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## RISK, EVERYDAY INSTITUTIONS, AND THE INSTITUTIONAL VALUE OF TORT LAW

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*This Note offers a normative critique of cost-benefit analysis, one informed by deontological moral theory, in the context of the debate over whether tort litigation or a non-tort approach is the appropriate response to mass harm. The first Part argues that the difference between lay and expert intuitions about risk and harm often reflects a difference in normative judgments about the existing facts, rather than a difference in belief about what facts exist, which makes the lay intuitions more defensible. The second Part considers how tort has dealt with this divergence between lay and expert perspectives. It also evaluates how tort's approach has differed from that of public law approaches to accident law, such as legislative compensation and risk regulation by administrative agencies. Ultimately, tort's ability to recognize the value of lay intuitions supports retaining the tort perspective as part of our societal arsenal of responses to risk and harm. This ability can also support a pro-tort perspective in two practical debates in the arena of tort law: that over preemption of tort law by administrative agency judgments, and that over access to tort recovery as part of a no-fault system.*

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## INTRODUCTION

This Note will argue that the intuitions and values of ordinary people regarding the problems of mass risk and mass harm deserve a place in our legal system, and that part of traditional tort law's enduring appeal as a way of addressing the problem of mass harm, and compensating victims, derives from the distinctive way in which tort can give voice and force to these intuitions and values. Alternative attempts to address mass harm, such as risk regulation and no-fault compensation, have tended to prioritize experts' views about risk and harm and to deemphasize laypeople's perspectives.<sup>1</sup> While the perspectives of expert scientists, physicians, and policymakers matter, other perspectives matter as well, and often matter equally—particularly where values, rather than facts, are in dispute.<sup>2</sup> The need to incorporate lay as well as expert perspectives has implications for the intersection of tort law with both risk regulation and no-fault compensation schemes. Recognizing the importance of the lay perspective, and tort's ability to capture that perspective, should lead us to resist widespread preemption of the tort system by regulation or the total bypass of tort by no-fault.

Part I will explore several ways in which laypeople's intuitions about risk diverge from the findings that cost-benefit analysis and other expert-driven methods suggest. Laypeople's intuitions often capture values that experts miss or find difficult to adequately represent within their preferred framework. More generally, the difference between lay and expert intuitions about risk and harm often reflects a difference in *values* or normative judgments about the existing facts, rather than a difference in belief about what *facts* exist.

Part II considers how tort has dealt with this divergence between lay and

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1. In the context of risk regulation, see, for example, STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); HOWARD MARGOLIS, *DEALING WITH RISK: WHY THE PUBLIC AND EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES* (1996); CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 53-77 (2002). In the no-fault context, see, for example, David M. Studdert & Troyen A. Brennan, *Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States*, 27 *AM. J.L. & MED.* 225, 230, 232 (2001) (favorably discussing the systems of medical injury compensation in Sweden and New Zealand, in which "[s]trengthened adjudication pathways" and "expert panels," rather than courts, set compensation schedules based on "basic information about the circumstances of the incident and the nature of the disability suffered," and recommending the employment of a similar system in the United States).

2. For the importance of whether judgments are grounded in facts or values, see SUNSTEIN, *supra* note 1, at 63; for a challenge to the idea that fact and value can be separated, see K.S. SHRADER-FRECHETTE, *RISK AND RATIONALITY: PHILOSOPHICAL FOUNDATIONS FOR POPULIST REFORMS* 43 (1991) ("[I]t is doubtful that there can be a complete dichotomy between facts and values.").

expert perspectives. It also evaluates how tort's approach has differed from that of public law approaches to accident law, such as legislative compensation and risk regulation by administrative agencies.

Part II will argue that the differences between tort law, on the one hand, and no-fault and risk regulation, on the other, show that tort law is worth preserving. Tort tends to be more willing to privilege the intuitions of non-experts—including both judges and juries. There is value in retaining this perspective as part of our societal arsenal of responses to risk and harm. While risk regulation and legislative compensation are important parts of a systematic societal approach to the problems of risk and harm, they should not be allowed to totally drive tort law from the scene.

Part III considers the consequences of the earlier analysis for two current territorial disputes at the boundaries of tort law. One of the most prominent arenas where expert-driven analysis has recently competed with tort for the same turf has been that of preemption, where state tort law and Food and Drug Administration (FDA) regulations prescribe different consequences. Recognizing the importance of everyday intuitions justifies a restrained attitude about preemption, one that accords with the majority view in the Court's recent decision in *Wyeth v. Levine*.<sup>3</sup> Tort also overlaps with no-fault compensation schemes, particularly in medical contexts; here, everyday intuitions support allowing access to a tort alternative in vaccine compensation and other no-fault schemes, rather than requiring that such access be waived. Ultimately, while the methods of risk regulation and no-fault compensation have clear value, tort retains a distinctive ability to reflect and give force to public intuitions about risk and should not be eliminated or totally bypassed in favor of other approaches.

This Note attempts to take the extensive legal scholarship on tort, no-fault, and preemption, as well as work in behavioral economics and moral philosophy on everyday intuitions about risk, in a different direction than the existing literature. Much of the existing work either defending or criticizing the tort system in comparison to alternatives focuses on other differences between tort and its competitors—for instance, federalism and separation of powers concerns.<sup>4</sup> The scholarship that focuses on cost-benefit analysis and behavioral economics, such as Cass Sunstein's and Howard Margolis's work, has primarily used the cost-benefit perspective to *criticize* tort law.<sup>5</sup> Finally, although some philosophers have attempted to normatively criticize the behavioral aspects of cost-benefit analysis, their work has not focused

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3. 129 S. Ct. 1187 (2009) (holding that a manufacturer's compliance with FDA labeling requirements does not provide a complete defense to a state product liability claim).

4. See, e.g., Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

5. See MARGOLIS, *supra* note 1, at 211 (contrasting the assessments of experts with those of "lay judges"). See generally SUNSTEIN, *supra* note 1 (arguing for "a more sensible system of risk regulation, embodied in the idea of a cost-benefit state").

specifically on the legal arena.<sup>6</sup> In contrast, this Note attempts to *bolster* the tort system via a normative critique of cost-benefit analysis, one informed by deontological moral theory.

## I. RISK, EVERYDAY INTUITION, AND COST-BENEFIT ANALYSIS

The differences between expert judgments and ordinary intuitions often reflect differences that are at least in part differences about *values*, and not merely differences in understanding *facts*. Within the realm of values, ordinary people are sometimes right and experts wrong.

Cass Sunstein has been one of the foremost proponents of a cost-benefit approach to risks. Sunstein argues that “people’s intuitions about risk are highly unreliable. Some of those intuitions do serve us well in ordinary life. But even so, they lead to ineffective and even counterproductive law and policy.”<sup>7</sup> Sunstein discusses several such commonplace intuitions about risk in his work. His claims and examples are paradigmatic of the cost-benefit critique of commonplace intuitions, and as such will serve as an entrée to the project of understanding the normative basis for these intuitions.

### A. *Incoherence, Intransitivity, and Context-Sensitive Judgments*

Sunstein asks us to consider the following situation:

Suppose that you are asked to say, without reference to any other problem, how much you would be willing to pay to protect [against] certain threats to coral reefs. Now suppose that you are asked to say, without reference to any other problem, how much you would pay to protect against skin cancer among the elderly. Suppose, finally, that you are asked to say how much you would be willing to pay to protect [against] certain threats to coral reefs and how much you would be willing to pay to protect against skin cancer among the elderly. Empirical evidence suggests that people’s answers to questions, taken in isolation, are very different from their answers to questions when they are asked to engage in cross-category comparisons.<sup>8</sup>

Sunstein assumes that the differences between willingness to pay in these different contexts are “a form of incoherence.”<sup>9</sup> And incoherence, or unreflective assumptions about facts, may often be what explains these differences.

But there is also a normatively respectable explanation for ordinary

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6. See, e.g., F.M. KAMM, *INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM* (2007) (advocating a nonconsequentialist ethical theory).

7. SUNSTEIN, *supra* note 1, at 29 (footnote omitted).

8. *Id.* at 48.

