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An Economic Rationale for the Legal Treatment of Omissions in Tort Law: The Principle of Salience

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An Economic Rationale for the Legal Treatment of Omissions in Tort Law: The Principle of Salience

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This paper provides an economic justification for the exemption from liability for omissions in torts and for the exceptions to this exemption. It interprets the differential treatment of acts and omissions under tort law as a proxy for a more fundamental distinction between harms caused by multiple injurers, where each one can single-handedly prevent the harm (either by acting or failing to act), and harms caused by a single injurer (either by acting or failing to act).

Since the overall cost to which a group of injurers is exposed is constant, attributing liability to many injurers reduces the part each has to pay and, consequently, reduces each one's incentives to take precautions. Broad exemption from liability for omissions is a way of carving a simple, practical rule to distinguish between the typical cases in which an agent can be easily selected and provided with sufficient incentives (typically, cases of acts) and cases in which there is a serious problem of dilution of liability (typically, cases of omissions).

The exceptions to the rule exempting from liability for omissions

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are explained in terms of efficiency. The imposition of liability for omissions depends on the ability to identify a salient agent, i.e., to single out one or few liable agents and differentiate their role(s) from that of others. Tort law designs three types of "salience rules." It either creates salience directly (by attributing liability to a single agent), or it can exploit salience created "naturally," or it can induce injurers to create salience voluntarily.

Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one.¹

INTRODUCTION

What is the rationale justifying the differential treatment of acts and omissions in tort law? What can justify the broad exemption from liability for harmful omissions? This article provides an economic justification both for this exemption and for the exceptions to it. In particular, the article interprets the differential treatment of acts and omissions in tort law as a proxy for a more fundamental distinction between harms caused by multiple injurers, where each one can single-handedly prevent the harm (either by acting or failing to act), and harms caused by a single injurer (either by acting or failing to act). The former type of cases — cases in which each agent can single-handedly prevent the harm — is typically labeled in the literature "alternative care situations."

The *Federalist Papers* expressed the conviction that "regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one."² The advocates of economic analysis long ago detected an analogous phenomenon in tort law. Attributing liability to too many injurers in alternative care situations leads to dilution of liability. Since the overall cost to which a group of injurers is exposed is constant, attributing liability to many injurers reduces the portion each has to pay and, consequently, reduces the injurers' incentives to take precautions.

Overcoming the risk of dilution of liability requires that the rule imposing liability satisfy a principle of salience, namely, that it identify ideally a single agent or a small group of agents that are liable for the harm. The principle of salience implies that sometimes what justifies the attribution of

¹ The *Federalist* No. 15 (Alexander Hamilton).

² *See id.*

liability to one agent rather than another is nothing more than the simple fact that the former is distinct and therefore can be clearly and unambiguously singled out from others in a salient manner. The principle of salience is not, in itself, a principle of liability. It does not dictate who the responsible agents are or how they are to be determined. Instead, it should be understood as a constraint that substantive principles of liability should meet. Thus, this article does not advocate replacing the traditional rules for allocating liability (rules that rely on culpability, corrective justice, or the principle of the cheapest cost avoider) with a new principle — the principle of salience. Instead, it argues that often, the traditional principles for allocating liability need to be modified in order to satisfy the constraints imposed by the principle of salience. A complex relationship exists, therefore, between the substantive principles of liability and this principle. Often, the traditional rules of liability satisfy the principle of salience, i.e., they naturally select a single agent and impose liability on her; at other times they need to be modified to accommodate the principle of salience.

This article concentrates on one particular manifestation of the principle of salience, namely, the legal treatment of omissions. More particularly, it argues that the reluctance of tort law to attribute liability for omissions cannot be explained in terms of the traditional rules of liability. These rules, and, in particular, the rule of the cheapest cost avoider, often select many agents, rather than a single agent, and thus frustrate the very same goals that this rule is designed to promote, namely, economic efficiency.

The principle of salience has three primary manifestations with respect to omissions. First, it dictates that as a general rule, the legal system should not impose liability for both actions and omissions. Attributing liability to both would aggravate the risk of dilution of liability. The legal system therefore should select and impose liability either for actions or for omissions.

Arguably, this reasoning could imply attribution of liability for omissions only and exculpate actors from liability! Yet, the need to prevent the dilution of liability explains a second central feature of tort law, namely, why tort law attributes liability primarily to acts rather than omissions. Typically, there are many more agents who could have prevented a harm by acting (i.e., who committed omissions) than agents who could have prevented the harm by failing to act in a certain manner. The broad exemption from liability for omissions is a way of carving a simple, practical rule to distinguish between the typical cases in which an agent can be easily selected and provided with sufficient incentives (typically, cases of acts) and cases in which there is a serious problem of dilution of liability (typically, cases of omissions). Third, the need to prevent dilution of liability explains why tort deviates from the general principle exculpating agents who committed omissions and imposes

liability in cases where a single agent responsible for the omission can be easily identified.

