

Defending Courts: A Brief Rejoinder to Professors Fried and Rosenberg

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Harvard Professors David Rosenberg and Charles Fried have presented a provocative, sweeping critique of the theoretical foundations of tort liability that leaves virtually no aspect of our current tort system untouched, or perhaps more accurately, unscathed. Their article throws down the gauntlet to defenders of traditional tort law. For instance, Rosenberg and Fried take aim at the jury system, arguing that *ex post* liability rules created by juries are inefficient and should be replaced, whenever possible, by *ex ante* liability rules set by legislative bodies.¹ And they attack the idea that compensation plays a legitimate role in structuring our tort system. In their view, in this era of near-universal access to insurance, deterrence is the only legitimate basis for creating rules of liability.²

Despite my trepidation in picking up the gauntlet and doing battle with two eminent scholars, I take issue with much of their thesis, so much so that I began my oral remarks by saying “so much to disagree with, so little time.” But I was not asked to engage in a point-by-point debate over theory. Nor was I called upon to challenge their view that the widespread availability of insurance somehow justifies dispensing with concerns over compensation in setting liability rules.

Rather, I was asked to comment *briefly* on their article. With that task in mind, I want to explore the central question posed in Rosenberg and Fried’s article, namely, which institution of government ought to have the principle responsibility for setting rules governing liability for accidents and product defects? Should it be the courts, through jury determinations? Or should it be legislative bodies, through legislation or the delegation of decisional authority to administrative agencies? Rosenberg and Fried argue at length that courts are poorly suited to establish liability rules, and they cite a variety of reasons to support their conclusion that, ideally, the rule-setting task should be the

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¹ Charles Fried & David Rosenberg, *Presentation*, 31 SETON HALL L. REV. 625 (2001).

² *Id.* at 629.

province of legislative bodies.³ In their view, information is the *sine qua non* of efficient standard setting.⁴ What tips the balance against the courts, Rosenberg and Fried argue, is the inherent advantage legislatures and administrative agencies have in gathering relevant information.⁵

Measured by the information-gathering resources available today to Congress, regulatory agencies, and the courts, Rosenberg and Fried have it backwards. Courts are much better equipped to gather and assess information. The civil discovery process gives litigants broad access to information. Parties in litigation tend to be highly motivated to discover any information that may aid their cause, and the adversary process enables parties to test the reliability of the information they acquire. Furthermore, judges and juries have a wide array of resources available to assist them in sifting and evaluating even the most complex scientific or technical information.

Congress, on the other hand, is institutionally hamstrung in engaging in the systematic acquisition of information. For one thing, it is wrong to think of Congress as a monolithic institution. It is not. It is a collection of dozens of committees in both Houses, each of which operates largely as an independent fiefdom, with its own leadership, staff, and priorities. Rarely is there sustained coordination between committees in information gathering.⁶ There is no central repository for the information that congressional committees compile, so multiple committees often plow the same ground without access to the work-product generated by their counterparts. Individual members have no right of access to Executive Branch records and no authority to compel non-governmental bodies to provide information.⁷ Although most congressional committees have subpoena authority, subpoenas

³ *Id.*

⁴ *Id.* at 629-30.

⁵ *Id.* at 630.

⁶ See generally HOUSE RULES COMM., CONGRESSIONAL OVERSIGHT: A "HOW-TO" SERIES OF WORKSHOPS, Conducted by the Congressional Research Service (Comm. Print 1999). Indeed, even in the most high-profile situations, it appears that there is little coordination between committees. See, e.g., Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc) (denying the Senate Select Committee's motion to enforce its subpoena for certain Nixon tape recordings on the ground, among others, that the request was cumulative inasmuch as the same matter was under investigation by the House Judiciary Committee, which had already obtained copies of each of the tapes sought by the Senate Committee).

⁷ See, e.g., Leach v. Resolution Trust Corp., 860 F. Supp. 868 (D.D.C. 1994) (rejecting Congressman Leach's effort to obtain access to information relating to a failed savings and loan); Lee v. Kelley, 99 F.R.D. 340 (D.D.C. 1983), *aff'd sub nom.*, S. Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984) (rejecting Senator Helms' effort to intervene in litigation to gain access to information); see also DAVID KESSLER, A QUESTION OF INTENT: A GREAT BATTLE WITH A DEADLY INDUSTRY 154, 289 (Public Affairs 2001) (former FDA Commissioner noting that on occasion he directed his staff to ignore congressional demands for information relating to the FDA's investigation of the tobacco industry).

may generally be issued only by the committee chair or by a majority committee vote, and they are notoriously difficult to enforce.⁸ Even when a congressional committee receives information, the committee has no means to verify the information's accuracy and congressional staffs frequently lack the expertise to evaluate complex or technical information.

