product liability claims in particular, a number of states have enacted statutes that put a thumb on the scale in situations in which there has been compliance with the non-tort agency-based regulatory standard. In several states, for example, the rule now is that, if a product manufacturer complies with a federal or state regulatory standard, there will be a “rebuttable presumption” against a finding of negligence or product defect.⁵⁷ Is this presumption welfare enhancing? If this presumption can easily be overcome by a showing that the regulation in question is best understood (or was clearly intended by the regulator to be understood) as only an efficient minimum, then it may well be an efficient rule, assuming that we have some degree of confidence in the ability and willingness of the regulator to do the job of identifying efficient minima. If the presumption is difficult to overcome, however, these rules seem likely to be inefficient and may well lead to under-deterrence rather than optimal coordination. The regulation of many consumer products is notoriously inadequate.⁵⁸ And even when federal safety regulation is considered reasonably effective, the resulting safety standards are often intended only to be efficient minima only.

If compliance with a minimally efficient standard should not be preemptive of a tort suit, what about *noncompliance* with the minimally efficient regulatory standard? If it is certain that the regulatory standard

⁵⁷ Colo. Rev. Stat. §13-21-403(1)(b) (2007); Ind. Code Ann. §34-20-5-1(2) (West 1999); Kan. Stat. Ann. §60-3304(a) (2005); Ky. Rev. Stat. Ann. §411.310(2) (West 2005); N.J. Stat. Ann. §2A:58C-4 (West 2000); Tenn. Code Ann. §29-28-104 (2007); Tex. Civ. Prac. & Rem. Code Ann. §82.007(a) (Vernon 2005); Utah Code Ann. §78-15-6(3) (2005).

⁵⁸ The Consumer Product Safety Commission is the most obvious example. Because of CPSC’s perennial underfunding and understaffing, it has long been, and still is, considered to be largely ineffective in maintaining general consumer product safety.

is minimally efficient for all potential injurers (as in the example above), and if the court determines that the failure to make the investment in fact increased the risk of the harm that is being sued for, there is an argument to be made for allowing the court to apply a default rule of negligence *per se*. NPS would allow the court to avoid the administrative expense of a full-blown negligence analysis, with all of the accompanying expert testimony and cross-examination of experts and so on.

Negligence *per se* would make sense in this case not only on administrative cost grounds; it may also actually improve potential-injurer care levels (compared with the full-blown *ex post* negligence analysis). This could be true if there is a concern that some courts or juries, applying their own *ex post* full-blown negligence analysis, will make mistakes – specifically, that they will apply an inefficiently lax standard of care that allows the injurer to avoid liability despite failing to make even the minimally efficient safety investment. If such scenarios are likely, then the doctrine of negligence *per se* could contribute directly to improving the efficiency of potential-injurer care levels, by ensuring that courts at least insist on the minimally efficient \$5 investment for all potential injurers.

In addition, the negligence *per se* doctrine might also contribute to efficiency by enlisting the tort system to impose additional sanctions for failure to meet the minimally efficient standard, when the *ex ante* regulator has limited resources for enforcing its own standards. In such a case, the court acts as an enforcer of the agency's minimalist regulatory standards.⁵⁹ Thus, if the non-tort regulator determines (correctly) that all potential injurers should invest \$5 in care, but the regulator does not have the resources to enforce this minimal standard, the existence of a tort regime applying a NPS doctrine will supplement the regulatory incentive to comply with that minimally efficient standard. They (the \$5-efficient-care parties) can avoid negligence *per se* liability merely by making the \$5 minimal investment, which they will rationally do. And so long as the traditional regulatory compliance doctrine applies (or even the new rebuttable regulatory compliance defense), the \$30-efficient-care parties will still need to make the full \$30 investment to avoid liability under the full-blown negligence analysis.

⁵⁹ Cross reference discussion *infra* of preemption cases.

If, however, the non-tort agency regulator fully enforces the minimally efficient standard (and thus all parties are already induced to make the \$5 floor investment in care), the NPS doctrine would not be needed. In such a case, the only remaining regulatory task for tort law would be to identify the \$30-efficient-care individuals and to hold them liable for not making the additional \$25 investment. This conclusion will be important when we focus on the criminal law in Part IV below.

There is of course an actual doctrine of negligence *per se*, which is roughly consistent with the preceding discussion. According to the *Third Restatement of Torts*, a finding of an injurer's non-compliance with a statutory or regulatory standard *will result* in a verdict of negligence, provided that the regulatory standard in question was designed to protect against the type of accident the injurer's conduct caused, and that the accident victim is within the class of persons the statute or regulation was designed to protect.⁶⁰ Thus, if the example above it could be shown that a particular potential injurer failed to spend the \$5 minimal safety investment, and that that failure created the sort of risk that resulted in the harm to the victim in question, the goal of overall cost minimization would be served by holding the defendant *per se* liable in tort. Optimal deterrence would be achieved; and administrative costs minimized. Again, this conclusion turns on some pretty strong assumptions not only about the level of competence and commitment of the regulatory agency in setting minimally efficient standards for all potential injurers, but also about the inability of the regulator to police such noncompliance on its own and thus the usefulness of tort liability in such cases.⁶¹

Note that there will be times when the injurer's failure to satisfy the regulatory standard should not qualify as negligence *per se* and

⁶⁰ Restatement (Third) of Torts § 14. NPS can apply to any statutory or regulatory safety-related rule, but it tends to be applied most often in the case of automobile accidents, both because of the number of accidents and because of the number and importance of the various statutory rules governing driving, such as speed limits, stop signs, and the like. *Id.* at comment d. In other fields, where there are far fewer statutory or regulatory rules governing the conduct of potential injurers (such as in the field of medicine), NPS is a doctrine on which plaintiffs rely far less often.

⁶¹ Michigan has in effect statutorily reversed the common law NPS doctrine in products cases (including but not limited to drug cases) by providing that evidence of noncompliance with any federal or standard will not create a presumption of negligence. This conclusion is consistent with the view that regulatory agencies should be allowed to handle noncompliance with their regulations as they see fit. Thus, at least for products suits against drug makers, the Michigan system amounts to a state-created regime of absolute two-way regulatory preemption.

should not be conclusive as to the defendant's negligence. For example, when a court can conclude that the injurer's noncompliance with the statute or regulation in question did not increase the particular risk that gave rise to the plaintiff's harm. To use the example from the text, imagine that the \$5 safety investment and \$25 safety investment actually correspond to risks that are causally *unrelated*. Say, for example, that the \$5 investment eliminates a \$20 risk of harm A, and the \$25 safety investment eliminates a separate \$80 risk of harm B. In such a case, failure to make the \$5 investment should not constitute negligence *per se* with respect to harm B; indeed, under the assumptions here, the former is irrelevant to the latter and should presumably not even be considered on the question of negligence with respect to harm B.

Whether courts are in fact applying the NPS doctrine efficiently is, again, difficult to say. But at least there *is* a doctrine that *could be* used by courts to achieve efficient coordination with existing *ex ante* C&C regulation in circumstances in which the minimal efficiency scenario is believed to exist.