After the foundations of the economic rationale for the special treatment of omissions are laid out in Parts I and II, Part III provides an efficiency-based rationale for the numerous exceptions to this rule. Most importantly, Part III argues that a person is liable for an omission when she can be singled out *ex ante*, i.e., when her role in bringing about the harm can be clearly and unambiguously differentiated from the roles of others. This Part also distinguishes between three types of "salience rules": tort law can create salience directly, or it can exploit salience created "naturally" under the circumstances, or it can induce injurers to create salience voluntarily. Finally, Part IV examines some objections to our position and refines our conclusions in light thereof.

I. THE DIFFERENTIAL TREATMENT OF ACTS AND OMISSIONS IN TORT LAW: IN SEARCH OF A RATIONALE

Acts and omissions are traditionally treated differently by tort law. Tort law makes a sharp distinction between "misfeasance" and "nonfeasance," i.e., between active misconduct effecting positive injury to others and passive inaction or a failure to take steps to protect others from harm.³

Some moral philosophers argue that this distinction is based on a moral difference between committing a harmful act (e.g., killing) and failing to perform a beneficial act (e.g., letting someone die).⁴ Utilitarians (as well as economists) would likely reject this argument.⁵ For as long as an act, or an

³ See W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 56 (5th ed. 1984). See also Dan B. Dobbs, *The Law of Torts* 853 (2000); Francis Trindade & Peter Cane, *The Law of Torts in Australia* 375 (2d ed. 1993).

⁴ The most careful attempt to investigate the moral ramifications of the distinction is by 2 Frances Kamm, *Morality, Mortality* 17-140 (1996).

⁵ Indeed, most utilitarians believe that individuals have a moral duty to act and that such a duty should be enforced. The utilitarian defense of the duty to rescue provides a good example of the utilitarian willingness to approve of positive duties. Bentham argues that "in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself, as well as to abstain from bringing it on him?" Jeremy Bentham, *The Principles of Morals and Legislation* at ch. XVII, § 1.XIX (1789). Mill states,

There are also many positive acts for the benefit of others which he may rightfully

omission, prevents harm that exceeds the cost of the act or the omission, the utilitarian considerations dictate imposing a duty on the agent.⁶

A simple example provided by Ames in his classic article⁷ can illustrate this utilitarian reasoning. While walking across a bridge admiring the beauty of the sunrise, I see a person fall off the bridge and cry for help. I am an excellent swimmer and can save him from drowning at no risk to myself. Moreover, on the bridge lies a rope that I can use to save this person without any special effort and, again, at no risk to myself. Yet, being of refined aesthetic sensitivity, I am reluctant to divert my attention from the beauty of the sunrise to the more earthly enterprise of saving a life.⁸

The cost of prevention in this scenario is very low (throwing the rope or even jumping into the water); whereas the possible harm is great. Hence, Epstein argues,

If one considers the low costs of prevention to *B* of rescuing *A*, and the serious, if not deadly harm that *A* will suffer if *B* chooses not to rescue him, there is no reason why... the general rules of negligence should not require, under pain of liability, the defendant to come to aid of the plaintiff.⁹

Epstein's argument can be extended far beyond this extreme case. From a utilitarian perspective, the duty to rescue should be much broader than what is required by most moral philosophers or what is acceptable in any legal system. Utilitarianism arguably dictates a duty to rescue, as long as

be compelled to perform, such as ... saving a fellow creature's life or interposing to protect the defenseless against ill usage — things which whenever it is obviously a man's duty to do he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury.

John Stuart Mill, *On Liberty*, in *Prefaces to Liberty; Selected Writings of John Stuart Mill* 239, 252 (Bernard Wishy ed., 1959). Finally, Sidgwick supports a (moral) duty to rescue on the grounds that "the moral rule condemning the refusal of aid in such emergencies is obviously conducive to the general happiness." Henry Sidgwick, *The Methods of Ethics* 437 (7th ed. 1981). For a helpful survey of the utilitarian arguments, see Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 *Yale L.J.* 247, 282-87 (1980).

6 See Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. Legal Stud.* 151 (1973); Richard L. Hasen, *The Efficient Duty to Rescue*, 15 *Int'l Rev. L. & Econ.* 141 (1995); Eric H. Grush, *The Inefficiency of the No-Duty-To-Rescue Rule and A Proposed 'Similar Risk' Alternative*, 146 *U. Pa. L. Rev.* 881 (1998).

7 James B. Ames, *Law and Morals*, 22 *Harv. L. Rev.* 97, 111-13 (1908).

8 *Id.* at 112-13.

