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J. Shahar Dillbary

University of Alabama - School of Law, sdillbary@law.ua.edu

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Apportioning Liability Behind a Veil of Uncertainty

J. SHAHAR DILLBARY*

This Article challenges the reasoning that led most states to abandon the “no contribution” rule. Under the rule, if a victim obtains a judgment against two tortfeasors but chooses (even arbitrarily or out of spite) to recover only from one, the “chosen one” must pay the entire judgment while the other is exempted. This is the case even if the paying tortfeasor is only 1% at fault while the non-paying tortfeasor is 99% at fault. The rule has been lamented by tort-reform crusaders as immoral and unfair. One tortfeasor, the argument goes, should not bear the entire burden while the more culpable tortfeasor is exempted from liability. In deviation from the prior literature, this Article employs economic theory to show that the “no contribution” rule that has been crowned by some as efficient is fair and just. It adopts a contractarian approach to analyze different apportionment regimes including joint and several liability (with and without contribution), several liability, and market-share liability. Relying on modern decision theory the Article shows that individuals behind a veil of uncertainty, unaware as to whether they would be victims or injurers, may in fact choose the much criticized “no contribution” rule. In doing so the Article sheds new light on a fierce and ongoing debate.

* Associate Professor, University of Alabama School of Law. B.A. in Law, Bar-Ilan University; LL.B. in Economics, Bar-Ilan University; LL.M., University of Chicago School of Law; J.S.D., University of Chicago School of Law. I would like to thank Susan Randall, Alan Durham, Caryn Roseman, Andy Morriss, Ariel Porat, Ian Ayers, Ronen Avraham, David Patton, Fred Vars, Heather Elliot, Meredith Render, Grace Lee, and the participants of the Midwestern Law and Economics Association Conference, the Italian Law and Economics Annual Conference, and The University of Chicago Legal Scholarship Workshop for their comments; Tel Aviv University School of Law for its accommodation while writing portions of this Article; and Tara Blake, Jonathan Kolodziej, and Joey Steadman for their research assistance. © J. Shahar Dillbary.

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INTRODUCTION

A major issue posed by the efficiency approach to the common law is the discrepancy between efficiency maximization and notions of the just distribution of wealth.

-Judge Richard Posner, *Economic Analysis of Law*.¹

[L]aws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.

-John Rawls, *A Theory of Justice*.²

Suppose that pollutants and debris washed in from different lands owned by different owners, commingled, and rendered the victim's property unusable. If the victim recovered her damages from one of the owners, can the latter seek contribution from the other owners? If so, how much? These questions are in no way trivial. Under the common law, if two or more people acted in concert or caused an indivisible harm, each was jointly and severally liable to the victim.³ This meant that the victim could seek recovery of the entire damage from any one or any combination of the defendants. Because the common law did not allow any contribution among tortfeasors, a defendant who paid the entire judgment could *not* recover from the other defendants.⁴ The result was that if a victim obtained a judgment against two tortfeasors but chose, arbitrarily or out of vengeance or spite, to recover only from one, the latter paid the entire damages; while the other was exempt, even though both were liable. This was the case even if the first was only 1% at fault while the other (the non-paying tortfeasor) was 99% at fault.

The rule of joint and several liability ("JSL") with no contribution has been lamented by scholars and policy makers as unjust, immoral, inefficient, and inequitable.⁵ The subject of their concern is not the victim. The victim is in fact indifferent between contribution and no contribution. The concern is the seemingly unfair results *between tortfeasors*.⁶ One tortfeasor, the argument goes, should not bear the

1. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 272 (7th ed. 2007) [hereinafter *ECONOMIC ANALYSIS OF LAW*].

2. JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971) [hereinafter *RAWLS 1971*]; JOHN RAWLS, *A THEORY OF JUSTICE* 3 (rev. ed. 1999) [hereinafter *RAWLS REVISED*].

3. DAN B. DOBBS, *THE LAW OF TORTS* 1077 (2000); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 46, at 322-23, 346-47 (5th ed. 1984).

4. DOBBS, *supra* note 3, at 1078; KEETON ET AL., *supra* note 3, at 336-38.

5. See, e.g., Part I, Part II.B, *infra* notes 58-59, 65, 71, 86-87, 109-21 and accompanying text.

6. See, e.g., *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 588 P.2d 1308, 1314 (Wash. 1978) ("Contribution is directed at equitably distributing *between or among multiple tort-feasors* the responsibility for paying damages suffered by the injured party. It is a remedial scheme which operates exclusively *between or among tort-feasors*. It has no effect upon the *injured party's initial right to recover from the multiple tort-feasors*." (citation omitted)); Mark M. Hager, *What's (Not!) in a Restatement? ALI Issue-Dodging on Liability Apportionment*, 33 *CONN. L. REV.* 77, 95 (2000)

entire burden while others who are often equally or even more culpable are exempted from liability. It also allows the victim, the criticism continues, to strategically cherry pick and recover from a tortfeasor based on arbitrary whims, the depth of her pocket, or her ability (or lack thereof) to defend herself.⁷ It is thus not a surprise that tort reform champions have led a crusade to change the law, with much success.⁸ Today, Alabama is the only jurisdiction that has retained the rule of JSL with no contribution.⁹ Due to the fairness-between-tortfeasors concern, the majority of states allows some form of contribution based on pro-rata or fault, although many still deny contribution to intentional tortfeasors.¹⁰ Some jurisdictions went even further and replaced the doctrine of JSL with several liability, often referred to as “proportionate” liability.¹¹ In these states, each tortfeasor, if found liable, is responsible for her own share only, and the issue of contribution does not arise at all.

Despite this success, the war that was declared almost four decades ago is not over. Recently, Alabama’s no contribution rule has been questioned,¹² and in other states interest groups push for the complete adoption of several liability.¹³ Similarly, in the federal arena there is still an ongoing debate as to whether Congress should overrule a thirty-year-old Supreme Court precedent¹⁴ and abrogate the no contribution rule between co-conspirators in antitrust cases.¹⁵ Fairness between defendants

(reporting that “[t]hrough the ALI takes no official position against joint and several liability, it registers disapproval repeatedly” and noting that according to the ALI JSL “may be unfair to defendants”).

7. For a summary of these arguments in the debate over the retention of the doctrine of joint and several liability, see, for example, Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1147, 1150, 1160, 1183 (1987) (concluding that the efficiency perspective is unhelpful because it “is a morally unattractive goal” and “because there is no efficient allocation method” and arguing that JSL with contribution is the preferred way for allocating liability).

8. See, e.g., Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 900 (2005) (reporting that JSL “has been the subject of intensive state tort reform efforts”); Michael K. Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 WM. MITCHELL L. REV. 845, 845 & n.1 (2004) (stating that JSL “modification is a key component of [the American Tort Reform Association’s] successful tort reform agenda” and noting that “[i]n Minnesota, as in other states, joint and several liability has been a familiar target for tort reform efforts”); *Joint and Several Liability Reform*, AMERICAN TORT REFORM ASS’N (“ATRA”), <http://www.atra.org/issues/index.php?issue=7345> (last visited July 4, 2011) (arguing for the abolition of JSL and its replacement with proportionate liability and noting recent changes in state law).

9. Susan Randall, *Only in Alabama: A Modest Tort Agenda*, 60 ALA. L. REV. 977, 980 (2009).

10. DOBBS, *supra* note 3, at 1078.

11. *Id.* at 1087.

12. Randall, *supra* note 9.

13. For a review of these efforts, see *supra* note 8; *infra* note 150.

14. *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639–40 (1981) (explaining that “[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers” and holding that there is no right of contribution in antitrust matters).

15. See, e.g., ANTITRUST MODERNIZATION COMM’N REPORT AND RECOMMENDATIONS 251 (2007)

has played a pivotal role in this debate.¹⁶ The antitrust debate gained new momentum in 2007 when a bipartisan committee, created by Congress to examine and revise antitrust laws,¹⁷ recommended that Congress enact a statute that would allow contribution in “all antitrust cases.”¹⁸

This Article seeks to reopen and reinvigorate the discussion over the desirability of the different apportionment rules by challenging the very reasoning that led most states to change their laws: the fairness argument. This Article argues that the no contribution rule is at least as fair as, and perhaps even more equitable than, its alternatives: JSL with contribution based on fault; several liability based on fault (“SL”); proportionate pro-rata liability (“pro-rata liability”); and proportionate market-share liability (“market-share liability”). Unlike previous accounts of the legitimacy of the apportionment rules, this Article uses economics to show that the no contribution rule is moral and just. It builds on the familiar “veil of uncertainty” concept first developed by John Harsanyi¹⁹ and then John Rawls.²⁰ The veil—by now a well-known

[hereinafter COMM’N REPORT] available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (noting that “[t]he policy questions raised by these rules [JSL and no contribution] have been debated extensively over the past two decades, particularly preceding and in the immediate wake of the Supreme Court’s 1981 decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*”).

16. See, e.g., IIA PHILIP E. AREEDA ET AL., ANTITRUST LAW ¶ 330, at 43 (3d ed. 2007) (“[M]ost arguments for a right of contribution in antitrust rest on the lack of fairness or justice in any rule that forces one guilty party to pay for the offenses of another equally guilty party.”).

17. Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051–11060, 116 Stat. 1758, 1856–59 (authorizing the creation of the Antitrust Modernization Committee).

18. COMM’N. REPORT, *supra* note 15, at 244 (noting that “[t]he existing rules of joint and several liability without a right of contribution and only limited claim reduction have given rise to substantial criticism regarding fairness” and recommending that “Congress should enact a statute applicable to all antitrust cases . . . allow[ing] claims for contribution”).

19. John C. Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls’ Theory*, 69 AM. POL. SCI. REV. 594 (1975) [hereinafter Harsanyi 1975] (criticizing John Rawls’ Theory of Justice); John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 J. POL. ECON. 434, 434–35 (1953) [hereinafter Harsanyi 1953] (arguing that an individual’s moral value judgment indicates what social order she would choose in a state of “complete ignorance” to what her position would be in the chosen social order had she had “an equal chance of being ‘put in the place of’ any particular member of the society”); John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309, 315–16 (1955) [hereinafter Harsanyi 1955] (drawing a distinction between an individual’s moral value judgments or “ethical preferences” which define the individual’s social welfare function and express what an “individual prefers (or, rather, would prefer) on the basis of impersonal social considerations alone” and “subjective’ preferences” which define the individual’s utility function and express what the individual actually prefers); see also William Vickrey, *Utility, Strategy, and Social Decision Rules*, 74 Q. J. ECON. 507, 523–24 (1960) (discussing a version of the veil which abstracts “from differences in age, sex, or family status” and arguing that under certain conditions “the social welfare function takes the form of a weighted summation of individual utilities”); Kenneth Arrow, *Some Ordinalist-Utilitarian Notes on Rawls’ Theory of Justice*, 70 J. PHIL. 245, 250 (1973) (noting that both Vickrey and Harsanyi used a form of the original position “to supply a contractarian foundation to a form of utilitarianism”). Rawls in fact acknowledged Harsanyi’s contribution in his seminal book, *A Theory of Justice*. RAWLS 1971, *supra* note 2, at 137 n.11, 162 n.21; RAWLS REVISED, *supra* note 2, at 118 n.11, 140 n.22.

concept—refers to a hypothetical situation in which people are divested from their personal characteristics, save their ability to think and their understandings of basic facts about the world.²¹ They do not know what will be their gender or race once the veil is pierced. Nor do they know whether they will be rich or poor, strong or weak, healthy or sick. In this so-called “original position” they are all on equal footing. They are free from personal interests, and therefore free from biases. Rules adopted in the original position are thus considered to be fair and just.

The concept of the veil—a hypothetical situation—has special force in deciding what apportionment regime should be adopted in tort law. When individuals or their representatives promulgate liability rules, they are truly behind a veil at least in the sense that they often do not and cannot know whether in the future, after the law comes into effect, they will be tortfeasors, victims, both, or neither. Similarly, at that early point in time they do not and cannot know what fault levels will be assigned to them by a jury if they are found liable.²² When the legislative process takes place, these are usually unknown factors that will be revealed only later in time. Of course, in real life some members of society do know that they are likely to be defendants. Others know they are likely to end up as victims. And each group of members would thus prefer different apportionment policies commensurate with its narrow interests. But a moral judgment must disregard such personal interests. More specifically, following Harsanyi, the moral view adopted here is an expression of a society one would prefer “if one had an equal chance of being ‘put in the place of’ any particular member” of society.²³ This Article shows that if put behind a veil of uncertainty, rational self-interested individuals unaware of whether they will be victims or tortfeasors, both, or neither, and who give each member’s interests the same weight, would be either indifferent between the alternative apportionment rules or would in fact contract for the no contribution rule. The model developed here does not, unlike Rawls, assume that parties are infinitely risk averse, nor does it adopt the much criticized maximin rule.²⁴ Instead, conforming with economic analysis and decision theory, it recognizes that parties behind the veil may have varying risk

20. RAWLS 1971, *supra* note 2, at 12 (coining the more familiar term: “veil of ignorance”); RAWLS REVISED, *supra* note 2, at 11; *see also* Harsanyi 1975, *supra* note 19, at 595 (“In actual fact, this concept [Rawls’ veil of ignorance and thus the ‘original position’] played an essential role in my own analysis of moral value judgments, prior to its first use by Rawls in 1957.”); *infra* Parts III.A.1, IV.B.

21. *See supra* note 19 and accompanying text; *infra* notes 136–41 and accompanying text.

22. Unlike the original position, however, members of society are aware of their initial endowments. A defendants organization, for example, will be interested in curbing liability and prefer to adopt a SL or a contribution rule over JSL with no contribution. *See infra* Part III. Such a bias, however, can be easily detected and should be ignored. *See infra* notes 150–51 and accompanying text. In any case, it cannot serve as a theoretical or “fair” basis for adoption of a contribution rule.

23. Harsanyi 1953, *supra* note 19, at 435; Harsanyi 1955, *supra* note 19, at 316.

24. *See infra* Part III.A.2, Part IV.B.

preferences, and it argues that such parties may nevertheless contract for the no contribution rule.

Importantly, the framework suggested here employs economic theory but it does not fall into the economist trap: it does not argue simply that what is “efficient” must be fair. This indeed would be unacceptable to many. After all, economic analysis does not seek to eliminate all accidents, only those that are not cost justified.²⁵ It views accidents that already occurred as “sunk,” and it is (mostly) *neutral* as to whether a victim is compensated. It is perhaps then not a surprise that, with a few exceptions, the economic literature has failed to take head-on the fairness concerns that were so influential in the apportionment debate.²⁶ Some prominent economists even joined the trend denouncing the no contribution rule as unfair.²⁷ The model developed here is an attempt to fill this gap. It shows that the no contribution rule, which has been crowned by some as efficient,²⁸ is also fair. It would likely be acceptable, indeed contracted for, by members of society if put behind the veil. In making this argument, this Article gives a contractarian explanation for the adoption of the Hand formula in the tort of negligence and it sheds some new light on its nonalgebraic “reasonable person” formulation. In making the argument that the no contribution rule is just, this Article also reinforces the conclusion that the rule is efficient. It shows, for example, that the insurance feature embedded in the contribution rules, and which was viewed as a possible reason to adopt such regimes, is in fact a reason to reject them.

This Article proceeds as follows. Part I traces the origins and evolution of the no contribution rule. It shows that the abrogation of the no contribution rule was consistent with the pursuit of fairness—though not free of confusion—but was based on a misconception of what is fair. It was consistent because it was motivated by a desire to achieve fairness between tortfeasors. The no contribution rule was first applied only to “joint tortfeasors” at the time when the term referred *only* to tortfeasors who acted intentionally and in concert.²⁹ Tortfeasors who concurrently but unintentionally caused an indivisible harm were not considered joint tortfeasors. Consequently, such tortfeasors had to be sued separately and each was severally liable for the damage she caused even where the

25. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972); *infra* note 145.

26. See *infra* notes 106–15 and accompanying text.

27. See *infra* notes 109–15, 163–69 and accompanying text.

28. See ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 189–90; Frank H. Easterbrook, William M. Landes, & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & ECON. 331, 354 (1980); William Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 529 (1980) [hereinafter Landes & Posner 1980]; see also *infra* notes 92–95 and accompanying text.

29. KEETON ET AL., *supra* note 3, at 323–28; see also *infra* note 35 and accompanying text.

damage was indivisible. The reason for insisting on proportionate liability where liability could not be apportioned was to avoid injustice as between the tortfeasors. One tortfeasor, courts consistently explained, should not be liable for the damage caused by another. When the term “joint tortfeasor” was broadened to include also those who caused indivisible harm and SL was replaced by JSL, the law changed. Contribution was then recognized for the same reason it was initially denied: to achieve fairness between tortfeasors. It simply made no sense and resulted in much injustice, it was argued, to place the entire liability on one tortfeasor where two or more caused the damage.³⁰

The fairness argument was based on a misconception because it focused on the *end* result: that some tortfeasors paid more than their share. Leading (distributive) theories of justice, however, do not focus on fairness between the parties *after* the constituting event, such as an accident, has occurred. At that time, the parties are already divided into groups according to their interests, and the discourse of what is fair must be biased. A tortfeasor would clearly prefer a regime that would minimize her exposure, such as SL, and the victim would prefer a regime that would increase her chances to fully recover, such as JSL. Thus, modern theories of justice regard a rule as fair if it would be adopted before the constituting event has occurred by parties who are unaware of what the future will bring. If behind the veil parties would contract for a certain rule, such a rule would be considered acceptable (by definition) and just.

Part II reviews the fairness-efficiency debate as it has been framed by the legal academy and self-interested organizations. It shows that with the conclusion that all apportionment regimes can be equally efficient, the debate has centered on fairness. These fairness considerations, however, are overly simplistic. They focus mainly on the fairness between tortfeasors and were motivated, indeed shaped, by lobbying and defendants’ organizations.³¹ Building on Harsanyi, Part III constructs a contractarian model that shows that rational, self-interested individuals may in fact contract for a no contribution rule. Part IV turns to re-evaluate some of the basic assumptions of the model in light of three leading alternative theories of justice: Corrective Justice, Wealth Maximization, and Rawls’ Theory of Justice. It also reveals that at least one state supreme court explicitly relied on Rawls’ Theory of Justice to justify the adoption of a contribution rule.³² The cursory decision adopted Rawls’ social contract approach—that “in exchange for the opportunity of some undertaking, we each promise all others that we will be liable for

30. KEETON ET AL., *supra* note 3, at 337.

31. *See supra* note 8; *infra* notes 127, 150 and accompanying text.

32. *See* Mo. Pac. R.R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466, 474 (Mo. 1978) (en banc).

the damage which our own negligence in the undertaking has caused.”³³ But it failed to discuss Rawls’ much criticized distribution (maximin) rule, which this Article finds to be unsuitable for the contribution debate. Finally, the conclusion discusses the implications of the model on the current debate and provides closing remarks.

I. APPORTIONING LIABILITY

A. THE OLD COMMON LAW RULE: JOINT TORTFEASORS, JOINT AND SEVERAL LIABILITY, AND SEVERAL LIABILITY

The term “joint tortfeasors” has meant different things at different times and has been cluttered by procedural complications and much confusion.³⁴ Originally, the term was very limited in nature. It applied only to situations where multiple tortfeasors acted in concert, collusion, or in pursuit of a common design to injure the plaintiff.³⁵ *Substantively*, the tort committed was considered a “joint enterprise” and consequently each tortfeasor was held vicariously, or jointly and severally, responsible for the act of the others.³⁶ In the eyes of the law there was only one cause of action and one injury.³⁷ This meant that each of the joint tortfeasors was liable for the entire damage and that all could be joined as defendants.³⁸ For this reason, the jury could not apportion the damages between the different tortfeasors.³⁹ Even if one obtained access, while a second imprisoned and a third inflicted harm, each was liable for the entire damage. The parties’ comparative fault, the fact that each committed a different tort, or that the injury resulted from different acts was of no consequence.⁴⁰ It was an “all for one, one for all” rule.

In these situations the plaintiff’s discretion over apportionment and execution of a judgment was—and still is, although to a lesser degree—infinitely vast. The plaintiff could sue any one or any combination of the alleged tortfeasors,⁴¹ and once a judgment was obtained, the plaintiff

33. *Id.* at 469 n.4.

34. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 10 cmt. b (2000); KEETON ET AL., *supra* note 3, at 322.

35. KEETON ET AL., *supra* note 3, at 323; Wright, *supra* note 7, at 1148.

36. Swain v. Tenn. Copper Co., 78 S.W. 93, 94 (Tenn. 1903); KEETON ET AL., *supra* note 3, at 323.

37. Lucio v. Curran, 139 N.E.2d 133, 136 (N.Y. 1956). For this reason, if one of the tortfeasors settled with the plaintiff the release of one tortfeasor was a release of all. *See, e.g.*, Price v. Baker, 352 P.2d 90, 93 (Colo. 1959); McFarland v. News & Observer Publ’g. Co., 132 S.E.2d 752, 755 (N.C. 1963); Simpson v. Plyler, 128 S.E.2d 843, 845 (N.C. 1963).

38. *See, e.g.*, Stull v. Porter, 184 P. 260, 260 (Or. 1919); Daingerfield v. Thompson, 74 Va. 136, 151 (1880).

39. KEETON ET AL., *supra* note 3, at 323 n.5.

40. Stull v. Porter, 196 P. 1116, 1118 (Or. 1921) (citing 1 COOLEY ON TORTS 213 (3d ed.)); Coleman v. Bennett, 69 S.W. 734, 735 (Tenn. 1902); Riverside Cotton Mills v. Lanier, 45 S.E. 875, 875 (Va. 1903); 74 AM. JUR. 2d *Torts* § 69 (2001).

41. Buddington v. Shearer, 39 Mass. 427, 429 (1839); KEETON ET AL., *supra* note 3, at 325.

could execute it fully against one or more defendants or partly against one and partly against others.⁴² If the plaintiff filed separate suits against the wrongdoers she could even refuse tender, continue to collect judgments in the hope of obtaining a larger recovery, and then elect against which of the wrongdoers she would execute the judgment.⁴³ The defendant, on the other hand, could not compel the plaintiff to add the other joint tortfeasors to the action.⁴⁴ The result was that one defendant might pay the entire judgment. And because contribution was not allowed, the defendant who paid the entire judgment could not recover from the other tortfeasors.⁴⁵

The term “joint tortfeasors” also had a *procedural* meaning. Joinder—the technical act of allowing the plaintiff to sue a number of defendants in the same action—was allowed when the defendants acted in concert.⁴⁶ Where the tortfeasors acted independently, however, joinder was not allowed.⁴⁷ In these situations liability was only several, and each tortfeasor was liable for her own share even if the harm to the plaintiff was indivisible.⁴⁸ This is well illustrated by a line of cases in which animals

42. DOBBS, *supra* note 3, at 1078.

43. See *Bradford v. Carson*, 137 So. 426, 428 (Ala. 1931); *Fitzgerald v. Campbell*, 109 S.E. 308, 309 (Va. 1921); *R. M. Harrison Mech. Corp. v. Decker Indus., Inc.*, 75 Va. Cir. 404, 414 (2008) (“[P]laintiff can only enforce one satisfaction for the same injury, and therefore must elect against which of the several wrongdoers he will proceed to execution of the judgment for satisfaction of his damages.”).