9. *Id.* at 49; see also Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 310 (1996) (demonstrating that context-dependent decision-making occurs in legal contexts and arguing that “context-dependent decision-making is problematic when actors make legal judgments”).

people's different intuitions in these cases: their preferences may not be incoherent, but simply intransitive. And intransitive preferences are often perfectly sensible. Consider this example, from Bruce Chapman:

Suppose, for example, that someone is offered a choice of fruit at the end of a dinner. If only a large apple, *A*, and a large orange, *O*, are offered to her, she would choose the large apple. Both fruits are large and, all else equal, she prefers apples to oranges. However, if she is offered *A*, *O*, and a small apple, *a*, then different considerations arise. For now there is an issue of etiquette to be addressed. The rule, let us say, is that one should never choose the larger of two items of the same kind. Our chooser now reasons that, in the choice from the set (*A*, *O*, *a*), she cannot now choose *A*, because that would be in breach of the rule of etiquette. She therefore chooses *O*, a piece of fruit that is larger than *a*, but a fruit of a different kind.<sup>10</sup>

As Frances Kamm has argued, intransitivity can be justified by our different reasons (here, etiquette and taste) for each of the dominance relations.<sup>11</sup> This intransitivity is perfectly comprehensible:

[D]espite this apparent "irrationality," what is happening in the etiquette example is hardly incomprehensible to us . . . . We simply *understand* the choice situation (*A*, *O*, *a*), where both *A* and *a* are present and etiquette *is* at issue, *differently* from the choice situation (*A*, *O*), where *a* is absent and etiquette is *not* at issue.<sup>12</sup>

Returning to Sunstein's example, then, we could imagine that people are willing to pay \$10 million for coral reefs and an equal amount for protecting against skin cancer among the elderly when they consider these options in isolation. But, following Chapman, they may have good reason to pay more for the elderly when the options are considered together, because the combination of options in a choice set makes new reasons relevant. In particular, it may be inappropriate or disrespectful to prefer an aesthetic or abstractly environmental value like the beauty of a coral reef over human life in a situation of direct comparison. (Consider this example: One might have good reason to give one's nephew more money for his fifteenth birthday than his seventh, considered in isolation. But if you have both a seven-year-old and a fifteen-year-old nephew, it would be the foolish uncle who gave more money to one nephew than the other: the disrespect shown would be evidenced by the cries of "he got more than me!")

Of course, it is possible to normatively criticize the values, like etiquette in Chapman's example, that the intransitive preferences reveal. Perhaps we should abandon etiquette, and leave people free to go for the larger apple. Similarly, perhaps we should be willing to value aesthetic values over human life. But this

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10. Bruce Chapman, *Rational Choice and Categorical Reason*, 151 U. PA. L. REV. 1169, 1177-78 (2003) (footnote omitted); see also Frances Myrna Kamm, *Supererogation and Obligation*, 82 J. PHIL. 118, 118 (1985) (defending intransitive moral preferences via a similar example).

11. Kamm, *supra* note 10, at 135-36.

12. Chapman, *supra* note 10, at 1179.

is a substantive normative criticism—a complaint that the intransitivity is *wrong*, not that the intransitivity is *incoherent*. As such, it is squarely in the realm of value rather than fact. And in the realm of value, there is no reason to think that a scientific expert's opinion should carry any special weight compared to that of thoughtful laypersons such as judges or juries.

### B. *Loss Aversion and the Doing-Allowing Distinction*

Ordinary people distinguish harming others from failing to benefit them, and evaluate the former as *prima facie* worse than the latter. Sunstein observes and critiques this intuition, claiming that “[p]eople tend to be loss averse, which means that a loss from the status quo is seen as more undesirable than a gain is seen as desirable.”<sup>13</sup> This loss aversion, he believes, leads ordinary people to ignore benefits or fail to weigh them appropriately against harms. In contrast, he praises experts as “prepared to look at the benefits as well as the risks associated with controversial products and activities.”<sup>14</sup> Although Sunstein does not believe that the preference for preexisting risks over new ones is always wrong, he believes that to the extent that greater concern about new risks is justified, it is justified either by the new risk's greater magnitude, or by the psychological fact of the risk being difficult to adjust to.<sup>15</sup> Both of these factors are differences of degree, not kind: new risks are bad simply because they correlate with more severe losses of welfare, due either to greater magnitude or greater psychological upset caused to their victims, not because of some qualitative problem with new risks. The idea that there could be something else explaining what is wrong with exposing people to new risks is perfunctorily rejected.<sup>16</sup>

Yet the distinction between a new and an old risk may track another distinction: one that may seem “automatic” and “insufficiently reflective,” but in fact reflects the pull of a normative worldview—one that has an emotional valence. Creating a new risk generates a new causal and moral relation between risk-creator and victim: the risk-creator, should the new harm come to pass, is responsible for harming the victim. She has done something to someone else.<sup>17</sup>

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13. SUNSTEIN, *supra* note 1, at 42 (citing Richard H. Thaler, *The Psychology of Choice and the Assumptions of Economics*, in *QUASI RATIONAL ECONOMICS* 137, 143 (Richard H. Thaler ed., 1991)).

14. *Id.* at 64.

15. *Id.* at 42 (“Of course, it is possible that a new risk is worse than an old risk, perhaps because it is larger in degree, perhaps because people will have a hard time in adjusting to it.”).

16. *Id.* (“The problem is that loss aversion operates in an automatic, insufficiently reflective manner so that preoccupation with new risks cannot possibly be justified in these terms.”).

17. See, e.g., F.M. Kamm, *Action, Omission, and the Stringency of Duties*, 142 U. PA. L. REV. 1493 (1994); F.M. Kamm, *Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status*, 21 PHIL. & PUB. AFF. 354, 386 (1992) [hereinafter Kamm,

In contrast, allowing an old or preexisting risk to persist does not generate a new relation: the person who fails to eliminate a preexisting risk has not harmed the victim of that risk, but merely allowed the harm to continue. And this distinction has force even in the absence of differences in magnitude of risk or harm, and even when the magnitude of the harm points in favor of creating the new risk. It is permissible to refuse to harm one person even when doing so would save ten more from a preexisting harm, not because the new harm would be worse for the single person than the preexisting harm would be for the ten, but because it is permissible to refuse to set up that moral relation between yourself and the person harmed.<sup>18</sup>

Upon reflection, this distinction between what we do and what we merely allow seems also to have emotional immediacy as well as moral force: ordinary people have an automatic, intuitive reaction to the doing-allowing distinction.<sup>19</sup> Yet, its psychological force seems different from, and deeper than, that of simple loss aversion.<sup>20</sup> In particular, maintaining this distinction may be essential to an important value: that of seeing ourselves as separate and independent persons.<sup>21</sup> Of course, the claim that doing harm is in itself worse than allowing it has its critics.<sup>22</sup> But, as with the discussion of intransitivity above, these critics are making a normative argument: one grounded in contestable values, not in facts to which they have special access.

Of course, an act will not count as invariably “done” or “allowed”: which

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*Non-Consequentialism*] (“[T]he view being presented here emphasizes the distinction between what it is *permissible to do to a person* . . . and what *happens* to persons . . . . What I do, rather than what happens, is important when it reveals what it is permissible to do, that is, what the status of any person is.”); Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing*, 98 PHIL. REV. 287, 287 (1989). The misfeasance-nonfeasance distinction can be seen as reflecting this distinction in tort law. *See, e.g.,* H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 899 (N.Y. 1928) (Cardozo, J.) (“The failure in such circumstances to furnish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong.”).

18. *See* Kamm, *Non-Consequentialism*, *supra* note 17, at 367-70.

19. *See, e.g.,* Marc D. Hauser et al., *Reviving Rawls’s Linguistic Analogy: Operative Principles and the Causal Structure of Moral Actions*, in 2 MORAL PSYCHOL. 107, 125-35 (Walter Sinnott-Armstrong ed., 2009) (providing data that people generally see causing harm as worse than allowing it); John Mikhail, *Law, Science, and Morality: A Review of Richard Posner’s The Problematics of Moral and Legal Theory*, 54 STAN. L. REV. 1057, 1088-1110 (2002) (defending the claim that humans have a “Universal Moral Grammar”).

20. *See* F.M. Kamm, *Moral Intuitions, Cognitive Psychology, and the Harming-Versus-Not-Aiding Distinction*, 108 ETHICS 463, 470-78 (1998) (arguing that Kahneman’s loss/no-gain distinction is different from a harming/not-aiding distinction).

21. *See, e.g.,* Quinn, *supra* note 17, at 289.