*Precisely Efficient but Under-Enforced Regulatory Standards:
Partial Displacement*

Another way in which a non-tort regulatory regime can be partially optimizing (leaving an important complementary role for tort law) would be if the regulatory standard is *precisely efficient but under-enforced*, in the following sense: the standard (a) is both an efficient floor and an efficient ceiling of conduct on the part of the regulated party (as was the \$30 investment for all regulated parties in the original example above), but (b) the sanction (or the expected value of the sanction) is too low to induce full compliance with that standard. Think of a regulatory agency that has a large research budget for safety research, but that has a relatively paltry enforcement budget (and little stomach for fining the heck out of non-compliers), such that any regulatory scofflaw's prospect of being sanctioned by the agency is fairly small. Going back to our example, imagine that the regulator determines that all potential injurers should make the \$30 safety investment, and the regulator sets the penalty for failure to comply with the standard at \$100. However, because of budget constraints, the regulator is able to detect only 1 in 100 instances of noncompliance, a fact known by the regulated parties. This reduces the expected penalty to \$1, not enough to induce

compliance. How might tort law supplement non-tort regulatory law in such a case?

Obviously tort law might provide a helpful supplementary sanction in this case. For those potential injurers who fail to comply with the standard, there would be a 1 in 1000 chance of having to pay a \$100,000 tort damage award. This threat would be more than enough to induce full compliance. What is more interesting, however, is how tort law should deal with the question of compliance or non-compliance with a precisely efficient but under-enforced regulatory standard. As it turns out, if achieving efficient *ex ante* incentives is the goal, not only should noncompliance with the regulatory standard constitute negligence *per se* (for the reasons already discussed), but *compliance* with the standard should result in a finding of “non-negligence *per se*.” In other words, when the non-tort regulatory standard is both an efficient floor and ceiling but the sanction is inadequate, tort law should still apply in cases of non-compliance with the regulatory standard (unlike in the full displacement situation described above). Moreover, to save on administrative costs, the non-tort regulatory standard should in effect be substituted for the common law court’s own application of the negligence standard.⁶²

Summary

Under the framework set out above, when the non-tort regulatory regime is fully optimizing – has a precisely efficient standard of care that is fully enforced – tort law should be absolutely displaced. In the case of federal non-tort risk regulation, what this means is that tort law in such situations should be fully *preempted*. When, however, the non-tort regime merely sets an efficient minimum standard of care—an efficient floor – there should be no displacement (or preemption) of tort law; the common law court should apply the doctrine of negligence *per se*, but the court should not treat compliance as decisive on the question non-negligence. Finally, when the non-tort regime is partially optimizing in

⁶² This assumes, of course, that the floor and ceiling is the same – that is, it calls for a single, precisely efficient level of care. It is also possible to imagine a regulatory standard that sets a floor and a ceiling that are different. Using our example, the regulator might set a floor of \$5 (if everyone should make that level of investment) and a ceiling of \$30 (as anything above \$30 is a waste of resources). In that case, we would have to think of the floor and the ceiling as separate requirements, and each would have different implications (in terms of compliance and noncompliance), both of which were discussed above.

the sense of setting a precisely efficient (floor-and-ceiling) standard of care, but one that is not adequately enforced by the agency regulator, tort law should deploy both negligence *per se* and non-negligence *per se* such that compliance and noncompliance with the regulatory standards would be wholly decisive of the negligence question in the tort suit. In this third situation, then, non-tort regulatory standards should only be partially displacing or preemptive of common law tort claims – i.e., when there is full regulatory compliance.⁶³

IV. Examples of Displacement of State Products Liability Claims

State Statutory Displacement of Tort Law

In applying the three different coordination rules set out in the previous Part, a critical question is how a court is to decide which is appropriate for a given situation. Sometimes the choice will be easy, if only because the legislature has made the choice clear. If the legislature (federal or state) has clearly stated what the coordination principle should be, then, barring some unlikely constitutional constraint, that is that. We might call that “express displacement.”⁶⁴ As mentioned above, a number of states have enacted statutes altering the common law rules for coordinating tort claims with state and federal product safety regulations, creating a sort of rebuttable regulatory compliance defense. The Michigan legislature has gone one step further than merely creating a presumption in favor of non-negligence in cases of regulatory compliance. In 1996 Michigan became the first and only state to immunize drug makers from tort liability in cases in which drug manufacturers have complied with FDA standards and are using FDA-approved labels. Specifically, if FDA compliance is shown in such a case, the drug in question is conclusively assumed not to be defective or unreasonably dangerous.⁶⁵ No other state has gone this far.

If we project an efficiency/cost-minimization rationale on the Michigan state legislature, the assumption underlying the statute would

⁶³ Again, one could either imagine common law courts making these coordination decisions or, as discussed in the next section, legislatures adopting these coordination rules that common law tort courts would be required to apply.

⁶⁴ Again I use the term preemption to describe any sort of displacement of state tort liability by some non-tort system of deterrence. Express preemption can also result from an agency pronouncement, if the agency is acting within its properly delegated authority.

⁶⁵ [Mich. Comp. Laws Ann. §600.2946\(5\)](#) (West 2007).

seem to be that FDA regulation of drug manufacturers fits the description of the partially optimizing agency regulation that (a) sets a floor-and-ceiling (rather than floor only) efficient standard of care but (b) that may require some state involvement in the enforcement of that precisely efficient standard. The minimally-efficient-standard assumption can be seen in the fact that compliance is considered decisive as to non-negligence (non-negligence *per se*), and non-compliance seems to disable the tort-displacing effect of the immunity statute – thus making possible the application of negligence *per se*. The statute preserves some minimal backup enforcement role for tort law, inasmuch as it includes exceptions for cases in which the manufacturer committed fraud in the regulatory process or if the manufacturer fails to comply with the required FDA labeling. Thus, the Michigan legislature seems to have adopted a partial displacement regime.

Whether this means that the Michigan drug liability regime promotes efficient deterrence depends on the various assumptions that underlie the analysis. However, if you believe that drug manufacturers will be responsive to tort liability *qua* regulation and are not likely to be judgment proof, and you hold the view that the FDA regulation of drugs is at best only partially optimizing (either in the efficient-floor sense or under-enforced floor-and-ceiling sense), than state legislation adopting what amounts to a blanket displacement of tort law as a supplementary tool for regulating drug-maker incentives seems highly dubious. Interestingly, the Michigan statute seems to regard as irrelevant whether Congress or the FDA itself intended a greater (complementary) regulatory role for state tort law with respect to drug manufacturers. This is the sort of information that, as mentioned above, might be taken into account in those states that have adopted only rebuttable presumptions against a finding of negligence or product defect rather than outright displacement of such claims. Of course, from the perspective of a court applying applicable state and federal law (which is the perspective I have generally taken in this Article), there seems to be little discretion in the interpretation of the statute. In Michigan, with respect to the regulation of drug manufacturers, tort law has a very minimal role.⁶⁶

⁶⁶ Of course, Michigan (or any state for that matter) gets to decide the scope of its own products liability law, even if that means defining the cause of action in a manner that borrows from federal standards. If Congress wants to guaranty that tort law will be used in every state as a serious form of safety regulation in any particular field, it would have to create federal private rights of action.