44. *Hoosier Stone Co. v. McCain*, 31 N.E. 956, 957 (Ind. 1892); *Berkson v. Kan. City Cable Ry. Co.*, 45 S.W. 1119, 1120–21 (Mo. 1898); *Coleman*, 69 S.W. at 735.

45. DOBBS, *supra* note 3, at 1078.

46. KEETON ET AL., *supra* note 3, at 322–24.

47. In the early days of the common law the terms “joint liability” (the substantive rule that each of the tortfeasors who acted in concert is liable for the entire harm) and “joinder” (the procedural rule that allows the plaintiff to sue more than one defendant together), were subject to much confusion. See *id.* at 329.

48. *Id.* at 325; I WILLIAM WAIT, A TREATISE UPON SOME OF THE GENERAL PRINCIPLES OF THE LAW, WHETHER OF A LEGAL, OR OF AN EQUITABLE NATURE, INCLUDING THEIR RELATIONS AND APPLICATION TO ACTIONS AND DEFENSES IN GENERAL, WHETHER IN COURTS OF COMMON LAW, OR COURTS OF EQUITY; AND EQUALLY ADAPTED TO COURTS GOVERNED BY CODES 318 (1885). In *Swain v. Tennessee Copper Co.*, the court explained that

Where the tort feasons have no unity of interest, common design, or purpose or concert of action, there is no intent that the combined acts of all shall culminate in the injury resulting therefrom, and it is just that each should only be held liable so far as his acts contribute to the injury.

78 S.W. 93, 94 (Tenn. 1903). The court continued, “In such cases the party injured must proceed in separate actions against the several wrongdoers for the proportion of the damages caused by them, respectively.” *Id.* In the court’s view “[t]his [was] the only reasonable and just rule that can be applied.” *Id.* It thus concluded that

If [the defendants] are joint tort feasons, each one is responsible for the damages resulting from the acts of all the wrongdoers, and they may all be sued severally or jointly; but, if they are not joint tort feasons, each is liable only for the injury contributed by him, and can only be sued in a separate action therefor.

Id.; see also *Blaisdell v. Stephens*, 14 Nev. 17, 21–22 (1879) (holding that absent concerted action, waste water from the lands of multiple land owners that damaged the plaintiff’s property subjected

owned by different owners entered the plaintiff's land and caused an indivisible damage.⁴⁹ In these cases it was consistently held that every owner is severally responsible for the damages caused by her own animal only.⁵⁰ Some courts allowed the jury to pro-rate the damage between the defendants so that each would be responsible for an equal share of the damage.⁵¹ Others left the difficult (impossible?) job of apportioning damages between the defendants to the jury, often without any guidance.⁵²

The facts in *Russell v. Tomlinson*⁵³ are illustrative. In *Russell*, two dogs, each owned by a different defendant, entered the plaintiff's land and killed her sheep. The trial court found the defendants jointly and severally liable.⁵⁴ On appeal the Supreme Court of Errors of Connecticut reversed.⁵⁵ It held that each owner is responsible only for the damage caused by his own dog.⁵⁶ The reason for insisting on a several liability rule was couched in the requirement of fairness amongst defendants.⁵⁷ In Chief Justice Swift's words: "[I]t would be repugnant to the plainest principles of justice, to say, that the dogs of different persons, by joining in doing mischief, could make their owners jointly liable."⁵⁸ Simply put, in the court's view, one defendant should not be liable for a tort committed by another. In reaching the same conclusion, the *Van Streenburgh v. Tobias* court provided the following analogy:⁵⁹

An ox and a calf belonging to different owners, reaching through a fence, throw it down and enter the enclosure of another at the same time; it would be unjust that the owner of the small animal should be holden to pay the damage done by the larger; and yet he must do so if a joint action could be sustained against both owners. The difficulty in accurately

each to several liability only).

49. See, e.g., *Russell v. Tomlinson*, 2 Conn. 206 (1817); *Anderson v. Halverson*, 101 N.W. 781 (Iowa 1904); *Buddington v. Shearer*, 39 Mass. 427 (1839); *Miller v. Prough*, 221 S.W. 159 (Mo. Ct. App. 1920); *Auchmuty v. Ham*, 1 Denio 495 (N.Y. Sup. Ct. 1845); *Van Streenburgh v. Tobias*, 17 Wend. 562 (N.Y. Sup. Ct. 1837); *Adams v. Hall*, 2 Vt. 9 (1829).

50. See, e.g., *Russell*, 2 Conn. at 207-08; *Anderson*, 101 N.W. at 782; *Buddington*, 39 Mass. at 429; *Miller*, 221 S.W. at 162; *Auchmuty*, 1 Denio at 499-501; *Van Streenburgh*, 17 Wend. at 562-63; *Adams*, 2 Vt. at 11-12.

51. *Anderson*, 101 N.W. at 782; *Buddington*, 39 Mass. at 429; *Miller*, 221 S.W. at 162; *Little Schuylkill Navigation v. Richards's Adm'r*, 57 Pa. 142, 147 (1868) (citing *Partenheimer v. Van Order*, 20 Barb. 479 (N.Y. Supp. 1855)).

52. *Russell*, 2 Conn. at 207; *Auchmuty*, 1 Denio at 500-01; *Van Streenburgh*, 17 Wend. at 563; *Adams*, 2 Vt. at 11-12; *Sellick v. Hall*, 47 Conn. 260, 273-74 (1879).

53. 2 Conn. at 207.

54. *Id.*

55. *Id.* at 209.

56. *Id.* at 208-09.

57. *Id.* Prosser and Keeton, in their leading and much influential treatise, hypothesize that the effort to apportion the damages in such circumstances was due to the no contribution rule. But this is not just a speculation, as discussed above. See KEETON ET AL., *supra* note 3, at 349.

58. *Russell*, 2 Conn. at 207.

59. 17 Wend. 562, 563 (N.Y. Sup. Ct. 1837).

estimating the separate injury done by each dog, is not an argument of sufficient strength to warrant the injustice The jury must, in this, as in most cases of wrong, get at the real damages in the best way they can.

Several liability with no joinder was also applied in cases where sewage, debris, or fumes generated by different tortfeasors commingled and damaged the plaintiff's property.⁶⁰ For example, in *Chipman v. Palmer* the defendant and other hotels discharged sewage that polluted the plaintiff's stream.⁶¹ The court rejected the claim that an indivisible injury subjects the tortfeasors to JSL.⁶² Instead, it held, each is liable only to the extent of the wrong committed by him, and that absent concerted action, a joint suit cannot be brought.⁶³ Rather, "the plaintiff must pursue each of the wrong-doers separately."⁶⁴ The court explained that "[i]f the law was otherwise, the one who did the least might be made liable for the damages of others far exceeding the amount for which he really was chargeable, without any means to enforce contribution or to adjust the amount among the different parties."⁶⁵

Over time a more liberal rule developed, allowing procedural joinder where an equitable remedy of injunction was sought.⁶⁶ Many of the decisions leading to the new exception involved situations in which waters or fumes from lands owned by different owners commingled and damaged the plaintiff's property.⁶⁷ For example, in *Miller v. Highland Ditch Co.*, the defendants caused water and debris to be diverted to the plaintiff's property, thereby causing it damages.⁶⁸ The trial court granted an injunction and awarded damages against *all* the defendants jointly.⁶⁹ On appeal the injunction against the defendants was upheld but the judgment as to the award was reversed.⁷⁰ The court's rationale was, again, rooted in justice between tortfeasors. If joinder were allowed, the court

60. *Chipman v. Palmer*, 77 N.Y. 51, 53-54 (1879) (holding that SL with no joinder applies for sewage discharged from a large number of hotels and polluted the plaintiff's stream); *Little Schuylkill Navigation Co. v. Richards's Adm'r*, 57 Pa. 142, 147 (1868) (same for dirt from different coal mines acting independently filled the basin of the plaintiff's dam).

61. 77 N.Y. at 52.

62. *Id.* at 53.

63. *Id.* at 53, 54, 56; see also *Little Schuylkill*, 57 Pa. at 147 ("Without concert of action no joint suit could be brought.").

64. *Chipman*, 77 N.Y. at 56 (citation omitted).

65. *Id.* at 53-54.

66. KEETON ET AL., *supra* note 3, at 325-26; see, e.g., *Miller v. Highland Ditch Co.*, 25 P. 550, 551-52 (Cal. 1891); *California v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1157 (Cal. 1884).

67. See, e.g., *Gold Run Ditch*, 4 P. at 1158. Plaintiff, a mining company, together with other unnamed plaintiffs, dumped debris into rivers, which decreased their depths and caused floods which damaged adjacent properties. *Id.* Although the injury was clearly indivisible, the court held that where several persons "acting independently of each other, engage in the commission of wrongful acts, the torts are distinct and not joint, and each is only severally liable for the injury caused by his own acts, and not for the torts of others with whom he was not acting in concert." *Id.* at 1157.

68. 25 P. at 551.

69. *Id.*

70. *Id.* at 551-52.

explained, “one defendant, however little he might have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the other defendants; and he would have no remedy against the latter, because no contribution can be enforced between tort-feasors.”⁷¹ The result was that in actions for damages each defendant had to be sued separately and only for the damage it caused. The plaintiff could not join the defendants as a matter of procedure nor could she recover her entire injuries from one defendant.⁷²

But things did not stop there. Statutory reforms as well as development in the common law led to the liberalization of the procedural and substantive rules.⁷³ These two trends resulted in much confusion, which is outside the scope of this Article.⁷⁴ Importantly, however, at the end of the day the substantive rule of JSL and procedural joinder were allowed in two situations important to this Article: (1) as before, when the parties acted in concert; and (2) where the parties concurrently but unintentionally caused the victim an indivisible harm.

B. CONTRIBUTION

It is in this context that the no contribution rule should be understood. The rule was originally adopted by the English courts in *Merryweather v. Nixan*.⁷⁵ At that time the term “joint tortfeasors” referred only to those defendants who acted intentionally and in concert.⁷⁶ Because it was an “all for one, one for all” rule, a release of one tortfeasor from liability by the victim served as a release for all. Similarly, the satisfaction of the judgment by one tortfeasor was considered a satisfaction by all.⁷⁷ Courts were not willing to entertain any attempt by one intentional tortfeasor to seek contribution from another, perhaps based on the parties’ “unclean hands.”⁷⁸ But once the *procedural* joinder and *substantive* JSL rules were liberalized so the term “joint tortfeasors” referred also to those who concurrently caused indivisible harm, the attitude towards contribution had to take a sharp turn. Under a rule of

71. *Id.* at 551; *see also Gold Run Ditch*, 4 P. at 1158 (permitting joinder in an action for an injunction and explaining that “[i]n an equitable action for that purpose [injunction] there is generally raised no question of damages”).

72. KEETON ET AL., *supra* note 3, at 325–26.

73. *Id.* at 325–28.

74. *See supra* note 47.

75. (1799) 101 Eng. Rep. 1337 (K.B.).

76. *See supra* notes 34–35 and accompanying text.

77. KEETON ET AL., *supra* note 3, at 330–31.

78. *See, e.g., Mo. Pac. R.R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 469 (Mo. 1978) (en banc) (“Early in Anglo-American law the ‘rule’ developed that there shall be no contribution or indemnity between joint tortfeasors as ‘a necessary consequence of the principle embodied in the maxim *ex turpi causa non oritur actio* [out of an immoral or illegal consideration an action does not arise].” (citation omitted)); *see also Holcim (US), Inc. v. Ohio Cas. Ins. Co.*, 38 So. 3d 722, 727 (Ala. 2009).

no joinder, fairness between negligent tortfeasors was achieved by imposing an artificial rule of several liability in cases where the damage was clearly indivisible.⁷⁹ Thus, when the fumes of two factories commingled and harmed the victim, or their streams flooded and brought debris to her land, or their animals killed her sheep or destroyed her crops, the damage was somehow arbitrarily divided. When joinder was finally permitted and JSL applied in cases where the parties negligently caused an indivisible harm, recognizing a right of contribution was just a matter of time. Guided by the *same* logic—fairness between tortfeasors—the courts allowed contribution to avoid a situation in which one tortfeasor would pay more than her “fair” share.

This is well illustrated by *Swain v. Tennessee Copper Co.*⁸⁰ and *Davis v. Broad Street Garage*.⁸¹ In *Swain*, an early case, the plaintiffs claimed that two neighboring copper smelting plants emitted gases, which “indistinguishably mingled, commingled, and intermingled into clouds of noxious . . . vapor, which . . . drifted over and on the [plaintiffs’] premises” causing them damage.⁸² The damage was clearly indivisible.⁸³ Yet the court held that the defendants were not “joint tortfeasors” because they did not act in concert.⁸⁴ It thus concluded that each factory was severally liable for the damage it caused and must be sued separately.⁸⁵ The court reasoned that “it is just that each should only be held liable so far as his acts contribute to the injury. . . . If the law were otherwise, one whose acts contributed in a very slight degree to the wrong could be held for great damages done by others.”⁸⁶ It explained that under such a rule “a citizen who allowed his private sewer to flow into a stream in which the sewers of a large city were discharged, fouling and poisoning its waters, however small the taint caused by his private sewer, would be liable for the entire damage done.”⁸⁷ *Swain*, however, was overruled half a century later by *Davis*.⁸⁸ By that time, the law in the

79. See *supra* notes 48–72 and accompanying text.

80. 78 S.W. 93, 94–95, 99 (Tenn. 1903).

81. 232 S.W.2d 355, 357–58 (Tenn. 1950).

82. *Swain*, 78 S.W. at 93.

83. As was alluded to in *Velsicol Chemical Corp. v. Rowe*, 543 S.W.2d 337, 340–41 (Tenn. 1976) (overruling *Swain*).

84. *Swain*, 78 S.W. at 99. The court explained that

If [the defendants] are joint tortfeasors, each one is responsible for the damages resulting from the acts of all the wrongdoers, and they may all be sued severally or jointly; but, if they are not joint tortfeasors, each is liable only for the injury contributed by him, and can only be sued in a separate action therefor.

Id. at 94.

85. *Id.* at 99.

86. *Id.* at 94.

87. *Id.* at 95.

88. *Davis v. Broad St. Garage*, 232 S.W.2d 355, 357–58 (Tenn. 1950); see also *Velsicol Chem. Corp.*, 543 S.W.2d at 339 (discussing the development of the rule of JSL in Tennessee and citing *Davis*

state of Tennessee had changed.⁸⁹ JSL liability was applied not only between intentional tortfeasors but also between those who negligently caused an indivisible harm.⁹⁰ Consistent with its rationale in *Swain*—fairness between tortfeasors—the court justified a right of contribution. Holding otherwise, it explained, would result in one tortfeasor shouldering the entire burden for which two or more are liable.⁹¹

II. THE EFFICIENCY-FAIRNESS DEBATE

A. EFFICIENCY

It is now well established that administrative costs aside,⁹² both the contribution and no contribution rule—indeed *any* rule of apportionment—can be efficient in achieving deterrence.⁹³ The following example is illustrative. Assume that T_1 and T_2 , potential tortfeasors, must both take precaution or the victim will suffer an injury of \$100. If the cost of precaution is \$60 to T_1 and \$20 to T_2 , both will take precaution and the injury will be avoided regardless of the apportionment regime. Under a contribution rule, each party expects to share 50% of the damage (assuming they are equally at fault). T_2 will therefore take precaution ($20 < 50$), and given that T_2 took precaution, T_1 will take precaution or she will have to pay 100% of the damage ($60 < 100$). The result would not change even if T_1 was 99% at fault (and T_2 1%). In the latter case, T_1 will invest \$60 in precaution to avoid an expected cost of \$99 and knowing this, T_2 will take precaution ($20 < 100$). A no contribution regime would yield the same results. Assuming again that the expected liability of the parties is \$50 (because, for example, each has a 50% chance to pay the victim), T_2 will take precaution ($20 < 50$) and, knowing this, T_1 will similarly take precaution. So long as the total cost of the accident (\$100) is more than the total cost of care (\$80), one party has an incentive to

for the proposition that “[a] small minority of states—including Tennessee—eventually came to a contrary conclusion, allowing contribution among joint tortfeasors without the aid of legislation”).

89. See *Velsicol Chem. Corp.*, 543 S.W.2d at 340–41.

90. *Id.*

91. *Davis*, 232 S.W.2d at 357–58.

92. Once the costs of litigation and the impact of the apportionment regime on the parties’ incentives to settle are introduced, the no contribution rule emerges as a more efficient one. See Easterbrook, Landes, & Posner, *supra* note 28, at 354. But see Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. REV. 427, 434 (1993) (“[A] regime with no right of contribution has identical effects on the choice between settlement and litigation as one with contribution.”); *infra* note 95.

93. Easterbrook, Landes, & Posner, *supra* note 28, at 344; Landes & Posner 1980, *supra* note 28, at 529 (noting that “any allocation rule (not just no contribution) under which the sum of the tortfeasors’ expected shares . . . in joint-care cases are equal to 1 . . . would provide incentives for efficient accident avoidance”); A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447, 450 (1981) (“[I]t is not possible to recommend any of the rules without making some judgments about . . . various considerations.”). For a critical review of the literature, see Wright, *supra* note 7, at 1169–79.

take care, in which case the entire loss will fall on the second tortfeasor unless the latter also takes care.⁹⁴

The previous example deals with the case of “joint-care,” where both parties must take precaution or an injury will occur. But the no contribution rule leads to efficient results also in cases of “alternative care,” where *either* party can take precaution. To illustrate, assume that the \$100 accident may be avoided by T_1 at a cost of \$60 or T_2 at a cost of \$20. In this case efficiency requires that only one party take precaution: the cheaper cost avoider (T_2 in the example). Under a no contribution rule with indemnity, even if the victim chooses to recover from T_1 , then the latter will be able to be fully reimbursed by T_2 . Indemnity simply shifts the burden from one joint tortfeasor to another who is better situated to avoid the accident, rather than dividing it between the tortfeasors. Under a contribution rule the same result will occur (T_2 will exercise care) if the parties are 50% at fault. But under some circumstances, T_1 , the high cost avoider, will take precaution if, for example, she expects to be 81% at fault and indemnification is not allowed.

Finally, once administrative costs such as litigation are considered the no contribution rule appears to be superior.⁹⁵ It conflates into one proceeding what would otherwise require numerous court sessions to determine the allocation of liability between tortfeasors in order to recover the same amount. The no contribution rule saves the administrative costs that do not increase—they may in fact decrease—the parties’ incentives to take care and results in a waste of valuable resources to redistribute wealth.

Despite what may seem to be a pronounced superiority of the no contribution rule, Landes and Posner identified two important “economic benefits of contribution in joint-care” that left them, at least initially, unable to declare a winner.⁹⁶ The first is informational. The argument is that if because of uncertainty the total expected liability is

94. Landes & Posner 1980, *supra* note 28, at 524–25. This is not, however, necessarily the case when uncertainty is introduced. *See id.* at 525, 530.

95. *Id.* at 529–30. These benefits are discussed *infra* Parts III.C, III.F, IV.D. The incentives to settle under the different regimes are subject to a fierce debate. *See, e.g.,* Howard F. Chang & Hillary Sigman, *Incentives to Settle Under Joint and Several Liability: An Empirical Analysis of Superfund Litigation*, 29 J. LEGAL STUD. 205, 206–07 (2000); Easterbrook, Landes, & Posner, *supra* note 28, at 331–32; Lewis A. Kornhauser & Richard L. Revesz, *Multidefendant Settlements: The Impact of Joint and Several Liability*, 23 J. LEGAL STUD. 41, 42–43 (1994); Kornhauser & Revesz, *supra* note 92, at 429–35; John H. Langmore & Robert A. Prentice, *Contribution Under Section 12 of the Securities Act of 1933: The Existence and Merits of Such a Right*, 40 EMORY L.J. 1015, 1019–20 (1991); Polinsky & Shavell, *supra* note 93, at 455–56 & n.29; Timothy James Stanley, *An Analysis of the Rules of Contribution and No Contribution for Joint and Several Liability in Conspiracy Cases*, 35 SANTA CLARA L. REV. 1, 4–5 (1994).

96. Landes & Posner 1980, *supra* note 28, at 530–31.

less than 100%, an inefficient allocation of resources may result.⁹⁷ The second is the role of the contribution rule as a form of insurance.⁹⁸ Here the argument is that risk-averse tortfeasors would benefit from a contribution rule.⁹⁹ These two considerations led the authors to conclude that “*it is impossible at this stage of our knowledge to pronounce no contribution a more efficient rule than contribution.*”¹⁰⁰ Rather, the result “depends on the trade-off between the administrative cost savings under the former and the informational and insurance benefits under the latter.”¹⁰¹ Despite these concerns, the authors concluded that “a broad contribution rule is almost certainly less efficient than no contribution.”¹⁰²

The conclusion that the no contribution rule is efficient, however, is subject to criticism on at least two different grounds. First, the models used by law and economics enthusiasts assume that actors seek to maximize their utility and, in cases of uncertainty, their expected utility. But because working with utility functions is a formidable task, to simplify the analysis, the law and economics literature almost universally assumes that the parties are risk neutral.¹⁰³ The assumption allows the economist to treat actors as if they try to maximize expected benefits (or minimize expected costs) and yield definite predictions. The risk-neutrality assumption has been criticized widely as being for the most part an arbitrary assumption, one which frees the economists from real-life concerns and results in oversimplified models of little or no value.¹⁰⁴ Another possible criticism, and one that goes to Landes and Posner’s model, refers to the “two economic benefits of contribution” they identified.¹⁰⁵ Here, the claim is that these “benefits” may in fact justify the adoption of a contribution rule which was rejected by the authors.

Part III attempts to fill a gap in the economic literature which, for the most part, has failed to enter the fairness debate. It initially abstracts

97. See *infra* notes 173–79 and accompanying text.

98. Landes & Posner 1980, *supra* note 28, at 531.

99. But see William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 867–68 (1981) [hereinafter Landes & Posner 1981] (arguing that tort law should not perform an insurance function); see also Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1098 (1986).

100. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 203–04 (1987) (emphasis added) [hereinafter *THE ECONOMIC STRUCTURE OF TORTS*]; Landes & Posner 1980, *supra* note 28, at 531.

101. Landes & Posner 1980, *supra* note 28, at 531.

102. *Id.* at 550; see also Peter A. Diamond, *Single Activity Accidents*, 3 J. LEGAL STUD. 107, 140–45, 160 (1974).