22. *E.g.,* SHELLY KAGAN, THE LIMITS OF MORALITY (1989). The extension of this argument against the doing-allowing distinction to the legal context is discussed in Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 249 (1980) (recapitulating the Coasean view that when “distinctions based on causation are obliterated . . . a plaintiff can claim no special consideration as a victim of another’s action, and a defendant does not necessarily escape liability because the harm complained of was not caused by any of his actions”).

side of the distinction it falls on will also depend on context, just as the intransitive preferences above depend on context. What one person does, another person may merely allow: the deaths of the ten are done by whoever set the preexisting threat in motion, but allowed by the person who refuses to harm the one in order to save the ten. Furthermore, from a broader institutional perspective, the distinction between causing and allowing harm, and hence between new and old risks, may break down: even though the doing-allowing distinction is relevant for individuals, institutions such as governments may be so intimately involved with all causal interactions that there is no normative difference between their positive and negative responsibility for an outcome.<sup>23</sup> That the doing-allowing distinction may have different relevance for individuals than it does for institutions will be important in later Parts of this Note, which will explore how tort law, no-fault, and risk regulation respond to moral intuitions like the doing-allowing distinction.

### C. *Dreaded Risks, Self-Conceptions, and Expressive Rationality*

Ordinary people also qualitatively distinguish risks and harms by type, rather than simply quantifying the probability of death or other loss. Sunstein discusses cases where ordinary people especially dread certain risks, such as airplane crashes, while experts see the same risks as less serious.<sup>24</sup> It is possible that the public dreads these risks because they are making a factual mistake: they believe that such risks are more likely than they actually are. This is what now-Justice Breyer believes: “The public’s ‘nonexpert’ reactions reflect not different values but different understandings about the underlying risk-related facts.”<sup>25</sup> And indeed, some public judgments that differ from expert judgments do seem to centrally depend on erroneous perceptions of the facts: for instance, tort verdicts that are motivated by juries’ willingness to give credence to experts making incorrect factual claims on the basis of those experts’ claims of factual authority.<sup>26</sup> Such decisions do not reflect a disagreement about values, but indeed reflect a public misunderstanding of facts.

However, other disagreements between lay intuitions and expert assessment are not so easily dismissed. Ordinary people’s differences from experts may rest on disagreements about values, rather than disagreements

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23. See THOMAS NAGEL, *EQUALITY AND PARTIALITY* 84 (1991).

24. See SUNSTEIN, *supra* note 1, at 43.

25. BREYER, *supra* note 1, at 35; accord SUNSTEIN, *supra* note 1, at 63 (“I suggest that, in many cases, people’s judgment that a certain risk is unusually bad is not a rich qualitative assessment but is based on some combination of affect, rooted partly in an unreliable intuition about the likely facts.”).

26. See Richard S. Cornfeld & Stuart F. Schlossman, *Immunologic Laboratory Tests: A Critique of the Alcolac Decision*, in PHANTOM RISK: SCIENTIFIC INFERENCE AND THE LAW 401, 401-24 (Kenneth R. Foster et al. eds., 1993) (discussing *Elam v. Alcolac Inc.*, 765 S.W.2d 42 (Mo. Ct. App. 1988)).

about facts. These responses may have to do with important values or self-conceptions that are particularly threatened by certain types of risk and harm: “When people draw on their emotions to judge the risk that such an activity poses, they form an expressively rational attitude about what it would *mean* for their cultural worldviews for society to credit the claim that that activity is dangerous and worthy of regulation . . . .”<sup>27</sup> The particular concern about harms that are caused rather than allowed that I discuss above could be understood as an example of expressive rationality: it may derive from a widely shared self-conception of ourselves as separate persons. But there are many other such self-conceptions, such as egalitarianism, libertarianism, and tradition-oriented conservatism, that could shape our views about risk.<sup>28</sup> While the judgments about risk and social priorities that flow from these self-conceptions are appropriately subject to normative criticism, and scientific evidence can play a role in that criticism, scientific evidence cannot settle the question of which self-conception we should adopt.<sup>29</sup> For instance, a scientific finding that secondhand smoke causes lung cancer in others who have not chosen to smoke challenges the view that a libertarian perspective should permit smoking, but it does not give us reason to accept or reject a libertarian position generally.

Many have argued that we should be skeptical about our intuitive emotional responses, because intuitive responses lead us astray in many contexts.<sup>30</sup> But this argument runs the risk of conflating the question of whether intuitive emotional responses are appropriate guides in matters of *fact* with that of whether such responses are appropriate guides in matters of *value*. We have good grounds to believe that our intuitive and emotional responses can be poor guides with respect to statistical questions, or to measuring the length of two lines.<sup>31</sup> But it is by no means clear that intuitive, emotional responses are poor guides to matters of value: indeed, people who lack the capacity to respond intuitively to values are generally judged to be irrational, at least where values are concerned.<sup>32</sup> That a ruler is a poor tool for the analysis

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27. Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 750-51 (2008); see also Tamar Schapiro, *Three Conceptions of Action in Moral Theory*, 35 NOÛS 93, 93 (2001) (discussing the idea that action can be evaluated by what it expresses, rather than its consequences).

28. Kahan, *supra* note 27, at 751 (discussing the ways in which egalitarian, individualist, and socially conservative self-conceptions influence judgments about which risks are to be avoided); see also PAUL SLOVIC, *Introduction and Overview*, in THE PERCEPTION OF RISK, at xxi, xxxiv (2000) (discussing the effect of different “worldviews” on risk perception).

29. E.g., SUNSTEIN, *supra* note 1, at 110 (“It bears emphasizing that science cannot by itself resolve normative questions. An understanding of likely consequences cannot resolve issues of value.”).

30. See, e.g., MARGOLIS, *supra* note 1, at 39-47.

31. *Id.* at 53-59 (describing a statistical puzzle about poker chips, and the Muller-Lyer illusion, in which two lines of the same length appear to be different in different contexts).

32. Kahan, *supra* note 27, at 750 (discussing the work of philosophers, psychologists,

of poetry or for making policy decisions does not show that it lacks value in measuring the length of two lines; in the same way, that our intuitive responses are unreliable when it comes to measuring the length of lines does not show that they are unreliable tools in the aesthetic or moral realms.

Sunstein also argues that we should be skeptical about basing our normative views of risk on people's ex ante intuitions about risk, because of the phenomenon of adaptation to harm, where people see a harm as less bad once they have experienced it.<sup>33</sup> But this is not quite right, particularly where risks that pose a central threat to one's self-conception are concerned. We do not always have to experience something to have a defensible position that it is something to avoid. Sometimes an identity can involve not being open to certain possibilities: for instance, the fact that a celibate person may see sexual activity as less bad once she has experienced it does not give us reason to ignore her present preference to avoid that temptation.

#### D. *The Normative Respectability of Everyday Intuitions*

This Part's goal has been to illustrate the normative respectability of everyday intuitions as an alternative to cost-benefit analysis. The differences between ordinary people and experts are often a matter of different values, rather than simply different facts.<sup>34</sup> Sunstein argues that "[w]hen they disagree, experts are generally right, and ordinary people are generally wrong. . . . When ordinary people make mistakes, it is usually for three now-familiar reasons: They rely on mental shortcuts; they are subject to social influences that led them astray; and they neglect tradeoffs."<sup>35</sup> However, once we understand everyday people's patterns of thought as potentially reflecting differences in values rather than a lack of understanding of facts, everyday intuitions seem often to be placed on an equal footing with expert judgment.<sup>36</sup>

This reframing makes a response to the critique of everyday intuitions possible. Context-sensitive variations in willingness to pay can be justified as

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and neuroscientists on the importance of emotion to appropriate reasoning about what goods are valuable); *see also* Mikhail, *supra* note 19, at 1093-94 (discussing the importance of "obscurely felt" and introspectively opaque feelings to moral judgment).

33. *See* SUNSTEIN, *supra* note 1, at 66.

34. *See, e.g.*, Elizabeth Anderson, *Values, Risks, and Market Norms*, 17 PHIL. & PUB. AFF. 54, 58 (1988). Sunstein describes this as a "populist" perspective on values. *See* SUNSTEIN, *supra* note 1, at 54.