Administrative agencies are also severely limited in their information-gathering ability. Most significantly, many agencies have no subpoena power and therefore cannot compel the submission of records or the testimony of outsiders.⁹ The Paperwork Reduction Act¹⁰ also places very strict limitations on the information gathering ability of agencies. Agencies may not even send surveys to ten or more regulated entities without first securing the permission of the Office of Information and Regulatory Affairs at the Office of Management and Budget. Most agencies have small staffs, which further hampers their ability to engage in substantial information-gathering activities, particularly on multiple fronts. The FDA, which is responsible for regulating one-quarter of the American economy, employs fewer than 10,000 people

⁸ Congressional subpoenas are to be enforced pursuant to the procedures laid out in 2 U.S.C. § 192 (1994), which requires that civil or criminal contempt proceedings be brought to compel a recalcitrant witness to testify or to turn over records. *See also id.* § 194 (establishing a procedure by which Congress may refer contempt cases to United States Attorneys, who, of course, are part of the Executive Branch). There is a statute nominally authorizing the Senate to bring litigation to enforce its own subpoenas, 2 U.S.C. § 288d (1994), but the validity of that authorization has yet to be tested in court. Not surprisingly, only a handful of contempt proceedings have been brought under these provisions. There is also a statute requiring executive agencies, on request of any five members of the Senate Committee on Government Affairs or any seven members of the House Committee on Government Reform, to submit information, so long as the information relates "to any matter within the jurisdiction of the committee." 5 U.S.C. § 2954. The executive branch has long contended that this provision is not enforceable. *See, e.g.*, Executive Privilege, Secrecy in Government: Hearings on S. 2170, S. 2378, S. 2420 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 94th Cong. 116-17 (1975) (statement of Antonin Scalia, Assistant Attorney General). Litigation is underway by 16 members of the House Committee on Government Reform to test the enforceability of this provision. *Waxman v. Evans*, Civ. Action No. 01-04530 (LGB) (C.D. Cal.).

⁹ The FDA, for instance, has no subpoena authority. Although the agency does have the power to examine business records during the course of a factory inspection, 21 U.S.C. § 374 (1994), that power is highly circumscribed (for example, it does not reach third parties) and is not a substitute for subpoena authority. *See KESSLER, supra* note 7, at 235 (observing that the tobacco industry was able to hobble the FDA's investigation into its practice of manipulating the nicotine levels in cigarettes because the FDA could not subpoena industry documents or compel the testimony of industry employees and consultants).

¹⁰ 44 U.S.C. § 3501 (1994). Although the stated purpose of the Paperwork Reduction Act is to minimize the paperwork burden the federal government imposed on individuals and small businesses and to increase efficiency within the federal government, *id.*, it seeks to achieve those goals by placing strict limits on the ability of agencies to acquire information. *See* 44 U.S.C. §§ 3507, 3508 (1994).

nationwide.¹¹ These employees are responsible, among other things, for inspecting virtually all non-meat food products sold in this country, including imports; reviewing new drug applications; evaluating the safety of medical devices; and overseeing the safety of the blood supply, veterinary medicines, and cosmetics.¹²

One way to test the validity of the proposition that the courts are better positioned to gather and assess information is to examine the Tobacco Wars of the 1990s—battles waged before Congress, the FDA, and in the courts—and ask: “Which institution did a better job of collecting and assessing information?” The answer is clear—it was the courts.

Consider first Congress’ investigation, which was carried out mainly by the Subcommittee on Health and the Environment, House Committee on Energy and Commerce. Under the leadership of Democrat Congressman Henry Waxman, the Subcommittee began looking into the health risks posed by tobacco use in the early 1990s and held a series of hearings on the regulation of tobacco products in 1994.¹³ The Subcommittee also sought and obtained some documents from the industry, and other documents were provided by industry whistle-blowers and by trial lawyers who had obtained industry documents through discovery. As a result of the 1994 election, control of the House shifted to the Republicans, and the leadership of the Subcommittee fell to Tom Bliley, the former Mayor of Richmond, Virginia (home to Philip Morris) and ardent defender of the tobacco industry. Not surprisingly, the Subcommittee’s investigation ceased at that point, and all the Subcommittee had to show for its efforts was the publication of its hearings and the release of several thousand industry documents.¹⁴

¹¹ See <http://www.fda.gov/opacom/faq/faw.html> (last visited Apr. 11, 2001) (reporting that the FDA has “more than 9,000 employees”).