103. *THE ECONOMIC STRUCTURE OF TORTS*, *supra* note 100, at 57; Lewis A. Kornhauser & Richard L. Revesz, *Joint and Several Liability*, in *TORT LAW AND ECONOMICS* 126–27 (Michael Faure ed., 2009) (analyzing the fairness of different apportionment regimes and concluding that JSL “performs badly”); Landes & Posner 1980, *supra* note 28, at 521; Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 1 (1980).

104. See, e.g., Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 645, 655–58 (1980).

105. Landes & Posner 1980, *supra* note 28, at 530–31.

away from efficiency to discern whether the no contribution rule is not only efficient but also “fair,” and it concludes that it is. In the process, however, this Article also bolsters the efficiency argument for adopting the no contribution rule. It argues that what Landes and Posner refer to as the “economic benefits of contribution” are overstated at best. The informational problem can be, and in fact was, mitigated by the common law and the insurance feature of the contribution regime is not a benefit at all. Rather, absent evidence to the contrary, it is a reason to reject the contribution rule.

B. FAIRNESS

Finally, even if the no contribution rule is truly efficient, the question still remains whether it should be adopted in light of its seemingly “unfair” results. The economic literature has failed to fully address the fairness argument. In three separate publications Landes and Posner,¹⁰⁶ and Landes, Posner, and Easterbrook¹⁰⁷ noted in passing that the no contribution rule is “fair” if analyzed from an ex-ante perspective. The focus of these publications, however, was the efficiency of the no contribution rule. The authors did not explain the basis for adopting the ex-ante/ex-post approach; how such an approach would be impacted by the uncertainty of litigation, insolvency, or transaction costs if at all; and to what extent it could be extended to unintentional torts. Moreover, their brief discussion was premised on the assumption that parties are inherently risk neutral, an assumption the authors relaxed only in discussing the efficiency of the rule.¹⁰⁸

It is perhaps therefore no surprise that later attempts to address the fairness issue from an economic perspective reached the opposite conclusion. Cooter and Ulen, for example, take the position that “people who cause an accident should compensate the victim in proportion to their fault.”¹⁰⁹ They argue that requiring a tortfeasor to pay according to

106. THE ECONOMIC STRUCTURE OF TORTS, *supra* note 100, at 193; *see also* Landes & Posner 1980, *supra* note 28, at 520.

107. Easterbrook, Landes, & Posner, *supra* note 28, at 332, 342–64. After acknowledging that “[p]erhaps, also, ‘fairness’ rather than economic analysis should determine the outcome of the contribution controversy” the authors analogized in two paragraphs contribution rules between intentional joint tortfeasors in a price fixing cartel to a lottery ticket and concluded that “the case for a contribution rule as a means of preventing unfairness is unpersuasive.” *Id.*

108. Easterbrook, Landes, & Posner, *supra* note 28, at 332, 351, 353 (noting that consideration such as different risk preferences “make[s] it impossible to conclude . . . which rule is preferable,” and arguing that if “firms are risk averse, a rule of no contribution will have a greater deterrent effect”); Landes & Posner 1980, *supra* note 28, at 520–21, 531 (assuming risk neutrality and discussing the effect of apportionment regimes on risk-averse individuals).

109. Cooter & Ulen, *supra* note 99, at 1095–96. Although the authors focus on comparative negligence and conclude that it is “more efficient and more equitable” than its alternatives, the same arguments hold for preferring a contribution rule over a rule of JSL with no contribution. *Id.* at 1071; *see also* Langmore & Prentice, *supra* note 95, at 1066 (noting that Cooter and Ulen’s fairness argument

her share of fault “seems to satisfy intuitive feelings about fairness”; that just as tax law requires people with the same level of income to incur the same tax liability, so tortfeasors “who are equally at fault should bear an equal share of the accident’s costs.”¹¹⁰ In their view it is simply “inequitable for one to bear a greater share of the accident’s cost than the other if their fault is the same.”¹¹¹ To bolster their argument, the authors take a contractarian approach absent in Landes and Posner’s analysis. Relying on Harsanyi and Rawls, they argue that behind a veil of uncertainty, wealth-maximizing parties who “believe that they are equally likely to be victims or injurers in future accidents,” would prefer an apportionment rule, which requires each tortfeasor to pay according to her fault—a conclusion that this Article rejects.¹¹² The lack of contractarian support for Landes and Posner’s ex-ante equity rationale and their reliance on a lottery example have led others to reject their approach as “a very stunted view of the notion of fairness,”¹¹³ one which “has relatively little legitimating power” and is “illusory.”¹¹⁴ In a more recent attempt, Kornhauser and Revesz reached a similar conclusion. According to Kornhauser and Revesz, when it comes to fairness between tortfeasors JSL “performs badly” because “it places a disproportionate burden on the defendant with the smaller share of the liability.”¹¹⁵

Outside of the law and economics literature, equitable and fairness considerations, especially fairness among tortfeasors, have been the focus of the apportionment debate. Opponents of the no contribution rule argue that it is unfair that a tortfeasor whose share in causing the damage was minimal will bear the entire burden of compensation, while others who are more culpable will be exempted from liability.¹¹⁶ They usually

would justify a contribution rule).

110. Cooter & Ulen, *supra* note 99, at 1095–96.

111. *Id.* at 1096.

112. *Id.* at 1097.

113. Langmore & Prentice, *supra* note 95, at 1066–67 (“[The lottery] analogy offered by Easterbrook, Landes, and Posner reveals confusion on their part at a very basic level. Ex post equality is unimportant in a lottery. The whole idea of a lottery is that there will be only one winner and everyone else will have a less happy result.”).

114. Scott C. Hecht, *Tort Reform Revisited: An Alternative to Missouri’s Comparative Fault Settlement System*, 62 UMKC L. REV. 247, 266, 268–69 (1994) (discussing Easterbrook, Landes & Posner’s lottery example, arguing that “the view that the ex ante perspective should define the extent of extant fairness has relatively little legitimating power,” and noting that “[a] strong consensus exists supporting the idea that ex ante fairness is illusory”).

115. Kornhauser & Revesz, *supra* note 103, at 126; *see also infra* notes 163–69.

116. *See, e.g.,* McIntyre v. Balentine, 833 S.W.2d 52, 58 (Tenn. 1992) (declaring JSL “obsolete” and explaining that it “fortuitously impose[s] a degree of liability that is out of all proportion to fault”); AM. BAR ASS’N, ACTION COMM’N TO IMPROVE THE TORT LIABILITY SYS., REPORT TO THE HOUSE OF DELEGATES 215 (1987) (“There is a perceived sense of unfairness in cases where the blameworthiness of the defendant’s conduct is so dramatically out of line with the ultimate burden of damages borne by the defendant.”); U.S. ATTORNEY GEN. TORT POLICY WORKING GRP., REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 33 (1986) [hereinafter TORT POLICY WORKING GROUP]

spice the argument with “horror stories” such as *Walt Disney World Co. v. Wood* where Disney was found to be only 1% at fault but was held liable for the entire judgment.¹¹⁷ Some complain that JSL with no contribution allows the victim to target large, deep-pocket defendants,¹¹⁸ while others take the opposite view, arguing that the rule allows the victim to target small defendants.¹¹⁹ Both, however, conclude that the rule is unfair due to the victim’s ability to arbitrarily or strategically choose from whom to recover.¹²⁰ It is thus not a surprise that most states

(arguing the JSL “has been used to make a defendant with only a limited role in causing an injury bear the full cost of compensating [the] plaintiff”); Wright, *supra* note 7, at 1160–62. Wright notes that as between tortfeasors the no contribution rule leads to unfair results. This “sense of unfairness flows from the fact that the tortfeasor with comparatively much greater fault escapes all liability, while the tortfeasor with comparatively lesser fault bears all or almost all of the liability.” Wright, *supra* note 7, at 1160–62.

117. 515 So. 2d 198, 198–99, 202 (Fla. 1987). Although in *Disney* the question before the court was whether JSL should be replaced with SL and not a right of contribution, the concern that a party might be required to pay more than her share of fault is at the heart of both issues. *Id.* at 200; see also *Olson Farms, Inc. v. Safeway Stores, Inc.*, 649 F.2d 1370, 1372 & n.3, 1377 (10th Cir. 1979) (defendant whose share was less than \$300,000 was denied contribution and had to pay \$2.4 million); Note, *Contribution in Private Antitrust Actions*, 93 HARV. L. REV. 1540, 1542 (1980) (discussing *Olson Farms*).

118. TORT POLICY WORKING GROUP, *supra* note 116, at 33–34 (recommending replacing JSL with SL); Wright, *supra* note 7, at 1149, 1151–52 (criticizing the “deep pocket” argument); Steven F. Cherry & Gordon Pearson, *Why Twombly Does (and Should) Apply to All Private Antitrust Actions, Including Alleged Hard-Core Cartels: A Reply to William J. Blechman*, ANTITRUST SOURCE (Dec. 2007), <http://www.wilmerhale.com/services/practice/pubs.aspx?firmService=449> (“[I]n antitrust, [l]iability is also joint and several with no right of contribution, which allows the plaintiff to pursue the deepest pocket (or pockets) for full recovery of damages attributable to all participants in the conspiracy.”).

119. See, e.g., Easterbrook, Landes, & Posner, *supra* note 28, at 343 (“Several judges, and a majority of the Senate Judiciary Committee, have asserted that under no contribution plaintiffs are likely to sue relatively smaller firms and leave larger firms alone.”); Polinsky & Shavell, *supra* note 93, at 455–56 & n.29, 466 (discussing both claims).

120. CAL. CIV. CODE § 1431.1 (2010) (referring to JSL as “the deep pocket rule” and one which “has resulted in a system of inequity and injustice”); *Alvarez v. New Haven Register, Inc.*, 735 A.2d 306, 312, 314 (Conn. 1999) (summarizing the law of JSL with no contribution under which “the plaintiff could collect the entire amount of his judgment from the richest defendant, or from the defendant with the deepest pocket” but noting that in enacting a tort reform “the legislature effectively allowed for contribution among joint tortfeasors and removed the onus of the deep pocket theory”); *DeBenedetto v. CLD Consulting Eng’rs, Inc.*, 903 A.2d 969, 977 (N.H. 2006) (“[N]umerous jurisdictions have enacted legislation seeking to ameliorate the ‘inequities’ suffered by low fault, ‘deep pocket’ defendants as a result of joint and several liability.”); *Mitrione v. Monroe*, No. 1:02-CV-0526 (LEK/RFT), 2010 WL 1539719, at *5 (N.D.N.Y. Apr. 19, 2010) (“New York enacted Article 16 of its Civil Practice Laws and Rules to ‘[l]imit[] the liability of persons jointly liable’ in certain circumstances and thereby ‘remedy the inequities created by joint and several liability on low-fault, deep pocket defendants.’” (citing N.Y. C.P.L.R. 1601 (internal quotation marks omitted))); Jonathan Toby Dykes, *Alabama’s Wrongful Death Act: A Time for Change*, 21 AM. J. TRIAL ADVOC. 617, 647 (1998) (arguing that JSL with no contribution is “not fair” because it “punishes . . . a defendant [who] is slightly at fault but has deep pockets”); Nancy C. Marcus, *Phantom Parties and Other Practical Problems with the Attempted Abolition of Joint and Several Liability*, 60 ARK. L. REV. 437, 495 (2007) (arguing that JSL with no contribution resulted in a “‘deep pockets’ problem” but arguing that “[w]hile the abolition of joint and several liability may seem fair to a wealthy defendant, such abolition is actually detrimental to the interests of many small business owners” who “under pure several liability . . . are almost

that have abrogated the no contribution rule did so either wholly or partially to achieve fairness between tortfeasors.¹²¹

guaranteed to be sued"). *But see* Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 n.3 (N.Y. 1989) (applying proportionate market-share liability to diethylstilbestrol ("DES") cases and explaining that "joint and several liability expands the burden on small manufacturers beyond a rational or fair limit"); *Antitrust Equal Enforcement Act of 1979: Hearing on S. 1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong. 70 (1979) (statement of Robert P. Taylor, antitrust practitioner) (supporting an amendment that would allow contribution and noting that it "will provide immediate relief to a number of companies, usually smaller ones, which are currently being subjected to extreme prejudice as a result of having been swept into large class action proceedings along with other companies in their particular industry and left to face disproportionately large exposure to liability after other defendants have settled"); *id.* at 67-68, 70 (statement of Donald G. Kempf, Jr., antitrust practitioner) (arguing that small firms are likely to be named defendants and settle even if they are not liable in order to avoid a high risk of false positive and concluding that the amendment will cure "a terrible injustice"); S. REP. NO. 96-428, at 1, 14-17 (1979) ("S. 1468, the Antitrust Equal Enforcement Act of 1979, is designed to rationalize the process of the allocation of damages in an antitrust price-fixing suit, so that . . . smaller and middle-sized businesses which find themselves in the midst of a price-fixing suit are not left responsible for the liability caused by another's wrongdoing."); Paula A. Hutchinson, *A Case Against Contribution in Antitrust*, 58 TEX. L. REV. 961, 982 (1980) ("Proponents of contribution attribute four major evils to the no-contribution rule" the first of which is that "it allows a single defendant—perhaps one small and less culpable—to pay for the sins of an entire industry."); Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747, 761-63 (2009). Leslie reports that some observers argue that the unfairness on JSL with no contribution is "magnified by the fact that the plaintiff can decide which alleged conspirator it would like in the vulnerable last position" and that it may decide to sue "the smallest conspirator capable of paying the total damages" in order "to simplify and speed up the litigation." Leslie, *supra*, at 761-63. Further, "the absence of contribution might be particularly unfair to small players with lower market shares." *Id.*

121. ARK. CODE ANN. § 16-61-202 (2011); MISS. CODE ANN. § 85-5-7 (2011); R.I. GEN. LAWS § 10-6-3 (1997); S.C. CODE ANN. § 15-38-20 (1977); S.D. CODIFIED LAWS §§ 15-8-12, 15-8-15 (2011); VA. CODE § 8.01-443 (2011); WASH. REV. CODE ANN. § 4.22.040 (2011); 1981 WASH. SESS. LAWS 112; Greyhound Lines, Inc. v. Cobb Cnty., 681 F.2d 1327, 1332-33 (11th Cir. 1982) (applying Georgia law); Morris v. UHL & Lopez Eng'rs, Inc., 442 F.2d 1247, 1254 (10th Cir. 1971) (applying New Mexico law); George's Radio, Inc. v. Capital Transit Co., 126 F.2d 219, 220-21 (D.C. Cir. 1942); Patten v. Knutzen, 646 F. Supp. 427, 428-29 (D. Colo. 1986); Petrolane, Inc. v. Robles, 154 P.3d 1014, 1019 (Alaska 2007); Herstam v. Deloitte & Touche, LLP, 919 P.2d 1381, 1386 (Ariz. Ct. App. 1996); Little v. Miles, 212 S.W.2d 935, 936 (Ark. 1948); Miller v. Stouffer, 11 Cal. Rptr. 2d 454, 460 (Ct. App. 1992); Alfano v. Randy's Wooster St. Pizza Shop II, Inc., 881 A.2d 379, 385 (Conn. App. Ct. 2005); Farrall v. A. C. & S. Co., Inc., No. 85C-FE-10, 1990 Del. Super. LEXIS 67, at *3-4 (Del. Super. Ct. Feb. 2, 1990); Lincenberg v. Issen, 318 So. 2d 386, 390 & n.1, 391 (Fla. 1975) ("The majority of states have receded from this doctrine either by legislation or judicial fiat in view of its inequity and harshness. The rationale for this change of view is generally explained that principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors without proportionate payment from the others, gives the latter an advantage to which he is not equitably entitled."); Mitchell v. Branch, 363 P.2d 969, 977-78 (Haw. 1961); Masters v. Idaho, 668 P.2d 73, 76 (Idaho 1983); Skinner v. Reed-Prentice Div. Package Mach. Co., 374 N.E.2d 437, 454 (Ill. 1977), *superseded by statute*, ILL. REV. STAT. 1985 ch. 70, pars. 301-05, *as recognized in* J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc., 516 N.E.2d 260, 266-67 (Ill. 1987); Control Techniques, Inc. v. Johnson, 762 N.E.2d 104, 109 (Ind. 2002); Best v. Yerkes, 77 N.W.2d 23, 29 (Iowa 1956); Brown v. Keill, 580 P.2d 867, 872-74 (Kan. 1978); Elpers v. Kimble, 366 S.W.2d 157, 161 (Ky. 1963); Quatray v. Wicker, 151 So. 208, 210-12 (La. 1933); Hobbs v. Hurley, 104 A. 815, 816-17 (Me. 1918); Montgomery Cnty. v. Valk Mfg. Co., 562 A.2d 1246, 1248 & n.4, 1249 (Md. 1989); McGrath v. Stanley, 493 N.E.2d 832, 835 (Mass. 1986); O'Dowd v. Gen. Motors Corp., 358 N.W.2d 553, 557-59 (Mich. 1984); Duluth, M. & N. Ry. Co. v. McCarthy, 236 N.W. 766, 767-68 (Minn. 1931); Mo. Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d

There are a number of compelling reasons why no contribution is a fairer regime, many of which have been raised in support of retaining JSL over its replacement with SL. These include the fact that: (1) each of the joint tortfeasors caused and therefore is responsible for the *entire* harm;¹²² (2) each of the tortfeasors could have avoided that harm had they taken more precaution; (3) contribution provides a culpable party with a windfall because it reduces the liability of a fully responsible tortfeasor simply because others joined her;¹²³ (4) a regime of SL or one that allows contribution shifts the risk of litigation and insolvency to the innocent victim;¹²⁴ (5) comparing fault between fully responsible

466, 473–74 (Mo. 1978) (en banc); *Hampton v. Safeway Sanitation Servs.*, 725 S.W.2d 605, 607–08 (Mo. Ct. App. 1987); *State Farm Fire & Cas. Co. v. Bush Hog*, 219 P.3d 1249, 1252 (Mont. 2009); *Royal Indem. Co. v. Aetna Cas. & Sur. Co.*, 229 N.W.2d 183, 189–90 (Neb. 1975); *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1050–51 & n.11–n.13 (Nev. 2000); *Rodgers v. Colby's Ol' Place, Inc.*, 802 A.2d 1159, 1161–62 (N.H. 2002); *Tino v. Stout*, 229 A.2d 793, 798 n.3 (N.J. 1967); *Otero v. Jordan Rest.* 922 P.2d 569, 572 (N.M. 1996); *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1372 (N.Y. 1992); *Med. Mut. Ins. Co. v. Mauldin*, 529 S.E.2d 697, 701 (N.C. Ct. App. 2000), *abrogated by Sterling v. Gil Soucy Trucking, Ltd.*, 552 S.E.2d 674, 679 (N.C. Ct. App. 2001); *Bartels v. City of Williston*, 276 N.W.2d 113, 117 (N.D. 1979); *Fidelholtz v. Peller*, 690 N.E.2d 502, 506–07 (Ohio 1998); *Barringer v. Baptist Healthcare of Okla.*, 22 P.3d 695, 698 (Okla. 2001); *Blackledge v. Harrington*, 634 P.2d 243, 244–45 & n.3 (Or. 1981); *Jensen v. Alley*, 877 P.2d 108, 110 & n.3 (Or. Ct. App. 1994); *Swartz v. Sunderland*, 169 A.2d 289, 290–91 (Pa. 1961); *Degen v. Bayman*, 200 N.W.2d 134, 136–37 (S.D. 1972); *First Premier Bank v. Kolcraft Ent.*, 686 N.W.2d 430, 442 (S.D. 2004); *Davis v. Broad St. Garage*, 232 S.W.2d 355, 357–58 (Tenn. 1950); *Lottman v. Cuilla*, 288 S.W. 123, 126 (Tex. Comm'n App. 1926); *Unigard Ins. Co. v. City of LaVerkin*, 689 P.2d 1344, 1346 (Utah 1984); *Howard v. Spafford*, 321 A.2d 74, 76 (Vt. 1974); *Haynes v. City of Nitro*, 240 S.E.2d 544, 547 (W. Va. 1977); *Brown v. Haertel*, 246 N.W. 691, 692–93 (Wis. 1933); *Halliburton Co. v. McAdams, Roux and Assocs.*, 773 P.2d 153, 155 (Wyo. 1989); *Cheri D. Green & Michael K. Graves, Allocation of Fault: Joint Tortfeasors in Court and the Ones Who Should Be*, 63 *Miss. L.J.* 647, 649–53 (1994); *James T. Irvin III, Easing A Client's Pain After the Game Is Over: Contribution, Indemnification and Set Off*, S.C. LAW., Sept./Oct. 2001, at 28, 28–29; *Randall, supra* note 9, at 980 (encouraging the Alabama State Legislature and Alabama Supreme Court to abrogate the no contribution rule because it violates “fundamental justice”); *W.E. Shipley, Annotation, Uniform Contribution Among Tortfeasors Act*, 34 *A.L.R.2d* 1107, 1107–08 (1954) (explaining that a number of jurisdictions have adopted the Uniform Contribution Among Tortfeasors Act, which abandoned the common law rule of no contribution); *Alexandria E. Baez, Comment, Joint Tortfeasors, Full Compensation, and the 1,800 Degree Crucible: Rekindling Rhode Island's Uniform Contribution Among Tortfeasors Act in the Aftermath of the Station Nightclub Fire*, 12 *ROGER WILLIAMS U. L. REV.* 386, 389 (2007); *Megan P. Duffy, Note, Multiple Tortfeasors Defined by the Injury: Successive Tortfeasor Liability After Payne v. Hall*, 37 *N.M. L. REV.* 603, 608 (2007); *see supra* Introduction, Part I, Part II.B.

122. *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 588 P.2d 1308, 1313 (Wash. 1978) (“That it may be possible to assign a percentage figure to the relative culpability of multiple tort-feasors does not detract from the preliminary fact that *each* tort-feasor’s conduct was a proximate cause of an entire indivisible injury.”), *superseded by statute*, *WASH. REV. CODE ANN.* § 4.22.070 (2011), *as recognized in Kottler v. Weyerhaeuser Co.*, 963 P.2d 834, 838–39 (Wash. 1998).

123. *Richard W. Wright, The Logic and Fairness of Joint and Several Liability*, 23 *MEM. ST. U. L. REV.* 45, 59 (1992); *see also Hager, supra* note 6, at 103 (“[SL] embodies a paradox that the more tortfeasors there are causing plaintiff’s injury the less answerable each one of them becomes.”).