9 Epstein, *supra* note 6, at 190.

the costs to the rescuer are marginally lower than the benefits to the one in need of rescue.¹⁰ Hence, even if jumping into the water were to pose a grave risk to my life, utilitarian considerations would dictate that I do so if the benefits to the person in need of rescue are higher than the costs. Furthermore, a utilitarian perspective founded on these premises would reject the sharp principled distinction drawn in many legal systems between the duty to save lives and the duty to save property.

Following the utilitarian tradition and, yet, at the same time placing great faith in the efficiency of common law, law & economics advocates offer numerous sophisticated explanations to demonstrate that a legal duty to rescue is, nevertheless, inefficient. Most of these explanations are limited to specific circumstances or rely upon speculative premises.¹¹ However, this

10 See Michael A. Menlowe, *The Philosophical Foundations of a Duty to Rescue*, in *The Duty to Rescue: The Jurisprudence of Aid* 5, 21 (Michael A. Menlowe & Alexander McCall Smith eds., 1993). Indeed, some utilitarians argue for a broad (moral) duty of rescue, even when it requires extreme personal sacrifice. See William Godwin, *Enquiry Concerning Political Justice and Its Influence on General Virtue and Happiness* 165, 192, 219, 327 (1976). Yet other utilitarians provide sophisticated arguments in favor of limiting the scope of the duty to rescue and duties of beneficence in general. Sidgwick, for instance, believed that

[f]or human nature seems to require the double stimulus of praise and blame from others, in order to the best performance of the duty that it can at present attain: so that the "social sanction" would be less effective if it became purely penal. Indeed, since the pains of remorse and disapprobation are in themselves to be avoided, it is plain that the Utilitarian construction of a Jural morality is essentially self limiting; that is, it prescribes its own avoidance.

Sidgwick, *supra* note 5, at 493. John Stuart Mill pointed out another problem with an extended duty of beneficence, arguing that

there are two sets of consequences to be considered: the consequences of the assistance and the consequences of relying on the assistance. The former are generally beneficial, but the latter, for the most part injurious There are few things for which is it more mischievous that people should rely on the habitual aid of others than for the means of subsistence, and unhappily there is no lesson which they more easily learn.

John Stuart Mill, *The Principles of Political Economy* 967 (1923).

11 One needs a mind as fertile as those of Richard Posner and William Landes to reconcile efficiency with the common law principle that rejects the duty to rescue. William Landes & Richard Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 *J. Legal Stud.* 83, 101 (1978). Landes and Posner provide several arguments to show that imposing a duty to rescue is not necessarily efficient. Under their first argument, the duty to rescue is not necessarily justified, because the transaction costs between the rescuer and the rescued often are relatively small. If there is a boat in non-imminent risk of danger

article does not delve into these explanations; instead, it provides an alternative efficiency-based explanation of the treatment of omissions that is broader and more general than traditional economic explanations.

and a second boat can rescue it, the owners of the two boats can negotiate an efficient rescue operation. Yet this argument applies only to a narrow range of cases — those typically not covered by the statutes providing for a duty to rescue. These statutes typically apply only to cases of imminent risk, so imminent that negotiations cannot be conducted fruitfully.

Landes and Posner provide a second, alternative explanation. In their view, if the costs of rescue are small and the benefits to the one in need of rescue are high, there will be sufficient incentives to rescue. Hence, imposing such a duty might be redundant. The incentives typically include the rescued party's sense of gratitude for being rescued, which is a psychological benefit for the rescuer. It seems, however, that this argument fails. If sufficient non-legal incentives already exist, then the costs of administering the legal duty are negligible. If, on the other hand, the costs of administering the legal duty are not negligible, it follows that in some cases, people will not have sufficient incentives, which could then be provided by the law. Landes and Posner provide an interesting counterargument to this objection, claiming that imposing a legal duty to rescue may diminish the incentives to rescue in that a person who rescues will not be recognized as a hero, but, rather, will be regarded as merely having fulfilled his or her duty. This argument is grounded in a dubious psychological conjecture. It is difficult to know what effect imposing a duty of rescue has on people's attitudes toward rescuing another; and it would be particularly difficult to establish that the behavioral effects of the legal incentives would be outweighed by the psychological ones.