¹² See *id.*; see also 21 U.S.C. §§ 301-1908 (1994).

¹³ *Regulation of Tobacco Products (Part 1), Hearings Before Subcomm. on Health and the Environment, House Comm. on Energy and Commerce, 103d Cong., (1994), available at 1994 WL 226262 (F.D.C.H.).*

¹⁴ Congress addressed the liability questions relating to the tobacco industry again in 1997-98, this time as part of its review of a proposed agreement negotiated by the tobacco industry and State Attorneys General, which the parties sought to have Congress impose through legislation. The agreement would have required the tobacco industry to pay substantial sums to the states as reimbursement for tobacco-related health care expenditures. In exchange, the tobacco industry would have received immunity from certain forms of civil liability. A number of congressional committees held hearings to assess the wisdom of the settlement. See, e.g., *First Amendment Implications of Regulating the Advertising and Promotion of Tobacco Products to Children and Adolescents, Hearing Before the Senate Judiciary Comm., 105th Cong. (1998), available at 1998 WL 244802 (F.D.C.H.); Hearings on the Tobacco Settlement, Hearing Before the Senate Commerce Comm., 105th Cong., (1997), available at 1997 WL 757507 (F.D.C.H.).* No effort was made, however, by the committees to coordinate the compilation of information, let alone assemble it in a central repository accessible to all staff. Ultimately, Congress deadlocked on the legislation and none was enacted.

Consider next the FDA's tobacco investigation, which ran from 1993 to 1996. As noted, the FDA is typical of administrative agencies. It has no subpoena authority and thus must depend on cooperation, not compulsion, in gathering information. Its investigation into the tobacco industry underscores the inefficiencies in such an approach. The tobacco industry repeatedly ignored FDA efforts to obtain information, witnesses routinely refused to cooperate with FDA investigators, and it appears that at least on one occasion, a company's personnel deliberately misled the FDA about the company's development and use of tobacco plants genetically engineered to increase their nicotine content.¹⁵ Tellingly, in his recent book, *A Question of Intent*, former FDA Commissioner David Kessler relies heavily on evidence obtained in litigation to make his case that the tobacco industry deceived Congress, regulators, and the American people about the addictive nature of its products and its ability to manipulate the nicotine dose delivered by cigarettes to maintain addiction.¹⁶ His book chronicles the severe information-gathering limitations that hampered the FDA's investigation from start to finish.

Contrast this with the tobacco litigation efforts in the various lawsuits brought against the industry by state attorneys general, often with the assistance of private counsel. In Minnesota, for example, lawyers representing the state gathered, reviewed, and ultimately made public over 12 million pages of tobacco industry records, many of which had initially been designated as privileged by the industry.¹⁷ They had no problem getting subpoenas. In fact, tidal waves of subpoenas were issued and enforced. They had no difficulty in getting claims of privilege adjudicated because the state court stood ready to referee discovery disputes between the parties. And the plaintiffs were able to assimilate efficiently the mountains of documents they acquired because they were highly motivated litigants who had, literally, armies of lawyers, paralegals, scientists, and other experts to review documents, and computer experts to place the documents in a searchable

¹⁵ KESSLER, *supra* note 7, at 228, 234, and 242-44.

¹⁶ *See generally id.*

¹⁷ Professor Rosenberg suggests that, because I see significant advantages in the data-gathering resources available in litigation, I favor privatization in the context of data acquisition. That suggestion is mystifying, especially in the context of the Minnesota litigation, where the plaintiff was a state government, not a private party. But Professor Rosenberg's suggestion is off base for a more fundamental reason: Information generated in litigation is public information and the courts have, almost without exception, recognized a broad right of nonparties to intervene in litigation to obtain records exchanged in discovery. *See, e.g.,* *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000); *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (citing supporting cases from nine circuits); *United States v. Amodeo*, 71 F.3d 1044, 1047 (2d Cir. 1995); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-84 (1st Cir. 1988) (permitting intervention of public health organizations interested solely in obtaining access to documents concerning the safety of cigarettes); *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 141 (2d Cir. 1987).

