Introduction

The goal of promoting a healthier and safer society — and specifically law's role in achieving this goal — is the subject of a long-lasting debate in legal, political, and social scholarship. The articles collected in this issue join this debate and contribute to its development by rethinking, reconceptualizing, and suggesting novel answers to its core questions: On which issues should policymakers and lawyers focus? Which policies and strategies are the most efficient and would incentivize doctors, drivers, employers, lay people, and so on towards safer and healthier conduct and behavior? What are the normative bases for such policies and strategies? Not surprisingly, the answers to these questions are diverse. Quite interestingly, what emerges from the articles in this issue is that this diversity is essential to promoting the goal of a healthier and safer society.

The diversity is apparent at several levels. First, it is apparent in the variety of relevant issues. Some articles deal with the well-known problem of smoking and the strategies that have been used in order to reduce its rates. Others deal with the relatively new — but nonetheless stressing — problem of obesity and the public-health risks it bears. Some articles tackle the issue of medical malpractice and analyze the influence of different strategies on doctors' and hospitals' deterrence. Others reconsider policies regarding road accidents, products safety, fire safety, food safety, and safety in the workplace. The diversity is also apparent in the variety of strategies that are discussed. Some articles examine the ways in which traditional tort law promotes health and safety, while suggesting some innovative doctrines and considerations in this area. Others deal with the formulation and implementation of federal regulation, and underscore the significant influence of regulation — both public and private — on health and safety. Some articles deal with promoting health and safety via adjudication and dispute resolution, while others focus on the formation of policies, regulations, legal doctrines, and laws.

Differentiation may be found among the strategies not only with regard to their substance, but also with regard to their normative basis, characteristics, and application. For instance, some articles point to the need for a common normative basis for the various strategies, while others point to the inevitable normative difference between them. Some strategies are applicable to several and various health- and safety-related problems, while other strategies, which were successful with regard to a certain problem, need to be changed and adapted when applied to another problem. Some strategies are embedded

within private law and depend upon the legal action of private people and entities. One — quite significant — kind of private action is the proliferation of private supervision, regulation, and certification, which can substitute, complement, or constitute the basis for similar supervision, regulation, and certification by public agencies. These variations among strategies point to a hybrid conception of law and regulations as a crucial instrument for promoting a healthier and safer society.

The issue is divided into four parts. The first three articles are grounded in the tradition of promoting health and safety via tort law. The next two articles provide a bridge between torts and federal regulation. Thereafter, seven articles discuss various aspects regarding the formation and implementation of public, private, and hybrid regulation. Finally, the last two articles in this issue deal with the influence of adjudication and binding arbitration on the promotion of a healthier and safer society. A few articles demonstrate the abovementioned diversities quite well, when tackling various issues and various strategies, and specifically by showing that in some areas implementing several strategies together yields better results than implementing only one strategy. But the diversity and its advantages are most apparent when considering the collected articles as a whole.

Ehud Guttel and Shmuel Leshem open the part on torts, discussing the case of multiple injurers and the distortion of incentives to take precautions under a strict liability rule in such a case. The authors highlight the tension between equity and efficiency. While according to the first principle liability should be cast proportionally to each injurer's relative level of care, the authors show that proportional allocation leads to inefficient results. When the precautions of both injurers are complements they induce excessive care-taking, and when the precautions are substitutes they induce free-riding and incentivize the potential injurers to take insufficient care. Guttel and Leshem prove this argument by applying an economic analysis to the various possible cases of multiple injurers: complement vs. substitute precautions, different levels of costs of care, and simultaneous vs. sequential-move game. Guttel and Leshem's argument should be carefully considered when legal scholars, legislatures, judges, and policymakers formulate the allocation of liability between injurers.