Jewish sources seem to disagree with Posner and Landes' psychological conjecture. The Talmud tells of Rabbi Ulla who was asked, "To what extent does one have to honor one's parents?" Rabbi Ulla responded by telling a story about a Gentile who missed a great business opportunity because he did not want to disturb his father by taking a key that was under his father's pillow. The red cow that was his reward for honoring his parents was of immense value at the time. Rabbi Ulla derived from this story that if a Gentile, who is not commanded by God to honor his parents, was rewarded so profoundly, a Jew, who is subject to this commandment, would be rewarded even more for so doing. He based this conclusion on a statement by Rabbi Hanina that "he who is commanded and fulfils [the command] is greater than he who fulfils it though not commanded." The *Tosfot*, one of the important Talmudic commentaries, explains the rationale underlying this surprising claim. It argues that one who is commanded is anxious to obey the commandment. Someone who is not commanded obeys because of his own will to do so and, consequently, should not be rewarded in the same way. The *Ritba* (another influential Talmudic commentary) provides an analogous explanation. The reason, according to the *Ritba*, for this differential treatment is that "it is the devil which argues when he is commanded, and the devil does not argue when he is not commanded." A natural understanding of the reference to the "devil" is the evil residing in every individual, which tempts people to resist what they have been commanded to do. A person's reward is greater when a greater effort is necessary

Moreover, in contrast to the traditional economic justifications for the treatment of omissions, this article also examines in detail the numerous exceptions to the general principle exempting agents from liability for omissions and provides an economic rationale for these exceptions. Lastly, and most importantly, we show that the way in which tort law treats omissions should be regarded as one instance of a much broader phenomenon in tort law, namely, the special treatment of multiple injurers in alternative care situations.

After expressing their moral repulsion at the absence of an affirmative duty to rescue, Prosser and Keeton point out a reason for the differential treatment of acts and omissions in tort law. In their view, this perhaps derives from the difficulty entailed in "making any workable rule to cover possible situations where fifty people might fail to rescue one."¹²

to resist the temptation to disobey. Lastly, Rabbi Elbo explained this Talmudic story as follows:

And on this it was said he who is commanded and fulfills [the command] is greater than he who fulfills though not commanded since the man who is commanded and fulfills ... performs two things. The one that he does the good deed or the honest deed, and the second that it is meant to do the will of his father in Heaven, and he who is not commanded and fulfills merely because it is the right deed and nothing else.

Rabbi Elbo, *Sefer Ha'ikarim* art. III ch. 28. Elbo's interpretation suggests perhaps that the Talmudic observation refers to divine commandments, whereas human commands should be treated differently. While obedience to divine commandments is intrinsically valuable, there is no intrinsic value to obeying human commands.

Landes and Posner also argue that imposing a duty to rescue may deter people from participating in activities that may place them in a position in which the law could apply to them. Thus, if I know that I have a duty to rescue a drowning person, I may stay at home and watch the sunrise on television rather than search for it in nature where I may encounter a drowning person. Indeed, this may even worsen, *ex ante*, the drowning person's position, given that the potential rescuers stay at home rather than take a hike in nature. This argument, while more compelling than the first two, nonetheless suffers from a major flaw: The duty to rescue typically applies to cases in which the costs of rescue are minimal and the deterrent effect of those costs is, therefore, inevitably limited. Nobody seriously proposes expanding the duty to rescue to include cases in which the rescue imposes great costs on the rescuer.

Richard Hasen, *supra* note 6, provides a compelling argument against the Landes-Posner analysis, attacking the presupposition that a person is always either a victim or a rescuer and demonstrating that if this assumption is discarded and every individual has a significant probability of being one of the two, both Pareto efficiency and Kaldor-Hicks efficiency mandate imposing a duty of rescue.

¹² Keeton et al., *supra* note 3, at 376.

The problem of multiple potential tortfeasors is a concern often raised by scholars considering the justifiability of punishing, or imposing liability, for omissions. Some of these writers point out the doctrinal complications resulting from the multiplicity of tortfeasors, while others emphasize fairness concerns. Arguably, if there are three non-rescuers, *A*, *B*, and *C*, it is unclear whether it is *A*, *B*, or *C* who "caused" the harm.¹³ Others have pointed out the difficulties in developing doctrinal tools to apportion the resulting liability among the different potential tortfeasors.¹⁴ Still other scholars question whether it is fair to attribute liability to one agent among a number of possible tortfeasors who are similarly situated.¹⁵ Lord Hoffman succinctly expressed these sentiments in a compelling manner:

A moral version of this point may be called 'why pick on me?' argument. A duty to prevent harm to others or to render assistance to a person in danger or distress may apply to a large and indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another?¹⁶

Yet most scholars raise this concern only to eventually dismiss it. Weinrib points out that even if there are multiple possible rescuers, the difficulties in selecting the liable agent in cases of omissions are just as great as the difficulties in cases of multiple tortfeasors who committed actions.¹⁷ Woozley argues that

the idea that it is not fair to one person if he is caught and punished for breaking the law where others who also broke it were not caught, **either** when they could have been caught **or** when they could not have been caught, rests on a very queer idea of fairness.¹⁸

13 Marc A. Franklin & Matthew Ploeger, *Of Rescue and Report: Should Tort Law Impose Duty to Help Endangered Persons or Abused Children?*, 40 Santa Clara L. Rev. 991, 1001 (2000); Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 Va. L. Rev. 879, 934 (1986); Alexander McCall Smith, *The Duty to Rescue and the Common Law*, in *The Duty to Rescue: The Jurisprudence of Aid*, *supra* note 10, at 55, 57.