database. The information developed as a result of that litigation remains the largest and most comprehensive repository of information relating to the tobacco industry in the world, and it is available on line to scholars, regulators, prospective tobacco plaintiffs and anyone else who cares to review it.¹⁸ I could go on. But as this illustration makes clear, in terms of institutional competence, the court system has substantial advantages over any other government institution in gathering and assessing data.¹⁹

This point is further confirmed by the controversy over the safety of silicone gel breast implants. In 1976, Congress enacted the Medical Device Amendments²⁰ to the federal Food, Drug, and Cosmetic Act.²¹ Part of that law required manufacturers of medical devices on the market in 1976 to submit health and safety data to the federal government that showed the device was safe for its intended use.²² In May 1990, the government called for the makers of breast implants to provide safety information for their products. It was not produced. After giving the implant manufacturers several extensions, the FDA ultimately withdrew silicone breast implants from the market. The agency took that drastic step, not because there was evidence proving them to be unsafe (although there was considerable

¹⁸ See, e.g., <http://www.tobaccodocuments.com> (last visited Apr. 11, 2001); <http://www.rjrtdocs.com> (last visited Apr. 11, 2001).

¹⁹ Admittedly, protective orders are often used in litigation to shield from the public documents that might shed light on public health controversies. Indeed, in the early rounds of the tobacco litigation, the industry effectively concealed its information by insisting on the entry of broad protective orders that kept much of the most damning evidence from public view. See *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992) (proclaiming the industry the “king of concealment and disinformation,” in its effort to keep over 1,500 industry records secret and finding that the crime/fraud exception might justify denying the industry’s attorney-client privilege claims), *vacated*, 975 F.3d 81 (3d Cir. 1992). Yet, as is often true in high-stakes public health litigation, the industry’s effort to hide this material failed in the long run, with courts ultimately rejecting privilege claims and requiring the public release of virtually all of the industry’s documents.

²⁰ 21 U.S.C. §§ 351-360m (1994).

²¹ 21 U.S.C. § 301 (1994).

²² Medical devices are classified under the Act depending on the likely safety consequences of their use; because they were intended to be implanted in the body, breast implants were classified as Category III devices (devices which are to be used “in supporting or sustaining human life,” “in preventing impairment of human health,” or which “present[] a potential unreasonable risk of illness or injury.” 21 U.S.C. § 360c(a)(C)(1)(ii) (1994). Manufacturers of Class III devices must be able to demonstrate that their device provides “a reasonable assurance of . . . safety and effectiveness” for its intended use. *Id.* For devices on the market at the time the Medical Device Amendments became effective, the Act directs the FDA to engage in a rulemaking to establish appropriate standards for the device. 21 U.S.C. § 360e(b) (1994). At the outset of the rulemaking process, the FDA called for the submission of data demonstrating that the device meets the “reasonable assurance of safety and effectiveness standard.” *Id.* The FDA published a proposed rule calling for the submission of the data on May 17, 1990. 55 Fed. Reg. 20,568 (May 17, 1990). See generally *Teich v. FDA*, 751 F. Supp. 243 (D.D.C. 1990) (recounting the FDA’s effort to compel breast implant manufacturers to submit safety data to the FDA).

evidence raising safety concerns), but because the industry had failed to obey the law and submit evidence showing that the implants did not pose an unreasonable risk when used as intended.²³

Now, fast-forward to the multi-district litigation over breast implant safety that was consolidated before Judge Pointer,²⁴ the respected jurist who authored the *Manual on Complex Litigation (Second)*. To assess the plaintiffs' claims that implants were responsible for a range of immune and connective tissue disorders, Judge Pointer appointed a panel of scientific experts to conduct a massive epidemiological study of the safety of implants. The scientific panel reported that, although breast implants showed serious problems with breakage, leakage, and capsular contraction,²⁵ the evidence did not support a clear link between the widely feared immune and connective disorders and the devices.²⁶ Some may question the scientific panel's findings. But there can be no dispute that, in this case, the court achieved in the span of a couple of years an information-gathering process that the FDA could not accomplish for most of a decade. If one looks at the kinds of tort cases on which Professors Rosenberg and Fried focus—accident and product defect cases—it is hard to argue that any governmental institution other than the court system is capable of dealing with these matters in a systematic, sustained, and organized way.