Avihay Dorfman explores in his article the doctrine of assumption of risk. This doctrine, which exonerates the defendant of liability when the plaintiff willingly and knowingly assumed the risk, has been widely criticized and thus underused despite its intuitive appeal. Dorfman explores two kinds of critiques — one doctrinal and the other philosophical — and shows that these critiques lean on a falsified conception of assumption of risk. Moreover, the author points to the historical roots of the deep resentment towards this doctrine,

namely the identification of assumption of risk with the notion of *laissez-faire*. Dorfman carefully draws a distinction between the assumption of risk and *laissez-faire*, and clears the path for a liberal account of assumption of risk. Under this account, some basic requirements need to be met in order to apply the assumption of risk in a specific case: the victim should have a genuine possibility of exiting the hazardous situation (thus staying in it implies her preference of risk); the victim should be informed with respect to the nature of the risk, or else she cannot be considered to have willingly assumed it; the activity should be necessary (rather than optional or leisure-related); and there should be a sufficient variety of other options other than the hazardous one. These requirements are demonstrated in the article in the context of the risk that stems from consuming junk food. Adopting this format of the doctrine of assumption of risk is nested in the liberal respect for individuals' preferences, and promotes a just application of tort law.

Robert Cooter and Ariel Porat tackle the under-theorized issue of lapses of attention. Despite the fact that lapses are one of the major causes of accidents, only few scholars have thus far dealt with their implications in tort law. Moreover, courts rarely allow defendants to prove that the injury was caused due to a non-negligent lapse of attention and not due to a careless behavior per se. In other words, liability is cast in many instances upon cautious people who lapsed and caused injuries, notwithstanding their efforts to take reasonable precautions. This tendency of courts is not only unjust but also inefficient, as it encourages drivers, doctors, manufacturers, enforcement agencies, etc., to prefer activities that are less likely to be affected by lapses, but are also less socially desirable. Cooter and Porat therefore suggest that defendants should be allowed to prove that they were mostly cautious and took "second-order precautions": precautions that reduce (albeit do not nullify) the probability of lapses. This kind of defense, according to the authors, has several advantages; in particular, it prevents potential injurers from preferring less socially desirable activities, and it encourages potential injurers to record the second-order precautions they take and reveal them in court. Finally, the authors discuss the means of implementing this defense, highlight several doctrinal problems, and suggest initial solutions to be further researched.

On the border between torts and federal regulation, Catherine M. Sharkey analyzes the American preemption cases: cases in which courts had to determine whether private parties could invoke legal proceedings in state courts regarding issues that are subject to federal regulations. Under the assumption that federal agencies are the most adequate bodies for formulating regulations — specifically health- and safety-related ones — it would be inefficient if state courts apply other standards, be they more lax or stricter than the federal standards. Consequently, throughout the last decades federal courts have tended

to narrow states' ability to override federal regulations. Sharkey points to a second wave of preemption cases that has recently arisen — dealing with the enforcement of the standards, rather than with formulating them. In these cases federal courts dismissed private plaintiffs' claims brought before state courts, since they undermined the enforcement of regulations by federal agencies. According to this aspect of the preemption rule, only when plaintiffs can prove that the claim complements — and does not undermine — the federal enforcement, will the suit stand. In order to determine this question, Sharkey suggests a model of a tort-agency partnership, in which state courts should consider the input of federal agencies regarding the question of preemption in the specific context. State courts, however, need not accept the agencies' input as is, but rather should scrutinize it before determining whether the preemption rule applies to the cases before them or not.

Mark A. Geistfeld explores another interrelation between torts and regulation by examining the entitlement to physical security, which serves as the baseline for evaluating the efficacy of environmental, health and safety regulations. Geistfeld contends that if the government wants to protect the health and safety of individuals, which are threatened by the risky behavior of others, there has to be substantive consistency among the different departments of law (e.g., administrative regulation, criminal law, and tort law). This consistency depends upon the unity of the underlying entitlement to physical security. Since in the American legal tradition this entitlement is deeply embedded in the common law of tort, the common law, according to Geistfeld, should serve as the normative basis across all legislation and regulation dealing with public health and safety. Geistfeld highlights, using several examples, the advantages of the common-law tort entitlement, and shows how a unified common law-based analysis enables identifying in each context the basic entitlements, the right holders, and the duty holders, thus leading to coherent formulation and application of health- and safety-related laws and regulation.