14 Franklin & Ploeger, *supra* note 13, at 1001; Weinrib, *supra* note 5, at 262.

15 See, e.g., Anthony D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 Va. L. Rev. 1273, 1290-91 (1983); Weinrib, *supra* note 5, at 262; Charles Fried, *Right and Wrong — Preliminary Considerations*, 5 J. Legal Stud. 165, 181-82 (1976).

16 *Stovin v. Wise*, 1996 P. 923, 941 (Eng. C.A.).

17 Weinrib, *supra* note 5, at 262.

18 Woozley, *supra* note 15, at 1291.

Both criminal and tort law have developed mechanisms to address the problem of multiple agents in alternative care situations, and there seems to be no reason why these mechanisms cannot be extended to the duty to act in general and the duty to rescue in particular.¹⁹

While these arguments successfully address the doctrinal complexities as well as fairness concerns, they fail to contend with the efficiency concerns generated by the coexistence of multiple potential tortfeasors in alternative care situations. Such cases (of multiple tortfeasors in alternative care situations) pose a difficult challenge for tort law — one that is not merely doctrinal or moral in nature. Attributing liability to too many tortfeasors, where each could have single-handedly prevented the harm, typically leads to a dilution of liability. Since the overall cost to which a group of tortfeasors in alternative care situations is exposed is constant, increasing the number of liable tortfeasors will reduce the compensation paid by each one and, consequently, each one's incentives to take precautions. Assigning liability to too many tortfeasors in alternative care situations therefore will lead to dilution of the liability; the imposition of liability fails to provide sufficient incentives for each potential tortfeasor to invest in precautions.²⁰ In contrast, attributing liability to multiple tortfeasors can lead to over-investment in precautions when, as a result, several agents, who each alone could prevent the harm, all invest in precautionary measures for fear of having to bear the full burden of liability.²¹ This is a typical case of a coordination problem, and it can be resolved only by designing legal mechanisms that guarantee that one from among the many agents somehow

19 See Liam Murphy, *Beneficence, Law and Liberty: The Case of Required Rescue*, 89 *Geo. L.J.* 605, 620-21, 623 (2001).

20 This analysis suggests that the problem raised by too many co-tortfeasors derives from the fact that potential tortfeasors act in order to maximize their own utility. Yet, the same problem arises if potential tortfeasors idolize Bentham and act solely to maximize aggregate utility. In this case, each agent may reason that her participation is simply unnecessary given the large number of other potential agents.

This argument could even be applied to the case of altruists. Leo Katz, for instance, argues that "[w]e are all altruists. We all derive pleasure from seeing the poor helped. But we also realize that we can enjoy that pleasure without actually contributing ourselves. As a result, however, we end up worse than if nobody had shirked his responsibility in the first place." Leo Katz, *Bad Acts and Guilty Minds — Conundrums of the Criminal Law* 151-52 (1987).

21 This scenario is conditioned upon the fact that the precautionary measures are not completely observable, for if they were, precautions taken by one of the potential tortfeasors would prevent the investment of all others.

becomes conspicuous to the people involved due to some specific feature she possesses²² and, thus, in game-theory terms, becomes "salient."²³

The risk of dilution of liability can provide the rationale for three fundamental principles of tort law. First, it explains why, in cases in which there are agents who committed an act and agents who failed to act and the harm could have been prevented by both, tort law typically does not attribute liability to both types of agents. Second, it explains why in these cases, tort law chooses to attribute liability for acts rather than for omissions. And third, it explains why tort law often exempts from liability even in cases when the only potential defendants are agents who committed omissions.²⁴

Absent a risk of dilution of liability, tort law could have imposed liability not only on defendants who committed acts, but also on their codefendants who committed omissions. Yet, since the risk of dilution of liability does exist in alternative care situations, there is a need to limit the number of liable tortfeasors, selecting either those who commit acts or those who commit omissions. Hence, it is not surprising that in cases in which either acts or omissions could have prevented the harm, tort law does not, as a rule, attribute liability for both the acts and omissions.