35. SUNSTEIN, *supra* note 1, at 55.

36. *Cf.* Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1099 (1990) ("When it comes to public risk, there simply is no objective view, there are only 'conflicts between two sets of (inevitably subjective) judgments.' This takes us back to ground already covered. Because the conflicts in question are not and cannot be objectively grounded, they cannot be resolved on objective grounds. Much less should they be consigned to experts whose competence lies in the technical arts. The question isn't technical." (footnote omitted)).

intransitivity rather than dismissed as incoherence; the preference for old over new risks can be justified as tightly tracking the distinction between harming and not aiding, rather than dismissed as an imperfect proxy for welfare considerations or as a mere psychological phenomenon without normative backing; and concern about dreaded risks can be justified as tracking defensible differences in values rather than dismissed as following from factual errors.

One worry about the above perspective is that any disagreement about facts can be redescribed as a disagreement about values, and vice versa, such that popular opinion can wholly swallow up expert opinion, or the reverse. Another is the possibility that qualitative explanations of everyday intuitions prompted by questioning do not reflect the genuine source of the intuition: “[W]hen people are asked to say *why* they believe that some risk is especially bad, their answers may not truly explain their beliefs, but instead represent post hoc rationalizations of more visceral judgments (based partly on faulty quantitative assessments).”<sup>37</sup>

These are both legitimate concerns, but there are several good responses. Of course it may be possible for people to disguise or rationalize attitudes about risks that are, at bottom, grounded in a misunderstanding of the *facts*, as beliefs grounded in differences in *values*. But we should remember that an action or belief can be directly motivated by a visceral judgment while being more indirectly motivated, or justified, by background normative facts.<sup>38</sup> Imagine a person driving along Interstate 280 from Palo Alto to San Francisco who has made that drive many times before. She may well arrive in the Financial District without ever having thought about the California Drivers’ Handbook whose rules she learned when she received her license; her driving was more or less an instinctual rather than reflective matter. But the fact that she never considered the law during her drive does not show that she would be wrong in saying, if asked why she used her turn signal to change lanes, that she did so because that is what the law required. Similarly, that someone’s intuitive response to a risk is not *directly* causally motivated by values does not show that it does not *ultimately* flow from an underlying value. In fact, even an intuitive response that a person explains, when asked, as being motivated by a belief about probabilities may ultimately be motivated by an unarticulated belief about values: the person may feel that the probability-based belief is a more publicly defensible reason than the value that ultimately grounds the response.<sup>39</sup> Of course, the danger of misrepresenting one’s reasons always arises when the sources of people’s beliefs become relevant to the possibility of

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37. SUNSTEIN, *supra* note 1, at 63.

38. See, e.g., Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 474-75 (2007) (hypothesizing that white men’s aversion to gun control derives from a background self-conception that causes them to associate gun possession with the role of father and protector); see also SLOVIC, *supra* note 28.

39. See Kahan et al., *supra* note 38.

enacting their values;<sup>40</sup> but this danger has not undermined deliberative democracy and similarly does not undermine popular beliefs about risk.

As for the fact-value distinction, as with any concept, there are hard cases at the borderline; however, hard cases should not vitiate a workable distinction between fact and value.<sup>41</sup> It may never be possible to provide an analysis that perfectly separates facts from values; nonetheless, the capacity to investigate facts is different from the capacity to investigate values.<sup>42</sup> The existence of hard cases does not show that there is not a defensible conceptual distinction.

What should establishing the normative respectability of laypeople's intuitions lead us to conclude about the place of these intuitions and of their rivals? The respectability of everyday intuition does not entail the abandonment of cost-benefit analysis. Many of the points Sunstein makes are amply valid ones: cost-benefit analysis can be an "excellent place not to end but to start" our decisions about how to respond to risks.<sup>43</sup> And expertise about matters of fact, such as the likely medical consequences of a chemical exposure or economic consequences of an infringed patent, remains centrally important. Finally, the proposed system should put expert judgments about values on equal footing with lay intuitions, not ignore expert intuitions about value entirely. After all, increased scientific or economic expertise does not automatically devalue one's intuitive judgment—though we should be aware of certain cognitive changes that may correlate with expertise, such as a reduced willingness to see cooperation as rational.<sup>44</sup>

But the value of Sunstein's cost-benefit approach should not lead us to make the opposite mistake: to let cost-benefit analysis drive laypeople's intuitions from the scene. Part of what motivated Sunstein, and what is appealing and attractive about his project and that of other cost-benefit advocates such as Breyer, is the new perspective that cost-benefit analysis can offer. This value can be lost if cost-benefit analysis comes to totally dominate the decision-making arena to the exclusion of other perspectives, and exercises a sort of normative imperialism over our judgments about risk.<sup>45</sup>

While cost-benefit imperialism may not seem like a genuine danger, it could arise if the administrative state becomes dominated by cost-benefit analysis, and administrative decisions driven by such analysis broadly preempt

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40. See Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061 (1992) (book review) (discussing the tensions that arise as religious discourse tries to express itself while conforming to Rawlsian norms of public reason that require that policies be justified based on reasons that everyone can accept).

41. E.g., G.A. Cohen, *Facts and Principles*, 31 PHIL. & PUB. AFF. 211 (2003).

42. See SHRADER-FRECHETTE, *supra* note 2, at 43-45.

43. SUNSTEIN, *supra* note 1, at 110.

44. See Robert H. Frank et al., *Do Economists Make Bad Citizens?*, 10 J. ECON. PERSP. 187 (1996) (arguing, based on survey data, that increased education in economics and evolutionary biology leads to reduced willingness to cooperate with others).

45. Cf. John Dupré, *Against Scientific Imperialism*, 2 PHIL. SCI. ASS'N 374 (1995) (arguing against one theory dominating all others in a scientific context).

state tort judgments. A similar concern arises when tort law is bypassed by no-fault schemes that also rely on expert-driven cost-benefit analyses. As such, what I would criticize is Sunstein's claim that cost-benefit analysis should be a central part of our *legal* analysis. Although Sunstein sometimes suggests that law should be approached from a different perspective than policy,<sup>46</sup> he more often conflates law and policy when discussing the appropriate role of lay intuitions and expert judgments.<sup>47</sup> The two, however, seem different. Whether or not "the judgments of ordinary people seem to be a good starting point for policy,"<sup>48</sup> the decisions of ordinary judges and juries are the appropriate starting point for tort law. Tort law is a common law system largely constituted by the aggregated precedent of past judges and juries. In particular, the importance of the jury's role in tort law derives in large part from tort law's concern with representing laypeople's intuitions. It may be that although we should have a "cost-benefit *state*," we should nonetheless have a *common law* driven by lay intuitions.

## II. THREE APPROACHES TO RISK: TORT, LEGISLATIVE COMPENSATION, AND REGULATION

Within the broader realm of law that addresses risk and harm—what Henry Steiner calls "accident law"—tort law is often contrasted with two alternative approaches, both of which have statutory rather than common law origins.<sup>49</sup> One is legislative-administrative compensation, which generally includes workers' compensation and auto no-fault.<sup>50</sup> The other is safety or risk regulation, such as workplace safety, environmental protection, and the testing of prescription drugs.<sup>51</sup> Both regulation and legislative compensation fall under the umbrella of "public law," whereas traditional tort law is common law. (Mass tort, however, often is seen as—partly out of necessity—straddling this public-private divide.<sup>52</sup>) This Part will consider the differences between how tort law, on the one hand, and these two legislative approaches, on the other, incorporate everyday intuitions into their decision-making processes.

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46. See SUNSTEIN, *supra* note 1, at 181 (differentiating the proper role of courts from that of agencies).

47. *E.g.*, *id.* at 29 ("[P]eople's intuitions about risks are highly unreliable. . . . [T]hey lead to ineffective and even counterproductive law and policy."); *id.* at 64 ("[T]hat people perceive certain risks and deaths as especially bad should not be decisive for purposes of law and policy."); *id.* at 295 ("Some people think that it is important for law and policy to 'make statements'—to express attitudes that all or most citizens find correct or congenial.").

48. See *id.* at 10 (paraphrasing stance of critics of cost-benefit analysis).

49. See HENRY J. STEINER, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW* 10-13 (1987).

50. See *id.* at 11-12.

51. See *id.* at 12.

52. See JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 169 (1995).

Before discussing and comparing these different approaches, it is worth noting the progressive expansion of non-tort approaches and the contraction of tort law. Much of what would have been formerly covered by a tort regime is now covered by administrative and legislative interventions. One prominent example is the choice to compensate victims of the September 11th attacks via a legislative scheme, the September 11th Compensation Fund, which Robert Rabin argues gives us “reason to reflect on whether the Fund . . . should be regarded as a singular response or as a window for thinking about redress of future victims of terrorist activity—or even, perhaps, victims of criminal violence more generally.”<sup>53</sup> Vaccine compensation presents another recent example. The recent health care reform debate has generated new publicity surrounding medical malpractice tort actions, and produced a push for alternatives to tort in this sphere as well. As such, the debate between the strengths of tort law and potential alternatives is real and not merely theoretical.