Federal Preemption of State Tort Claims

The most well-known examples of legislative displacement of state tort claims, however, come at the federal level; and this sort of displacement – better known as preemption – can also be express or implied. Congress, for example, sometimes expressly and specifically provides that certain federal safety standards are to be understood as preemptive of all state regulation, which has been interpreted to include state tort claims.⁶⁷ An example of this would be FDA regulation of medical devices, which regulation the Supreme Court recently held to be preemptive of state tort claims.⁶⁸ More often than not, however, Congress prefers to be (or for whatever reason ends up being) unclear about its intentions on the tort law coordination/preemption question, leaving courts with the task of determining what degree of preemption, if any, the legislature meant to impose. In the absence of clear statutory direction on the coordination question, a court hearing a tort case will presumably fall back on the sorts of common law doctrines already discussed, including the doctrines of negligence *per se*, regulatory compliance, and the like. In such situations, when courts have some discretion in the matter, how should they decide the overlapping-sanction coordination issue?

The framework of this Article suggests a tentative answer: courts (at least appellate courts who are given the ultimate task of interpreting and implementing the boundaries between common law tort claims and non-tort regulatory regimes) should consider the nature of the non-tort regulation at issue and whether the goal of efficient deterrence (i.e., creating optimal *ex ante* accident-avoidance incentives at the lowest administrative cost) would best be achieved if that regulation is understood as an efficient floor or as both an efficient floor and an efficient ceiling. If the regulation in question is an efficient floor only, then a conclusion of no displacement – or no preemption – would be optimal; and negligence *per se* should be applied in cases of noncompliance. If, because of the nature of the regulatory process in question, the regulation is likely to involve an efficient floor-and-ceiling (a precisely efficient standard of care) but additional state-level enforcement would be useful, then a symmetrical rule of negligence and non-negligence *per se* would make sense – or one-way

⁶⁷ *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); and *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

⁶⁸ *Riegel v. Medtronic* (USSC 2008).

displacement/preemption. And, of course, if it happens to be a case in which federal regulation seems to be fully optimizing, the court could reach the full displacement/preemption conclusion, although, again, that would be an extreme result and should not be reached lightly.⁶⁹

Is this approach consistent or inconsistent with prevailing federal preemption doctrine, which is often said to entail a “presumption against preemption”?⁷⁰ It depends. If one holds that view that federal safety regulations tend in general to be only minimally efficient at best, and this view applies to all federal agencies, then such a presumption may well make sense.⁷¹ If, however, one believes that at least some agencies some of the time produce floor-and-ceiling efficient safety standards, then a presumption against preemption in those situations may not make sense, unless such a presumption is made easily defeasible by a showing to the court (presumably made by a defendant) that the regulatory standard in question is precisely efficient. (This would be the inverse of the argument regarding the efficiency of the “rebuttable presumptions” in favor of federal preemption created by a number of state legislatures,

⁶⁹ That is what should be done with implied preemption cases. What about express preemption cases? Even with cases involving express statutory preemption provisions, courts will often have some decision-making discretion when the terms of the preemption provisions are not entirely clear on the relevant question. In such situations, courts can, and should, take into account the nature of the regulation in question and the regulatory process that produced it, as just described. This conclusion, of course, is limited by the assumptions set out at the beginning of the Article, including the assumption of rationally informed regulated parties. However, at least in many of the most high-profile products liability cases, where the regulated parties are large automakers or pharmaceutical companies, these assumptions seem entirely plausible.

⁷⁰ See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715–16 (1985)). Note, however, that the presumption against preemption does not always seem to be honored. See, e.g., *Geier*. Justice Alito in the *Levine* case has gone so far as to say that there has never been a presumption against preemption in conflict preemption questions. [See his fn 14.]

⁷¹ This conclusion ignores other more traditional federalism-type rationales for the presumption against preemption. From the desire to satisfy the potentially disparate regulatory preferences of the citizens of different states, to the hope that deferring to state and local law would induce democratic participation at the state and local levels, to a vision of race-to-the-top competition among 50 separate regulatory laboratories, numerous reasons (that are strictly speaking not deterrence reasons) have been given by scholars for why federal laws regulating risk should not be interpreted readily to displace state laws that do the same thing. See generally Nina A. Mendelson, *A Presumption Against Preemption*, 102 Nw. U. L. Rev. 695, 709-10 (2008) (reviewing arguments and citing relevant literature).

discussed above.) Indeed, depending on how easily the presumption is rebutted, there may not be much difference between a presumption against preemption and no presumption at all. The ease with which the courts (including most famously the U.S. Supreme Court in recent years) have in fact overcome this presumption has led some scholars to argue either that there is a presumption in the other direction or that, instead of a presumption, the courts are simply applying their own substantive preferences.⁷²

A recent Supreme Court case dealing with federal preemption of state tort claims illustrates how this analysis might be applied. *Wyeth v. Levine*,⁷³ decided this term, involved a state law failure-to-warn tort claim brought against the maker of the anti-nausea drug Phenergan. The plaintiff was severely injured when the drug was administered to her through the so-called IV-Push method, whereby the drug is injected directly into a vein, and during that process some of the drug came into contact with oxygen-rich arterial blood in the plaintiff's arm, causing an interaction that eventually led to gangrene. As a result, the plaintiff's arm had to be amputated. At trial the plaintiff claimed, and the jury ultimately agreed, that if the warning on the drug had been more explicit about the specific risks of IV-Push administration compared with the much safer IV-Drip method, the accident would not have happened. The drug maker argued that the warning *did* in fact mention the risk of the IV-Push method and that, in any event, the claim was impliedly preempted since the specific warning had been approved by the FDA.

The Supreme Court did not buy the defendant's implied preemption argument and held instead that presumption against preemption led to the opposite result. In reaching its conclusion, the majority included a lengthy discussion of tort law's history of supplementing federal regulation of drug labels and warnings.

In keeping with Congress' decision not to pre-empt common-law tort suits, it appears that the FDA traditionally regarded state law as a complementary form of drug regulation. The FDA has limited resources to monitor the 11,000 drugs on the market, and

⁷² Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 *Brook. L. Rev.* 1313, 1318–24 (2004); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 *S.C. L. Rev.* 967 (2002); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 *U. Chi. L. Rev.* 429, 471–72 (2002).

⁷³ Full cite.

manufacturers have superior access to information about their drugs, especially in the post-marketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information. Failure-to-warn actions, in particular, lend force to the FDCA's premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times. *Thus, the FDA long maintained that state law offers an additional, and important, layer of consumer protection that complements FDA regulation.*⁷⁴

This statement of the Court's reasoning sounds very much consistent with the sort of coordination framework this Article is putting forward: that federal regulation of drug labels and warnings sets only minimally efficient standards which, in specific cases, might be optimally supplemented with additional warnings. And that tort law is supposed to play the role of inducing manufacturers to do adopt the precisely optimal warnings that fit the particular situations that arise. Again, this conclusion is obviously consistent with the coordination framework set out above. Whether we can say that it is the right conclusion in this particular case, however, would depend on a close reading of the specific facts of the case.⁷⁵

What about Non-Compliance with Regulatory Standards?

In the cases just discussed, and in most cases involving claims of federal preemption of state tort claims, the defendants in question have complied with the federal regulatory standards. What about cases of

⁷⁴ Id. at __.