124. *Seattle First Nat'l Bank*, 588 P.2d at 1313–14 (“[if the rule of JSL is abandoned] a completely faultless plaintiff could be forced to bear a portion of the loss if any tort-feasor should prove financially unable to satisfy his proportionate share of the damages”); *see also Am. Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 906 (Cal. 1978) (“One of the principal by-products of the joint and

tortfeasors is infeasible, arbitrary, and unfair in and of itself;¹²⁵ and (6) a contribution (or SL) regime will result in more proceedings and thus increase the cost of litigation to the victim and at best delay collection or even worse, reduce it.¹²⁶

All of these considerations are well known by now, although they are often ignored by pro-defendants organizations.¹²⁷ This Article adds to the fairness debate by taking a contractarian approach. Unlike Cooter and Ulen, however, it argues that if situated behind a veil of uncertainty the very tortfeasors that are said to suffer from the “unfair” results of the no contribution rule would prefer the no contribution rule, or at least would view it as fair as its alternatives, and might in fact agree to adopt it.¹²⁸

III. APPORTIONING LIABILITY FAIRLY: AN ECONOMIC APPROACH

The relation between just distribution of wealth and apportionment rules is straightforward, indeed tautological: “Justice is concerned with (proper) distributions over individuals. Distributions—or ‘apportionments,’ ‘allotments,’ ‘allocations’—are ‘just’ when they are in some sense appropriate; ‘unjust’ when they are not.”¹²⁹ For some, a rule may be fair or appropriate if it is efficient. To others, however, fairness and efficiency are far from being synonyms. “[L]aws and institutions,” noted Rawls, “no matter how efficient and well-arranged must be reformed or abolished if they are unjust.”¹³⁰ But even if “[j]ustice is the first virtue of social institutions,”¹³¹ the question still remains: what is “just?” This Part reviews one theory of justice.¹³² It then undertakes to refute the

several liability rule is that it frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability.”). As a response to *American Motorcycle* the California legislature adopted Proposition 51, also known as the “deep pocket” initiative, which aimed “to eliminate the perceived unfairness of imposing ‘all the damage’ on defendants who were ‘found to share [only] a fraction of the fault.’” *Miller v. Stouffer*, 11 Cal. Rptr. 2d 454, 460 (Cal. Ct. App. 1992) (citing *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 146 (Cal. 1992)).

125. *Seattle First Nat’l Bank*, 588 P.2d at 1313 (“Joint and several liability is premised upon causation and the indivisibility of the *harm* caused. The simple feasibility of apportioning *fault* on a comparative negligence basis, between plaintiff and defendant, does not render an indivisible injury ‘divisible’ for purposes of joint and several liability.”).

126. See Landes & Posner 1980, *supra* note 28, at 529.

127. See Wright, *supra* note 7, at 1161, 1163.

128. See *supra* notes 109–12 and accompanying text.

129. Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice*, 26 CARDOZO L. REV. 1179, 1187 (2005); see also Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 194–95 (2000) (“[T]o the extent we are concerned with justice and fairness in tort law, we should be concerned more with matters of distributive justice—with the fair apportionment of the burdens and benefits of risky activities.”).

130. RAWLS 1971, *supra* note 2, at 3; RAWLS REVISED, *supra* note 2, at 3.

131. RAWLS 1971, *supra* note 2, at 3; RAWLS REVISED, *supra* note 2, at 3.

132. The discussion of competing theories is deferred to Part IV, *infra*.

misconception that the no contribution rule is “unjust.” More specifically, it draws on the “veil of uncertainty” literature to evaluate the fairness of a number of legal regimes, including JSL with and without fault-based contribution, SL, market-share liability and its sister, pro-rated liability. Building on Harsanyi and Landes and Posner, it shows that self-interested individuals behind a veil, unaware of whether they would be victims, tortfeasors, both, or neither, may in fact prefer the no contribution rule.

A. THE ASSUMPTIONS

1. *The Veil of Uncertainty*

In a series of articles, Harsanyi identified two sets of preferences that each individual holds: subjective (or personal) preferences, and moral preferences.¹³³ Subjective preferences give high weight to the decisionmaker’s own personal interests, taking under consideration her endowments, status, skills, and other unique characteristics.¹³⁴ Thus, for example, a wealthy person may prefer an income distribution or a tax policy that favors the rich if she *is* egoistic, or one that benefits the poor if she *is* altruistic. Similarly, an actor who is likely to be a defendant may say to herself: “under a regime of SL my liability is curbed, whereas under a regime of JSL I may be required to bear the entire burden. I thus prefer a regime of SL.”¹³⁵ In making these choices the decisionmaker is aware of her place in society (she knows whether she is poor or rich) and her situation (she knows whether she is or is likely to be a victim or an injurer), and she is motivated by her own set of beliefs (whether it is egoism or altruism), which are the result of her own unique circumstances, such as her upbringing, education, and so forth.

Subjective preferences (often) guide the individual but they cannot serve as a moral judgment. They are just too narrowly tailored to serve the decisionmaker’s own personal needs and are therefore too biased. In contrast, moral preferences or “moral value judgments”¹³⁶ indicate what social order an individual would choose in a state of “complete ignorance”¹³⁷ of her personal or relative position in the chosen social

133. Harsanyi 1975, *supra* note 19, at 598; Harsanyi 1955, *supra* note 19, at 315; Harsanyi 1953, *supra* note 19, at 434–35; *see also supra* note 19.

134. Harsanyi 1975, *supra* note 19, at 598; Harsanyi 1955, *supra* note 19, at 315; Harsanyi 1953, *supra* note 19, at 434.

135. The example is based on Harsanyi 1975, *supra* note 19, at 598 (noting that an individual who is wealthy under a capitalistic regime but “would be at best a minor government official” under socialism would prefer capitalism but that such decision would be only a “judgment of personal preference” as opposed to a “moral value judgment”).

136. Harsanyi uses these terms interchangeably. *See* Harsanyi 1975, *supra* note 19, at 598; Harsanyi 1953, *supra* note 19, at 434–35.

137. Harsanyi 1953, *supra* note 19, at 434–35.

order. In making her moral choice, the individual assumes that she has an equal probability to obtain any of the positions in the new social situation.¹³⁸ Moral preferences therefore give the *same* weight to the interest of *every* member of society.¹³⁹ And in doing so they represent a “‘fair compromise’ among them.”¹⁴⁰ In the above example, the individual must choose a tax policy or an apportionment regime without knowing whether she will be rich or poor, a tortfeasor, victim, both, or neither, but assuming she has the same chance as other members to assume the position of the best-off member, second-best off member, and so on, up to the worst-off member.¹⁴¹

2. *Individuals’ Risk Preferences*

The availability of private low-cost insurance to tortfeasors and victims requires that individuals behind the veil are treated as risk-neutral actors. This is so because insurance, by compensating the policy holder, eliminates the risk and thereby converts the risk averse actor into one who is risk neutral. The conclusion relies on some simplifying assumptions, but moral hazards aside, a person who purchased insurance that would compensate her in case her car is stolen, would be indifferent between engaging in a risky activity that would put her car in jeopardy, such as parking on the street, and taking additional precaution, such as

138. Harsanyi 1975, *supra* note 19, at 598; Harsanyi 1953, *supra* note 19, at 435 (recognizing that “in the real world value judgments . . . usually . . . do not presuppose actual ignorance” and noting that they can “still be interpreted as an expression of what sort of society one would prefer if one had an equal chance of being ‘put in the place of’ any particular member of the society”).

139. Harsanyi 1975, *supra* note 19, at 598–99; Harsanyi 1953, *supra* note 19, at 435.

140. Harsanyi 1955, *supra* note 19, at 315. *But see* Harsanyi 1975, *supra* note 19, at 598 (noting that “Rawls’s approach yields a moral theory in the contractarian tradition” and contrasting it with his own approach).

141. Rawls’ veil of ignorance—as opposed to his substantive difference rule—is very similar to Harsanyi’s veil of uncertainty, although the latter preceded the former. Harsanyi 1975, *supra* note 19, at 595 (“In actual fact, this concept [Rawls’ veil of ignorance] played an essential role in my own analysis of moral value judgments, prior to its first use by Rawls in 1957.”). For a review of Rawls’ substantive maximin (or difference) rule and reasons for rejecting it, see *infra* Part IV.B. According to Rawls, a just society is one which people would agree on or contract for behind a veil. RAWLS 1971, *supra* note 2, at 5, 17–22, 136–42; RAWLS REVISED, *supra* note 2, at 4, 15–19, 118–23; Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 260, 298–304 (1998). In this so called “original position,” people are free from special interests. They do not know their race, gender, religion (if any), social status, and intelligence. Nor do they know whether they will be rich or poor, healthy or sick, injurers or victims. Put differently, the original position is a position of uncertainty and therefore equality, in which free, self-interested and rational individuals are divested of any specific characteristics (save their ability to think and make decisions based on general information). Individuals do, however, know “the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology.” RAWLS 1971, *supra* note 2, at 137; RAWLS REVISED, *supra* note 2, at 119. Behind this veil of ignorance, individuals will be able to choose a fair set of rules. Unaware of the personal attributes they will possess in the real world, they would be free of biases and would thus be able to promulgate rules and allocate resources in a way that would be acceptable to all and, by definition, just.

parking in a gated garage.¹⁴² By offering full compensation, the insurance eliminates the risk and renders the insured indifferent or neutral to risk.¹⁴³

The risk-neutrality assumption is also embedded in the celebrated Hand formula.¹⁴⁴ Liability in negligence arises when one does not take cost-justified precautions.¹⁴⁵ According to the algebraic terms of the Hand formula “liability depends upon whether B [the burden of precaution] is less than L [the severity of the harm] multiplied by P [the probability of harm]: i.e., whether $B < PL$.”¹⁴⁶ The formula compares the costs of precaution to its benefits, but while the costs of precaution (B) may be certain, the benefits from taking precautions (PL) are not. After all, the accident may (at probability p) or may not (at a probability $1-p$) happen, even without precautions. Yet, the Hand formula does not calculate the expected utility from avoiding the accident as decision theory requires. Instead it calculates the expected value of the accident (PL), which is also a measure of expected utility from exercising care, but only if one assumes risk neutrality.

Consider a textbook example where the cost of precaution is \$100, the probability that an accident would completely destroy a widget is 1%, and the loss (the widget’s value) is \$200. This is tantamount to a game under which one needs to choose between (a) paying \$100 upfront, or (b) paying nothing at a probability of 99% and paying \$200 at a probability of 1%. A risk-neutral actor is indifferent between paying the expected value of the accident: \$2 ($200 \times 1\%$) and taking her chances, but she will not pay \$100 to avoid an accident with an expected value of \$2. The risk seeker would be willing to take the chance and would decline to pay the \$100 upfront. The risk averse actor may be willing to pay \$100 upfront (depending on the intensity of her aversion) just to avoid the risk that she would have to pay \$200. The Hand formula assumes risk neutrality because it looks only at expected values. In the

142. Insurance companies take a number of actions in order to provide parties with incentives to take care, including requiring insureds to share some of the cost (for example, in the form of a deductible or a co-payment), requiring insureds to take certain protective measures (for example, purchasing an alarm system) and exceptions from coverage where care was not taken. *See also infra* note 144.

143. This assumes that co-payment and other related costs are trivial. Rizzo, *supra* note 104, at 656.

144. ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 167, 169 (noting that the risk-neutrality assumption can be made in tort (but not in contract) because of the availability of “well developed markets in insurance against personal injury and death”); Larry L. Chubb, *Economic Analysis in the Courts: Limits and Constraints*, 64 IND. L.J. 769, 774 (1989); Landes & Posner 1981, *supra* note 99, at 867. *But see* Rizzo, *supra* note 104, at 645 (criticizing the risk-neutrality assumption on the grounds that it allows scholars “to deal with the simpler notion of expected wealth rather than the more complex expected utility”).

145. ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 200; Posner, *supra* note 25, at 73 (“The rules of liability seem to have been broadly designed to bring about the efficient (cost-justified) level of accidents and safety, or, more likely, an approximation thereto.”).

146. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

game of life it exempts from liability the person who did not take precaution in case the accident occurred because the costs of precaution (\$100) outweigh the expected benefits (\$2). Note that if individuals were infinitely risk averse, as Rawls assumes,¹⁴⁷ the victim in the example would always take precaution because she would treat all risks—including the risk that the accident would occur and the risk that the tortfeasor would not be required to pay her damages—as certain. Similarly, if the tortfeasor were infinitely risk averse, she would never commit the tort in the first place because she would act as if the event requiring her to pay the value of the widget would surely happen, however unlikely the event may be. She would even alter her behavior in order to avoid being sued for fear of a false positive: that she will be found liable even though she was not. If Rawls' assumption was correct and individuals were truly so risk averse, very few torts, if any, would ever be committed. This is clearly not the case.

This Article assumes that individuals act as risk-neutral actors in the tort context. One objection may be that this assumption is equally as unrealistic as that made by Rawls. After all, the assumption made here, that individuals are risk neutral and Rawls' assumption that they are infinitely risk averse, are both factual assumptions, equally strong and may be equally wrong. The risk-neutrality assumption, albeit factual, is very different than that made by Rawls. Unlike Rawls, this Article does not assume that individuals are *inherently* risk neutral. Rather, it recognizes that different people may have varying risk preferences as they indeed do. But it relies on the *availability* of low cost insurance to assume that people, even those who are risk averse, behave as if they are risk neutral.

The above explanation is a descriptive one. But the discussion about individuals' risk preferences can also provide a normative account and shed some light on the elusive "reasonable person" concept in the tort of negligence. Under the nonalgebraic normative formulation of the tort of negligence, liability is found if one did not act as a reasonable person would under the circumstances. Perhaps, then, the hypothetical "reasonable person" in torts is that person who behaves as if she were a risk neutral. This reasonable person must invest in precautions up to the expected value of the accident, even if a risk seeker would not invest in precaution at all; but she does not have to invest more than the expected value, even if a risk-averse person would. Viewed this way the negligence rule can also be justified on contractarian grounds. A social contract, like any contract, serves as a means to allocate risks between the parties. The risk-neutrality assumption is thus only a manifestation that individuals behind the veil, aware of the existence of low-cost insurance, are not

147. See *infra* notes 234, 236 and accompanying text.

willing to impose on victims the damages caused by risk seekers who invested in precautions below the *PL* level; and they ask, though they do not require, that a risk averse person will not invest more than that level.

3. *The Maximand*

Following Harsanyi, the model assumes that behind the veil individuals know that people are different, that they have different preferences, goals, intellects and different attitudes towards risk, or, to use an economic term, that they have a different utility function—what Harsanyi referred to as “subjective preferences”¹⁴⁸—denoted as U_i . Uncertain of whom they will be after the veil is pierced, these individuals will try to maximize their expected utility.¹⁴⁹ This means that if there are n members in that society and each individual has an equal probability to be the i^{th} individual, the chance to be the i^{th} member and face U_i is $1/n$. For every individual the expected utility function that each person tries to maximize behind the veil can be formulated as follows:

$$(1) \quad EU = \frac{1}{n}U_1 + \frac{1}{n}U_2 + \dots + \frac{1}{n}U_n = \frac{1}{n}(U_1 + U_2 + \dots + U_n) = \frac{1}{n} \sum_{i=1}^n U_i$$

The risk-neutrality assumption facilitates this expression even further by allowing us to replace expected utility with a more manageable maximand: expected value. But even with this new, simplified maximand at hand one may still ask whether the veil can really serve as a practical tool for devising rules for apportioning liability. After all, the veil is applied only as a mental exercise. It is a theoretical tool that philosophers use when they play “what if.” In this game they must pretend that they are members of society, that they are in the original position, and act as if they do not know whether in the real world they would be a man or a woman, poor or rich, black or white, and so on. It is a theoretical tool because members of society do live in the real world and because they do know who they are and act accordingly. Yet, when it comes to promulgating liability rules people are truly behind a veil, at least in the sense that they do not know if they will be victims or injurers; and in case they are injurers, they do not know what fault level would be assigned to them by the jury. One objection could be that in real life, members of society are not truly behind the veil because they *are* aware of their initial endowments. A defendants organization, for example, would likely lobby for a contribution or SL rule to curb its members’ liability and thereby maximize their subjective preferences.¹⁵⁰ Such

148. See Harsanyi 1955, *supra* note 19, at 315.

149. This is Harsanyi’s maximand. See Harsanyi 1975, *supra* note 19, at 598.

150. For example, the Wisconsin Civil Justice Council “was formed in early 2009 to represent Wisconsin business interests on emerging civil litigation challenges before the Legislature” and its “primary goal is to achieve fairness and equity.” WISCONSIN CIVIL JUSTICE COUNCIL, INC.,

biases, however, can often be detected and should be ignored. In any case, they should not play a role in deciding on a theoretical or “moral” basis for adoption of a contribution rule as it cannot be justified on contractarian grounds—as a scheme to which all members of society would agree on. Rather, together with Harsanyi, “we can say that [members of society] are expressing a *moral value judgment*, or that they are expressing a *moral preference* for one of these social arrangements, if they make a serious effort to *disregard* this piece of information [i.e., their own personal position], and make their choice *as if* they thought they would have the same probability of taking the place of any particular individual in society.”¹⁵¹ The model below attempts to do exactly that.

B. THE SIMPLE MODEL

If individuals do not know if they will be victims or joint tortfeasors, what rule of apportionment would they choose? This sub-Part tries to answer the question by providing a simple model with a number of additional assumptions that are later relaxed. Specifically, it assumes that there is one victim; n tortfeasors, each of whom is solvent; that litigation costs are not prohibitive; and that litigation is certain. In this simple world, under a regime of several liability, ex-post, each tortfeasor ($n > 1$) will pay $\alpha_i D$ where α_i is the fault assigned by the jury to the i^{th} tortfeasor and D is the damage to the victim ($\sum \alpha_i = 1$). For example, if there are two tortfeasors, one is 1% at fault and the other is 99% at fault, and the

<http://www.wisciviljusticecouncil.org/about-us/> (last visited July 4, 2011); *id.* at http://www.wisciviljusticecouncil.org/wwcms/wp-content/uploads/2009/06/wcjc_memo-senate061509.pdf (last visited July 4, 2011) (advocating for the abolishment of JSL). In addition, the American Academy of Family Physicians (“AAFP”) prides itself as “one of the largest national medical organizations, representing more than 97,600 family physicians, family medicine residents and medical students nationwide.” *About Us*, AAFP, <http://www.aafp.org/online/en/home/aboutus.html?navid=about+us> (last visited July 4, 2011); *Joint and Several Liability: AAFP State Government Relations*, AAFP http://www.aafp.org/online/etc/medialib/aafp_org/documents/policy/state/liability-joint.Par.0001.File.tmp/stateadvocacy_Liability_Joint%20and%20Several.pdf (last visited July 4, 2011) (calling for the replacement of JSL with SL). Also, ATRA was founded by the American Council of Engineering Companies, joined by the American Medical Association, and advocates for the abolishment of JSL on the grounds that it “is neither fair, nor rational, because it fails to equitably distribute liability. The rule allows a defendant only minimally liable for a given harm to be forced to pay the entire judgment, where the co-defendants are unable to pay their share.” *Joint and Several Liability Rule Reform*, ATRA, <http://www.atra.org/issues/index.php?issue=7345> (last visited July 4, 2011); see also Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 VAND. L. REV. 1277, 1280–81 (1987) (“Unfortunately, the congressional debates regarding the merits and demerits of contribution and claim reduction have been obscured by self-interest.”); Leslie, *supra* note 120, at 750 (“[M]any firms lobbied Congress to create a statutory right of contribution.”).

151. Harsanyi 1975, *supra* note 19, at 598; see also Harsanyi 1955, *supra* note 19, at 316 (“[I]n either case [whether the individual does not in fact know his choice or disregard it] an impersonal choice (preference) of this kind can in a technical sense be regarded as a choice between ‘uncertain’ prospects.”).

damage to the victim is \$100, then the first will pay \$1 and the second \$99. If behind the veil members know that they will be tortfeasors but they do not know what percentage of fault would be assigned to them (1% or 99% in the example) then ex-ante their expected liability will be:

$$(2) \quad EL_{Ti} = \frac{1}{n} \alpha_1 D + \frac{1}{n} \alpha_2 D + \dots + \frac{1}{n} \alpha_n D = \frac{1}{n} \sum_{i=1}^n \alpha_i D = \frac{D}{n}$$

In the example above, each tortfeasor knows that she has a 50% chance to be the first tortfeasor and if so she will be assigned 1% of fault and pay \$1; and there is a 50% chance that she will be the second tortfeasor in which case she will be 99% at fault and pay \$99. Her expected liability is therefore equal to \$50 (50% × \$1 + 50% × \$99).

Under a pro-rated regime each tortfeasor pays 1/n of the damage (in the example above, each pays \$50), which is also equal to their expected liability behind the veil, as shown by Equation (3):

$$(3) \quad EL_{Ti} = \frac{1}{n} \frac{D}{n} + \frac{1}{n} \frac{D}{n} + \dots + \frac{1}{n} \frac{D}{n} = \frac{1}{n} \sum_{i=1}^n \frac{D}{n} = \frac{D}{n}$$

In a market-share regime, liability is not pro-rated or based on fault, but rather on the market share possessed by each tortfeasor, denoted by m_i . In this truncated version of the tort of negligence the causation element is missing. For policy reasons, liability arises if one breached her duty, even if her breach did not cause the victim's injury.¹⁵² To illustrate, if the tortfeasor in the above example who was 99% at fault had only $m_i=30\%$ of the market, she would only be liable for 30% of the damage, or more generally $m_i D$ ($\sum m_i=1$). Her expected liability, however, is the same as in the case of pro-rated and several liability:

$$(4) \quad EL_{Ti} = \frac{1}{n} m_1 D + \frac{1}{n} m_2 D + \dots + \frac{1}{n} m_n D = \frac{1}{n} \sum_{i=1}^n m_i D = \frac{D}{n}$$

Behind the veil a tortfeasor does not know if she will be the competitor with the high market share (70%) or the one with the low market share (30%). But she knows that regardless of her fault she has a 50% chance to be liable for 30% of the damage and a 50% chance to be liable for 70% of the damage. She therefore knows that her expected liability will be \$50 (50% × \$70 + 50% × \$30), or \$100/2.

JSL with and without contribution yields the same expected liability. Under JSL with contribution ex-ante, each tortfeasor's expected liability is equal to D/n , but ex-post she pays only $\alpha_i D$. It is true that a tortfeasor may be required to pay the entire damage, D (\$100 in the example) to the victim, but since the parties are solvent and litigation is cheap and certain, such party will be able to receive contribution and her liability

¹⁵² See, e.g., *Sindell v. Abbott Labs.*, 607 P.2d 924, 936-37 (Cal. 1980); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1075 (N.Y. 1989).

will be brought down to $\alpha_i D$. To analyze the no contribution rule, assume the worst case scenario to a tortfeasor: the situation in which she will be required to pay the entire damage by herself. Unlike the contribution rule, ex-post this means that the unlucky tortfeasor will bear the entire amount and the other tortfeasors will be off the hook. In the example above, if the victim decided to recover her damages from the tortfeasor who is only 1% responsible, the latter will bear 100% of the burden, and the tortfeasor who is 99% at fault will get off scot-free. But the expected liability is the same as in the previous regime. Behind the veil the tortfeasor does not know what would be her fault level, α_i , nor does she know if she will be required to pay the entire amount. She has a $1/n$ chance to pay the entire amount and a $(1-1/n)$ chance to pay nothing, which brings her expected liability to D/n :

$$(5) \quad EL_{Ti} = \frac{1}{n} D + (1 - \frac{1}{n}) 0 = \frac{D}{n}$$

In this example each tortfeasor has a 50% chance to get sued and pay the entire amount of \$100, and a 50% chance of being off the hook. Their expected liability is thus \$50. It is the same expected liability that tortfeasors behind the veil face under JSL with contribution, pro-rated liability, market-share liability, and SL. In this sense, these regimes are therefore equally fair. Behind the veil the tortfeasors would be indifferent between the different legal schemes.