#### *A. Tort Law and Risk Regulation: Courts Versus Agencies*

Risk regulation has traditionally taken a much more expert-driven approach than tort law. Regulators have been willing to engage in cost-benefit analyses and comparisons: “For several decades, agencies have undertaken cost-benefit analysis of major regulations, even when CBA [(cost-benefit analysis)] is not the basis for decision but is merely a matter of informing the public about the consequences of proposed courses of action.”<sup>54</sup> Furthermore, several specific statutes, including the Toxic Substances Control Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Safe Drinking Water Act, incorporate cost-benefit analysis into their directions to agencies implementing them.<sup>55</sup> These analyses generally value costs and benefits using a “willingness to pay” model, in which people in a controlled setting are asked how much they would be willing to pay for a given change.<sup>56</sup>

In fact, a greater reliance on administrative risk regulation rather than tort law, precisely because of risk regulation’s willingness to set aside everyday intuitions about risk in favor of a more statistical model, has been a theme of those, like now-Justice Breyer, who criticize tort and favor an agency-based, administrative approach to risk:

Regulatory agencies are equipped to make the risk comparisons on which all progressive transformation of the risk environment must be based. The courts are simply not qualified to second-guess such decisions; when they choose to do so they routinely make regressive risk choices. Requiring—or at least

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53. Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV 769, 769 (2003).

54. CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* 76 (2002).

55. *Id.* at 14-15.

56. *Id.* at 77.

strongly encouraging—the courts to respect the comparative risk choices made by competent, expert agencies would inject a first, small measure of rationality into a judicial regulatory system that currently runs quite wild.<sup>57</sup>

Rather than tort, Breyer believes that a bureaucracy of scientifically knowledgeable civil servants empowered to set priorities and allocate resources to reduce risks is the most promising solution.<sup>58</sup>

In contrast, tort systematically has a greater sensitivity to lay intuitions about risk, for which it is both praised and derided. This reflects the history and institutional framework of tort law. Each tort suit that is brought into the legal system, if not settled before trial, is considered on its own merits at least by a judge, and often by a jury as well. These decisions are governed by a precedent-based system of law that looks back to other decisions made by judges and juries. While there are exceptions to this, and efforts like the Restatements of Torts inaugurate a more codified system of law, the common law is by and large the law of common people's intuitions. Breyer offers a critical perspective on this aspect of the legal system:

Courts also administer a system of tort law which discourages the negligent production of risky substances by forcing producers . . . to compensate those whom they injure. That system, however, leaves the determination of “too much risk” in the hands of tens of thousands of different juries who are forced to answer the question not in terms of a statistical life, but in reference to a very real victim needing compensation in the courtroom before them. The result is a system much criticized for its random, lottery-like results and its high “transaction costs” . . .<sup>59</sup>

Likewise, judges, despite their greater legal expertise, are generally grouped with laypeople rather than experts with respect to determinations of value.<sup>60</sup> So the decision-making method that Breyer identifies can be seen as reflecting lay intuitions—for good or evil—at work.

Another difference between tort and regulation, closely related to the one Breyer identifies, is the perspective from which each approaches risk. Tort approaches risk *ex post*, while risk regulation approaches risk *ex ante*. Foster et al. take this difference to speak decisively in favor of the administrative approach:

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57. Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 335 (1985).

58. BREYER, *supra* note 1, at 78 (proposing an increased role for “a small, powerful group of especially well-qualified civil servants”); *see also* Gillette and Krier, *supra* note 36, at 1030 (“Some . . . call for a reduction of the judicial role in risk assessment and management, and for more reliance on administrative agencies. Agencies, they argue, have more expertise, are more objective and rational, can be more attentive to the net effects of technological advance. Courts, they conclude, should defer to them.”).

59. BREYER, *supra* note 1, at 59.

60. *See, e.g.*, Ken Kress, *The Seriousness of Harm Thesis for Abnormally Dangerous Activities*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 277, 288 (David G. Owen ed., 1995) (“[J]udges are members of the public whose beliefs constitute conventional morality.”).

For all its imperfections, the regulatory process is far better suited than tort law for controlling subtle risks. Regulatory agencies seek to inhibit risk ex ante, just in case. Courts are only supposed to compensate people ex post, not for risk but for proven harm. Regulators can, at least theoretically, aim for a far higher level of protection than can possibly be achieved by tort law.<sup>61</sup>

They take for granted the superiority of ex ante compensation, and indeed this norm for compensation has been more prominent recently.<sup>62</sup>

However, both the ex ante and ex post perspectives have an important place in a comprehensive response to risks, even subtle risks, and the way that these perspectives fit together is complex. Consider a hypothetical case that reveals the strangeness of taking a purely ex ante perspective to compensation for a toxic exposure: Say that the exposure could be predicted to lead to each of the ten people exposed having a 10% chance of developing liver cancer, but that only one actually developed cancer. Pure ex ante compensation would leave the actual cancer victim incompletely compensated for the harm he suffered, since he only had a 10% chance of developing cancer and so only would receive 10% of the compensation he would have received under an ex post approach. Tort law, at least in the mass-tort context, has traditionally rejected this result of purely ex ante compensation.<sup>63</sup>

On the other hand, taking both an ex ante and an ex post perspective will result in “double counting,” as Claire Finkelstein describes it.<sup>64</sup> If a polluter exposes ten people to a 10% ex ante risk of cancer, and one of the exposed people develops cancer, the polluter will have to pay more under a combined ex ante/ex post regime than would have been the case under a purely ex ante regime (where the polluter would have been responsible for the ten 10% risks only) or a purely ex post regime (where the polluter would only be responsible for the cost of the single cancer). As Weinstein asks, “[s]hould we allow what some courts have considered impermissible ‘double dipping’ . . . ?”<sup>65</sup> Even if we should not allow “double dipping” within the context of a single system, it may well be appropriate for overlapping administrative regulation and tort law to enforce both ex ante and ex post compensation.

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61. Kenneth R. Foster et al., *Conclusion: Phantom Risk—A Problem at the Interface of Science and the Law*, in PHANTOM RISK, *supra* note 26, at 431, 440 (emphasis omitted).

62. Cf. Barbara H. Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123, 124 (2003) (noting that luck egalitarianism, which has dominated the philosophy literature, and the rational expectations model of individual decision-making, which has dominated the economics literature, both rely on an ex ante perspective).

63. See WEINSTEIN, *supra* note 52, at 148-52 (“The primary purpose of mass tort cases has evolved to be compensation of victims.”).

64. See Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 990 (2003) (“If the risk of harm were itself a harm, it would seem to follow that the person exposed to a risk who suffers an outcome harm as a result is *worse* off than the person who simply suffers that harm without the associated risk.”).

65. WEINSTEIN, *supra* note 52, at 152-53.

### B. *Tort Law and Legislative Compensation: Judge and Jury Versus Expert Panel*

Tort law's approach to risk can also be compared to another system of compensation: the legislative-administrative model. In the United States, we have seen this type of legislation used in response to black lung disease, vaccine-related injuries, neurological injuries, and injuries and losses related to the September 11th attacks.<sup>66</sup> These compensation schemes generally are organized around a claims fund, often one that manufacturers of a specific type of product pay into, and from which claimants can draw compensation.<sup>67</sup>

Generally, these no-fault compensation schemes assess claims using some sort of expert-developed tool tailored to the demands of the specific case at hand, and are often managed by a special master. For instance, the vaccine injury no-fault system uses a Vaccine Injury Table enumerating the injuries that are assumed to be caused by vaccines.<sup>68</sup> More relevant to the issue of risk and everyday intuitions is that these no-fault schemes often are not individualized to the particular harms that the claimant suffered. The vaccine scheme bases recovery on the average earnings of workers in the nonfarm sector of the economy, and caps recovery at \$250,000.<sup>69</sup> When calculating the wage-loss component, some schemes also traditionally incorporate "scheduled limitations based on type of harm and ceilings reflecting notions of horizontal equity" for economic damages, and in some instances "modest, fixed-sum pain and suffering" damages.<sup>70</sup> A proposal for an even more comprehensive legislative scheme might follow the model of New Zealand, where tort is replaced by a society-wide accident compensation plan.<sup>71</sup>

Many proponents of administrative regulation also favor legislative compensation solutions over tort law. Peter Huber, for instance, praises the liability limitations involved in many no-fault schemes as an (albeit ad hoc) improvement over tort law that protects industries that produce net public benefits from the depredations of an out-of-control tort system.<sup>72</sup> And, indeed, the decrease in the individualization of benefits similarly avoids the

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66. See Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 703, 706, 708-10 (2005) (describing the Black Lung Benefits Act, the National Childhood Vaccine Injury Act, state legislation regarding birth-related neurological injuries, and the September 11th Victim Compensation Fund).