⁷⁵ The presence of a dissenting opinion in the case suggests, of course, that reasonable people can disagree on how the case should be resolved. The *Levine* Dissent's primary argument is that the FDA in this case seems to have concluded that the warnings/labels that were authorized were sufficient to get the job done – in the sense of being both an efficient floor and an efficient ceiling. To support this conclusion, the Dissent was at pains to document the amount of time and effort the agency put into approving the particular warnings that were used in this case; and the opinion observes that the manufacturer had even suggested a more stringent warning several years back, which had been rejected by the Agency. The Majority gives a great deal of weight to the trial court's finding that that the Agency never gave more than “passing attention” the issue of IV-Push versus IV-Drip administration of the drug. I provide a fuller discussion of the details of *Levine* case and its significance for products liability law elsewhere. See Kyle D. Logue, Federal Preemption and the Purpose of Tort Law (working paper).

non-compliance? Specifically, what has the Supreme Court said about federal preemption in situations in which there has been non-compliance by the tort defendant with federal regulatory standards? Frankly, such cases rarely reach the Supreme Court, presumably because it is considered uncontroversial that non-compliance with federal regulatory standards negates federal preemption. There has certainly been a fair amount of explicit dicta to that effect. The Court has often stated that parallel state-based products liability claims should *not* be preempted, so long as the state-based duties that are alleged to be violated merely parallel (and do not add to) federal duties.⁷⁶ Thus, the Court seems to be saying that non-compliance with FDA standards should disable any preemptive effect of the otherwise preemptive regulations and that, if states want to supplement the federal enforcement of FDA regulations with parallel state-law enforcement, that is just fine. What's more, although none of the Supreme Court cases that discuss the possibility of such parallel claims mention the doctrine of negligence *per se*, presumably that doctrine, in the event of manufacturer's noncompliance with FDA requirements, would also not be preempted.

Why, as an efficiency matter, would such parallel common-law tort claims, whether as negligence *per se* claims or product defect claims, be exempt from preemption, given the presence of rigorous FDA regulation? Again, applying the framework from the previous Part, it could be that the Court views the agency as being competent at setting standards but in need of help with regard to enforcing those standards. (The quote above from *Levine* certainly has language to that effect.) Alternatively, it may be that the Court, in deciding the circumstances under which federal regulations will preempt state tort claims, is influenced by a corrective justice conception of tort law, or by a sort of blended corrective justice/regulatory view. There is evidence for both of these views within the Court's various tort-preemption opinions. One lesson of this Article is that the Court needs to decide on a particular conception of the function of tort law, in part because one's normative vision of the function of tort law can have important implications for how tort law should be harmonized with other forms of regulation.

One area of continuing controversy in the tort-preemption field – an area that also presents the problem of non-compliant tortfeasors – is the problem of the manufacturer who seems to be in compliance with

⁷⁶ Riegel; Lohr.

FDA regulations, but who the plaintiff alleges secured FDA approval through fraud. The Supreme Court has held that tort suits brought against such defendants alleging “fraud on the FDA” are preempted, because allowing such suits would interfere with agency’s ability and discretion to punish such fraud on its own.⁷⁷ After all, the argument goes, the FDA has the power to seek sanctions, including criminal penalties, for such fraudulent behavior. On the one hand, there is a strong argument that federal preemption should be disabled (and state tort claims allowed to proceed) when the parties have lied to secure regulatory approval.

On the other hand, there is something troubling about the prospect that any time a manufacturer gets approval from the FDA for a new drug or medical device, that manufacturer then has to prepare to defend itself against state tort suits in potentially 50 states arguing that the FDA’s decision should be annulled due to fraud.⁷⁸ Moreover, if federal criminal penalties for defrauding a federal agency are not enough to deter such behavior, what additional benefit will there be from state-based tort suits?

Professor Catherine Sharkey has suggested a resolution to this debate: Allow preemption to be disabled only by a decision of the FDA (or whoever the relevant agency is) that there was fraud in the application process. At that point, once the agency has made the fraud finding, the preemption of state-based tort suits would be “turned off.”⁷⁹ This strikes me as a reasonable suggestion. Let the FDA be the judge of whether or not there has been adequate and untainted compliance with its (the FDA’s) regulations. Injured victims, or other interested parties, could of course bring any available evidence of fraud to the agency’s attention, as they would have an incentive to do. But it would be up to the agency to make the fraud determination. If we allow any old common law court hearing a court case to make such a determination, then the possibility of redundant regulation is obvious.

⁷⁷ *Buckman v. Plaintiff’s Legal Committee*, 531 U.S. 341 (2001). It remains unclear, however, whether that case will be construed as requiring preemption only state claims that specifically sound in “fraud on the agency,” or whether it will be interpreted to preempt a regular design-defect claim that relies in some way on the fraud of the defendant.

⁷⁸ Catherine M. Sharkey, *The Fraud Caveat to Agency Preemption*, 102 Nw. U. L. Rev. 841 (2008).

⁷⁹ *Id.* at 841.

The only qualification I would add to Sharkey's conclusion is that if it is the case that the agency in question has the resources to police fraud in the regulatory process, it may also be the case that the agency has the ability also to police and punish fraud in that process as well, in which case preemption may still be appropriate. Perhaps the FDA (or whatever agency it is) should, in addition to making the initial fraud determination, determine explicitly whether it wishes to be the sole enforcer of the rules against fraud in the regulatory process. Of course, there may be reasons to doubt the agency's objectivity on this question, but if that is a concern, we might not want to rely on the agency to make the fraud determination in the first place.

V. Other Issues of Overlapping Sanctions and Coordination with Torts

Overlapping Social Norms or Customs

The law-and-economics literature on social norms treats non-legal norms and their accompanying informal sanctions as an alternative system of regulation. The basic idea is that norms arise more or less organically from within a particular community, and these norms play a regulatory role similar to that of legal rules by identifying conduct that is considered undesirable and imposing informal sanctions on those who engage in this behavior.⁸⁰ Although the precise nature of these informal sanctions usually is left vague in the literature, the quintessential example is a loss of reputation within the community, which in turn reduces the sanctioned party's wealth or, more generally, her utility. Ideally, actors over time begin to "internalize" social norms such that the experience some sort of internal sanction (such as guilt) if they violate

⁸⁰ As Eric Posner has aptly observed, "[t]he concept of a 'norm' is slippery, and scholars use it in different ways." Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. Pa. L. Rev. 1697, 1698 (1996). Although there are numerous different definition of norms, Posner's will do will enough for my purposes:

A norm can be understood as a rule that distinguishes desirable and undesirable behavior and gives a third party the authority to punish a person who engages in the undesirable behavior. Thus, a norm constrains attempts by people to satisfy their preferences. In these ways, a norm is like a law, except that a private person sanctions the violator of a norm, whereas a state actor sanctions the violator of a law.

Id.

the norm, thus eliminating the need for external enforcement of the norms by members of the community.⁸¹

Within this literature, it is generally assumed, always implicitly, that an informal social sanction will not produce an offsetting gain to anyone else, not even the victim of the norm violation. That is, unlike a monetary sanction such as a tax or tort damages, social sanctions (loss of reputation or pangs of guilt) do not increase anyone else's utility.⁸² If that is true, social sanctions have something important in common with prison sentences: the disutility experienced by the sanctioned party is a deadweight loss.⁸³ As mentioned in Part II, this is the main reason that fines are generally considered by economists to be superior to non-monetary penalties, assuming fines are feasible. Of course, norms can operate where monetary legal sanctions cannot, when there are problems with insolvent injurers, for example. Also, norms (especially fully internalized norms) are cheaper to administer than a regime of pure legal sanctions. Think of all the deterrence/cost-internalization work that is continuously done by informal norms (external and internally enforced) in the world with respect to everyday behavior. Now consider how unimaginably expensive it would be if there were no social norms to do all of that heavy lifting and if everyone was the quintessential Holmsonian bad man.

