SELF-CORRECTION MECHANISMS IN THE REGULATORY SYSTEM

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The Titanic, when it set sail, carried 2,227 passengers.[1] Nearly 1,500 died when the Titanic struck an iceberg and sank.[2] At the time, the British Board of Trade's lifeboat standard called for enough space for only about 825 people.[3] This "disgracefully out of date" standard was so low because it was based on the tonnage of the ship without any regard to the total number of passengers the ship could carry.[4]

The story of the Titanic yields two observations about the tort and the regulatory system: (1) we need a strong regulatory system to prevent tragedies like the one that occurred on the Titanic; (2) because the regulatory system itself is imperfect and cannot adequately discipline the marketplace, the tort system must provide remedies for those who are injured. Despite stories about the abuse of the regulatory system or the tort system on the margins, no one would propose doing away with either. This Article defends these systems as they currently exist.

Both the tort and the regulatory system deal with risk allocation and we must examine risk in terms of choice. Although adults may choose to bear the risks that come with smoking cigarettes, the risk that requires regulation is different than the risk one voluntarily assumes. Government should regulate to protect us from those risks over which we have no control. It is true that there are irrational regulations, and that the tort system is susceptible to abuse, but the mechanisms necessary to correct errors in the systems already are in place. For the tort system, the principle constraint is the evolutionary process of the common

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1. *See* PAUL HEYER, TITANIC LEGACY: DISASTER AS MEDIA EVENT AND MYTH 2 (1995).

2. *See id.*

3. *See* MICHAEL DAVIE, THE TITANIC: THE FULL STORY OF A TRAGEDY 65 (1986).

4. *Id.* at 65, 67.

law, which guarantees that each change in the law is subject to careful deliberation and percolation through the courts. For the regulatory system, it is the twin checks of executive oversight or the regulatory agencies and the vigilance of reviewing courts. Thus, there is no force, in my view, to the argument that the systems are broken and in need of wholesale reform.

Nonetheless, there is real foment in Congress to restructure drastically the administrative process by requiring agencies to prepare extensive cost-benefit and risk analyses as a precondition to publishing even a proposed rule.[5]

Consider two proposed solutions for getting more rational risk regulation. First, for example, bills pending in both houses of Congress[6] would require the Food and Drug Administration (FDA) to do a risk assessment[7] on lead toxicity for children before the FDA could simply require warnings on iron-containing products. For at least a century, we have known the adverse effects of iron poisoning in children. What sense does it make for the FDA to do a risk assessment to conclude what it already knows—that children ought to avoid ingestion of iron tablets?[8] When an agency is considering regulating a substance for which there is very little human epidemiological evidence, such as ethylene oxide,[9] it must use the best tools available to estimate the actual human risks. The problem with the bills that are pending in Congress is that the extensive analytical burdens, such as cost-benefit analyses that include all the indirect costs,[10] will enmesh an agency in all sorts of questions beyond its competence. Agencies must perform reasonable analytical tests, but there is real danger of ossifying agencies by saddling them with burdensome

5. For a more comprehensive treatment of this issue, see David C. Vladeck & Thomas O. McGarity, *Paralysis by Analysis: How Conservatives Plan to Kill Popular Regulation*, AM. PROSPECT, Summer 1995, at 78.

6. *See, e.g.*, H.R. 1742, 104th Cong., 1st Sess. (1995); S. 773, 104th Cong., 1st Sess. (1995).

7. Risk assessment is a device that is used routinely by agencies when they are regulating risks for which the hazard is unknown.

8. *See* 60 Fed. Reg. 27,321 (1995) (announcing an FDA proposal for warning labels on aspirin-containing products); David Woodward, *Recent Multistate Enforcement Initiatives: Prescription Drug Promotional Practices*, 50 FOOD & DRUG L.J. 295, 296 (1995) (stating that the leading cause of poisoning injuries in children is inadvertently taking their parents' vitamin supplements which contain iron).

9. Ethylene Oxide (EtO) is a sterilant used to sterilize hospital equipment and in other industrial settings. OSHA performed an extensive risk assessment on EtO in the course of its rulemaking on EtO. *See* 49 Fed. Reg. 25,734 (1984).

10. *See* H.R. 1022, 104th Cong., 1st Sess. (1995).

and unnecessary analytical requirements. The locus of the dispute is not whether risk assessments can be valuable, but whether an unnecessary risk assessment should stand in the way of a much-needed regulation, such as a rule to protect children from iron poisoning.