The third part, dealing with regulation, opens with Peter H. Schuck and Steven Kochevar, who focus on the concept of regulated negotiation (reg neg) — a procedure of rule-making that was developed in the United States during the 1980s and later adopted by the Congress and incorporated into American administrative law. Contrary to the adversarial approach that characterizes the American rule-making procedures, reg neg is based upon the negotiations between multiple and various stakeholders. Schuck and Kochevar explain the foundations of reg neg and present the prominent critiques made against it. First, it is often argued that reg neg grants excessive power to the regulated parties in a way that undermines the public interest. Second, empirical evidence challenges the efficiency that is attributed to reg neg by its supporters; mainly, it has been shown that the negotiations do

not necessarily produce better regulation in a shorter time, compared to the common notice-and-command rulemaking. The authors respond to these critiques. They emphasize the participatory opportunities provided by neg reg, which strengthen its democratic nature rather than negate it; and they show that in specific cases and circumstances — mainly when the issue at stake is relatively narrow and when there is a definite number of stakeholders — reg neg does result in better and more efficient regulation. Schuck and Kochevar conclude that reg neg is a relevant and viable alternative for notice-and-command rulemaking in certain issues and circumstances and should be used more often and more widely.

Another angle of regulation formation is presented by Saul Levmore, who suggests an alternative theory for the motivations for regulation. Regulation is commonly understood as a means to control negative externalities or as a paternalistic intervention. Contrarily, Levmore argues that legal interventions — health and safety regulation in particular — can be interpreted as a means to solve internality problems caused by time-inconsistent preferences and collective action problems. Legal interventions, according to the author, are best understood as an outcome of political coalitions between those who have self-control problems and seek to help their future selves, and third parties who directly or indirectly benefit from the intervention. Since it is quite hard to form such coalitions, governmental regulation is needed and tends to be widely accepted by the various groups. Levmore demonstrates this theory in two health-related issues: smoking and obesity. Although both issues have some similar characteristics, Levmore shows that different strategies are suitable for each. Specifically, while political coalitions and subsequent governmental regulation are useful in the case of smoking, their application to the case of obesity does not yield the same results; a more suitable solution for obesity, according to Levmore, is private contracting for self-control.

Coalitions are also found in Mariano-Florentino Cuéllar's article, which applies an institutional analysis to regulations formation (and their implementation), and focuses on the concept of partial autonomy of health- and safety-related federal regulatory agencies. The concept of partial autonomy relates to the extent to which federal agencies can operate free of external political and economic pressures and interests. *Vis-à-vis* the "capture theory," which negates the autonomy of agencies, Cuéllar shows that although no agency can operate in complete independence and without any influence by external forces, each agency can gain a certain level of partial autonomy. The author develops a model that describes how agencies reach such autonomy by forming internal and external coalitions with politicians, NGOs, and other stakeholders. Such coalitions enable the agencies to formulate regulations and implement them, so in this sense, the external forces may strengthen the

agencies' autonomy rather than weaken it. Cuéllar applies his model to three case-studies — tobacco control, food safety, and disease prevention — in which agencies used their partial autonomy in order to advance significant and most influential policy innovations.

Robert Rabin provides an updated account of the prominent strategies used to limit smoking in the United States — most of which are public strategies and implemented by public entities: taxation, public place restrictions, information dissemination, tort litigation, and promotional restrictions. Some of these strategies had been quite successful in the past, but all were left with limited directions for developing and being implemented in the present and in the future. Against this background, Rabin points to new effective initiatives that focus on curbing youth smoking. Taking New York City as an example of a successful municipal campaign against smoking in general and youth smoking in particular, the author examines the various current strategies, such as education, taxation, and the enforcement of the ban against selling tobacco to teenagers. Nonetheless, when considering whether the same strategies can be effective in solving other public-health-related problems, Rabin is quite skeptical. For example, the most successful antismoking strategies may not be applicable to obesity, despite some strong similarities between both problems.

On the private side of the regulative arena, Timothy Lytton discusses private certification, its benefits in comparison to public certification, and some key conditions for its success. Lytton analyzes two case studies that demonstrate successful private certification: fire safety and kosher food. Following the illustration of the unique environment in which private certifiers were able to improve the quality of certification, the author turns to discussing the key factors that led to the effectiveness of these endeavors. Among them are vigilant consumers, the concentration of market power in the hands of a few strong and highly skilled certifiers, interdependence among participants in the certification system (specifically when production has several stages), a common sense of mission among certifiers and producers, and tight social and professional networks among them. The author also presents some flaws that are often attributed to private certification, such as the risk of a race to the bottom, inefficiency due to personal ties and private interests, and lack of public transparency. Nonetheless, he shows that in the analyzed case studies these flaws have not been realized. Private certification, therefore, can be as efficient as the public kind — and sometimes even more so.