Whether a given social norm or custom is efficient (in the regulatory sense of optimally incentivizing potential injurers), or under what conditions efficiency should be expected, is a much debated issue. Some argue that, at least in situations in which the community in question is close knit and there are no parties outside of the community who are affected by the communities' behavior, efficient norms or

⁸¹ Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 Va. L. Rev. 1577 (2000).

⁸² One exception is Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. Legal Stud. 401 (2001). Cooter and Porat argue that in informal social sanctions will generally produce what amounts to beneficial externalities. For example, they argue that whenever a social sanction is imposed on someone who has violated a norm, the fact of enforcement of the norm reinforces the norm itself, thus generating a sort of public good. A conclusion they draw from this argument is that tort damages should be offset to the extent of the non-monetary social sanctions, similarly to the way that I have argued that strict liability tort damages should be reduced to offset the existence of *ex ante* Pigovian taxes. See *infra* note ___ for further discussion of this issue.

⁸³ This conclusion of course ignores any psychic benefit that victims might get, or any intrinsic retributive value in seeing criminals locked up.

customs can emerge.⁸⁴ In such situations, the evolution of the social norm has the structure of iterated Prisoner's-Dilemma game, from which value maximizing solutions can evolve. Not everyone agrees, however, that efficient norms will develop even in close-knit groups: for example, if there are spillover effects outside of the group.⁸⁵ In addition, efficient norms can arise in situations other than iterated in Prisoner's-Dilemma game structures. Steven Hetcher has pointed out, for example, that efficient norms or customs can arise to solve coordination problems, even without close-knittedness.⁸⁶ Consider the norm of drivers in a particular country all driving on the right-hand side of the road. This norm prevails not primarily because of the threat of informal reputational sanctions within the community of drivers, but rather because failing to follow the norm once it has taken hold can lead to a serious car accident, an outcome that anyone would want to avoid.⁸⁷

So how should tort law interact, or be coordinated, with such social norms/customs? Before proceeding with the analysis, one caveat is in order. This Article has assumed that the common law court deciding a tort case must take all non-tort regulatory regimes as given. This is an obviously unrealistic perspective. A legislature or agency might adjust its approach to regulating risky behavior based on what tort courts do; and if a court truly wants to maximize social welfare, it would need to take such reactions into account. Still, as a first approximation, ignoring such interactive effects makes sense, as such legislative/agency adjustments may well never come. This narrow static perspective is a little harder to maintain when the alternative system of regulation is social norms. When a court announces that a given behavior is negligent, it may increase the social sanction imposed on that conduct as well, assuming people take their cues on such matters from what courts say. Alternatively, if a court decides to impose strict liability on a given activity, the community might regard this as a form of *ex post* taxation (as, in effect, charging a price to engage in the behavior in question) and

⁸⁴ Ellickson, *supra* note ____.

⁸⁵ E. Posner, *supra*.

⁸⁶ Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. Cal. L. Rev. 1, 78 (1999). Indeed, close-knittedness can be a cause of inefficiency, when the close-knit group becomes insulating from improvements in knowledge in the larger community. *Id.*

⁸⁷ This particular norm has of course now been incorporated into the law. The point is that even in the absence of legal penalties for driving on the wrong side of the road, there would be a large sanction for doing so in the form of the risk of injury to one's self.

may therefore regard it as a substitute for social sanctions. This sort of “crowding out” effect has been documented in some experimental settings. Ideally, then, courts hearing tort cases (or lawmakers designing tort law) would take such interactive effects into account. To put it mildly, such an evaluation would be challenging. To avoid complicating my own analysis beyond what can reasonably be addressed in a single Article, I will ignore such interactive effects.

Back to the question, then: how best to coordinate tort law with overlapping social norms/customs. Part of the argument tracks the analysis from Part III above. If the social-norm/informal-sanction regime is fully optimizing, no tort law is necessary. If it is only partially optimizing, then tort law can play a supplemental role. And if tort law *is* to play a supplemental role, the nature of that role will depend on the structure of the norm. Specifically, it will depend on whether the applicable tort rule is negligence or strict liability and on whether the norm itself is more like a negligence rule or a strict liability rule. If the applicable liability rule is negligence, and the norm too is akin to an informal non-legal negligence standard, a court could then inquire whether the standard of care enforced under the norm is efficient and if so whether it is merely minimally efficient or floor-and-ceiling efficient. If this nonlegal standard is only minimally efficient (and this could be demonstrated), then it would save administrative costs to apply something like a negligence *per se* doctrine, whereby failure to comply with the custom would be decisive as to negligence.

Likewise if it could be determined that the norm was floor-and-ceiling efficient (and assuming the social sanction is not fully deterring), a rule of negligence *per se* plus a rule of non-negligence *per se* might be efficient. In such a situation, non-compliance with the social norm should be considered decisive as to negligence and compliance with the social norm should be considered fully exculpatory; in both cases, the use of the floor-and-ceiling efficient custom would avoid the administrative costs of having the court do the full-blown negligence analysis. And again, if it can be demonstrated both that the norm is floor-and-ceiling efficient and that the norm is fully enforced through informal sanctions (i.e., that the social norm and informal sanctions are fully optimizing), then tort law would have no deterrence role. That is, a court might think of custom as displacing state tort law (or not), in much the same way that federal regulations sometimes displace or preempt state tort law.

Does tort law actually follow this pattern? Not so much. The way in which tort law tends to coordinate with custom in practice is that, when there is a relevant custom, compliance and non-compliance are considered merely relevant, not decisive.⁸⁸ Thus, in the existing tort doctrine, there is nothing equivalent either to negligence *per se* or what I have called non-negligence *per se*, as sometimes exists with regulations. The framework of this Article would suggest that such doctrines might be worth adopting, in situations in which it is possible for courts (or for tort-reformist legislatures) to identify non-legal social norms that are efficient but that are not already fully enforced through informal sanctions. Moreover, in situations in which it can be shown that social norms are fully optimizing, an argument can be made for eliminating tort liability as a form of regulation altogether, although such a radical move would obviously have to come from a legislative pronouncement.

The preceding discussion assumed that applicable social norm was structured like a negligence rule, that the norm called for an informal non-monetary (e.g., reputational) sanction only if the injurer failed to take something approximating due care. But what if norms do not work that way? What if social norms are less precise than that and instead of making fine-grained determinations of whether the party who caused the injury could have efficiently prevented it, the norms simply call for some sort of sanction on whoever causes an injury? That is, what if norms act more like strict liability rules?

First, a strict liability social norm would have implications for a tort regime that applied a negligence standard, implications that are very different from those associated with the existence of an overlapping monetary sanction such as a Pigovian tax.⁸⁹ If a potential injurer can expect to incur a SL non-monetary sanction for causing a given harm to some third party, then the negligence standard itself governing that conduct (not the damage award) would need to be adjusted upward to take account of this additional social cost. That is to say, the standard of care would need to be raised to account for the fact that the activity in

⁸⁸ Restatement (Third) of Torts: Liability for Physical Harm § 13. There are some cases that diverge from this general rule. Specifically, in some cases, divergence from custom is considered presumptive negligence, a conclusion that turns out to be difficult for the defendant to rebut. *Id.*

⁸⁹ See the discussion below.

question not only poses a risk of harm to some third party victim, but also that it poses a risk of harm to the potential injurer herself.