That conclusion also undercuts Professor Rosenberg and Fried's argument in favor of regulatory preemption. Professors Fried and Rosenberg

²³ See *Across the Nation*, SAN DIEGO UNION-TRIBUNE, Aug. 24, 1991, at A2. The *San Diego Tribune* reported that Bristol Meyers-Squibb was required to remove its silicone gel breast implants from the market because the company failed to comply with the FDA's request for information about the implants' safety. *Id.*; see also Bruce Ingersoll, *Bioplasty Drops Silicone Implants After FDA Questions Safety Data*, WALL ST. J., Mar. 6, 1992, at B12 (reporting implant manufacturer's removal of breast implants after non-compliance with FDA requirements).

²⁴ See *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 996 F. Supp. 1110 (N.D. Ala. 1997).

²⁵ *Id.* at 1115.

²⁶ In the early 1990s, some scientists reported that silicone breast implants could cause a serious autoimmune disorder in recipients. See, e.g., *Researcher Says Breast Implants May Be Linked to Autoimmune Disease*, CANCER WEEKLY, Dec. 21, 1992, at 16. Others reported a high incidence of rupture, running as high as thirty percent at five years, fifty percent at ten years, and seventy percent at seventeen years. J.S. Marotta et al., *Silicone Gel Breast Implant Failure and Frequency of Additional Surgeries: Analysis of 35 Studies Reporting Examination of More Than 8,000 Explants*, J. BIOMED. MATERIALS RES. 48(3):354-64 (1999). In 1999, however, a study by the National Academy of Sciences' Institute of Medicine did not find a greater risk of chronic illness in women with silicone implants. Reuters, *Study Finds Little Evidence that Silicone Breast Implants are Linked to Disease*, CHI. TRIB., Mar. 28, 2001, available at 2001 WL 4056283. The Institute's report is available at <http://www.nap.edu/books/0309065321/html/> (last visited Apr. 2, 2001); see also B.G. Silverman et al., *Reported Complications of Silicone Gel Breast Implants: An Epidemiologic Review*, ANNALS OF INTERNAL MED. 124(8):744-56 (Apr. 15, 1996).

quite wrongly, in my view, use automobile safety as an example to illustrate their proposition that compliance with specific federal regulatory requirements should generally preempt tort remedies.²⁷ The history of standard setting by the National Highway Traffic Safety Administration (NHTSA) suggests that the confidence Professors Rosenberg and Fried place in the agency is not well founded.

To take one example, consider NHTSA's regulation of automobile fuel systems. Recently, there have been a number of high-profile cases involving car accidents leading to fires. In these accidents, cars collided, either with another car or a stationary object, their fuel systems ruptured, and serious fuel-fed fires occurred. People were killed or seriously maimed. One might ask why effective regulation has not reduced the incidence of these catastrophic accidents. The answer is as simple as it is grim. NHTSA's fuel system safety standard²⁸ is at least three decades out of date: It is the same standard that governed General Services Administration automobile purchases in 1967. The standard requires that a car be able to sustain certain impacts from the rear, the front, and the side, without rupturing the fuel tank.²⁹ NHTSA adopted the standard shortly after the agency was created in 1966. NHTSA has not changed this standard despite enormous technological strides in upgrading fuel system safety. In 1991, NHTSA conducted a study of the safety of fuel systems and found that cars on the road then were every bit as likely to sustain fuel tank ruptures as they were in 1967.³⁰ In fact, the standard has had no impact at all on the death and injury rate since 1967.

²⁷ The Supreme Court has accepted regulatory preemption arguments with regarding to automobile safety standards issued by the National Highway Traffic Safety Administration only where there was strong evidence of an intent by the agency to preempt inconsistent state law. Compare *Geier v. American Honda Motor, Inc.*, 529 U.S. 861 (2000), with *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995). See also Robert L. Rabin, *Reassessing Regulatory Preemption*, 88 GEO. L.J. 2049 (2000).

²⁸ 49 C.F.R. § 571.301 (1999). The automobile safety provision states that "[t]he purpose of this standard is to reduce deaths and injuries occurring from fires that result from fuel spillage during and after motor vehicle crashes" *Id.*

²⁹ *Id.* at S5-S6.6 (setting forth crashworthiness requirements for specific vehicles).