TABLE I: EX-ANTE AND EX-POST LIABILITY UNDER DIFFERENT REGIMES

	Severall Liability	Market Share	Pro-Rated Liability	JSL with Contribution	JSL with No Contribution
Ex-Ante Payment	D/n	D/n	D/n	D/n	D/n
Ex-Post payment	$\alpha_i D$	$m_i D$	D/n	$\alpha_i D$	D or 0

Table I demonstrates why SL, market-share liability, pro-rated liability, and JSL with contribution serve as social insurance policies to wrongdoers. In these regimes the burden of liability is distributed among all the tortfeasors. Each of these legal schemes provides insurance against the risk that one tortfeasor will have to pay the entire damages, although their terms are different; for example, under SL the defendant’s “deductible” is $\alpha_i D$, under market-share liability it is $m_i D$ and so on. In contrast, the no contribution rule does not provide such insurance. The risk that one tortfeasor will be required to pay everything is not spread among the tortfeasors. But this result is justified. It is not clear why victims (and society) should subsidize insurance to those who wronged them. This social insurance is unnecessary also because the tortfeasors can insure themselves if they wish to do so. It is also a form of a

mandatory insurance that would even be unacceptable to some tortfeasors. Recall our example of two tortfeasors who jointly caused the victim an indivisible harm of \$100. The tortfeasors would be indifferent (if they are risk neutral) or even prefer (if they are risk seekers) a regime of JSL with no contribution. In the latter case, they would prefer to take their chances (each hoping to be the one who pays nothing) rather than pay a certain amount of \$50 (under several or pro-rated liability).

C. TRANSACTION COSTS

Assume now that transaction costs (e.g., litigation costs) are positive and equal to k per trial per party, but that they are not prohibitive ($D/n > k$). The other assumptions remain. If each party bears her own litigation costs, the expected liability under SL, market-share liability, pro-rated liability, and JSL with contribution is the same: $k + D/n$ ¹⁵³; and the total litigation costs would reach $(n + 1)k$.¹⁵⁴ This is because under market share and SL n proceedings will result. Under JSL with contribution, litigation will be equally or more costly. It is true that the victim can recover her damages from one tortfeasor, but then $n-1$ parties will be required to pay "their share" to redistribute the burden among the tortfeasors.¹⁵⁵ In the case of ten tortfeasors, the one who paid the victim would seek recovery from the remaining nine tortfeasors.

Under a no contribution regime, on the other hand, the expected liability would be substantially lower:

$$(6) \quad EL_i = \frac{1}{n}(D + k) + (1 - \frac{1}{n})0 = \frac{D}{n} + \frac{k}{n}$$

Because litigation is certain and costly and all parties are solvent, the victim will sue only one tortfeasor (at a probability of $1/n$). Equation (6) implies that the more tortfeasors involved, the more efficient the no contribution rule becomes compared to the alternative regimes. The intuition is simple. In a no contribution regime the victim can recover from one party only. She does not need to sue each and every tortfeasor, and because contribution is not available, the payment to the victim does not generate a secondary wave of litigation. In this respect the no contribution rule is not only efficient, it is more just. If in

153. The expected liability in Equations (2)-(4) can be rewritten by adding k as a certain cost that would be incurred in addition to the compensation that the tortfeasor will be required to pay. Equation (4), for example, can be rewritten as follows:

$$(4) \quad EL_n = k + \frac{1}{n}m_1D + \frac{1}{n}m_2D + \dots + \frac{1}{n}m_nD = k + \frac{1}{n}\sum_{i=1}^n m_iD = k + \frac{D}{n}$$

154. This assumes that the victim sues each tortfeasor for her share. If the victim recovers her entire damages only from a subset of the tortfeasors, under a JSL regime with contribution the paying tortfeasors' cost and total expected cost could be higher.

155. The pro-rated regime enjoys a cost-reducing feature absent in market-share liability, several liability, and JSL with contribution, because it is easier to pro-rate than to determine fault or market share.

the Simple Model individuals were indifferent between the alternative regimes behind the veil, where litigation costs are positive, they would in fact *prefer* the no contribution rule because it minimizes their expected cost. It will undoubtedly leave most of them with more resources while still allowing risk-averse parties to insure themselves using market mechanisms.

Finally, the no contribution rule reduces the perverse outcomes that can result from a “tortfest.”¹⁵⁶ The term refers to the fact that the expected liability of each tortfeasor decreases as the number of tortfeasors increase (D/n in the simple model). If litigation costs are positive they may become prohibitive if n increases up to the point that filing a suit would not be profitable ($k > D/n$). Assume for example that the victim considers filing a suit against two tortfeasors, each equally at fault, who caused her a damage of \$100, and the cost to file a suit is \$60. Under a rule of JSL with no contribution the victim will file one suit for a net gain of \$40 ($100 - 60$). But under a SL regime she will not file a suit because each suit represents a net loss of \$10 ($50 - 60$).¹⁵⁷ The result cannot be justified morally. It is “perverse” because it exempts from liability a tortfeasor who was found liable for the *entire* damage simply because other tortfeasors happened to join her in harming the victim.

D. INSOLVENCY

Assume that each individual’s solvency level, defined as her ability to pay the maximum amount for which she can potentially be found liable, is denoted by s_i such that $0 \leq s_i \leq 1$ (i.e., if $s_i < 1$ the i^{th} tortfeasor is insolvent). Under a SL regime and assuming that litigation is certain and costless, ex-post each tortfeasor will pay $s_i \alpha_i D$. The tortfeasor who jointly caused a \$100 damage and is responsible for 99% of the damage will pay at most \$9.90 if she is only 10% solvent ($10\% \times 99\% \times 100$). Ex-ante, however, the tortfeasor does not know her fault (α_i) or solvency (s_i) levels. She does not know if she will be the person who would be 1% or 99% at fault and whether she would be able to fully pay the judgment against her, 50% or 10% thereof. Thus her expected liability behind the veil is:

$$(7) \quad EL_i = \frac{1}{n} s_1 (\alpha_1 D) + \frac{1}{n} s_2 (\alpha_2 D) + \dots + \frac{1}{n} s_n (\alpha_n D) = \frac{D}{n} \sum_{i=1}^n s_i \alpha_i$$

The victim will recover from each tortfeasor only $s_i \alpha_i D$ and thus the victim’s total expected recovery will be:

156. For a similar but different use of this term, see Wright, *supra* note 123, at 59.

157. If each of the parties is not fully solvent so that each can pay only 50% of the damage, the same result would arise under JSL with contribution.

$$(8)^{158} ER_V = s_1(\alpha_1 D) + s_2(\alpha_2 D) + \dots + s_n(\alpha_n D) = D \sum_{i=1}^n s_i \alpha_i$$

As noted above, the analysis with regard to proportionate market-share liability is identical with the exception that α_i will not be a measure of the i^{th} tortfeasor's fault but a measure of her market share (previously denoted by m_i).

If liability is severally pro-rated, then each tortfeasor's expected liability behind the veil and the victim's expected recovery can be denoted as follows:

$$(9) EL_i = \frac{1}{n} s_1 \left(\frac{D}{n}\right) + \frac{1}{n} s_2 \left(\frac{D}{n}\right) + \dots + \frac{1}{n} s_n \left(\frac{D}{n}\right) = \frac{D}{n^2} \sum_{i=1}^n s_i$$

$$(10)^{159} ER_V = s_1 \left(\frac{D}{n}\right) + s_2 \left(\frac{D}{n}\right) + \dots + s_n \left(\frac{D}{n}\right) = \frac{D}{n} \sum_{i=1}^n s_i < D$$

Under a regime of JSL each tortfeasor is liable for the entire damage, D . The payoffs of the parties with and without contribution are thus a function of both the fault and solvency levels of each tortfeasor and they are summarized in the Technical Appendix. By denoting δ_i as the probability for the i^{th} branch in Diagram 3 in the Technical Appendix, it is possible to derive the expected liability of T_i behind the veil and to show that it is the same under a rule of contribution and no contribution and is equal to:

$$(11) EL_{T_i} = \frac{1}{2} \sum_{j=1}^4 \delta_j D + \sum_{j=5}^7 \delta_j D (s_{1j} + s_{2j})$$

This means that even when parties behind the veil are unaware of whether they are tortfeasors or victims, at least from a fairness standpoint they should be indifferent between the two regimes. The victim recovers the same amount under both legal schemes, and the tortfeasor, ex-ante, unaware of whether she will be more (T_1) or less (T_2) solvent, expects to pay the same amount.

E. UNCERTAINTY IN LITIGATION

This sub-Part relaxes the Simple Model's assumption that litigation is certain. It begins by investigating the payoffs that parties face behind the veil when the probability that each tortfeasor will be found liable is independent from, or uncorrelated with, others, as in the case of two independent acts that resulted in an indivisible harm. The fact that the

158. Equation (8) implies that the victim will not fully recover her damages. Assuming that at least one tortfeasor is not fully solvent (i.e., that there exists s_i such that $s_i < 1$ and hence $s_i \alpha_i < \alpha_i$), and because $\sum \alpha_i = 1$, then $\sum s_i \alpha_i < 1$ and therefore $D \sum s_i \alpha_i < D$.

159. Assuming that at least one tortfeasor is not fully solvent, it follows from the fact that $s_i < 1$, $\sum s_i < n$ and thus $(D \sum s_i) / n < D$.

victim can prove and win her case against one tortfeasor does not mean that she will be able to prove her case against the other tortfeasor. Given the uncertainty of the litigation—and assuming it is not prohibitive and that the parties are solvent—the victim will try to recover from all tortfeasors.

Under a SL regime each tortfeasor has a probability p_i that she will be found liable and pay $\alpha_i D$, and a probability $(1 - p_i)$ that she will be found not liable (false negative) and pay nothing. The expected liability of the several tortfeasors and the victim's expected recovery are therefore:

$$(I2) \quad EL_T = p_i \alpha_i D$$

$$(I3) \quad ER_V = \sum_{i=1}^n p_i \alpha_i D$$

Because behind the veil tortfeasors do not know the percentage of fault that will be assigned to them, they face an expected liability of:

$$(I4) \quad EL_i = \frac{1}{n} p_1 (\alpha_1 D) + \frac{1}{n} p_2 (\alpha_2 D) + \dots + \frac{1}{n} p_n (\alpha_n D) = \frac{D}{n} \sum_{i=1}^n p_i \alpha_i$$

Consider the case of two tortfeasors, one is 30% at fault and the other is 70%, and assume that the probability that each will be found liable is 50%. If the damage to the victim is \$100 then ex-post, if found liable, one will pay \$30 and the other \$70. But ex-ante their expected liability is \$15 ($50\% \times 30\% \times 100$) and \$35 ($50\% \times 70\% \times 100$) respectively. And if behind the veil a tortfeasor does not know if she will be assigned 30% or 70%, her expected liability is \$25 ($\frac{1}{2} \times 15 + \frac{1}{2} \times 35$). Note that the ratio of the expected liabilities EL_1/EL_2 ($15/35$) reflects their fault ratio ($30/70$). But this is not always the case. If, for example, $\alpha_1=20\%$, $\alpha_2=80\%$, $p_1=10\%$ and $p_2=60\%$, then the tortfeasors' expected liabilities are \$2 ($10\% \times 20\% \times 100$) and \$48 ($60\% \times 80\% \times 100$), and their expected liability ratio ($2/48$) is different than their respective fault ratio ($20/80$).¹⁶⁰

Under a proportionate pro-rata regime, the expected liability of a tortfeasor and the expected recovery behind the veil is:

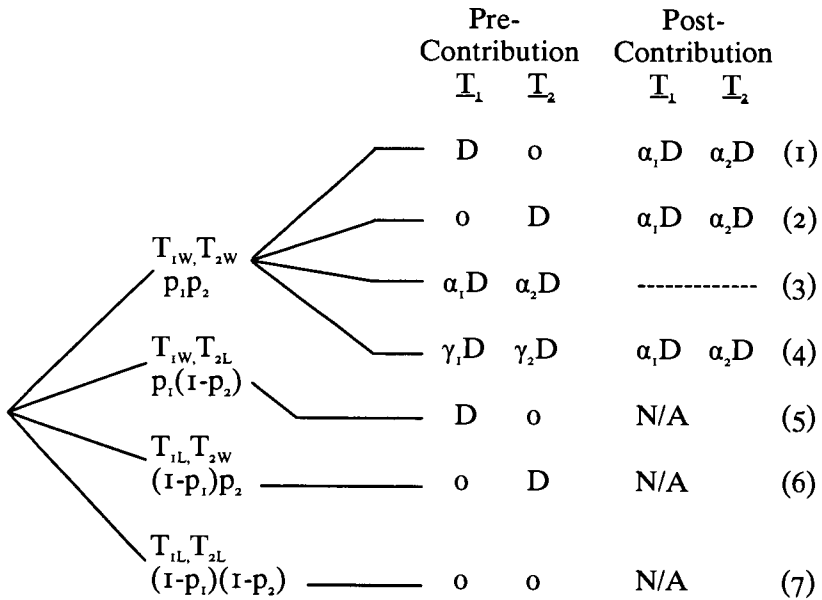
$$(I5) \quad EL_T = \frac{1}{n} p_1 \frac{D}{n} + \frac{1}{n} p_2 \frac{D}{n} + \dots + \frac{1}{n} p_i \frac{D}{n} = \frac{D}{n^2} \sum_{i=1}^n p_i$$

$$(I6) \quad ER_V = p_1 \frac{D}{n} + p_2 \frac{D}{n} + \dots + p_n \frac{1}{n} = \frac{D}{n} \sum_{i=1}^n p_i$$

160. Behind the veil, however, not knowing whether she will be T_1 or T_2 , her expected liability is still the same: \$25 ($\frac{1}{2} \times 2 + \frac{1}{2} \times 48$).

Diagram 1 describes the possible apportionments under a regime of JSL (with and without contribution) in the case of two tortfeasors where the probability to prove liability is uncorrelated. There are four possible outcomes. In the first, the victim may win her case against both defendants (at probability p_1p_2), and then she may either recover from one only (branches 1 and 2 in Diagram 1) or from both according to their fault level (branch 3), or in any ratio, γ_i , she may deem fit such that $\gamma_i \neq \alpha_i$ (branch 4). Regardless of her choice, however, because the defendants are solvent, if contribution is allowed each will pay no more than her fault level, $\alpha_i D$. In the second, third, and fourth scenarios (branches 5-7), the victim wins only against one of the defendants and fully recovers her damages from the latter, or neither. Contribution in these situations is not a possibility.

DIAGRAM 1: APPORTIONMENT WITH UNCORRELATED PROBABILITIES¹⁶¹



It is easy to show that the expected liability behind the veil under a regime of JSL and SL (or JSL with contribution) is the same and equal to:

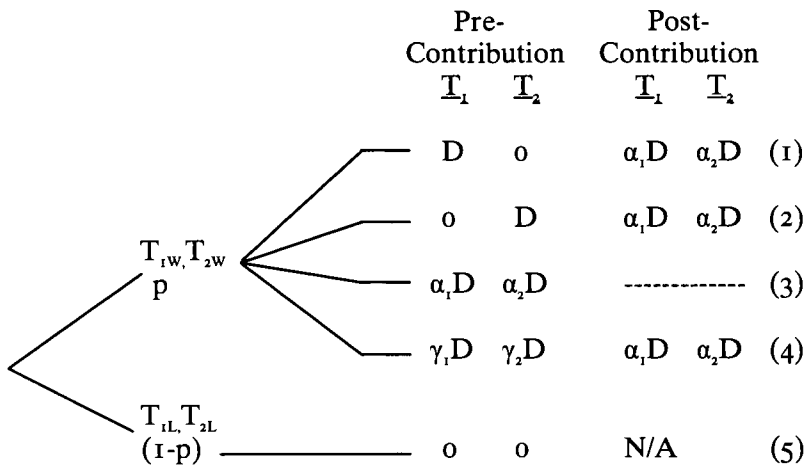
$$(17)^{162} \quad EL_{Ti} = \frac{1}{2} D(p_1 + p_2 - p_1 p_2)$$

161. Branches (1)-(4) can be collapsed into one branch, where each tortfeasor pays a certain fraction, f_i , such that $\sum f_i = 1$.

162. This result is independent of the probability assigned to branches 1-4.

If the probabilities are correlated—if winning (at a probability p) against one defendant also means that the victim wins against the second—then there are only two possibilities described in Diagram 2 below. Either the victim wins and fully recovers her damages (branches 1-4), or she loses against both and recovers nothing (branch 5).

DIAGRAM 2: APPORTIONMENT WHEN PROBABILITIES ARE CORRELATED



If contribution is available, at the end of the day the parties will always pay according to their respective fault level. But whether liability is apportioned under JSL with or without contribution, the expected liability behind the veil is the same and equal to:

$$(18) ER_v = \frac{1}{2} pD$$

The conclusion is thus that even when litigation is uncertain, JSL with no contribution is as fair as any other contribution regime. In both, the expected liability is the same for tortfeasors behind the veil.

However, in a recent book titled *Tort Law and Economics*, Professors Kornhauser and Revesz compare the different apportionment regimes but reach a different conclusion.¹⁶³ When it comes to apportionment of liability between the tortfeasors, they argue, “joint and several liability performs badly: [I]t places a disproportionate burden on the defendant with the smaller share of the liability, except when the plaintiff’s probabilities of success are perfectly correlated.”¹⁶⁴ The authors provide the following example as a support for their argument.¹⁶⁵ Consider a situation in which a victim seeks to recover her \$100 from two

163. Kornhauser & Revesz, *supra* note 103, at 126.

164. *Id.*

165. *Id.* at 126–27.

defendants, Row and Column. Row and Column are 25% and 75% at fault respectively, and the plaintiff's independent probabilities to win is $p_i=50\%$. Assume further that if both defendants are liable, the plaintiff will recover from Row and Column according to their faults. In this case there are four scenarios with equal probability of 25%: the plaintiff (1) wins against both and recovers from Row \$25 and Column \$75 (branch 3 in Diagram 1); (2) loses to Column but wins against Row in which case Row pays \$100 (branch 5 in Diagram 1); (3) loses to Row but wins against Column in which case Column pays \$100 (branch 6 in Diagram 1); or (4) loses to both (branch 7 in Diagram 1). The expected liabilities of Row and Column are thus 31.25 and 43.75, respectively.¹⁶⁶ Based on this example, Kornhauser and Revesz conclude that: "[W]hile Row's contribution to harm is only one-third [25/75] that of Column's, her expected liability is about three-quarters that of Column's [31.25/43.75]."¹⁶⁷

The authors' conclusion is correct but only if one assumes that the parties already know who they are, that the tort was already committed, and fault has been assigned. This version of the veil, however, cannot serve as a basis for a fairness analysis. It is too "thin." It is premised on an ex-post analysis and it ignores the prospective nature of the legislative process and the common law. When the legislator or judge pronounces the law, its force is mainly prospective. Actors are often not aware whether they will be future victims, tortfeasors, both, or neither. And even if one does know what her position is or is likely to be, a moral judgment requires members of society to "make a serious effort to *disregard* this piece of information."¹⁶⁸ If one does not know whether she will be Row or Column—or disregards this information—she has an equal probability to face an expected liability of \$31.25 or \$43.75. Thus, according to Equation (17), the expected liability behind the veil is the *same* as it would be under a regime of JSL with contribution: \$37.50.¹⁶⁹

F. A FEW WORDS ON EFFICIENCY AND LOBBYING

The model can shed some light not only on the fairness of the no contribution rule but also on its efficiency. Recall that Landes and Posner's conclusion that the no contribution rule is superior was not free from doubts. The authors identified two important "economic benefits of contribution in joint-care" that caused them, at least initially, to question

166. Row has 25% chance to pay \$25 and 25% chance to pay \$100 ($25\% \times 25 + 25\% \times 100 = 31.25$), and Column has 25% chance to pay \$75 and 25% chance to pay \$100 ($25\% \times 75 + 25\% \times 100 = 43.75$). The authors mistakenly note that Column's expected liability is \$42.75.

167. Kornhauser & Revesz, *supra* note 103, at 127.

168. Harsanyi 1975, *supra* note 19, at 598.

169. This assumes that the parties are solvent (as implied by Kornhauser and Revesz's example).

their own conclusion.¹⁷⁰ One concern was the insurance feature of the contribution rule. According to the authors, because “contribution is a form of liability insurance” and because some tortfeasors “may be risk averse, and they would gain from a rule of contribution,” then it is not clear whether “the gain [to tortfeasors from insurance] would exceed the extra costs of administrating such a rule.”¹⁷¹ It seems, however, that the insurance “benefit” identified by the authors is not a benefit at all. There is simply no reason to use the tort machinery to create a social insurance for wrongdoers (or victims). In fact, some tortfeasors would prefer not to purchase any insurance or would be indifferent to it altogether (if they are not averse to risk). And those who would like to purchase such insurance can do so in the open market.¹⁷²

The other benefit identified by the authors is informational. The argument is that “[u]nder a rule of no contribution each prospective tortfeasor is uncertain what share of the expected accident cost he will bear;” and if this uncertainty causes her to underestimate her expected liability an inefficient allocation of resources may result.¹⁷³ The authors note, however, that the problem is unavoidable since the parties may underestimate the number of tortfeasors.¹⁷⁴ To illustrate, assume a joint-care scenario where two tortfeasors, T_1 and T_2 , must take precaution at a cost of \$55 and \$35, respectively, to avoid a \$100 damage. In this situation, T_2 will take precaution ($35 < 50$), and knowing this, T_1 will take precaution ($55 < 100$). But if the two tortfeasors thought that a third person may pay the damages, then each would act as if her expected liability is \$33.33 (believing there is a 1/3 chance she would need to pay the victim \$100). In this situation, neither T_1 nor T_2 will take precaution ($55, 35 > 33.33$).

However, the problem can be remedied, at least partially, by the common law. In England the satisfaction of a judgment by a third unrelated party barred its enforcement against any of the tortfeasors.¹⁷⁵ The plaintiff was entitled to one compensation regardless of who paid it.¹⁷⁶ In the U.S. the single-recovery rule was also applied, but only when the judgment was paid by one who was herself actually liable for the wrong. Thus, if one joint-tortfeasor paid the plaintiff, the payment was final and released all other joint tortfeasors.¹⁷⁷ But if the judgment was

170. See *infra* notes 173–79 and accompanying text.

171. Landes & Posner 1980, *supra* note 28, at 531; see also Cooter & Ulen, *supra* note 99, at 1098.

172. The authors themselves seem to allude to this point elsewhere. See Landes & Posner 1981, *supra* note 99, at 867–68 (arguing that tort law should not perform an insurance function).