This point is almost identical to an argument made by Robert Cooter and Ariel Porat concerning how the negligence standard, embodied in the Hand Rule, should be adjusted to account for the risk of harm to the potential injurer.⁹⁰ The point is fairly simple, albeit somewhat counterintuitive. Take the example again of an activity that has a 1 in 1000 chance of causing a \$100,000 harm to some third-party victim, but imagine that it is a risk that can be completely eliminated for a given expenditure of care on the part of the potential injurer. The question now is how much of an investment in risk reduction does efficiency require? Put differently, given these numbers, what constitutes the optimal level of care? The answer would depend on a number of factors, but given these numbers the maximum efficient amount of care on the part of the potential injurer is \$100. Any expenditure greater than that, even if it eliminated the risk of harm to the third parties, would not be cost-justified. Now add the assumption that, in the event of the accident, not only will the third-party victim be harmed, but the injurer herself will suffer a harm of \$25,000. Because this harm to the injurer is a social cost as well, it should be taken into account, if what we care about is overall cost minimization, which means that the maximum level of due care should now be higher – in this example, \$125.⁹¹

What Cooter and Porat did not point out, however, is that, insofar as there are strict liability nonmonetary sanctions for a given third-party harm (such as the sort of non-monetary reputational sanctions that often occur when norms are enforced), such sanctions would have essentially the same effect on the calculation of the optimal negligence standard as do “harms to self.” Again, this is because non-monetary sanctions,

⁹⁰ Robert Cooter & Ariel Porat, *Does Harm to Self Increase the Care Owed to Others?* *Law and Economics in Conflict*, 29 J. Legal Stud. 19 (2001).

⁹¹ Cooter and Porat therefore suggested that American tort law should be reformed to incorporate this insight. Cooter & Porat, *supra* note __, at 25 (“By ignoring the effect of injurer’s precaution on self-risk, American common law systematically fails to analyze accurately the problem of joint risk.”). Interestingly, the Third Restatement seems to adopt Cooter & Porat’s view on this question and even cites their article. Restatement, Draft 1, § 3 cmt. b (“In many situations the conduct of the actor imperils both the actor and third parties. In such situations, all the risks foreseeably resulting from the actor’s conduct are considered in ascertaining whether the actor has exercised reasonable care.”)

which cause disutility to the injurers and not necessarily offsetting gain to the victim, are costs that have to be taken into account in the efficiency analysis. Thus, if the \$25,000 in the example above were a loss of reputation experienced by the injurer, then the maximal due care standard would rise, as in the previous example. But to whatever extent there are nonmonetary sanctions – whether they are external social sanctions (reputational) or even internal ones (such as guilt) – that are imposed in a sort of strict liability way (that is, automatically upon the causing of a third-party harm, with little, or at least not full, mitigation for lack of fault on the part of the injurer), such sanctions are obviously analogous to physical or emotional harm to oneself; and the same Cooter/Porat type of harm-to-self sort of analysis would apply.⁹²

It seems highly likely that some norms do in fact sometimes take the form of a strict liability rule, if for no other reason than the problem of information costs. Such costs render a highly accurate version of the fault-based alternative impossible. For example, those who cause harm to others in ways that become very public often suffer an instant reputational cost that is probably not eliminated, or even much diminished, by the fact that the injurer perhaps could not have cost-justifiably avoided the harm. If you accidentally hit a pedestrian with

⁹² There are a number of possible explanations for why Cooter and Porat might have left this point out of their analysis. First, perhaps they were simply not thinking about nonlegal sanctions, maybe because their view is that such sanctions are too difficult to quantify in the first place. However, in another article written around the same time as the *Harm to Self* piece, Cooter and Porat wrote explicitly about the question whether tort damages should be offset to account for nonlegal sanctions; so they certainly had nonlegal sanctions on their minds at the time, and in that piece they seem to be of the view that the value of such sanctions could be quantified. See Cooter & Porat, *supra* note __. Second, maybe the Cooter and Porat have in mind that social norms tend to take the form of a negligence rule rather than a strict liability rule, in which case the analysis would be very different. As discussed in the text, the negligence standard need not be adjusted if the non-monetary social sanction will be imposed only in the absence of reasonable care; the point is that any excess sanction will just further encourage due care, except of course to the extent there is uncertainty in the application of these rules. As discussed more below, this explanation seems consistent with the assumptions underlying Cooter and Porat's *Nonlegal Sanctions* article, which does seem to assume a negligence standard is being applied. Finally, it may be that they omitted nonlegal sanctions from their *Harm to Self* analysis because they view nonlegal sanctions as producing beneficial externalities of one sort or another, which makes them more like monetary sanctions in the sense that they represent, in effect, a transfer and not a social cost. And indeed this assumption is consistent with assumptions made in their *Nonlegal Sanctions* paper. *Id.* For further elaboration of the implications of the difference between monetary and non-monetary sanctions, see Logue, *supra* note __.

your car in such a way as to kill them or cause them serious bodily injury, you almost certainly would experience severe guilt and remorse and personal anguish, as well as perhaps some loss of reputation in the community, even if the accident were not your fault in the strictest sense, that is, even if there was no cost-justifiable step you could have taken to prevent the accident. Of course, the guilt and anguish and reputational hit would be considerably larger if the crash were the result of your recklessness or, worse still, your intentional wrongdoing. But even if it were the result of pure bad luck, there would be some residual nonmonetary cost associated with causing severe harm to others. And to that extent, the nonmonetary sanction, internal or external, would have an element of strict liability, of harm to self.⁹³

Overlapping Criminal Sanctions

What if the non-tort regulatory regime in place, instead being agency-based command-and-control regulation or informal social norms, is the criminal law? That is, if we envision the criminal law itself as a tool of risk regulation that tort law must take as fixed, how should tort law be adjusted to coordinate with the existence of potential criminal sanctions for the same activities to which tort law sanctions often apply? The section briefly addresses that question.

First of all, we should note that most criminal standards fit the mold of what this Article's framework would call an efficient minimum, in the sense that criminal laws envision a standard of conduct that everyone is expected to comply with. Put in the standard language of deterrence, the criminal law prohibits activity whose net social value for whatever reason is deemed to be zero. For example, if we think of crimes that easily fall within the category of intentional harms, it is easy to see that, but for a narrow set of exceptional cases, it would generally be welfare-maximizing for everyone to refrain from violating the standard.⁹⁴ Thus, the law should seek, as cheaply as possible, to deter all

⁹³ Although this is not a question that has been analyzed thoroughly or tested empirically, my intuition seems to be shared by others. See, e.g., Richard Posner, *Economic Analysis of Law* 270 (2007) ("So the law penalizes murder, but not rudeness, and negligent injuries but not (in general) injuries that are the result of a pure accident even though people feel guilt when they inflict even an unavoidable injury--showing there is a norm, though not in general a law, of strict liability for inflicting injury.").

⁹⁴ When transaction costs are high (such that the potential injurer is faced with an emergency situation and must decide whether to harm someone else's property or be

intentionally caused harms (so long as they do not fall within one of the categories of exceptions).