³⁰ See Barry Meier, *Officials Did Little, Despite Report Saying U.S. Rule Wasn't Cutting Fatal Car Fires*, N.Y. TIMES, Nov. 21, 1992, at A7. Meier wrote:

Standards on fire safety were first issued in 1967 and extended to pickups a decade later. The 1990 study, which the agency published in early 1991, compared the safety records of vehicles built before and after the standard. It concluded that the standard had reduced car fires by about 14 percent but that it did not find a decline in fire-related car deaths. The report noted that fire deaths might remain constant, even while overall fires declined, if the fatalities occurred in crashes above the speeds covered by the standard.

Id.; see also *GM's Fuel-Tank Problems May Lead to Rule Changes*, ORLANDO SENTINEL TRIB., Dec. 3, 1992, at G4 (stating that because of controversy surrounding faulty fuel tanks in General Motors automobiles, "the agency may have to beef-up safety rules as a result").

Why is this standard so lax? There are a number of reasons. One is that the automobile industry has fought tooth and nail against upgrading safety standards, even in the face of NHTSA's concerted effort during the 1990s to modernize its outmoded standards. NHTSA faces a formidable challenge in doing battle with the automobile industry because it is so profoundly outmatched. NHTSA has a skeletal staff, numbering fewer than 1,000 employees.³¹ It has a tiny research budget. It is one "David" facing many Goliaths. For these reasons, it has to be very selective in the fights it takes on.³²

Another reason the 1967 standard remains intact has to do with politics. Like every other federal agency, NHTSA is subjected to political pressure that is often irresistible. For example, NHTSA's earliest effort to phase in the use of air bags in automobiles was thwarted by the lobbying effort of Chrysler head Lee Iacocca and Ford chairman, Henry Ford II. When NHTSA first announced the introduction of air bags, Iacocca and Ford went to see President Nixon to complain, arguing that the requirement would hurt Detroit and help Japanese automakers.³³ Immediately after the meeting, Nixon called Secretary of Transportation John Volpe and told him to rescind the rule, which he did.³⁴ The conversation between Nixon and Iacocca and Ford is included in the newly released collection of the Nixon audiotapes. Admittedly, few rules are subject to the kind of political pressures that delayed the introduction of airbags. But the rulemaking process has become highly political over the past decade or so, with interventions coming subtly and generally secretly—through the Office of Management and Budget, the Council on Competitiveness, or the Quayle Council—or

³¹ See WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS & CASES* 9 (2d ed. 2001) (reporting that NHTSA had 913 employees).

³² In its decision finding that, in response to industry pressure NHTSA had improperly rescinded a regulation requiring the phase-in of air bags, the Supreme Court noted that "[f]or nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983). The fight against airbags is not the only "war" the industry has waged against NHTSA standards.

³³ See *New Tape: Ford Co. Officials Pressed Nixon on Air-Bag Rules*, UNITED PRESS INT'L, Nov. 28, 1992. United Press International reported:

Two top Ford Motor Co. executives [Henry Ford II and Lee Iacocca] met secretly with President Richard Nixon in 1971 in an apparently successful effort to quash federal regulations that would have put air bags in every new car sold in the United States, it was reported Monday. The Los Angeles Times report, based on a long-sought White House tape, said the pending rule, which would have required airbags in every new car from 1973 on, was rescinded by the Department of Transportation shortly after the meeting.

Id.
³⁴ *Id.*

overtly through proposed appropriations riders that restrict the agency's rulemaking power or punish an agency for daring to take on an industry.³⁵

As the airbag example illustrates, there are sound reasons why the tort and regulatory systems operate in tandem and place separate, albeit reinforcing, disciplines on the market. When functioning well, a regulatory system prevents injury. But the tort system is vital because far too often there are gaps that our regulatory agencies fail to fill. Perhaps in a perfect world one could expect our regulatory agencies to have immediate access to data enabling them to pinpoint problems and solve them; in that case, the regulatory preemption argument advanced by Professors Rosenberg and Fried might have more force. But that would be a world where agencies never lack the personnel, technical data, and other resources needed to deal with emerging safety hazards; where regulations are issued once the agency identifies a problem requiring a solution; where rules are updated swiftly to reflect design changes (as in the automotive industry), technological advances or scientific knowledge; and where regulatory decisions are made by politically insulated agencies, free from untoward pressure from congressional committees and powerful industry lobbyists. That may be the world as seen by Professors Rosenberg and Fried; it is not the world as seen by those of us who routinely work with regulatory agencies.³⁶