Yet, even if we recognize the need to limit liability to *either* acts or omissions, the question remains why the legal system decided to select the former rule over the latter, i.e., why it decided to choose to attribute liability to acts. Theoretically, the legal system could have chosen to attribute liability only to persons who commit omissions. The preference for actors may have been motivated by the need to prevent dilution of liability in alternative care situations. More specifically, this choice can be explained by the conjecture

22 And indeed in the field of social psychology, much work investigates the analogous phenomenon of diffusion of liability. Empirical studies show that the greater the number of people present in a situation in which help is required, the less likely that any one person will provide it. *See* Robert S. Feldman, *Social Psychology* 23-24, 267 (3d ed. 2001); Marilyn B. Brewer & William D. Crano, *Social Psychology* 282-86 (2001). (The first to investigate this phenomenon were Darley and Latane, J.M. Darley & B. Latane, *Bystanders Intervention in Emergencies: Diffusion of Responsibility*, 8 *J. Personality & Soc. Psychol.* 377 (1968); B. Latane & J.M. Darley, *Group Inhibition of Bystander Intervention*, 10 *J. Personality & Soc. Psychol.* 215 (1968).) If each agent reasons in this way, no agent will prevent the harm even if all agents are solely concerned with maximizing social utility.

23 For a discussion on salience, see Edna Ullmann-Margalit, *The Emergence of Norms* 83-84 (1977).

24 The dilution of liability explanation, as understood from its name, deals with the issue of liability. The liability can be for bodily injury as well as for damage to property.

that the number of agents who commit omissions is typically large relative to the number of agents who commit actions and, consequently, that the risk of dilution of liability would be greater if liability were attributed to agents who commit omissions rather than to actors.

This last explanation can also clarify why tort law, as a rule, refuses to attribute liability to agents who have committed omissions, even when no actors are involved. The risk of dilution of liability in such circumstances is so grave that attributing liability would not be likely to induce potential agents to act, and as we demonstrate later, such attribution of liability could even reduce the incentives of the potential victim herself to take precautions. Hence, the risk of dilution of liability can be used to explain three fundamental principles of tort law.

Arguably, dilution of risk explanation is vulnerable to two principal objections: a doctrinal-coherence objection and an efficiency-based objection. The doctrinal-coherence objection is based on the fact that tort law has already established mechanisms to deal with multiple tortfeasors in alternative care situations who commit negligent acts. Given that tort law often imposes joint liability on multiple tortfeasors for their negligent acts, why should it not impose joint liability also on multiple tortfeasors who commit negligent omissions?²⁵

Despite its obvious appeal, the doctrinal-coherence objection has two crucial flaws. First, multiple tortfeasors who commit negligent acts in alternative care situations are often exempt from liability. Second, liability for omissions is often imposed when a specific agent can be singled-out *ex ante* and thereby becomes conspicuous.

There are numerous doctrines in tort law that serve to absolve multiple tortfeasors in alternative care situations who commit negligent acts. There are at least two principal doctrines that serve to limit liability so that the risk of dilution of liability is overcome. First, the number of tortfeasors can be limited by defining the duty of care narrowly. By applying a narrow definition, none of the tortfeasors (except, perhaps, the one who has been singled out *ex ante*) is deemed liable for negligence, even though they acted unreasonably.²⁶ Second, the number of tortfeasors can be limited by using the doctrine of "legal causation."²⁷ A "lenient" doctrine of causation would mandate only that each tortfeasor's act be causally related to the harm. Consequently, there would be too many tortfeasors, none of

25 See, e.g., Weinrib, *supra* note 5.

26 See W.V.H. Rogers, Winfield & Jolowicz on Tort 90 (5th ed. 1998).

27 *Id.* at 207-16.

whom has sufficient incentives to prevent the harm. In contrast, a "restrictive" test of causation would impose more demanding conditions for attributing liability. Ideally, such a test would attribute liability only to one or a few of the tortfeasors and, consequently, would provide those who "cause" the harm with sufficient incentives to prevent it.²⁸ The doctrines of causation, proximity, and foreseeability are often used to exempt certain tortfeasors from liability for actions²⁹ because of tort law's reluctance to attribute liability to too many tortfeasors.³⁰

28 *Id.*

29 See Dobbs, *supra* note 3, at 443-92; Keeton et al., *supra* note 3, at 263-321; Richard A. Epstein, Torts 258-84 (1999).

30 An example of a doctrine that provides an exemption in cases of alternative care situations is the *novus actus interveniens* doctrine. If *A* negligently left her window open and *B* then stole a pistol from *A*'s house and killed somebody, *A* typically would be exempt from liability because of *B*'s action. This exemption can be rationalized as an attempt to prevent the dilution of liability. Another case in which tort law excuses actors from liability is pure economic loss. The term "pure economic loss" has been given many definitions, with different levels of abstraction. However, it seems most scholars would agree to the following general definition: pure economic loss is a financial loss other than payment of money to compensate for physical injury to a person or property. See Robby Bernstein, *Economic Loss 2* (2d ed. 1998). For more refined definitions, see Bernstein, *supra*, at 2-5. Common law frequently denies recovery to plaintiffs for pure economic loss. See, e.g., Epstein, *supra* note 29, at 606 ("The general legal position today denies recovery to *P* for pure economic loss as a result of *D*'s Negligence."). Numerous explanations have been provided for the common law reluctance to impose liability for pure economic loss.