What the framework of this Article suggests that tort law should do in such situations is this: If the criminal law's minimally efficient standard is not fully enforced, in the sense that it does not induce all parties to comply with this minimal standard of care, then tort law can supplement the sanction with a sanction of its own. In that case, efficiency would call for tort liability in all cases of intentional harm, perhaps with a threat of punitive damages just to emphasize the point: everyone must comply with the minimal standard of not intentionally harming others. If, however, the criminal law itself already fully deters non-compliance with this minimal standard of care, then tort law need not supplement the sanction; and the appropriate coordination rule would be: no tort liability for intentionally caused harms.⁹⁵

Does the law coordinating tort liability with criminal sanctions line up with these recommendations? It's hard to say. It depends on one's view of whether existing criminal sanctions are ever fully deterring, in the sense of ever providing optimal *ex ante* incentives to comply. But for the exceptions already mentioned, tort law always permits injured victims to recover for intentionally caused harm; and this is true even (or perhaps the better word is especially) in those subset of cases in which the intentional harm would also qualify as criminal and thus subject the injurer to criminal penalties. Indeed, if there is a criminal conviction for the act in question, that conviction will often be decisive on the question of intent to cause harm and on the question of causation. Moreover, not only does the common law of torts allow injured victims to recover damages for intentional harms, it usually allows them to recover punitive damages as well. If one holds the view that the functions of criminal law and tort law are purely regulatory, and that the goal of both should be to minimize the costs of harm (including the costs of preventing harm as well as administrative costs), do these results make sense?

To state the obvious, if it is the case that criminal law is already fully deterring of intentionally caused harms, then tort law as a system of

harmed himself), the law sometimes allows exceptions, using such term as "necessity" or "self defense." Or so goes the standard L&E story.

⁹⁵ This latter conclusion is analogous to the situation discussed in Part II above where the *ex ante* agency regulation fully enforces the \$5 minimally efficient standard of care.

deterrence/cost-internalization is redundant and wasteful. Unless it can be shown that criminal sanctions are never (ever) fully deterring for any activity under any circumstances, it would seem from the economic perspective that tort law is never (or almost never) preempted by the existence of overlapping criminal sanctions.

There are a number of obvious responses to this conclusion. First, it might be argued that criminal sanctions are indeed never fully deterring and thus that tort law is always needed as a supplementary sanction. This claim is probably true in many settings, where the criminal sanction is woefully under-enforced because of budget constraints or political considerations. But it is difficult to believe that it is always true in every context in which criminal sanctions apply. For some criminal offenses, it seems likely that even a remote possibility of jail time would likely serve as more than sufficient deterrent.⁹⁶ Second, one might instead argue that criminal law cannot be fully deterring because criminals, or parties considering criminal activity, do not act rationally. They simply do not, in their *ex ante* decision making, take into account the prospect of criminal punishment after the fact. Whether or not this is true, it would be just as valid a critique of tort law as a regulatory mechanism and thus does not provide a good explanation for why tort sanctions generally should apply alongside criminal sanctions. Third, one might argue that imposing an overlapping criminal sanction will not produce over-deterrence, because it really is not possible to over-deter criminal conduct. That is, criminal behavior is the sort of behavior that society has decided should be prohibited altogether. And imposing tort liability for harm caused as a result of a banned activity would simply reinforce the ban; and actors who want to avoid the double sanctions need merely honor obey the law. This is true enough; however, there is still the problem of unnecessary administrative expenses. Whenever criminal law is thought to be fully deterring of a given type of misbehavior, it does not make sense for society to incur the expenses to duplicate the effect via tort law.

⁹⁶ It is important to remember, of course, that the fact that a crime happens does not mean that there are not already in place optimal deterrents against such crime. Unless we are willing to devote infinite resources to policing crime, even an optimal criminal sanction will not prevent all crime. This analogous to the point made earlier about optimal regulation and tort law: accidents will happen, even in a world of optimal regulation.

The most powerful argument against the redundancy of tort law in cases of overlapping criminal sanctions contends that neither tort law nor criminal law is about deterrence or cost-internalization, or that one is but not the other. Rather, tort law, the argument might go, is about corrective justice, and criminal law is about something else – perhaps retribution. Or maybe tort law is about both deterrence and criminal law is about retribution – or some other permutation of those options. The point is that the two regimes – tort and criminal law – have two different functions that can be fulfilled simultaneously when criminally caused harms are allowed to give rise to both criminal sanctions (including possibly prison time) and private tort damages. On this view, it is no accident that tort claims are available for criminally (intentionally) caused harms; corrective justice and retributive justice tend to go together and cut in the same direction, though without being the least redundant. This argument is internally consistent and in some ways difficult to refute. Even if one thinks criminal law is entirely and exclusively about retribution, however, if one does hold the view that tort law is, at least in part, about deterrence/cost internalization, and if there are *ever* situations in which criminal law is fully deterring of certain types of breaches of minimally efficient standards of behavior, there is at least a tension created – a potential tradeoff between efficiency (and the avoidance of excessive administrative costs) and this goal of retribution or whatever else it might be.⁹⁷ Of course, insofar as a criminal conviction resolves all of the difficult factual questions presented in a tort case (of causation and fault, for example), then securing an overlapping tort judgment – which would in most cases be reached via summary judgment – would be relatively cheap in terms of administrative costs, even if redundant.

Pigovian Taxes, Strict Liability, and Activity Levels

The analysis in the preceding Parts addressed the problem of how to coordinate tort law (specifically negligence-based tort claims) with some overlapping non-tort system of regulation – specifically, agency-based command-and-control regulation or social norms or the criminal law. In this Part, I consider a few other combinations. First, reconsider the possibility of *ex ante* Pigovian taxes as well as tort law's *ex post*

⁹⁷ One way in which the tort system does coordinate with the criminal system in a manner that is consistent with framework of this article is that, insofar as the criminal system requires injurers to pay restitution to their victims, such payments must be deducted from tort damages.

equivalent, by which I mean a rule of strict (or more accurately, absolute enterprise) liability. As discussed in Part II, there are certain advantages and disadvantages associated with both of these regulatory tools. One advantage that they have in common is that, if done properly, both have the potential not only to optimize potential injurers' care levels (as negligence and command-and-control regulation have the potential to do), but they can optimize activity levels as well, which even a perfectly functioning negligence or command-and-control regime will not.

To illustrate, use the example from above but this time imagine that the only available care-level investment is a \$25 enhancement that lowers risk from \$100 to \$20 – an \$80 improvement. (Say that the care-level investment either reduces the probability of the \$100,000 harm from .001 to .0002, or it reduces the likely harm itself from 100k to 20k). Still, this care-level investment leaves a residual (unavoidable) risk of \$20. In that case, if there were a command-and-control regulation in force that required potential injurers to make the efficient \$25 care-level investment, and if that were the only regulation in effect, the potential injurers would tend to over-invest in this activity, as the \$20 residual risk would be externalized to third parties. That is, the potential injurers may engage in the activity even though the benefit to them is only, say, \$15, because of the \$20 residual-risk externality.

In such a situation, tort law would provide no useful cost-internalization/deterrence, assuming that negligence standard was the applicable liability rule. This is because, if the regulated party were to comply with the command-and-control regulatory standard, she would also avoid a negligence claim and thus continue to externalize the \$20 residual risk. If, however, the tort rule were strict liability instead, then the externality would be internalized and there would be no overinvestment in the activity. There would only be investment in the activity up to the point at which the marginal social cost equals the marginal social benefit. Notice also that the existence of the *ex ante* command-and-control care-level standard would not change the way in which strict liability should be implemented: the court would still simply hold the injurer liable *ex post* for the actual harm caused, whether that harm turned out to be \$100,000 or \$20,000. As explained, with strict liability, optimality is achieved simply by setting damages equal to harm.