173. Landes & Posner 1980, *supra* note 28, at 530.

174. *Id.*

175. KEETON ET AL., *supra* note 3, at 330.

176. *Id.*

177. *Id.* at 331–32. For decisions that seem to support this view, see *Carroll v. Kerrigan*, 197 A. 127, 127–28 (Md. 1938); *Phillips Sheet & Tin Plate Co. v. Griffith*, 120 N.E. 207, 208 (Ohio 1918); *Brimer v.*

satisfied voluntarily—even if under a mistaken belief of liability—by one not in fact liable, it did not prevent the plaintiff from recovering again from those who otherwise were liable.¹⁷⁸ Prosser and Keeton explain that the reason for the rule is the result of the confusion that surrounded joint tortfeasors.¹⁷⁹ But whatever its reason, it had an important benefit. The rule reduced the ex-ante uncertainty about *n*. Even if there was a chance that a stranger would volunteer or mistakenly satisfy a judgment, the rule assured the tortfeasor that her chance to be sued behind the veil is still $1/n$ and, therefore, her expected liability remained the same (D/n or \$50 in the above example).

The model and the insurance feature embedded in contribution regimes can also shed some light on a different yet related debate: whether states should delete JSL from their books altogether and replace it with several liability. In this debate, lobbying plays an important role.¹⁸⁰ It has been reported that “organizations representing prospective defendants have attempted, with some success, to eliminate or limit [JSL] and to replace it with proportionate several (separate) liability.”¹⁸¹ Assume for a moment that the assumptions of the Simple Model apply so that parties are solvent and litigation is cheap and certain. In this case, the expected liability of all tortfeasors under JSL with and without contribution is the same as SL, D/n . Yet, even here defendant organizations would likely prefer the contribution rule over the no contribution rule. The reason is that under a no contribution rule a risk-averse tortfeasor will need to purchase an insurance policy with a broader recovery up to *D* (recall that she faces a $1/n$ chance to pay the entire damage, *D*). Under JSL with contribution on the other hand, the payment that a tortfeasor (or her insurance company) is expected to pay may be the same, but the variance is much smaller in the case of contribution. Liability is limited to D/n .¹⁸²

Interestingly, both opponents and proponents of JSL and SL raise fairness concerns. Proponents of JSL argue that it is unfair that the risk of identifying the defendants and establishing liability and recovery falls

Scheibel, 290 S.W. 5, 6 (Tenn. 1926).

178. *Deatley's Adm'r v. Phillips*, 243 S.W.2d 918, 921 (Ky. 1951); *Carroll*, 197 A. at 128.

179. KEETON ET AL., *supra* note 3, at 331–32.

180. Steenson, *supra* note 8, at 845–46 (“In the 2003 session, the Minnesota Legislature, motivated by pressure from municipal, business, and insurance interests, amended its joint and several liability rules for the fourth time.”); Victor J. Torres, *Tegman v. Accident & Medical Investigations, Inc.: The Re-Modification of Modified Joint and Several Liability by Judicial Fiat*, 29 SEATTLE U. L. REV. 729, 740–43 (2006) (reviewing the legislative process that led to the enactment of Washington’s Tort Reform Act of 1986); ATRA, *supra* note 8 (stating ATRA’s position and listing states’ reforms); see also *supra* notes 8, 150 and accompanying text.

181. Wright, *supra* note 7, at 1142, 1147–48.

182. See *supra* note 157 and accompanying text (discussing some of the perverse outcomes that may result under a SL regime).

on the innocent party: the victim.¹⁸³ Proponents of SL argue that it is unfair that a defendant bears more than her “fair” share.¹⁸⁴ Even if one is initially convinced by proponents of a SL regime, it seems that behind the veil of ignorance JSL presents a better alternative. Potential risk-averse defendants will be able to insure themselves. Those who do not wish to purchase insurance will not have to subsidize those who do. It is true that insurance premiums may be higher without such a subsidy, but absent a market failure or any evidence to the contrary, it is not clear that such a subsidy is justified. Many, Holmes among them, would argue that the presumption is against subsidy.¹⁸⁵

IV. COMPETING THEORIES OF JUSTICE: RE-EVALUATING THE ASSUMPTIONS

A. CORRECTIVE JUSTICE

The reason that led most states to change their laws and replace the no contribution rule is grounded in distributive justice. The concern was that the distribution of liability was apportioned unfairly¹⁸⁶—an argument that this Article seeks to prove faulty. But distributive justice is only one facet of the fairness debate. Some, like Professor Coleman, have taken the view that “at its core, tort law is a matter of corrective justice.”¹⁸⁷ The question then arises whether the argument pressed in this Article—that the no contribution rule is as fair as its alternatives—can be justified in corrective justice. This in turn requires an understanding of what corrective justice is. Professor Coleman distinguishes between three conceptions of corrective justice.¹⁸⁸ Under the annulment conception, “the point of corrective justice is to eliminate, rectify, or annul wrongful (or unjust) losses.”¹⁸⁹ The annulment conception requires that wrongful losses be rectified but it does not “impose this responsibility on anyone in

183. For a review of the arguments that shapes the JSL/SL debate, see generally Wright, *supra* note 7.

184. *Id.*

185. See *infra* note 299 and accompanying text.

186. See *supra* Parts I, II.B.

187. JULES L. COLEMAN, RISKS AND WRONGS 367 (1992); *id.* at 12 (“[A]t its core tort law seeks to repair wrongful losses” and “implements corrective justice.”); *id.* at 209 (“[T]he best explanation of current Anglo-American tort law sees the practice primarily in terms of its efforts to meet these demands of justice—what I call corrective justice.”); *id.* at 304 (arguing that “corrective justice is embodied in the structural and substantive core of tort law”); see also ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56–83 (1995); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 152 (1973). *But see* Keating, *supra* note 129, at 194–95 (“[T]o the extent we are concerned with justice and fairness in tort law, we should be concerned more with matters of distributive justice—with the fair apportionment of the burdens and benefits of risky activities—and less concerned than we have been with matters of corrective justice—less preoccupied with questions of wrongdoing and rectification.”).

188. COLEMAN, *supra* note 187, at 306.

189. *Id.*

particular.”¹⁹⁰ It does not say by whom and how the loss should be repaired.¹⁹¹ In fact, “wrongdoing creates no special reason for the wrongdoer to do anything.”¹⁹² The focus is solely on the *loss* which must be rectified,¹⁹³ although it does require that by rectifying a loss one does not create another wrongful loss.¹⁹⁴

A different conception of corrective justice is the relational concept. Under the relational concept, “[i]f one person has wronged another, then corrective justice imposes a duty on the wrongdoer to rectify his *wrong*,”¹⁹⁵ but “not the losses that might result as a consequence.”¹⁹⁶ As Coleman notes, the difference between the two conceptions can be substantial.¹⁹⁷ For example, if *A* runs *B* down and causes her a \$100 injury, under the annulment conception *A* or someone else would be required to pay *B* her \$100 *loss*. Under the relation conception, on the other hand, the *wrong*—as opposed to the *loss*—could be rectified if *A* apologizes, makes a public statement, or is imprisoned.¹⁹⁸ Repairing the wrong is simply not the same as repairing the loss. The mixed conception, as the name suggests, builds on both the annulment and relational conceptions. Like the annulment conception, it focuses on the loss, but it also creates a relation. It imposes a duty on the tortfeasor to repair the losses she caused and for which she is responsible.¹⁹⁹

In the case of multiple tortfeasors who cause an indivisible harm, the annulment and relation concepts pose no real challenge to the conclusion that JSL with no contribution is as fair or just as its alternatives. Under JSL with or without contribution, the victim is compensated. The loss, and thus the wrong, is rectified. In fact, the expected recovery to the victim is the same under both rules.²⁰⁰ The mixed conception, the one pressed by Coleman,²⁰¹ however, does not focus on repairing the loss only. Rather, it creates a duty running from the tortfeasor to the victim. One may thus claim that a tortfeasor who is 99% at fault has a *duty* to rectify 99% of the damage she caused and that such duty cannot be satisfied by the tortfeasor who is only 1% at fault. It

190. *Id.* at 309.

191. *Id.* at 312.

192. *Id.* at 313.

193. *Id.*

194. *Id.* at 306.

195. *Id.* at 314–15 (emphasis added).

196. *Id.* at 320.

197. *Id.* at 313–15, 320–21.

198. *Id.* at 321.

199. *Id.* at 322–24.

200. See *supra* Part III.B–E. Even if rectifying the loss does not rectify the wrong, a judgment—a statement of liability—may be considered enough. Note that under certain conditions (for example, if JSL with contribution may raise some of the perverse outcomes discussed *supra* Part III.C), a corrective justice approach may even prefer the no contribution rule.

201. COLEMAN, *supra* note 187, at 318–19.

may even be argued that requiring a tortfeasor who is only 1% at fault to pay 100% of the damage may rectify one wrongful loss: that caused by the tortfeasors to the victim; but may create a new wrongful loss: requiring one tortfeasor to pay more than her fair share.

These arguments, however, are flawed for two main reasons. To begin with, the liability of each of the tortfeasors is for the entire injury. It is only that in relation to one another, one is 1% at fault and the other is 99% at fault. Because each of the tortfeasors is responsible for the entire wrong, each has a duty based in corrective justice to rectify the loss. Secondly, a duty to rectify is not a duty to pay. An equation of the two blurs the distinction between what Coleman refers to as grounds and modes of rectification.²⁰² Indeed, as Coleman notes, “[e]ven if the injurer has the duty to repair [that is grounded] in justice, it does not follow that justice requires that the duty be discharged by the injurer.”²⁰³ Coleman illustrates the point by hypothesizing that if a third person (Donald Trump) pays the injurer’s debt, no injustice would be done.²⁰⁴ Put differently, according to Coleman corrective justice gives rise to a duty running from the injurer to the victim, but it does not require the injurer to pay the victim.²⁰⁵

Coleman goes even further, noting that even if the third party who has no contractual relation or understanding with the tortfeasor, on his own and without encouragement rectified the victim’s loss, such payment would satisfy the injurer’s duty and thus corrective justice.²⁰⁶ Under this view, requiring one tortfeasor to bear the entire burden can be grounded in corrective justice. Even if one tortfeasor has a duty in corrective justice to compensate the victim, it does not follow, to use Coleman’s words, that “justice requires that the duty be discharged by the injurer.”²⁰⁷ And if it can be satisfied by a third party who is not an injurer, it can surely be rectified by another injurer who was found liable for the entire harm. In fact, this Article argues for a narrower view than that proposed by Coleman. It would allow any of the tortfeasors or a third party with whom they have a contractual relation to satisfy the duty. But unlike Coleman, it would not allow *any* third party to satisfy the tortfeasor’s duty to rectify. If such payment by a third party would extinguish the duty of the tortfeasors to rectify the victim, this would reduce the tortfeasors’ expected liability behind the veil and result in an inefficiency that the “American rule”²⁰⁸ once sought to avoid.

202. For the distinction, see *id.* at 285–303, 326–27.

203. *Id.* at 327.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. The “American rule” allows the victim to go after the tortfeasors even if she was paid by a third party. See *supra* Part III.F.

B. RAWLS' THEORY OF JUSTICE

A leading moral theory, one which has been used by at least one state supreme court²⁰⁹ and a number of scholars²¹⁰ to justify the abrogation of the no contribution rule and its replacement by a right of contribution, is Rawls' "Theory of Justice."²¹¹ The Theory offers a procedure followed by a substantive account that is supposed to ensure a just society.²¹² The procedure adopted by Rawls is similar to that adopted by Harsanyi: a just society is one which adopts rules that people would agree on or contract for behind a veil.²¹³ Unlike Harsanyi, however, substantively Rawls argues that in the original position, behind the veil, members of society would agree on rules based on two principles that he deems just and fair: (1) equal liberty to all; and (2) a distribution of

209. *Mo. Pac. R.R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 474 (Mo. 1978) (en banc) (holding that the principle of fairness, as defined by Rawls, compels the adoption of a contribution rule).

210. See, e.g., Cooter & Ulen, *supra* note 99, at 1099 n.140; Langmore & Prentice, *supra* note 95, at 1065.

211. Rawls' self-proclaimed motivation was to provide an alternative account of justice that is superior to utilitarianism. RAWLS 1971, *supra* note 2, at viii; RAWLS REVISED, *supra* note 2, at xi, xviii. Utilitarianism is often equated with maximizing happiness. According to utilitarian theory in its crudest form, an action, an individual, or a law is "moral" or "good" or "just" if it increases total happiness. J. S. MILL, UTILITARIANISM 10 (1863). Happiness, in turn, is loosely defined as "the greatest possible surplus of pleasure over pain." HENRY SIDGWICK, THE METHODS OF ETHICS 413 (7th ed. 1907). It is achieved when one satisfies her preferences whatever these preferences may be. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1781); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 106 (1979) [hereinafter Posner 1979]. Despite its seemingly benevolent goal (increasing total happiness), utilitarianism is hard to apply and even harder to justify. See RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 57 (1981) [hereinafter THE ECONOMICS OF JUSTICE]; *infra* note 256 (discussing the measuring problem that plagues utilitarianism). Under a utilitarian approach one may be able to justify genocide if the villain's happiness and the enjoyment from the massacre and freed resources would outweigh the misery to the victims and other members of society. See THE ECONOMICS OF JUSTICE 57 (citing Alan Donagan, *Is There a Credible Form of Utilitarianism*, in CONTEMPORARY UTILITARIANISM 187, 188 (Michael D. Bayles ed., 1968)) (noting that under utilitarianism a grandchild who painlessly murders his "malicious, old and unhappy grandfather" so that his "children would be rejoiced by their inheritances" would be considered a good man). Similarly, one could defend a totalitarian regime on utilitarian grounds if she believes that the tyrant could maximize society's happiness better than its members. It can also justify a society in which all resources are owned by one individual if any other distribution would decrease total happiness. Utilitarianism in its strongest version can justify slavery if one could show that the master's pleasure from enslaving outweighs the suffering caused to her subjects; and theft, if the thief enjoys the stolen resource more than the original owner. In these situations, genocide, slavery, tyranny, and theft would all be considered "just" and "moral" as they increase *total* happiness. These examples highlight a basic problem in utilitarianism: that of "utility monsters." See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 41 (1974). These are individuals (perhaps even animals) who can extract so much happiness from a certain act or law that would overshadow the misery that the same would inflict on others. Because the monster's happiness more than offsets everyone else's suffering, the act increases total happiness and is thus deemed ethical. See Posner 1979 *supra*, at 131 ("[The] 'utility monster' has no place in a system of ethics founded on wealth maximization."). On the confusion that surrounds the terms "utility" and "utilitarianism" and the difference between utilitarianism and wealth maximization, see *infra* note 253.

212. RAWLS 1971, *supra* note 2, at 136-37; RAWLS REVISED, *supra* note 2, at 118.

213. See *supra* notes 19, 141 and accompanying text; *infra* Part III.A.1.

primary resources that would maximize the well-being of the least advantaged member of that society. Rawls refers to the second principle as the “difference principle.”²¹⁴ Others refer to it as the “maximin” because it advocates for a distribution that would maximize the minimum level of primary goods held by the worst-off member of society.²¹⁵ Primary goods are goods which *every* member of society desires.²¹⁶ Because primary goods are so crucial, individuals behind the veil of ignorance would seek to obtain more of these goods.²¹⁷ Such primary goods include basic rights and liberties but also, importantly, *wealth and income*.²¹⁸

Rawls’ Theory of Justice, undoubtedly one of “the most searching investigation[s] of the notion of justice in modern times,”²¹⁹ has been subject to much criticism for a number of reasons, a few of which are discussed below.²²⁰ To begin with, according to Rawls, rational individuals at the original position would *not* agree on a rule that allows members of society to reap and keep the fruits of their acumen, efforts and superior talent—all of which are part of their initial endowment and would thus violate the difference principle.²²¹ Rather, members of society

214. RAWLS 1971, *supra* note 2, at 76–80; RAWLS REVISED, *supra* note 2, at 65–70.

215. *See, e.g.*, ARROW, *supra* note 19, at 248.

216. RAWLS 1971, *supra* note 2, at 62, 92, 433; RAWLS REVISED, *supra* note 2, at 54, 79, 380.

217. RAWLS 1971, *supra* note 2, at 142, 144; RAWLS REVISED, *supra* note 2, at 123, 125.

218. RAWLS 1971, *supra* note 2, at 92; RAWLS REVISED, *supra* note 2, at 79. The application of the difference rule results in a more egalitarian society. It could even lead to a “radical equalization of income.” ARROW, *supra* note 19, at 258; *see* Robert Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV 1, 14 & n.51, 15 & n.52 and accompanying text. To illustrate, assume a two-member society has \$200 to distribute. A distribution that would endow one member with \$199 and the other with \$1 would violate the difference rule. To see why, assume that one member received the first dollar. With \$199 to be allocated, the different rule requires that the other member—the now least-advantaged member with no assets—would receive the next dollar before the endowed member receives a second. An additional (third) dollar would then be allocated to either of the members. The latter allocation would lead, once again, to inequality as one member would have \$2 whereas the other only \$1. The next dollar would be therefore allocated to the least well-off member of society (the one who has only \$1). At the end of the process *only* a distribution that provides each member with \$100 would conform with the difference rule and would thus be “fair.” Any other distribution would be considered “immoral.” Although the difference rule leads to a more equal society it does not always require that resources should be equally distributed. In fact, the difference principle may mandate an unequal allocation of resources if such allocation would benefit the least advantaged member of society. RAWLS 1971, *supra* note 2, at 76–80; RAWLS REVISED, *supra* note 2, at 65–70. For example, it would justify that an otherwise idle parcel of land is given to only one member of society, if the latter develops it and by doing so increases the value of the property owned by the least well-off individual. *See, e.g.*, Russell Korobkin, *Determining Health Care Rights from Behind a Veil of Ignorance*, 1998 U. ILL. L. REV. 801, 806–07 (noting that in a three-person society that is endowed with a hammer, a saw, and a wrench, it would be justifiable to allocate the entire set to the best carpenter if she would build a house for the two others).

219. ARROW, *supra* note 19, at 245.

220. *See generally id.*; Harsanyi 1975, *supra* note 19. It should be noted that this Article highlights only some of the criticism on Rawls and in no way does it attempt to constitute a full discussion of Rawls’ Theory of Justice.

221. *See, e.g.*, Korobkin, *supra* note 218, at 808. Korobkin acknowledges that “[e]ven if all

would agree to distribute and redistribute the primary resources.²²² Such a rule, however, would reduce individuals' incentive to work and thus result in a reduction of primary goods—those goods which, according to Rawls, are so crucial that every individual would prefer more.

Not only would the Rawlsian conception of justice result in the production of less primary assets, but the distribution itself might impoverish society.²²³ Consider, for example, three possible states of the world, summarized in Table 2 below. In the first, the distribution of wealth is such that 50% of the population (Class A) have no wealth and 50% (Class B) have \$200 each. In the second, every individual has \$100 (regardless of her class). In the third, 50% of the population (Class A) has \$99 and 50% (Class B) has \$501. Under the difference rule the second state of the world would be chosen because the worst-off members (Class A) do best, although in the third state societal wealth is three times higher (\$600 compared to \$200) and each of the worst-off members receives only \$1 less compared to State 2.²²⁴

TABLE 2: CHOOSING WEALTH DISTRIBUTIONS BEHIND A VEIL OF IGNORANCE

States	Class A	Class B
State 1	0	200
State 2	100	100
State 3	99	501

Another flaw in Rawls' Theory of Justice is its seemingly irrational, unacceptable, and thus by definition immoral, results.²²⁵ Consider, for example, a society in which the least well-off class of people is healthy but bald, and it must decide how to exploit its healthcare budget. The budget can be invested in finding a cure for baldness or to purchase drugs with therapeutic effects, such as a cure for psoriasis. Or, consider a situation in which a doctor at an accident scene must decide which of two

individuals in society were to begin their lives with identical resources and opportunities, some would undoubtedly accumulate more primary goods than others, a result of some combination of natural skills and talents," and argues that according to Rawls individuals behind the veil would "agree to redistribute these resources throughout the population." On the other hand, according to Epstein they would choose to "contract for a social structure that permits each citizen to keep the resources that he accumulates as a result of superior natural talents (and initial endowments)." *Id.* (citing RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? 14-15 (1997)).

222. See, e.g., *id.*

223. ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 497.

224. Rawls himself rejects this possibility. See RAWLS 1971, *supra* note 2, at 157; RAWLS REVISED, *supra* note 2, at 136. However, Posner finds his argument to be unpersuasive. See, e.g., ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 497 n.2

225. See, e.g., Arrow, *supra* note 19, at 251, 255 ("[T]he maximin principle would lead to unacceptable consequences if the world were such that [Rawls' conception of justice and utilitarianism] really differed."); Harsanyi 1975, *supra* note 19, at 595-97, 605 ("Rawls theory consistently yields morally highly unacceptable policy conclusions.").

individuals she should treat: a mentally-challenged person who is severely injured and would certainly die, or an intelligent individual who would surely recover.²²⁶ Even if the first cannot be saved and treatment would provide her only with a few seconds of relief, and the second would survive but remain paralyzed if not treated immediately, the difference rule mandates that the former is treated first. It would also require the investment of the health budget in finding a panacea for baldness rather than purchasing drugs to treat the sick.²²⁷ Put differently, the difference rule gives total priority to the worst-off individual and disregards the marginal benefits and costs conferred by the allocation. The results of the difference rule are not only unacceptable—even behind a veil—but they also contradict our sense of morality and ethical practices.²²⁸ The difference rule is also impractical because it requires society to identify the worst-off member, which in turn requires society to determine whether *A* is “happier” than *B*, a question society cannot determine without a utilitarian hedonic-meter.²²⁹

But even if resources could be distributed in a “just way” by using Rawls’ difference rule, such a distribution would be futile. Allowing individuals to engage in voluntary transactions would result in a *new* distribution that most likely would no longer conform with the theory of justice that mandated the initial distribution.²³⁰ Redistribution would thus

226. The examples draw on Harsanyi and Arrow. Harsanyi 1975, *supra* note 19, at 596; Arrow, *supra* note 19, at 251.

227. A related problem is that of “misery monsters,” the corollary of the utilitarian “utility monsters.” See Nozick, *supra* note 211. The term refers to people who are the worst-off members of society (and hence are first in the line for resource allocation), yet are incapable of becoming happier, so that any allocation afforded to them would constitute a pure waste and would only impoverish the society. See Arrow, *supra* note 19, at 253 (noting that under Rawls’ difference rule if the worse-off member of society happens to be “an individual who is incapable of deriving much pleasure . . . [will become] the touchstone of distribution policy, even though he derives little satisfaction from the additional income”); Posner 1979, *supra* note 211, at 131 (“[The] ‘utility’ monster has no place in a system of ethics founded on wealth maximization.”).