Thus far, I have limited my comments to responding to the thesis developed by Professors Rosenberg and Fried that legislatures and regulatory agencies should carry the laboring oar in setting liability standards. I have tried to explain that the authors' arguments regarding the superior institutional competence of those bodies to gather and evaluate information in a timely and unbiased way are highly contestable, if not demonstrably wrong. I want to

³⁵ See, e.g., Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456; Thomas O. McGarity, *Presidential Control of Agency Decisionmaking*, 36 AM. U. L. REV. 443, 456 (1987); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1 (1994); see also KESSLER, *supra* note 7, at 316-17 (describing the tobacco industry's successful retribution against the FDA by killing the agency's urgently needed appropriation for a facility in which to consolidate the agency's dispersed work-force).

³⁶ A page of history often speaks volumes, and history offers a cautionary tale that illustrates the hazards of using regulatory standards alone to define an acceptable level of public safety. When the *Titanic* set sail on its maiden and final voyage in April 1912, it carried 2227 passengers and crew; 1494 died after the ship hit an iceberg and sank. The *Titanic* carried 16 lifeboats with room for 980 people, thus satisfying (in fact exceeding) the then-current maritime safety regulations set by the British Board of Trade. The Board of Trade's standard had been set in 1884, when the largest vessel afloat was approximately one-quarter the size of the *Titanic* and other, new "super liners" such as the *Lusitania* and *Mauretania*, which carried far more passengers than their predecessors. The Board of Trade was not oblivious to this development; in fact, an advisory committee met in 1911 to discuss the standard, but did not take action. A year later nearly 1500 perished. See JOHN P. EASTON & CHARLES A. HASS, *TITANIC: DESTINATION DISASTER* 113-13 (1987); JOHN DUDMAN, *THE SINKING OF THE TITANIC* 13 (1988).

end, however, by explaining briefly the vital importance of having courts and juries play a role in forging the rules of tort liability.

There is a collective concern within the legal profession—given voice by Professors Rosenberg and Fried—about the legitimacy of the roles of the judge and jury in determining liability rules. After all, critics argue, what sense does it make to hand a small group of people the power to make liability rules that often have a broad application beyond the controversy before the court?

The answer, in my view, stems in part from the fact that the jury system is the purest democratic institution we have. There are no proxies in jury rooms. When a person sits in a jury room, his or her voice carries greater force than in any other setting or forum in our representative democracy. If a properly constituted jury determines that an automobile manufacturer's failure to upgrade its fuel system to prevent ruptures in low-speed crashes is indefensible and should form the basis of a liability determination, so be it. Juries have served that function in the United States for more than two centuries. Why is Congress, or NHTSA for that matter, better equipped to make that decision? Surely, Professors Rosenberg and Fried have no expectation that Congress would or should legislate to that level of detail. And, as I have explained, surrendering that authority to an embattled and undermanned regulatory agency like NHTSA is indefensible. It seems to me that the American people have a right to shape liability rules that, in the end, they pay for, and the jury plays a pivotal role in creating these rules.

Critics of the common-law process often attack the jury system and quite deliberately overlook the gate-keeping function played by judges. They speak of runaway juries and attack the democratic underpinnings of the jury system. This view is myopic. Juries have no roving commission to do as they see fit. The proposition that juries are untethered and unaccountable is untenable. After all, cases are not submitted to juries unless a judge has concluded that there is a legal theory that may give rise to liability. The interaction between judge and jury is one of the strengths of the common-law system, as well as a powerful check on any excess or abuse.³⁷ Consider Judge Cardozo's landmark opinion for the New York

³⁷ Critics of the civil justice system, like Professors Rosenberg and Fried, have long argued that reform is needed to stem the tide of runaway damage verdicts by juries. But empirical evidence does not support their thesis that juries behave irrationally. According to a recent report in the *New York Times*, a comprehensive empirical study soon to be published in the *Cornell Law Review* confirms that juries do not behave markedly different from judges in awarding punitive damages—a finding that runs directly counter to Rosenberg and Fried's argument. William Glaberson, *A Study's Verdict: Jury Awards Are Not Out of Control*, *N.Y. TIMES*, Aug. 6, 2001, at A3 (reporting that both judges and juries award punitive damages in about the same number of cases and in about the same amounts).