67. See *id.*

68. See *id.* at 707.

69. See *id.*

70. *Id.* at 711. A notable exception is the much more individualized September 11th Victim Compensation Fund. *Id.*

71. See WEINSTEIN, *supra* note 52, at 28-29. See generally STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989) (discussing the replacement of personal injury tort law with alternative compensation schemes such as social insurance).

72. See Huber, *supra* note 57, at 328-29 (describing statutes limiting liability in particular industries as necessary because of the judicial system's dismal record in distinguishing good public risk investments from bad ones).

arbitrariness for which tort is often criticized.

However, this strength of legislative compensation is also a potential weakness: by losing its connection to the intuitively compelling claims of unique individuals, it may end up ignoring important values. As Weinstein points out:

What troubles many of us about an administrative remedy to provide individual compensation is that in the absence of a strong independent bar and bench, the system often deteriorates. At first, the system has great promise. Often thereafter, either enough funds are not granted or the system falls under the control of one economic interest or another. We see that repeatedly. Workers' compensation was a splendid idea. But in many jurisdictions the worker obtains such a small award that the courts have been almost forced to find ways to circumvent the workers' compensation laws.<sup>73</sup>

These problems with administrative compensation are in part pragmatic. There are legitimate concerns about transitioning to a realm of solely administrative schemes: loss of transparency and public accountability, and attendant corruption or agency capture.<sup>74</sup> Tort, by contrast, may be less vulnerable to this sort of corruption.<sup>75</sup> There are also transitional problems with moving from a tort system to an administrative one: similar litigants may receive drastically different treatment under tort and administrative recovery.<sup>76</sup>

But there is a further, not merely pragmatic, value that is more centrally related to our everyday intuitions about harm and risk, and that tort may have a unique capacity to access. Weinstein puts it as follows:

How should we address a mass societal problem . . . and give each individual who is hurt a sense that, yes, somebody has heard *me*, somebody has listened to *me*, somebody has tried to compensate *me*, somebody cares about *me*. The tort system, when it works at its best, accomplishes this result.<sup>77</sup>

Weinstein describes this phenomenon as one of “procedural justice,”<sup>78</sup> but it can also be seen as a matter of substantive justice. What is being afforded the plaintiffs in a well-working tort system is not just a fair procedure, but one that

73. WEINSTEIN, *supra* note 52, at 163.

74. *See id.* at 169 (“I am suspicious of administrative systems because of the way they have sometimes been manipulated. . . . It is the underlying suspicion of government—I say this with great respect for the people who are administering the Black Lung Benefits Act and the Vaccine Act—that gives us pause when we consider an administrative scheme . . . .” (citations omitted)); *see also* MARGOLIS, *supra* note 1, at 215 (discussing the danger that “an unchallengeable elite . . . will be vulnerable to corruption and distortion of perspective”).

75. *See* WEINSTEIN, *supra* note 52, at 169 (“[T]he tort system in this country, with all its costs and with its lack of coherence, has the advantage of being out in the open and independent of government abuse.”).

76. *See id.* at 165 (“Someone who sued and recovered a judgment yesterday might get a half-million or a million dollars for an injury. Someone with a similar injury, who may have had a case pending for five, six, or more years, might get a few thousand dollars from the new agency.”).

77. *Id.* at 167.

78. *Id.*

additionally expresses “recognition respect” for them as individuals.<sup>79</sup> In contrast, modern administrative schemes, for all their efficiency, can imply “impersonal business bureaucracies, the absorption of individuals within statistical categories, and related abstraction and dehumanization.”<sup>80</sup>

A further difference in the way that tort and legislative compensation approach risk involves one of the values that might flow from our self-conception and that has emotional power. This is the idea that a tortfeasor has committed a wrong, and that he, rather than the wider society, should provide the victim with compensation.<sup>81</sup> This element of second-personal recognition—of the tortfeasor acknowledging the wrong he has done the victim—is something that traditional tort, but not an institution-mediated administrative scheme, can provide.<sup>82</sup>

### C. *The Hybrid Approach: Mass Torts*

Mass tort is at the boundary between tort law and public law alternatives. Mass torts constitute a powerful regulatory tool in practice, but also require many of the same methodologies of a jury and judge that administrative regulation requires of an agency:

[C]laims of design defect and inadequate labeling ordinarily target shortcomings of *all* specimens of a product, and they call upon juries (or judges) to determine whether “the manufacturer’s design specifications . . . themselves create unreasonable risks” . . . . To decide such issues, juries (or judges) must engage in risk-utility balancing, a process analogous to the inquiry conducted by a regulatory agency—except that it occurs within the narrow confines of a single tort lawsuit, with its evidentiary limitations, backward-looking perspective, and exclusive focus on the plaintiff’s specific injury.<sup>83</sup>

Weinstein also sees a clear nexus between toxic tort and regulation: “As tort law is in fact administered in a mass tort case, with many cases in the hands of a few lawyers, we provide a quasi-public, quasi-administrative system.”<sup>84</sup>

However, the fact that mass tort has a foot in each camp does not yet show us the best way to improve it. Perhaps it should become more administrative in

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79. For the idea of recognition respect, see STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 123-24 (2006) (discussing the idea that taking someone seriously in procedural deliberations confers recognition respect on them).

80. STEINER, *supra* note 49, at 145.

81. See sources cited *supra* note 17.

82. See DARWALL, *supra* note 79, at 3 (“[T]he second-person standpoint [is] the perspective you and I take up when we make and acknowledge claims on one another’s conduct and will.” (emphasis omitted)).

83. ALAN E. UNTEREINER, *THE PREEMPTION DEFENSE IN TORT ACTIONS: LAW, STRATEGY AND PRACTICE* 6-7 (2008) (citing RESTATEMENT (THIRD) OF TORTS § 2 cmt. d (1998)).

84. WEINSTEIN, *supra* note 52, at 169.

nature, relying more on risk-utility calculations and scheduled damages. Or perhaps it should try to recapture some of the old advantages of the tort system: by adding more judges and law clerks, it can try to regain a more individualized perspective that recognizes each litigant's unique position.

### III. TORT'S INSTITUTIONAL VALUE

Can the different attitudes of tort law and public law toward everyday intuitions about risk be justified, or are they simply an accident of history? Does one attitude toward everyday intuitions have to be the right one? This Part will argue that tort and public approaches can coexist despite their different attitudes toward everyday intuitions about risk, and, in fact, that they *ought* to have different attitudes, because of their different institutional positions.

Consider the harming/not-aiding distinction discussed above. Tort law captures this distinction through its focus on the particular victim bringing the suit and his relation to the tortfeasor, while public law largely ignores it. Tort law can be right to recognize the distinction, but public law can be equally right to deny its importance. This is because of the different perspectives in which they operate: tort law operates in the sphere of individual interactions, while public law sees those same interactions from an institutional perspective. And the doing-allowing distinction may operate in the individual sphere differently from how it operates in the institutional one:

The lack of a washing machine by the family next door is not even in part my doing or my responsibility just because I could have bought them one. But I believe that such restrictions on what is usually called negative responsibility do not apply in the same way to our relations to one another through our common social institutions, especially an involuntary institution such as the state, together with its economic structure. We are responsible, through the institutions which require our support, for the things they could have prevented as well as for the things they actively cause.<sup>85</sup>

This difference between the institution and individual which Nagel delineates can both explain and normatively justify the different attitudes of tort law and administrative risk regulation toward everyday intuitions.<sup>86</sup>

From the perspective of tort law, doing and allowing are legitimately different: although tort is an institution, it is arbitrating interactions between individuals—it is deciding whether or not failing to provide someone else with a washing machine constitutes a tortious act worthy of compensation from the other party. Here, the fact that the compensation comes directly from the other party is crucial: tort law both reflects and generates a special, often adversarial,

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85. NAGEL, *supra* note 23, at 84.