Stephen D. Sugarman focuses on strategies that can be implemented by both private entities and public agencies. By discussing a major issue of public health concern — the increasing actualization of preventable injuries and harms to patients in hospitals — Sugarman contends that neither current command-and-control regulatory policies nor malpractice doctrines under tort

law have succeeded in making hospitals safer. Instead, he offers two alternative outcome-based strategies that focus on reducing the number of adverse events in hospitals rather than dictating a set of specific uniform precautions. One suggested strategy is "required disclosure," which would obligate hospitals to publish their disclosed safety records and lead to an efficient competition between hospitals. The second strategy is "performance-based regulation," which offers financial incentives to hospitals if they achieve required safety levels and imposes financial sanctions if they do not achieve it. The article addresses both the benefits and the concerns of these proposed strategies.

David Freeman Engstrom provides an example of hybrid public-private regulation by exploring the issue of whistleblowing. Whistleblowing is the surfacing of information regarding illegal conduct of corporations in various issues, such as fraud, workplace safety, environmental protection, and so on, either by granting awards to the informers (bounty regime) or by enabling them to file private suits against the wrongdoers (*qui tam* regime). These schemes can be used as an enforcement measure aimed at promoting a healthier and safer society, and have been gaining growing academic attention. Nonetheless, thus far they have been used to a limited extent and in a limited scope of issues (specifically with regard to fraud). Engstrom maps the existing schemes and their characteristics, and highlights the main challenges faced by the schemes: determining the amount awarded so there will be enough — but not too many — reports on misconducts, and balancing between the advantages of private enforcement and the risk of losing public control over misconducts. The author then introduces a new normative model, which can serve as a blueprint for developing suitable whistleblowing schemes for each issue and may lead to the expansion of the use of whistleblowing. According to Engstrom's model, each issue is differently located on a grid that measures the directness of the harm and the determination of the legal source that forbids the harm. The location of each issue determines which whistleblowing scheme would be more efficient, i.e., would induce the exact quantity and quality of reports on misconducts and properly balance between private enforcement and public control.

David Rosenberg opens the last part of this issue, which deals with adjudication and dispute resolution. Rosenberg presents a novel idea aimed at transforming the legal procedure: simple random sampling in cases of multiple lawsuits against one defendant. For example, when a hundred different lawsuits are filed against a specific defendant, only two of them — randomly sampled — would be tried (or settled), and the amount to be paid by the defendant would be set at a hundred times the average outcome of both sampled cases. According to Rosenberg, this method would lower overall social and litigation costs, since only a small percentage of cases would be

tried. In addition, it would not change the motivations of plaintiffs to file (or not to file) suits, or their motivations to settle (or proceed with the trial). In other words, it would save litigation costs without distorting the current equilibrium that determines the number of lawsuits that are filed. The author also shows that when considering the prominent goals of torts, such as injurers' deterrence and plaintiffs' incentives to take precautions, the sampling method produces the same results as case-by-case adjudication. Therefore, Rosenberg concludes that this method is more efficient and more socially desirable than the regular case-by-case adjudication. Bearing this conclusion in mind, Rosenberg raises a few possible objections to sampling-based adjudication and offers preliminary responses to them.

Myriam Gilles closes the issue and points to the absence of mandatory arbitration clauses from contracts between doctors and patients. While such clauses are becoming more and more prevalent throughout several fields, including nursing homes and assisted-living facilities, the field of medical malpractice claims remains arbitration-free. The author presents several traditional explanations for this anomaly, but refutes them by showing they are largely irrelevant and unconvincing. In addition, she points to two recent trends: courts' increasing willingness to uphold arbitration clauses and the rollback of tort reforms that had made adjudication more favorable to caregivers. These trends, the author estimates, will eventually lead to the adoption of mandatory arbitration clauses by the medical malpractice field. Gilles concludes by suggesting that the malpractice insurance companies are likely to be the ones leading the drive to incorporate arbitration clauses in medical industry contracts.

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