Court of Appeals in *McPherson v. Buick*,³⁸ which gave rise to our modern product liability doctrines by abandoning archaic privity requirements and extending principles of strict liability to consumer products. If the liability rules created in *McPherson* were out touch with mainstream public views about corporate accountability, then juries would not have accepted them, and Cardozo's opinion would be forgotten, an island in the stream of justice. It is this dynamic—the constant revalidation of liability rules by juries—that gives the common-law system its enduring strength and legitimacy.³⁹

I close by coming full circle. Professors Rosenberg and Fried urge a wholesale restructuring of our current tort system by advocating that liability rules be established in advance, through legislation or preemptive regulatory action, not after the fact, through *ad hoc* liability determinations made by juries. As a matter of theory, their ideas have great power. But it is hard to see as a practical matter how their theory could be effectively implemented. Consider asbestos litigation. Assume that people of good faith had sat down in 1925 (or 1975) and tried to develop a rational set of liability rules to govern claims by individuals and companies alleging injury due to asbestos exposure. Was there sufficient information available at the time to write liability rules in a fair and even-handed way? Would we have been well served by legislating fixed, hard to change liability rules in 1925? In 1975? The answer, of course, is “no.” The more we have learned about asbestos exposure, and the behavior of the companies that manufactured and sold asbestos products,⁴⁰ the more our law has adapted to

³⁸ 217 N.Y. 382 (1916).

³⁹ For this reason, critics of the common-law system who isolate individual jury awards for condemnation miss the point. Roundtable, *Redressing Harm: Who Decides?*, 31 SETON HALL L. REV. 644, 644 (2001). To be sure, juries occasionally reach the wrong conclusions, or may be too free with the defendant's money and over-compensate the plaintiff. For that reason, trial judges and appellate courts are empowered to set aside jury verdicts that depart from the evidence or the law. But jury error is a two-way street. There are doubtless occasions where juries render pro-defense verdicts that are wrong, or under-compensate injured parties. The authors' suggestion that juries tend to over- rather than under-compensate is, at the least, highly contestable, and is certainly not borne out by the available evidence. Viewed in the aggregate, however, jury verdicts establish liability rules that accurately reflect the views of Americans. That is the enduring strength of the common-law system.

⁴⁰ The conduct of asbestos companies in concealing information about the hazards of asbestos exposure has played a pivotal role in liability determinations. Yet another example has recently come to light. According to a recent press account, the W.R. Grace Company engaged in a thirty year long campaign to suppress information that its fire-retardant “Monokote,” marketed as a safe substitute for asbestos products, was in fact laced with substantial amounts of tremolite, a little-known but equally deadly form of asbestos. Michael Moss & Adrienne Appel, *Protecting the Product: A Special Report—Company's Silence Countered Safety Fears About Asbestos*, N.Y. TIMES, July 9, 2001, at A1. Liability rules must be sufficiently flexible to enable any trier of fact to take into account this sort of

impose liability where it belongs.⁴¹

I agree with Professors Rosenberg and Fried that information is indeed the *sine qua non* of fair and efficient standard setting. But that fact argues in favor of retaining the common-law system that can respond swiftly and flexibly to new information, not to fixed rules of liability that may quickly become outdated and thus serve as barriers to justice.

perfidious conduct—which is yet another factor that counsels in favor of the retention of the common law system.

⁴¹ I recognize that at some point, the knowledge base becomes mature, and that legislative rules can reasonably be set by Congress or another legislative body. But that recognition hardly satisfies Professors Rosenberg and Fried, who advocate setting liability rules far earlier in the process. Moreover, this discussion assumes away the problem that legislative efforts to establish liability rules are inevitably subject to intense political and special interest pressures—factors that have thus far foreclosed congressional action on proposed asbestos liability legislation. *See, e.g.*, Fairness in Asbestos Compensation Act of 1998, H.R. 3905, 105th Cong. (1998) (sponsored by House Judiciary Committee Chairman, Henry Hyde); S. 2546, 105th Cong. (1998) (sponsored by Senate Judiciary Committee Chairman Orrin Hatch). *See generally* CHARLES LEWIS, THE BUYING OF THE CONGRESS: HOW SPECIAL INTERESTS HAVE STOLEN YOUR RIGHT TO LIFE, LIBERTY AND THE PURSUIT OF HAPPINESS 1-12 (1998).