Some have argued that the arbitrary nature of pure economic loss makes compensation in respect thereto difficult to implement and administer. Epstein believes that "[t]he reluctance to extend ... compensation to economic losses rests, broadly speaking, on the fear that countless plaintiffs will clog the system with expensive lawsuits of dubious merit." *Id.* Another explanation for the reluctance to impose liability for pure economic loss is rooted in the fear that the risk of liability for this type of loss would lead to overdeterrence. Economic loss often involves a chain reaction effect among tortfeasors and victims. If *A* negligently harms *B* who, in turns, harms *C*, who later inflicts harm on *D*, attributing liability to *A* for all resulting harm from her behavior may lead to overdeterrence. As noted in the literature, this argument is not very convincing. If, indeed, *A* caused these harms, why should attributing liability to her for all those harms lead to overdeterrence? Epstein provides an answer by pointing to the administrative costs entailed in attributing liability for economic loss. Recovery for large, concentrated losses should be allowed, but granting relief to parties who are indirectly affected would greatly increase the administrative costs of the tort system. *Id.* at 606-10.

The risk of dilution of liability could provide a plausible explanation for the reluctance to attribute liability for economic loss. The more remote the harm, the greater the number of people who can be held liable. In the hypothetical where *A*

Just as legal doctrine frequently exculpates actors in cases of alternative care, it often imposes liability for omissions under certain circumstances. Imposing joint liability on tortfeasors who commit omissions can, in some cases, be understood as resting on specific circumstances that overcome the risk of dilution of liability and, in our view, is therefore analogous to tort law's treatment of acts. Thus, in certain cases, tort law attributes liability for omissions to a person holding a certain position or in a certain relationship vis-à-vis the victim. Section 314a of the Restatement (Second) of Torts provides that a duty to aid or protect against an unreasonable risk of physical harm arises in the cases of: common carriers and their passengers; innkeepers and their guests; landowners and their invitees; as well as in numerous other cases.³¹ By narrowly defining the responsible agents, the Restatement diminishes the risk of dilution of liability. Thus, a thorough examination of legal doctrine indicates that the differences in the doctrinal treatment of acts and omissions are not as drastic as implied by the doctrinal coherence objection.

The efficiency-based argument is grounded in the view that economic analysis already offers a principle that overcomes the risk of dilution of liability and selects a single tortfeasor from among the numerous potential tortfeasors: the principle of the cheapest cost avoider.³² However, this objection too is subject to two principal objections. First, there are cases in which there are numerous cheapest cost avoiders. The principle of the cheapest cost avoider therefore fails to identify a single agent upon whom liability should rest. Second, even if a single cheapest cost avoider really does exist *ex ante*, it is not always obvious to the potential tortfeasors who among them this might be. If such uncertainty does exist, there could be a risk of dilution of liability even if as a matter of fact, a single agent can be identified (*ex post*) as the cheapest cost avoider. It seems, therefore, that while, all other things equal, it is best to select the cheapest cost avoider from amongst the potential tortfeasors, it is often the case that selecting a less ideally situated agent is necessary to ensure the provision of sufficient incentives for precaution. At other times, however, the fact that a given agent is the cheapest cost avoider is what will make her salient and, therefore, will

harms *B*, who then harms *C*, who, in turn, harms *D*, the harm to *D* could have been prevented by either *A*, *B*, or *C*. However, imposing a duty on all three of them would inevitably lead to dilution of liability. The exemption from liability for economic loss differentiates between cases involving harms (typically) committed by multiple parties (e.g., economic loss) and cases involving harms committed by a single agent.

³¹ Restatement (Second) of Torts § 314 (1965).

³² See Murphy, *supra* note 19, at 621.

differentiate her from others; in such cases, the principle of the cheapest cost avoider and considerations of salience operate in tandem. Satisfying the principle of salience requires, therefore, modifying the principle of the cheapest cost avoider in order to prevent the risk of dilution of liability. Such a modification is needed when a simple application of the principle of the cheapest cost avoider violates the constraints imposed by the principle of salience by identifying too many agents as responsible for the harm.