86. Sunstein has explored the individual/institution difference in Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 721 (2005) (“[T]he [act/omission] distinction is least impressive when applied to government.”).

relation between tortfeasor and victim. The tortfeasor can legitimately see herself as burdened by the victim's individual needs, and the victim can see her compensation as flowing not just from her need in a cost-benefit framework, but from her entitlement not to be treated in certain ways.

In contrast, administrative risk and no-fault regulation involve an institution interposing itself between individuals. The costs paid by those being regulated, via taxes, fines, and fees, flow to the administrative state or to the no-fault compensation fund; and the compensation to victims of harm flows from the no-fault or administrative agency. There is no confrontation between individuals: the person paying does not see the receiver of compensation as burdening him, and the person compensated does not receive affirmation of her entitlement. As such, it is appropriate for risk regulation and no-fault, as social institutions creating institution-individual relations rather than arbiters of individual relations, to ignore the distinction between old and new harms.

#### A. Preemption, Institutional Perspective, and Inviolability

What should we do when tort law and administrative regulation both assert authority over the same risk? This situation is one where preemption is at issue. And, if the earlier claim that tort law and regulation should coexist because they have fundamentally different stances toward harm can form the foundation for an argument, can that administrative regulation preempt tort law where the two cover the same domain?

Recently, the Supreme Court found in a 6-3 decision that a label's compliance with FDA regulations on IV push, a method of administering certain drugs, does not preempt a state tort suit by a person who was severely injured by an incorrect administration of the drug.<sup>87</sup>

Justice Alito's dissent argues explicitly for the primacy of FDA regulation over tort law, in part because of agency determinations' indifference to, and tort's sensitivity to, the normative distinctions that cost-benefit analysis deemphasizes: "This case illustrates that tragic facts make bad law. The Court holds that a state tort jury, rather than the [FDA], is ultimately responsible for regulating warning labels for prescription drugs."<sup>88</sup> Alito also argued that:

By their very nature, juries are ill-equipped to perform the FDA's cost-benefit-balancing function. As we explained in *Riegel*, juries tend to focus on the risk of a particular product's design or warning label that arguably contributed to a particular plaintiff's injury, not on the overall benefits of that design or label; the patients who reaped those benefits are not represented in court. Indeed, patients like respondent are the only ones whom tort juries ever see, and for a patient like respondent—who has already suffered a tragic accident—Phenergan's risks are no longer a matter of probabilities and potentialities.

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87. *Wyeth v. Levine*, 129 S. Ct. 1187, 1191-92, 1204 (2009).

88. *Id.* at 1217 (Alito, J., dissenting).

In contrast, the FDA has the benefit of the long view. Its drug-approval determinations consider the interests of all potential users of a drug, including those who would suffer without new medical products if juries in all 50 States were free to contradict the FDA's expert determinations.<sup>89</sup>

The "tragic" nature of the facts of *Wyeth v. Levine*, contrary to Alito's claim, in fact provides a justification for the Court's decision to uphold the tort jury's decision. The jury's decision, precisely because it was motivated by the tragic facts of the case rather than the same sort of cost-benefit analysis that motivates regulation, did not tread on the proper institutional competence of the FDA. Had the court justified its reasoning on the basis of an FDA-like judgment, it might well have been appropriate to preempt its decision, since it would no longer be playing a complementary role (as the majority opinion argued) but simply a parallel one.<sup>90</sup> It is precisely the fact that the Vermont court was *not* conducting a cost-benefit analysis, but was instead considering everyday intuitions that cost-benefit analyses ignore, that made the refusal to preempt its judgment appropriate.

The putative reasoning for which Alito criticized the jury—its prioritizing the person before them over the interest of others who could benefit from a decision not to help that person—in fact accords with a powerful and widely shared intuition. This is the intuition that we cannot countenance a serious harm to one person in order to benefit others, or even to protect those others from harms. Consider, for instance, the philosopher Philippa Foot's famous example:

Suppose, for instance, that there are five patients in a hospital whose lives could be saved by the manufacture of a certain gas, but that this inevitably releases lethal fumes into the room of another patient whom for some reason we are unable to move. . . . The relatives of the gassed patient would presumably be successful if they sued the hospital and the whole story came out.<sup>91</sup>

The situation in *Wyeth* is intuitively highly parallel to Foot's example.

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89. *Id.* at 1229-30 (citations, internal quotation marks, and brackets omitted); accord UNTEREINER, *supra* note 83, at 9 ("Imagine a case where the driver of a car who suffers abrasions to his scalp in a head-on collision sues the manufacturer, alleging that the car was defectively designed because it lacked sufficient padding in the sun visor (where the impact occurred). A jury might well agree with that claim, and impose compensatory and punitive damages, without ever giving serious consideration to the additional accidents that would materialize, and the pedestrians and other drivers who would be injured, if the extra padding were used and the driver's visibility correspondingly reduced or impaired.").

90. *Wyeth*, 129 S. Ct. at 1204 (majority opinion) (holding that failure-to-warn claims like the plaintiff's do not "obstruct the federal regulation of drug labeling"); see also Gregory D. Curfman et al., *Why Doctors Should Worry About Preemption*, 359 NEW ENG. J. MED. 1, 1 (2008) ("Previous administrations and the FDA considered tort litigation to be an important part of an overall regulatory framework for drugs and devices; product-liability litigation by consumers was believed to complement the FDA's regulatory actions and enhance patient safety.").

91. PHILIPPA FOOT, *VIRTUES AND VICES* 29 (Oxford Univ. Press 2002) (1978). Foot's work has been highly influential in both philosophy and law; see, for example, CHARLES FRIED, *RIGHT AND WRONG* 50 n.\* (1978) (discussing Foot's hospital example).

And, as with the example above, there is a strong intuition that no one should cause one person to suffer ghastly injuries even if doing so might save others. While this intuition is a contestable one—cost-benefit analysis might reject it—it deserves some place in our reasoning about risk and harm. We may care more about living in a world where it will be impermissible to treat us in certain ways than we do about whether we are slightly more likely to be saved from harm.<sup>92</sup>

Because tort law does not, and should not, always undertake the same sort of risk-benefit inquiry as administrative law would, my approach to preemption is slightly different from that argued for by Professor Robert Rabin. Rabin also supports a principle of resolving conflicts between tort law and administrative decisions that centers on the reason for the decision, but believes it is appropriate for the tort system to conduct a risk-benefit inquiry rather than leaving such inquiries purely in the realm of administrative agency judgments:

In proposing a framework for addressing these tensions, based on focused examination of whether the agency directive is grounded in the same evidence-based risk/benefit inquiry as the tort process would entail, I join those commentators who seek to forge a path that recognizes the distinct benefits that both regulation and tort have to offer.<sup>93</sup>

Rabin seems to assume that both the tort system and the agency evaluation should engage in some sort of risk-benefit reasoning. As such, an agency evaluation appropriately grounded in risk-benefit calculation should not be revisited by the tort system. But if we grant tort a different scope from agency evaluation, the situation changes. While Rabin is right that tort should not be used “to revisit and supersede the regulatory approval process,”<sup>94</sup> it may be acceptable for tort to consider values that may never have—and perhaps should never have—been brought into the process of administrative agency regulatory approval. If the tort claim advances considerations outside the factors that a risk-benefit inquiry would consider, then it has reason—grounded in comparative institutional competence—to go forward. On this view, it can be acceptable for a tort verdict to conflict with administrative agency prescriptions, even though this conflict does not immediately justify revisiting the regulatory approval process: the tort judgment and the administrative guidance have different grounding justifications. The Respondent’s Brief in *Wyeth*, which argues that the tort judgment does not compel an administrative conclusion, might be interpreted as expressing a similar view: “common law is distinct from statutory and regulatory law because it fulfills primarily a compensatory function, rather than a regulatory one.”<sup>95</sup> Ultimately, this Note’s proposed view of *Wyeth* represents a counterpoint to Justice Alito’s: “tragic

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92. Kamm, *Non-Consequentialism*, *supra* note 17, at 386.

93. Robert L. Rabin, *Territorial Claims in the Domain of Accidental Harm: Conflicting Conceptions of Tort Preemption*, 74 BROOK. L. REV. 987, 1009 (2009).