Now imagine how things would change if, in place of the command-and-control *ex ante* regulatory requirement, there was a Pigovian tax. How should tort law coordinate with such a non-tort regulatory regime? A Pigovian tax, recall, is capable of optimizing both potential injurer care levels (assuming the potential injurer knows what care-level investments to make and that the Pigovian tax is adjusted downward as the regulated party makes those investments) and activity levels (because of simple cost-internalization principles). As a result, if there were a fully optimizing (perfectly adjusting) Pigovian tax, then here again there would be no role for tort law as regulation. So, in the recurring example, if there were a Pigovian tax of \$100, tort law should be fully preempted/displaced. Tort liability of any sort would generate useless administrative costs and, in the case of strict liability (unlike in the case of negligence), redundant sanctions. This result, so far as I know, has not been addressed in the federal preemption jurisprudence (or literature). That is, no case has held, nor even suggested in dicta (and no scholar has argued), that the existence of a fully cost-internalizing federal Pigovian tax should be interpreted (under the Supremacy Clause) to preempt state taxes or state tort law that has the effect of a tax (such as strict products liability).⁹⁸

If, however, the Pigovian tax were only partially cost-internalizing, tort law could then provide an efficient supplementary sanction. If the Pigovian tax, for example, were for some reason set at, say, \$20 (\$80 less than the optimal amount), then the optimal tort liability system would use strict liability to impose tort damages of only \$80,000 – having an expected value of \$80. Thus, the presence of a Pigovian tax would inevitably require an adjustment to tort damages under a strict liability tort regime in order to optimize deterrence.

Note also that if there were Pigovian tax in place and the prevailing tort liability rule were negligence, there is some possibility of deterrence redundancy if the tax is not perfectly adjusting – specifically, if the Pigovian tax were not adjusted to take into account the potential injurer's likely adjustment to the threat of tort liability. So, in our

⁹⁸ The reasons, of course, that the case law and the commentators have ignored such potential conflicts between federal and state regulatory law are both that there are no real federal Pigovian taxes *per se* and, even if there were, federal preemption doctrine is generally not applied to taxes. That is, even if the federal government imposes a tax on a particular transaction or product, states likely would still be allowed to tax or otherwise regulate that transaction or product without raising any Supremacy Clause concerns.

example, imagine that the negligence rule induced potential injurers to make the efficient \$25 care-level investment. If the regulator nevertheless set the Pigovian tax at \$100 (the pre-deterrence level of expected external harm), there would obviously be excessive deterrence; and potential injurers would engage in too little of the regulated activity. In such a case, the regulator should set the Pigovian tax at \$20, which would account for the reduction in expected external harm induced by the negligence rule. The same point, of course, could be made about overlapping Pigovian taxes and command-and-control regulations: the former should be adjusted to take account of the latter.⁹⁹

Current tort doctrine does not reflect any of these considerations. That result, however, could be simply because of the absence of any real Pigovian taxes and the predominance of negligence doctrine over strict liability at the state level. Although there are so-called sin taxes (e.g., taxes on alcohol and tobacco sales) in the United States, both at the state and federal levels, there seems to be little effort to link those taxes to the amount of negative externalities associated with those activities. The same is true of gasoline taxes. In general, the federal government and the governments of the various states have made little use of taxes designed explicitly and precisely to be cost-internalizing. Of course, a tax need not necessarily be labeled “cost-internalizing” or “Pigovian” to have that effect; and it is certainly true that some of the various individual taxes on various activities could be considered roughly and partially cost-internalizing. And perhaps the reason tort law ignores those taxes is that the prevailing standard in most tort cases, and in cases involving activities likely to be subject to any sort of even roughly cost-internalizing tax, is negligence. As suggested above, so long as those quasi-Pigovian taxes are not thought to be fully optimizing (which would suggest that tort law should play not deterrent role), there is no need for negligence law to make an adjustment. Negligence law can induce optimal care levels; and the quasi-Pigovian taxes can help with activity levels.¹⁰⁰

⁹⁹ Of course, if there is some possibility of error in the negligence determination, and there is a Pigovian tax, it may be efficient for the court to adjust the tort damages downwards. But this would true even if there were no ex post Pigovian tax. That is, when there is a negligence standard in tort and that standard is uncertain in application, there can be over-deterrence, as potential injurers will be willing to take some degree of excessive care to be sure of getting being found non-negligent. See Calfee & Craswell, *supra* note ____.

¹⁰⁰ As mentioned above in the text, Pigovian taxes need to be adjusted to account for the care-level effects of a negligence rule or of command-and-control regulations.

VI. Conclusion

The traditional normative economic analysis of tort law has worked out in impressive detail the characteristics of an optimal tort regime. Thus, the theoretical circumstances under a liability rule of negligence would be superior, as a matter of efficient deterrence, than a rule of strict liability, and the circumstances under which the reverse would be true, are well known and are considered a part of the L&E canon.¹⁰¹ What has been lacking is a study of how the deterrence/regulatory function of tort law should be affected by the prior existence of non-tort systems of regulation that applies to the same conduct in question. The question could be put this way: If a tort court is supposed to be implementing a combination of liability rules and damage awards that gives potential injurers optimal – not too little, not too much, but Goldilocks optimal – *ex ante* incentives to minimize the external harms caused by their activities, then should not tort law somehow coordinate with already existing non-tort regulatory regimes that may already, at least to some extent, have dealt with the externality in question? Should not tort law be coordinated with other systems of regulation, so as to avoid redundancy of deterrence as well as unnecessary administrative costs?

This Article explores what such coordination might look like in situations in which the non-tort system of regulation is either agency-based command-and-control requirements or Pigovian taxes, informal social norms, or even criminal law. And under a strict set of assumptions, a fairly straightforward set of prescriptions emerges.

Whatever taxes currently exist that might be thought to approximate a Pigovian tax certainly do not make such adjustments. Again, if strict liability were the prevailing tort doctrine and there were real or quasi-Pigovian taxes, then adjustments to tort damages might be appropriate, and of course such adjustments would require legislative approval. Indeed, the argument has been made that taxes on tobacco use are so high that tort liability is not needed at all to internalize those costs and that for this reason, among others, tobacco companies should not be held liable in tort for the harms their products cause. See, e.g., W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, in *Tax Policy and the Economy* 51, 69 (James M. Poterba ed., 1995). This argument ignores the fact that existing tobacco taxes make no adjustments for improvements in care levels and thus give no incentives to try to make less dangerous cigarettes.

¹⁰¹ See sources cited *supra*.

Specifically, if we assume perfect rationality on the part of not only the regulated parties but also regulating parties (including courts), if we assume that the sole purpose of tort law is regulation of *ex ante* incentives, and, finally, if we assume that existing non-tort systems of regulation are a fixed part of the landscape, then the framework set out in this Article would make some normative sense. This conclusion has implications not only for how the negligence per se and regulatory compliance doctrines in tort should be applied by common law courts, but also for when courts should find state tort causes of action preempted by federal safety standards.