228. Posner 1979, *supra* note 211, at 110 (noting that an ethical theory can be rejected on three grounds one of which is if it “yields precepts sharply contrary to widely shared ethical intuitions—precepts such as that murder is in general a good thing”).

229. See, e.g., Arrow, *supra* note 19, at 253 (“Rawls maximin criterion also implies interpersonal comparison, for we must pick out the least advantaged individual, and that requires statements of the form, ‘individual *A* is worse off than individual *B*.’”); Rasmussen, *supra* note 218, at 21 (applying Rawls’ Theory of Justice to bankruptcy and noting that “[i]n applying the difference principle . . . I freely admit that I cannot *a priori* identify the group that is the least-advantaged”).

230. See *supra* notes 221–22 and accompanying text. This is illustrated by Nozick’s famous Wilt Chamberlain example. See Nozick, *supra* note 211, at 160–62. To illustrate, assume that initially the assets of an *n*-member society (denoted by *A*) were distributed in a manner which is considered “fair.” Call this distribution *D_i*. Perhaps the assets were distributed equally such that each member received *A/n*. This distribution might be considered “just” by egalitarians, Rawlsians, and even utilitarians, assuming, for example, that all members have the same decreasing marginal utility. Assume that *n*-1 members of society voluntarily paid some amount, *p*, to another member for her services. Immediately after the transactions took place a *new* distribution (*D_j*) resulted: *n*-1 members (those who paid) would have less than *A/n* (each would have *A/n*-*p*) and one member, the recipient, would have more than

inflict immediate costs without creating sustainable benefits. Moreover, such redistribution would interfere with people's ability to engage in free exchanges and violate the very individual liberties that Rawls sought to protect.

Finally, Rawls' difference rule—the principle that any allocation must advantage the worst-off member of society—assumes that individuals are risk averse.²³¹ To see why, assume that a society described in Table 2 above must choose between State 1 (a distribution under which the entire wealth of society is shared by 50% of the population so that each gets \$200) and State 2 (in which every member gets \$100). If members of the society were risk neutral they would be indifferent between the two states because their expected value in each is the same: \$100. The reason is simple: behind a veil, individuals do not know whether they would end up in Class A or Class B. Thus, if State 1 is chosen, each member has a 50% chance to be in Class A and receive nothing and a 50% chance to be in Class B and enjoy a wealth of \$200. Put differently, behind the veil the expected value of one's wealth is \$100 ($50\% \times 0 + 50\% \times 200$). If State 2 is chosen each member receives (with full certainty) \$100 worth of assets. The risk-neutral person looks only at the expected value which is the same in both states. She will thus be indifferent between receiving \$100 with certainty (State 2) or a risky prospect with the same expected value (State 1). If the parties were risk seekers they would prefer to forgo the safe endowment of \$100 in State 2 in the hope to get high returns in State 1: the chance to get \$200 in case they happen to be type B after the veil is pierced. Only a Rawlsian society of risk-averse individuals would *prefer* the safe payment of \$100 to avoid the uncertainty.

The assumption that individuals are risk averse is not without merits. People usually experience a declining marginal utility from money.²³² That is, they prefer more income to less, but the pleasure from an additional dollar decreases as they become richer. Put differently, people value the first dollar more than the second and would thus likely prefer a \$100 payment to a lottery ticket with a 50% chance of winning \$200. But this is not always true. Indeed, if members of society were all

A/n (she would have $A/n+np$). "If *D*, was a just distribution, and people voluntarily moved from it to *D*, isn't *D*, also just?" *Id.* at 161; see also Korobkin, *supra* note 218, at 811.

231. See, e.g., ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 497; Hockett, *supra* note 129, at 1291; Swygert & Yanes, *supra* note 141, at 305–08. An individual is "risk averse" if she prefers a certain amount, *M*, to any risky prospect with an expected value of *M*. She is risk neutral if she is indifferent between receiving *M* with certainty or a risky prospect with an expected value of *M*. She is risk seeker if she prefers a risky prospect with an expected value of *M* over a certain amount of *M*.

232. See, e.g., ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 11 ("[R]isk aversion is a corollary of the principle of diminishing marginal utility.").

or always²³³ risk averse, lotteries, casinos, and investment banking would exist only in theory.

But Rawls does not simply assume that individuals behind the veil of ignorance are “just” risk averse. Rather, by adopting the difference rule, Rawls assumes that they are *infinitely* risk averse.²³⁴ To illustrate, assume that a society with the two classes described in Table 3 below must choose between State 1, a distribution under which each member receives \$1; and State 2, a distribution under which members of class B receive \$1000. Assume further that there are 1000 individuals in that society, 1 in class A and the remaining 999 in class B. A society whose members are risk neutral would prefer State 2 because it has a higher expected value (\$999 compared to \$1).²³⁵ Yet, Rawls’ risk-averse society would choose State 1 over State 2. Under Rawls’ maximin principle, each individual acts as if she were sure that she would be the worst-off member in that society and give up any gain, however high and probable, if it is not certain.²³⁶ This means that individuals in a Rawlsian world are so risk averse that they would give up the very high chance (99.9%) of an enormous gain (\$1000) to secure a certain payment of \$1. They would also prefer a distribution that gives every individual \$100 over one in which some individuals get \$99 and others \$501 (States 2 and 3 in Table 2).

TABLE 3: CHOOSING WEALTH DISTRIBUTIONS BEHIND A VEIL OF IGNORANCE

	A	B
State 1	1	1
State 2	0	1000

That individuals are infinitely risk averse is a *factual* assertion that is hard to accept. Most likely, risk-averse individuals have varying levels of aversion to risk, and it is not clear why Rawls’ procedure—agreement behind the veil of ignorance—would produce the substantive difference rule. Put differently, it is not clear why individuals would adopt the

233. See generally Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453 (1981).

234. See, e.g., *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 497; Swygert & Yanes, *supra* note 141, at 308; Hockett, *supra* note 129, at 1291; Arrow, *supra* note 19, at 251 (arguing that Rawls veil of ignorance assumes “an extreme form of risk aversion”).

235. In State 1, behind the veil, each member regardless of her class receives a certain, and thus also expected, value of \$1. In State 2 there is some uncertainty. Behind the veil, members of society do not know whether they will end up in class A or B. Each has a 0.1% chance of receiving \$0 (there is 1/1000 chance a member would end up in class A) and a 99.9% chance of receiving \$1000 (there is 999/1000 chance a member would end up in class B). The expected value in State 2 is thus \$999 (0.1% × 0 + 99.9% × 1,000).

236. Harsanyi 1975, *supra* note 19, at 595–96 (“[A]ccording to the maximin principle [an individual behind the veil] has to evaluate any particular institutional framework as if he were sure that this was exactly what would happen to him.”).

maximin rather than any other maximand.²³⁷ They may equally choose the maximax, under which a favorable distribution is such that advantages the most well-off member of society.²³⁸ Or they may choose to maximize expected utility, as was offered by Harsanyi,²³⁹ or any other maximand for that matter. After all, they may end up risk averse, neutral, or seeking individuals when the veil is pierced, a fact alluded to by Rawls himself.²⁴⁰

Finally, the decision rule adopted by Rawls, the so-called difference or maximin rule, is not only divorced from reality, but it would also lead to a parade of absurdities. Because under the rule one must decide based upon the worst possibility that may occur, *however unlikely*, people who take the maximin principle seriously “could not ever cross a street (after all, [they] might be hit by a car); . . . could never drive over a bridge (after all, it might collapse); . . . [and] could never get married (after all, it might end in a disaster).”²⁴¹ “If anybody really acted this way,” noted Harsanyi, she “would soon end up in a mental institution.”²⁴²

Yet, despite these flaws, when the Missouri Supreme Court replaced the no contribution rule with contribution, it relied not only on fairness between tortfeasors,²⁴³ but it also relied, explicitly, on Rawls. In *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*, an en banc decision, the court analogized the law of “joint and concurrent tortfeasor liability” to an “old time-worn building” that “has lost its architectural integrity.”²⁴⁴ It then held that “[o]nly the foundation—the principle of fairness—remains undisturbed and sturdy,” and concluded that it is “obligated to reconstruct [the law] upon the principle of fairness.”²⁴⁵ The “principle of fairness,” it found, “compels [the] adoption of a system for the distribution of joint tort liability on the basis of relative fault.”²⁴⁶ Most significantly, the court made it clear that by the “principle of fairness” it adopted Rawls’ Theory of Justice²⁴⁷ so that “in exchange for the

237. See, e.g., Rasmussen, *supra* note 218, at 15 (“[T]he difference principle is the most controversial aspect of Rawls’ work, with many commentators doubting that it would emerge from the original position.”).

238. Korobkin, *supra* note 218, at 807–08 (“[A]lthough Rawls believes that [individuals behind the veil] would choose the difference principle as the substantive basis for distributing primary goods . . . the acceptance of the veil of ignorance as the proper procedural device for creating a just society does not require the acceptance of his conclusion.”).

239. Harsanyi 1975, *supra* note 19, at 598.

240. RAWLS 1971, *supra* note 2, at 137; RAWLS REVISED, *supra* note 2, at 118.

241. Harsanyi 1975, *supra* note 19, at 595.

242. *Id.*; see also Arrow, *supra* note 19, at 251 (calling the maximin principle “hardly acceptable”).

243. Mo. Pac. R.R. Co. v. Whitehead & Kales Co., 566 S.W.2d 466, 469 (Mo. 1978) (en banc).

244. *Id.* at 472.

245. *Id.* (emphasis added).

246. *Id.* at 474.

247. *Id.* at 469 n.4, 470; Steinman v. Strobel, 589 S.W.2d 293, 296 (Mo. 1979) (Donnelly, J., dissenting) (quoting Mo. Pac. R.R. Co., 566 S.W.2d at 469) (noting that the Supreme Court in *Whitehead* “embraced the concept [of justice], as explicated in Rawls, *A Theory of Justice*, that ‘in

opportunity of some undertaking, we each promise all others that we will be liable for the damage which our own negligence in the undertaking has caused.”²⁴⁸

The court’s analysis, however, was flawed and its conclusion unsupported. It did not provide any explanation for the conclusion that the no contribution rule is unfair, save the ex-post result that the victim could choose arbitrarily to recover from one tortfeasor her entire damage.²⁴⁹ Nor did the cursory decision provide any basis for adopting Rawls’ Theory.²⁵⁰ The court seemed to adopt the concept of the veil—the idea of hypothetical original position where members can enter into a social bargain—but it did not explain why this contractarian approach requires the adoption of Rawls’ Theory, with its much criticized maximin rule. This Article, while recognizing Rawls’ immense contribution, argues that in the apportionment context, an alternative conception of justice should apply. This conception not only retains the social contract approach and avoids many of the flaws that accompany the maximin rule,²⁵¹ but also seems to be better tailored to our tort system.

C. WEALTH MAXIMIZATION

An alternative moral theory and one which can also be justified on contractarian grounds, but adopts a different maximand, is wealth maximization or, to use Posner’s terminology, economic analysis.²⁵² Wealth maximization is not concerned with “happiness”—as is the case under utilitarianism²⁵³—but, as the name suggests, with wealth. The two

exchange for the opportunity of some undertaking, we each promise all others that we will be liable for the damage which our own negligence in the undertaking has caused”)

248. *Mo. Pac. R.R. Co.*, 566 S.W.2d at 469 n.4.

249. *Id.* at 473 (“To limit any apportionment of damages between tortfeasors to those whom the plaintiff has chosen to sue and against whom judgment is rendered is an inartful and capricious policy, relying in excess upon the whim and wrath of a plaintiff before concurrent wrongdoers can share liability.”).

250. The court’s discussion of Rawls’ Theory was limited to a footnote. See sources cited *supra* notes 247–48.

251. Dennis C. Mueller, Robert D. Tollison & Thomas D. Willett, *The Utilitarian Contract: A Generalization of Rawls’ Theory of Justice*, 4 *THEORY & DECISION* 345, 350 (1974) (arguing that some of the criticism on “the difference principle can be eliminated by assuming that individuals in the original position maximize their expected utilities”).

252. *THE ECONOMICS OF JUSTICE*, *supra* note 211, at 60–61; Richard A. Posner, *Wealth Maximization Revisited*, 2 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 85 (1985) [hereinafter Posner 1985]; Posner 1979, *supra* note 211, at 119. But see Ronald M. Dworkin, *Is Wealth a Value?*, 9 *J. LEGAL STUD.* 191 (1980); Rizzo, *supra* note 104.

253. See *supra* note 211 (discussing utilitarianism). The terms utility and welfare have been subject to much confusion. See, e.g., Posner 1979, *supra* note 211, at 104–05, (distinguishing utilitarianism, which is concerned with maximizing happiness, from economics, which is concerned with maximizing welfare, and explaining that the two terms have been confused for many reasons, one of which is “the tendency in economics to use the term ‘utility’ as a synonym for welfare, as in the expression ‘utility maximizing’”); Posner 1985, *supra* note 252, at 87 (using the term wealth as a synonym for “expected utility” and explaining that the former is a function of willingness to pay or part with); Richard A.

are of course related: The more wealth one has the happier she is likely to be. But wealth and happiness are fundamentally different. A person's wealth is defined as the dollar equivalent of all her goods, services, and entitlements, such as leisure, privacy, strength, and talents.²⁵⁴ It is the amount of money she is willing and able to pay for something or, if she already has it, the amount of money she demands to part with it.²⁵⁵ Wealth, unlike utility as that term is used by utilitarian philosophers, is therefore *measurable*.²⁵⁶ It does not require imaginary hedonic-meters, but information on individuals' willingness to pay for or to part with a thing. Such information is often revealed by the market. Even in circumstances where a market transaction cannot take place, as in the case of an unconscious patient in need of a medical treatment, it is relatively easy to guess the resource allocation that would maximize societal wealth and the shadow price of the commodity transferred or service rendered;²⁵⁷ or, put differently, to mimic the market.²⁵⁸ In the

Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 497 (1980) [hereinafter Posner 1980] (noting that wealth maximization can be viewed as imposing a constraint on utilitarianism "that people may seek to promote their utility only through the market or institutions modeled on the market"). Posner, it should be noted, seems to reject Harsanyi's analysis, which gives the same weight to every individual and instead proposes a thinner veil, one in which individuals are aware of their endowments. *See id.* at 499.

254. Posner 1979, *supra* note 211, at 119. For a criticism on this definition, see Rizzo, *supra* note 104, at 643, 645.

255. ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 10; THE ECONOMICS OF JUSTICE, *supra* note 211, at 60-61; Posner 1979, *supra* note 211, at 119.

256. Utilitarianism is concerned with maximizing total happiness. *See supra* note 211. Measuring happiness, however, is a formidable task. And if it cannot be measured how can it be aggregated? The literature often speaks of "utils"—arbitrary interpersonal units to measure happiness—but it does not solve the measurement problem (at least until "util" or hedonic meters are invented). It has been proposed that the measuring problem and the "happiness monstrosity" can be avoided if one adopted policies or laws, still on utilitarian grounds, that are Pareto superior. *See, e.g.,* THE ECONOMICS OF JUSTICE, *supra* note 211, at 54-56 (Posner is willing to assume that "[t]he Pareto approach may seem to offer a solution to the problem of measuring satisfaction" under certain conditions.); Hockett, *supra* note 129, at 1277 ("Pareto-efficiency as a criterion . . . might have circumvented the utility-measurement and compatibility problems."). Pareto himself was concerned with interpersonal comparison noting that "a sum of [utilities or utils] is a thing that has no meaning: there is no such sum, and none such can be considered," and for this reason he invented his famous criterion. *See* IV VILFREDO PARETO, THE MIND AND SOCIETY § 2110, at 1458 (1935); *see also* VINCENT TARASCIO, PARETO METHODOLOGICAL APPROACH TO ECONOMICS 79-84 (1966) (explaining that Pareto created the criterion which bears his name because "he felt that interpersonal comparisons of . . . individuals cannot be made"); Posner 1980, *supra* note 253, at 488. But this is only partially true. In fact utilitarianism, as opposed to economic theory discussed in Part IV.C *infra*, would not support all voluntary transactions. It is easy to show that if people's marginal enjoyment from money is decreasing—where the more money they have, the less enjoyment they gain from an additional dollar—a free exchange on a mutually agreed upon price would increase but not necessarily maximize the parties' happiness. On the confusion that surrounds the terms "utility" and "utilitarianism" and the difference between utilitarianism and wealth maximization, *see supra* note 253.

257. The "shadow price" is the price that society would assign to a good, service, or endowment for which a market does not exist.

258. THE ECONOMICS OF JUSTICE, *supra* note 211, at 61.

latter example, it is likely that had the parties been able to transact, the patient would be willing to pay the market price for medical services required to save her life.

Because economic analysis seeks to maximize society's wealth rather than its happiness, it avoids the monstrous results of both utilitarianism and Rawlsianism.²⁵⁹ Suppose, for example, that *A* is in need of an organ transplant for which she is willing to pay \$1000, and that *B*, the only suitable donor, is willing to sell that organ for \$2000.²⁶⁰ A pure utilitarian would justify a court decree allowing *A* to harvest the organ, against *B*'s will, if *A*'s happiness from the organ would be greater than *B*'s displeasure. The wealth maximizer, however, will oppose such a decree because it would allocate the organ to the person who values it less (*A*). Moreover, even if the numbers are reversed so that *A* values the organ more than *B*, the wealth maximizer would still oppose a decree forcing *B*, the low value user, to surrender the organ in question. In such a low cost setting where there are only two parties, there is simply no reason for the law to intervene. If *A* truly values the organ more than *B* the parties will enter into a voluntary transaction at a price between \$1000–\$2000, and the resource—here the body part—would gravitate from the low value user to the high value user.²⁶¹ If, on the other hand, transaction costs are prohibitive, a wealth-maximizing court would be willing to imitate the market and allow one to harvest the organ from another,²⁶² but only if the latter is compensated.²⁶³

Because wealth maximization is a market-based theory that relies heavily on voluntary exchanges, it provides greater respect to individual freedoms and choices compared to utilitarianism and Rawlsianism.²⁶⁴ It is a meritocracy in which individuals can keep or sell their work product. With few exceptions, no one can be compelled to do anything, transfer a

259. See *id.* at 62–63.

260. For an analysis of the market for body parts, see generally J. Shahar Dillbary, *Emergencies, Body Parts and Price Gouging*, in *SOVEREIGNTY, EMERGENCY, LEGALITY* (Austin Sarat ed., 2010).

261. See, e.g., *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91–92 (Ct. Com. Pl. 1978) (refusing to force a close relative to undergo a transplant to save the plaintiff who suffered from a rare disease, curable only by a bone marrow transplant from the defendant). For an analysis of this decision, see Dillbary, *supra* note 260, at 4–7.

262. See, e.g., *Strunk v. Strunk*, 445 S.W.2d 145, 146, 149 (Ky. Ct. App. 1969). The court in *Strunk* compelled one individual, an incompetent ward of the state with an I.Q. comparable to that of a six-year-old, to give his kidney to his brother who suffered from a fatal kidney disease. *Id.* Because the transplant was beneficial to both (saving one's life and ensuring the survival of a future guardian), but the parties could not transact (due to the inability of the incompetent brother to communicate), the court mimicked the market. See *id.*; see also Dillbary, *supra* note 260, at 4–7.

263. For a different interpretation, see Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 231–32 (1980).

264. *THE ECONOMICS OF JUSTICE*, *supra* note 211, at 66; see also Arrow, *supra* note 19, at 257 (criticizing Rawls' objection to utilitarianism on the grounds that it treats individual as means rather than ends because it requires "some individuals sacrifice for the benefit of others" and arguing that the maximin rule leads to same result when it requires that the better off sacrifice for the less well off).

right, relinquish a commodity, or render a service against her will. Commodities, services, and rights must be bought in the marketplace and each such voluntary transaction produces a surplus that increases total wealth.²⁶⁵ Importantly, rights are not assigned arbitrarily by a master planner to the worse-off member of society in complete disregard of total wealth or the resulting marginal benefits and costs of such an act. Rather, they are assigned through the market to the high value user.

Undoubtedly, Posner's theory is not free of what many would consider to be morally unacceptable results,²⁶⁶ and it has its detractors.²⁶⁷ To many, the most offending feature of wealth maximization as a moral theory is the result of its most important ingredient, wealth, defined as the amount an individual is willing and *able* to pay.²⁶⁸ The definition favors, at least on its face, the rich over the poor. It gives an advantage to those who already have one.

Take the textbook factory-resident example where a central planner must decide whether the factory should have the right to pollute or the resident the right to be free from pollution.²⁶⁹ Assume that the factory's benefits from production outweigh the damage to the resident, that there are no other third party effects, and that transaction costs are not prohibitive. Under these conditions, the Coase theorem tells us that it does *not* matter who receives the right to pollute. At the end of the day the factory will be the owner of the right, whether it was given the right or it bought the right from the resident. But it *does* matter—at least to those who care about distributive justice. The initial assignment would make one party, the assignee, richer and the other poorer. The assignment is tantamount to a windfall that does not impact the resource allocation but does impact the wealth distribution. To illustrate, if the benefit to the factory from production is \$2000 and the damage to the resident from pollution is \$1200, then assigning the right to the resident would make the resident-seller richer because she would be able to take a bite at the \$800 surplus. A price of \$1700, for example, would increase

265. THE ECONOMICS OF JUSTICE, *supra* note 211, at 79.

266. See, e.g., ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 271; THE ECONOMICS OF JUSTICE, *supra* note 211, at 83, 86. See also Posner's discussion of resource allocation under budget constraints, *id.* at 11; Dworkin, *supra* note 252; Posner 1979, *supra* note 211, at 131 (discussing slavery and torture); Rizzo, *supra* note 104. But see Mueller, Tollison & Willett, *supra* note 251, at 349 (arguing that under certain conditions "Rawls' own theory will allow slavery").

267. See, e.g., Dworkin, *supra* note 252; Kronman, *supra* note 263, at 229 (concluding that "wealth maximization is an absurd principle to adopt" and that it "is not only an unsound ideal, it is an incoherent one which cannot be defended from any point of view"); Rizzo, *supra* note 104.