Second, Professor Sunstein has proposed greater information as a solution.[11] But information by itself, however worthwhile, is not enough. For example, the federal hazard communication standard is designed to inform workers of what toxic substances they are exposed to in the workplace.[12] But information alone will not protect Appalachian miners from too much diesel exhaust in the mines; neither does it give the miner the economic and social mobility to change jobs if his job is too risky. Giving information to workers without the political or economic clout to act on it may be benign, but it is not meaningful help. Another problem with information is its source; most of the information for agency cost-benefit analyses comes from industry. Every retrospective study done on these cost estimates has shown that they typically are overstated two- or three-fold, not simply because industry has an interest in overstating them, but because the estimates do not take into account the developments that are going to occur as a result of the imposition of the standard.[13] In short, although information certainly is a normative good to be encouraged, it is not a complete solution to our regulatory problems.

Now consider the current biggest failure of the tort system: adequately supervising mass class action settlements. When I went to law school, class action devices were a plaintiffs' tool. They were a way of aggregating small claims and allowing plaintiffs to proceed in a case that would otherwise not be economically viable. And most class actions today fit that mold and are worthwhile. But today, the class action has become the darling

11. *See* Cass R. Sunstein, *Democratizing America Through Law*, 25 SUFFOLK U. L. REV. 949 (1991); Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653 (1993); Cass R. Sunstein, *Using Common Law Principles in Regulatory Schemes (With a Note on Victimology)*, 19 HARV. J.L. & PUB. POL'Y 651 (1996).

12. *See* 40 C.F.R. § 721.72 (1996). The hazard communication standard has been applied to inform workers in several industries. *See, e.g.*, 29 C.F.R. § 1915 (1996) (longshoring); 29 C.F.R. § 1926 (1996) (construction); 30 C.F.R. § 56 (1996) (metal and non-metal mines); 30 C.F.R. § 77 (1996) (coal mines).

13. *See, e.g.*, U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH, OTA-ENV-635 (1995).

of industry. When a company has a defective product on its hands, it wants a class action to be filed by an opportunistic plaintiffs' attorney with whom the company can enter into a quick, cheap settlement so it can get rid of its liability and go forward.[14] Our lawyers at Public Citizen are in courts around the country fighting inappropriate mass tort class action settlements, and we have had a fair amount of success. In the GM pickup truck case,[15] the Third Circuit threw the settlement out on the strength of our objections. In the Ford Bronco case, the district court rejected a class action settlement because there was no nexus between the relief sought in the complaint, and the minimal relief provided for in the settlement.[16] And with the first round of these cases now reaching appellate courts, it is likely that the circuit courts will follow the Third Circuit's lead in *GM Trucks* and lay down rules requiring district courts carefully to scrutinize the settlements to ensure that they confer real value on the plaintiffs, and that the attorneys' fees bear a reasonable relationship to the benefit conferred on the class.[17] The fact that the judicial system is now responding to the problem of abusive class action settlements to ensure that real justice is done is a testament to the ability and willingness of the judiciary to engage in self-correction to guard against irrational results.[18]

So my final submission is yes, there are problems. No system, particularly a system of justice as large and complex as ours, ever is free from problems. But both the common law and the regulatory system have their own effective methods of self-correction. The common law system of evolutionary justice provides a stabilizing force in our tort system. And, as for our regulatory system, we have agencies headed by presidential appointees who have political imperatives that check irrational rulemaking, and, as a backstop, we have judges who will throw out arbitrary or capricious rules. We have industry groups who will petition agencies

14. *See, e.g.*, Georgine v. Amchem Products, Inc., 47 F.3d 1160 (3rd Cir. 1995).

15. *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3rd Cir. 1995).

16. *See In re* Ford Motor Co. Bronco II Prods. Liab. Litig., Civil Action MDL-991 Section "G", 1995 U.S. Dist LEXIS 3507 (E.D. La. Mar. 15, 1995).

17. In both the *GM Truck* and *Ford Bronco* decisions, the courts cited the exorbitant attorneys' fees sought by plaintiffs' counsel and the lack of objection by the defendants as a signal that the settlement was not fair.

18. *See* David C. Vladeck, *Trust the Judicial System to Do Its Job*, L.A. TIMES, Apr. 30, 1995, at M5.

and sue them if they do not repeal rules that make no sense. The regulatory system is not perfect, but it is like Churchill's observation with democracy: it may be imperfect, but it is the best system we have, and every day our lives depend on it.