94. *Id.* at 1002.

95. Brief for Respondent at 43, *Wyeth*, 129 S. Ct. 1187 (No. 06-1249).

facts” are the appropriate institutional setting in which tort law should intervene.

### B. *No-Fault, Escape into Torts, and Ex Post Compensation*

The intersection between legislative compensation and tort poses a problem that is in some ways analogous to preemption. Should we require someone to waive her right to tort compensation in order to enter a compensation system such as the vaccine compensation system? Studdert and Brennan believe that we should:

[F]or the model we envisioned to be financially viable it would require potential claimants to waive the right to sue, as occurred upon the implementation of the system in New Zealand. . . . Simply grafting no-fault on to the tort system would inevitably raise the overall costs of compensating medical injuries. It would also be likely to put the purported benefits of no-fault out of reach.<sup>96</sup>

In addition, some also argue that those operating within a legislative compensation system should not be subjected to tort liability, because freedom from tort liability enables them to plan more predictably, without the danger of jury caprice.<sup>97</sup>

However, everyday moral intuitions again seem to point against enforcing an agreement not to pursue a tort suit—or, at the very least, suggest that the tort system should be available to someone who suffers severe harm. First, it seems unfair that someone should have to suffer the bad consequences of their *ex ante* choices, particularly choices made without knowledge of what suffering the harm in question would be like.<sup>98</sup> This first explanation may rest on decision makers’ lack of knowledge, or potential irrationality, in making decisions about risk.

Additionally, however, it may be intrinsically inappropriate to enforce an *ex ante* agreement, even against someone who was fully knowledgeable about what she was getting herself into, when enforcing it would lead the person to lose out on something she would have had without the agreement. Frances Kamm poses such an example:

[A] community is deciding the rules for . . . [an] ambulance. More lives overall will be saved if it is agreed that when the ambulance is on its way to the hospital with many people whose lives are to be saved, it will not stop—even though it could—to keep from running over someone in its way. Should the community agree to this?<sup>99</sup>

Kamm believes that, even if the community agrees to this, the ambulance

96. Studdert & Brennan, *supra* note 1, at 234.

97. *Cf.* Huber, *supra* note 57, at 327 n.178 (discussing an interagency study criticizing tort law “for failing to develop a clear standard of responsibility”).

98. *See* Fried, *supra* note 62, at 150; *see also* Anderson, *supra* note 34, at 61-62.

99. F.M. KAMM, 2 MORALITY, MORTALITY: RIGHTS, DUTIES, AND STATUS 303 (1996).

would still be required to stop and not run over someone—even though that person might have agreed, *ex ante*, to be run over in such a situation: “Preserving . . . inviolability or personal sovereignty of a certain sort—may be more important than increasing each individual’s chances of survival or giving him the freedom to make any binding agreements that he wishes . . . .”<sup>100</sup> And this intuition is a compelling one in Kamm’s example. Even though the harm of not having access to tort compensation is not as obviously serious as the harm in Kamm’s case, it could be quite severe depending on how low the legislative compensation is, and how much better off one would have been under tort. It may be inappropriate to set up a system that requires people to waive their rights, or enforce an agreement against an unwilling person, under such circumstances. This intuition makes the option of allowing access to tort compensation for those who can show a more severe injury an attractive one.<sup>101</sup>

### CONCLUSION

The enduring value of laypeople’s moral intuitions leaves us with two main options when considering how to incorporate these intuitions into our decision-making processes. One is an amalgam of everyday intuitions with cost-benefit and risk-utility analyses in the sort of “hybrid” system that Weinstein proposes.<sup>102</sup> This could be done by enhancing the place of deliberative democratic institutions and public input in administrative decisions about risk.<sup>103</sup> Or it could be done by introducing more expert control and cost-benefit analysis into our system of tort law.<sup>104</sup>

But another, and I believe preferable, alternative is to allow both tort law and public law to continue to cover much of the same ground, using different approaches and paradigms. When tort juries’ or judges’ intuitively motivated decisions prohibit a substance that is allowed under cost-benefit calculations, this generates a situation that the legislature can—should it wish—explicitly settle by statute. This is in accord with our separation of powers: we have statutory compensation (a legislative function), administrative regulation (an

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100. *Id.* at 307.

101. See Rabin, *supra* note 66, at 703-10 (discussing options to seek tort relief under various legislative compensation statutes).

102. WEINSTEIN, *supra* note 52, at 168 (noting that “in the area of asbestos” we may be left with a “semijudicial administrative model”).

103. See, e.g., SHRADER-FRECHETTE, *supra* note 2, at 197-216 (arguing that to address problems with equity of risk, “carefully structured citizen participation” is needed); Anderson, *supra* note 34, at 63 (noting the need for “an institutional framework within which people can better express their values and choose among alternatives”).

104. Cf. Lisa Heinzerling, *Doubling Daubert*, 14 J.L. & POL’Y 65, 79 (2006) (noting that “courts in tort cases could *also* take a ‘preventive’ perspective” which would require “policy considerations about how to allocate the burden of scientific uncertainty between plaintiffs and defendants”).

executive function), and tort (a judicial function). And we can get the same advantages of resiliency and “hybrid vigor” by continuing this mixed system that we get in the larger government from our system of checks and balances. I agree with Weinstein that “[d]eterrence of disasters by tort law or an administrative or welfare compensation scheme is not sufficiently effective in protecting society against the dangers of technology,” and that we would benefit from regulatory law *as well as* tort law and no-fault compensation.<sup>105</sup> But we do not need regulatory law *instead* of tort law and welfare compensation.

Retaining tort law as part of a pluralistic system may, of course, leave us with some problems that we would not otherwise have. For instance, some argue that relying on tort law creates a system that bases recovery excessively on the talent of individual lawyers rather than the strengths of the individual’s claims.<sup>106</sup> Others worry that, even if having one’s story heard generates a sense of dignity, the adversarial process can generate serious dignitary harms.<sup>107</sup> In a mass tort context, an aggregate settlement can fail to provide participants with recognition or respect.<sup>108</sup> And, of course, the tort system imposes substantial financial and administrative costs on society, such as the broad social cost of medical malpractice claims. Nonetheless, its unique advantages are worth preserving, and this is so even if these advantages inescapably involve some of the above disadvantages. The value of pluralism will outweigh its disvalue.

What Sunstein ultimately proposes is a sort of moderate technocracy—a system centered around expert judgments, but with room for popular opinion.<sup>109</sup> This Note’s proposal is that we adopt a moderate and pluralistic populism, where everyday intuitions are central, but expert judgments are also important. Under a moderate populism, not all everyday intuitions should be incorporated into our accident law. Mistakes about facts, for instance, should not be so incorporated. And there are good ways to differentiate between mistakes about facts and differences about value.<sup>110</sup>

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105. WEINSTEIN, *supra* note 52, at 170.

106. See Gillian K. Hadfield, *Don’t Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 56 DEPAUL L. REV. 401, 420 (2007) (raising a concern about “the potential for legal outcomes to be determined by resources and not reason”).

107. See MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE 2-3 (2009) (“The [adversarial] process is regarded as antagonistic and confrontational, with primacy being accorded to negating or destroying the opposition’s case rather than to settling the dispute.” (citation omitted)).

108. See, e.g., Samuel Issacharoff, Commentary, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1930 (2001) (criticizing “Sunday-school oratory about the importance of the rights of individuals standing before the courts” given “[t]he reality . . . that the economics of litigation and the sophistication of the bar in this area have combined to leave far behind such nostalgic renditions of an Aristotelian world of simple dispute resolution”).

109. SUNSTEIN, *supra* note 1, at 294-95.

110. Separation of matters of fact from matters of value is one appealing option. See

Now-Justice Breyer asserted that “[w]hatever its merits and problems, I do not believe the tort system can serve as a substitute for government regulation.”<sup>111</sup> This Note has examined one of the tort system’s merits—its ability to give our everyday intuitions a seat at the table in our national conversation about risk. This merit does not justify replacing regulation with tort, as Breyer fears, but it amply justifies keeping tort a continuing part of our approach to accident law.

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Foster et al., *supra* note 61, at 139 (discussing a “trifurcated” trial where the question of whether a drug caused a disease was separated from whether liability existed and what, if any, damages were owed the plaintiff).

111. BREYER, *supra* note 1, at 59.