268. See, e.g., Dworkin, *supra* note 252, at 207-12; Rizzo, *supra* note 104, at 648-51.

269. See, e.g., ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 61; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1121 (1972); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-2 (1960); Russell B. Korobkin & Thomas S. Ulen, *Efficiency and Equity: What Can Be Gained by Combining Coase and Rawls?*, 73 WASH. L. REV. 329, 336 (1998).

the resident's wealth by \$500 and the factory's by \$300. If it is assigned to the factory, on the other hand, it would confer a benefit of \$2000 upon the factory but it would make the resident poorer by \$1200. In either case the right or resource ends up in the hands of the high value user—the factory—and total wealth increases by \$800.²⁷⁰

The example demonstrates that economic analysis is *neutral* as to whether the resulting allocation would make some wealthier than others. The distribution of wealth is simply not a (major) concern in economic analysis. The Second Theorem of Welfare Economics is an expression of this idea.²⁷¹ According to this theorem, society should not try to maximize welfare and achieve distributive “fairness” at the same time.²⁷² Rather, it should undertake a two-step process. In the first stage resources should be allocated to their most efficient use, and only then *can* redistributive policies such as taxation be entertained. Boldly put, efficiency comes first, distributive justice second.²⁷³ This neutrality or low priority to distributive justice concerns has been subject to much criticism. Korobkin and Ulen report that:

For decades, one of the most constant criticisms of the economic analysis of law has been that it fails to address distributive justice concerns. The critics say that this failure, in combination with the seemingly single-minded commitment of law and economics to efficiency as a (or *the*) legal norm, places law and economics well outside the law's long-standing and deep commitment to justice. Moreover, according to the critics, the field is out of step with society at large, which, through both norms and laws, seems far more committed to fairness and equity than to efficiency.²⁷⁴

A number of attempts have been taken to combine the efficiency norm with distributive justice. Swygert and Yanes, for example, offer a model that combines efficiency norms with the Rawlsian concept of fairness mixed with what they call “empathy.”²⁷⁵ Specifically, they assume that parties are risk averse, and they argue that behind a veil of ignorance such parties would agree to divide the surplus from the transaction (the \$800 in the factory example).²⁷⁶ In Swygert and Yanes's model, people behind the veil have full information of everyone's attributes such as sex, age, and wealth, but they do not know which party

270. For attempts to address this problem, see Swygert & Yanes, *supra* note 141, at 257 (offering a theory that “embraces the requirements of efficiency but is qualified by constructive empathy”).

271. See HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 515, 517–18 (4th ed. 1996); Korobkin & Ulen, *supra* note 269, at 341–42 & n.37.

272. Korobkin & Ulen, *supra* note 269, at 341–42.

273. *Id.* at 342.

274. *Id.* at 329.

275. Swygert & Yanes, *supra* note 141.

276. *Id.* at 314–16 (stating that in their model, the object of the bargaining process behind the veil of ignorance “is to reach a consensus that will maximize the well-being of each of the parties while minimizing the risk to each”).

to the transaction they would become.²⁷⁷ In the nuisance example, the parties will not know whether they will be the factory owner or resident once the curtain is unveiled. They will thus be willing to share the surplus in order to minimize the risk to which they are so averse. Swygert and Yanes's model, however, suffers from a number of flaws:²⁷⁸ it relies on unrealistic assumptions, for example that all parties are equally wealthy prior to the transaction;²⁷⁹ it may lead to inefficiencies;²⁸⁰ it is limited to contractual contexts;²⁸¹ and, it is hard to apply.²⁸² Importantly, it adopts a version of the maximin principle, with its universal risk aversion assumption, that has been subject to much criticism.²⁸³

A more appealing alternative that also combines efficiency and equity is Korobkin and Ulen's "market contrarian" approach.²⁸⁴ Under this approach, if the parties (1) face the same decreasing marginal utility from money, and (2) are equally wealthy, then the right should be allocated to the party who values it *less* (the neighbor in the factory example). Such an assignment combined with a "super-liability" rule will force the high value user to purchase the right from the low value user and thus share the surplus.²⁸⁵ The "market contrarian" approach, however, is a theory of "entitlement allocation."²⁸⁶ It does not provide a framework for analyzing externalities—that is tort law.

This Article joins these attempts in a very limited way. It does *not* undertake to *combine* efficiency with fairness. Nor does it attempt to devise a rule that would make an otherwise justice-neutral system a fair one or to offer a new theory of justice. Rather, while still in the domain of wealth maximization, this Article argues that the no contribution rule is not only efficient.²⁸⁷ It is also fair.

277. *Id.* at 315–16.

278. These flaws have been the subject of an article that appeared in the same review. See Korobkin & Ulen, *supra* note 269.

279. *Id.* at 334, 335.

280. Swygert & Yanes's model reduces the parties' incentive to produce and the cooperative surplus where transaction costs (even if not prohibitive) are positive. See *id.* at 344–45.

281. *Id.* at 335.

282. *Id.* at 333–34.

283. *Id.* at 334 ("[T]he key insight that drives [Swygert and Yanes's] conclusions is that individuals are risk averse.").

284. *Id.* at 331. The theory is suggested as an alternative to Swygert and Yanes's model and the authors provide a critical review of its assumption. *Id.* at 343–47.

285. The authors define a super-liability rule as a rule that protects "the neighbors' entitlement with a liability rule under which the condemnation price is set to divide the cooperative surplus equally." *Id.* at 340.

286. *Id.* at 331, 335, 336–39. As such it also suffers from the Nozickian Wilt Chamberlain problem. See *supra* note 230.

287. ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 189–90.

D. THE MAXIMAND REVISITED

There are a number of important reasons to prefer wealth maximization over the difference rule to analyze the fairness of the tort system. To begin with, the common law, especially tort law, seems to be “best understood as a system of promoting economic efficiency,”²⁸⁸ and like economic analysis, it is, “for the most part, distributive neutral.”²⁸⁹ Posner’s famous claim is not only descriptive but it also has a normative moral charge. Efficiency requires judges to ignore the initial assignments of the parties before them. The fact that a party is rich or poor, a man or a woman, black or white becomes inconsequential. Nor is it important that the victim is bad and that the wrongdoer is good or a better person. Simply put, wealth maximization is a theory of justice that is blind to persons.²⁹⁰ Rawls’ difference rule, in contrast, gives preference to the least advantageous member of society and thus requires interpersonal comparisons in order to identify that person. It is also inoperable, as such identification cannot be performed without imaginary hedonic-meters.²⁹¹

Yet, another ground for rejecting the difference rule is that it acts as a form of a *social insurance*.²⁹² In the insurance lingo, the difference rule is a social policy under which the insurer (society) promises to compensate the policyholders (its members) against the occurrence of a specific event (that a member would turn out to be the least advantaged). Unlike regular insurance, however, the difference rule imposes the *same* insurance on *all members of society*,²⁹³ even when the costs of such insurance outweigh its benefits²⁹⁴ and even when better and cheaper alternatives are available. This is especially the case in the apportionment context. When it comes to apportionment of liability, the difference rule would likely mandate, at least on some occasions, the adoption of a contribution rule.²⁹⁵ Assume for a moment that tortfeasors

288. *Id.* at 272; see also Keating, *supra* note 129, at 195 (“For the past twenty or thirty years, scholars working the justice side of the divide have tended to assume that justice in tort law is a matter of corrective justice.”).

289. ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 272.

290. *Id.* at 560; see also OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 (1948) (“The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason.”).

291. *But see* Rizzo, *supra* note 104, at 642 (criticizing wealth maximization on similar grounds and arguing that “[a]n illusion of manageability has been created by the overly simple models within which much of the economic analysis of law takes place”).

292. See Hockett, *supra* note 129, at 1287, 1291; Robert Hockett, *Just Insurance Through Global Macro-Hedging: Information, Distributive Equity, Efficiency, and New Markets for Systemic-Income-Risk-Pricing and Systemic Income-Risk-Trading in a “New Economy,”* 25 U. PA. INT’L ECON. L. 107, 132, 156 (2004) [hereinafter Hockett 2004].

293. See Hockett 2004, *supra* note 292, at 156.

294. See, e.g., *supra* Part III.B; notes 227–228, 241–242 and accompanying text.

295. This contribution rule could take the direct form of comparative fault with contribution or the

are solvent, that litigation costs are low and that litigation is certain. Under these assumptions, a rule of no contribution would fully compensate the victim, but it would expose one tortfeasor to the risk that she would have to bear the entire damage. A contribution rule, on the other hand, would still provide full compensation to the victim, but it would also provide a form of insurance to the tortfeasor. The risk of having to pay the victim for the wrong is spread among the tortfeasors. In contrast, under the no contribution rule the tortfeasor who paid the entire damage receives nothing.

It is doubtful that from a moral standpoint society needs to subsidize insurance and offer compensation to wrongdoers. This is especially the case when it comes to joint tortfeasors where each is found to cause the *entire* damage. There is no reason to allow one tortfeasor to benefit from the fact that others joined her in committing the tort. But even if people behind the veil are interested in insurance against the lottery of life, the difference (and thus a contribution) rule is only one form of insurance and not necessarily the most desirable one. It is also unclear why the legal system should impose the same social insurance on all, including victims, when the marketplace offers private and individually tailored policies to those tortfeasors who want and are willing to pay for them.

Truth be told, the legal system is already deeply involved in the insurance business. Bankruptcy and the limited liability of corporations provide a form of insurance to entrepreneurs against business losses. Similarly, the old admiralty rule that two careless vessels must share equally the damages of their collision²⁹⁶ was also a form of insurance²⁹⁷ because it provided compensation to the party who was heavily damaged. JSL with contribution performs the same insurance function. It limits the liability of each tortfeasor to a fraction of the damage. The contribution rule, however, is different from these legal schemes in one important aspect. The social insurance is justified in bankruptcy, corporate limited liability, and colliding vessels because of a market failure. In these situations insurance cannot (or could not, in the case of admiralty) be provided by the marketplace whether because of moral hazard (in the case of bankruptcy and limited liability) or the state of technology (in the case of the colliding vessels).²⁹⁸ But when the market *can* meet the demand for insurance—as in the case of liability insurance—there is no reason to use the tort system which is likely to be more expensive and less efficient. In the words of Justice Holmes:

indirect form of a proportionate liability regime.

296. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 284 (1952).

297. *ECONOMIC ANALYSIS OF LAW*, *supra* note 1, at 175.

298. *Id.* (“[U]ntil modern times, maritime transportation was an extraordinarily risky business because of the great value of the ship and their cargoes and the significant probability of disaster, yet market insurance was difficult to come by and as a result there was a demand for an insurance by means of the tort system.”).

The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle *pro tanto*, and divide damages when both were in fault, as in the *rusticum judicium* of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*. *State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise.* The undertaking to redistribute losses simply on the ground that they resulted from the defendant's act would not only be open to these objections, but, as it is hoped the preceding discussion has shown, to the still graver one of offending the sense of justice.²⁹⁹

Although the excerpt refers to universal insurance for victims, the point is even stronger when it comes to insuring tortfeasors. Redistributing losses between tortfeasors, whether directly via a contribution rule or indirectly by limiting their liability via a proportionate liability rule, would equally offend "the sense of justice." It is an "evil," to use Holmes' words, because it subsidizes social insurance for those who committed a tort, even though such insurance is readily available in the marketplace. The difference rule should thus be rejected in the context of apportioning tort liability. A rule of no contribution will require those who are interested in insurance to purchase on the market at their own costs.

CONCLUSION

It has been argued that the no contribution rule is efficient,³⁰⁰ but is it fair? Many argue that it is not. Even some celebrated champions of the law and economics movement and economists concede that it may lead to unfair consequences.³⁰¹ The resentment to imposing on one tortfeasor the entire burden of the judgment, regardless of her comparative fault, caused all but one state, Alabama, to replace the old common law rule of no contribution with alternative regimes. Some have adopted comparative fault regimes. Under these regimes, in situations that give rise to JSL a tortfeasor who paid the defendant more than her share can

299. HOLMES, *supra* note 290, at 96 (emphasis added).

300. ECONOMIC ANALYSIS OF LAW, *supra* note 1, at 189, 190.

301. See Mario J. Rizzo & Frank S. Arnold, *Causal Apportionment in the Law of Torts: An Economic Theory*, 80 COLUM. L. REV. 1399, 1399 (1980) (discussing contribution among tortfeasors and concluding that "a more equitable sharing of the losses has become a reality"); *supra* Parts II.B, III.E. *But see* Easterbrook, Landes & Posner, *supra* note 28 (distinguishing between ex-post and ante justice).

seek contribution from the remaining tortfeasors. Other states abolished JSL altogether and replaced it with proportionate liability. In these jurisdictions each wrongdoer is liable for that proportion of the damage that is attributed to her alone. She is not liable for the entire damage and contribution is therefore not an issue.³⁰² Fairness between wrongdoers played a critical role where courts and legislators considered whether to grant a right of contribution not only in torts but also in employment, environmental, antitrust, patent, admiralty, and securities laws.³⁰³

Although fairness between defendants is considered by many to be “[t]he most powerful, and hence most frequently asserted, argument,”³⁰⁴ it is one that has been challenged only rarely.³⁰⁵ This Article attempts to challenge the fairness argument. By using the concept of the veil it seeks to isolate the apportionment debate from the biases that shaped it and that still fuel reformers. Using the concept of the veil to determine legal policies, it should be noted, is by no means a new proposition. Rawls’ version of the veil, for example, has been applied to other areas of the law, including contractual contexts,³⁰⁶ property rules and initial assignments of goods,³⁰⁷ and bankruptcy.³⁰⁸ Rawls’ procedure was also used to determine whether a right to health care should be recognized³⁰⁹ and to assess the legitimacy of judicial review.³¹⁰ At least one state supreme court raised Rawls’ Theory of Justice in deciding to reject the no contribution rule and replacing it with contribution.³¹¹ These attempts, however, adopted both Rawls’ procedure and the much-criticized difference rule which this Article, following

302. See *supra* Introduction.

303. For a review of some of these considerations in the context of securities, environmental law, and the Employee Retirement Income Security Act, see 42 U.S.C. § 9607 (2006) (allowing but not mandating a regime of JSL and 42 U.S.C. § 9613 (2006) authorizing contribution); Elizabeth A. Di Cola, *Fairness and Efficiency: Allowing Contribution Under ERISA*, 80 CALIF. L. REV. 1543 (1992); Bernard Chao, *The Case for Contribution in Patent Law* (Univ. of Denver Sturm Coll. of Law, Working Paper No. 11-02), available at <http://ssrn.com/abstract=1753910> (arguing that patent law should adopt a contribution rule and that “contribution will equitably spread liability among different responsible parties in patent law (*i.e.* parties responsible for the same infringement)”).

304. Wright, *supra* note 123, at 51.

305. *Id.* at 51–53.

306. Swygert & Yanes, *supra* note 141.

307. Korobkin & Ulen, *supra* note 269.

308. Rasmussen, *supra* note 218.

309. EPSTEIN, *supra* note 221; Korobkin, *supra* note 218, at 801 (arguing that the question of whether positive rights to health care should be recognized should be addressed from a “Rawlsian ‘veil of ignorance’ perspective”).

310. Lao-Tze Smith, *We Don’t Count! Rousseau’s General Will as a Tool to Judge the Legitimacy of the Judicial Decisions Relating to the Presidential Elections in Mexico and the United States*, 15 LAW & BUS. REV. AM. 339, 339–51 (2008).

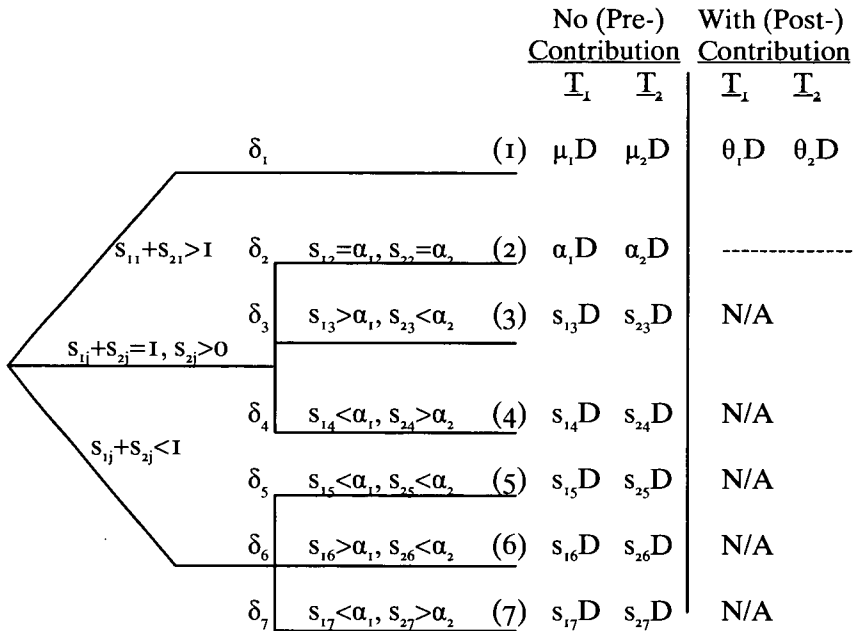
311. See *Mo. Pac. R.R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 468–69 (Mo. 1978) (en banc). The court recognized a right of contribution to avoid unfairness as between tortfeasors and held that “[t]he long history of the law of joint and concurrent tortfeasor liability . . . is in fact a rich expositional refinement of the principle of fairness” as this term is interpreted by Rawls. *Id.* “This premise,” the court explained, “is the basis of our fault-based system of tort liability.” *Id.* at 469 n.4.

Harsanyi and Posner, rejects. Instead it uses economic theory, and rather than build on unrealistic assumptions, it relies on market mechanisms and modern decision theory to argue the no contribution rule is as fair, indeed even more equitable, than its alternatives.

TECHNICAL APPENDIX

The expected liability behind a veil of uncertainty in a case involving one victim, V and two tortfeasors, T_1 and T_2 , is the same regardless of T_i 's solvency level. The solvency level is defined as the tortfeasor's ability to pay the maximum amount for which she can potentially be found liable and is denoted by s_i (i.e., if $s_i < 1$ the i^{th} tortfeasor is insolvent). Diagram 3 shows the payoffs of the parties with and without contribution. These payoffs are a function of the fault (α_i) and solvency (s_i) levels of each tortfeasor. For simplicity it is assumed without limitation if $s_{ij} \neq s_{2j}$ then $s_{ij} > s_{2j}$ (s_{ij} stands for the solvency level of the i^{th} tortfeasor with regard to the j^{th} branch).³¹² Here μ_i and θ_i stand for the share of the damage paid by the tortfeasor i before and after contribution respectively.

DIAGRAM 3: JSL REGIME WITH AND WITHOUT CONTRIBUTION³¹³



If the tortfeasors can more than fully compensate the victim ($s_1 + s_2 > 1$),³¹⁴ then the victim will sue one or both tortfeasors and may recover from each tortfeasor $\mu_i D$. Contribution may not be required (if μ_i , the amount initially charged from the tortfeasor i is equal to α_i) or even possible.

312. This simply means that if one tortfeasor is more solvent than the other, then the more solvent tortfeasor is denoted as T_1 , and the other as T_2 .

313. Branches 2-7 could be collapsed into one branch, but for expositional purposes only, are broken down to different scenarios according to the parties' fault level.

314. Whether because $s_i > 1$, or because $s_i < 1$, but $s_1 + s_2 > 1$.

Consider the case where $s_i > \alpha_i$ and $\mu_i \neq \alpha_i$, for example, where T_1 is 30% at fault and solvent and T_2 is 70% at fault and can pay $s_2=80\%$ of the \$100 damage. If the victim decided to recover from T_1 and T_2 20% and 80% respectively (i.e. $\mu_1=0.2$ and $\mu_2=0.8$), then T_2 will receive \$10 in contribution from T_1 so that at the end of the day each tortfeasor paid according to her fault level ($\theta_i = \alpha_i$). If, however, $s_i < \alpha_i$, then one party (even post contribution) will bear more than her share of fault ($\theta_i > \alpha_i$). In the preceding example, if $s_2=1\%$, then T_1 will pay at least 99% of the damage although she is only 30% at fault.

If none of the parties is fully solvent ($s_i, s_2 < 1$) but together they have enough resources to fully compensate the victim ($s_1 + s_2 = 1$), there are three possible scenarios, marked as branches 2-4. In each the victim will be able to fully recover her damages (for $2 < j < 4 \sum s_j = 1$) but the final allocation between the tortfeasors is different. In the first (branch 2), neither party can pay the entire damage but all will compensate the victim according to their fault ($s_i = \alpha_i; s_2 = \alpha_2$) so no contribution is needed. In the second and the third scenarios (branches 3 and 4), the victim also fully recovers but one tortfeasor will pay more than her fault level without the ability to get any contribution. Take for example scenario 2, under which $s_1 + s_2 = 1, s_1 > \alpha_1$ and $s_2 < \alpha_2$ (branch 3). Assume T_1 is 2% at fault but can pay 80% of the damage and T_2 is 98% at fault but can pay only 20% of the damage. If the damage to the victim is \$100 then T_1 and T_2 will pay the victim \$80 and \$20 respectively, but T_1 who "overpaid" \$78 (80-2) will not be able to get any contribution from T_2 who has no more available assets.

If the combined assets of the parties are less than the injury to the victim ($s_1 + s_2 < 1$), there are three possible scenarios (marked as branches 5-7).³¹⁵ This time the victim (by definition) will not be able to fully recover her damages and contribution will also not be available to the tortfeasors who paid more than her fault level. Consider the situation in which $\alpha_1=0.6$ (and hence $\alpha_2=0.4$), $s_1=0.5$ and $s_2=0.3$ (branch 5). Under these conditions none of the tortfeasors will fully pay her "share" (i.e., $s_i < \alpha_i$ and $s_2 < \alpha_2$) and the victim will recover only 80% of her damage.

By denoting δ_i as the probability for the i^{th} branch, it is possible to derive the expected liability of T_1 behind the veil:

$$(II)^{316} \quad EL_{T_1} = \frac{1}{2} \sum_{j=1}^4 \delta_j D + \sum_{j=5}^7 \delta_j D (s_{1j} + s_{2j})$$

315. A fourth situation in which $s_i > \alpha_i$ and $s_j > \alpha_j$ is impossible. If this was the case then it would be true that $s_i + s_j > \alpha_i + \alpha_j$ and, therefore, (because $\alpha_i + \alpha_j = 1$) that $s_i + s_j > 1$. But this would contradict the assumption that $s_i + s_j < 1$.

316. The expected recovery of the victim is the sum of the expected liability of the tortfeasors:

$$EL_{T_1} = \delta_1 \mu_1 D + \delta_2 \alpha_1 D + \sum_{j=3}^7 \delta_j s_{1j} D \quad \text{and} \quad EL_{T_2} = \delta_1 \mu_2 D + \delta_2 \alpha_2 D + \sum_{j=3}^7 \delta_j s_{2j} D \quad \text{which can be simplified to}$$

$$ER_V = EL_{T_1} + EL_{T_2} = \sum_{j=1}^4 \delta_j D + \sum_{j=5}^7 \delta_j D (s_{1j} + s_{2j}) \quad \text{because } \mu_1 + \mu_2 = 1 \text{ and for } 2 \leq j \leq 4, \alpha_i + \alpha_j = s_{ij} + s_{jj} = 1.$$