In our view, the broad exemption from liability for omissions is a way of formulating a simple, practical rule for distinguishing between cases in which an agent can easily be selected and be provided with sufficient precaution incentives (typically in cases of acts) and cases in which there is a serious risk of dilution of liability (typically in cases of omissions). While actions resulting in a harm are typically committed by one actor or a small group of actors, omissions are typically committed by a large group of individuals, none of whom has distinct and distinguishing characteristics. Hence, the risk of dilution of liability emerges much more frequently in cases of omissions than in cases of acts. The concern with the dilution of liability is what provides the economic rationale for tort law's reluctance to attribute liability for omissions.³³ This conclusion has numerous ramifications.³⁴

In their persistent attempts to provide a better rationale for the numerous

33 Indirect support for this hypothesis can be found in the example used by Sir James Fitzjames Stephen to illustrate the treatment of omissions in criminal law. Stephen argued, "A *number of people* who stand round a shallow pool in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the water, are no doubt shameful cowards, but they can hardly be said to have killed the child." 3 James Fitzjames Stephen, *History of Criminal Law* 10 (1883) (emphasis added). Stephen's example involves multiple potential rescuers, though the principle, as articulated by him, could be demonstrated by an example involving only one person.

34 We note only two significant ones: First, this conclusion suggests that the treatment of omissions in tort law can be analogized to the treatment of actions involving multiple agents in alternative care situations. See Levmore, *supra* note 13, at 938. The doctrinal tools used to restrict liability in the case of omissions have doctrinal equivalents in the context of actions involving multiple tortfeasors. Yet, unlike in the case of omissions, the exemption from liability in the case of actions with multiple tortfeasors in alternative care situations is often carried out in a more conscious and deliberate manner, since exempting from liability for an action is regarded as an exception to the principle that attributes liability for harmful actions. Hence, an examination of the legal treatment of harmful actions in alternative care situations can shed light on the legal treatment of omissions.

Second, this conclusion suggests that the exceptions to the rule exempting individuals from liability for omissions should be explained as instances in which somehow the risk of dilution of liability is overcome. While, in principle, the risk

exceptions to the broad exemption from liability for omissions, legal theorists have looked in the wrong direction. More specifically, legal theorists have been drawn to rationalize these rules as resting upon specific features of an agent — features that, arguably, explain why sometimes a particular agent is the *most suitable* agent to bear liability, either because (in contrast to other agents) she is morally more deserving than other agents³⁵ or because she is the cheapest cost avoider.³⁶ In contrast, our analysis demonstrates that the hunt for specific features of an agent that will single her out as the most suitable agent to bear liability frequently is futile. Often, there is nothing that justifies attributing liability to one agent rather than to another, other than the simple fact that she has arbitrarily distinct features and therefore can be clearly and unambiguously singled out from others.

II. THE GENERAL RULE OF (NO) LIABILITY FOR OMISSIONS

Consider the following scenario. One-hundred bystanders watch a car burning. Each of them can use a fire extinguisher to put out the fire. The cost of using the extinguisher to the person who would use it would be 10, and the expected damage (if the extinguisher is not used) would be 900.

This is a paradigmatic example of an alternative care situation. Arguably, in such a case, society should encourage one person to make the investment of 10.³⁷ Why, then, does the law not require bystanders to actively intervene? Why does the law exempt each one of the spectators in our example from

of dilution of liability is particularly serious in cases of omissions, there are types of omissions in which this risk can be overcome. A doctrinal examination of tort law will demonstrate that tort law carves out exceptions to the general exemption of omissions from liability — exceptions that are analyzed in *infra* Part III.

35 A good example is the libertarian analysis of the Good Samaritan cases discussed by Epstein. Epstein believes that although a person has no general affirmative duty to act, when she creates a risk (even unintentionally), she should be held liable if she fails to prevent its realization, for the simple reason that she was the cause of that risk. Epstein, *supra* note 6, at 191-92. For the same reason, he believes that when a person helps another and in so doing causes a risk, she cannot discontinue her efforts, *id.* at 194-95.

36 See generally Guido Calabresi, *The Costs of Accidents* (1970); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *Yale L.J.* 1055 (1972).

37 If more than one bystander invests, there would be an excessive investment, which should be discouraged.

liability and thereby apparently fail to provide them with an incentive to prevent the harm?

In order to understand the economic rationale for this rule, assume that since the damage is indivisible, all one-hundred bystanders are jointly liable.³⁸ In the absence of specific data showing a greater degree of fault on the part of any single spectator, the cost each one would have to bear if the damage were to occur would be 9. Since the cost to any one spectator to prevent the damage would be 10, it would not be economically worthwhile to any one of them to attempt to extinguish the fire. Thus, the imposition of joint liability in this case would be unlikely to provide sufficient incentives to the bystanders to intervene.

Assume, however, that a single bystander among the one-hundred is, in fact, the cheapest cost avoider, because, for instance, she is stronger than the other spectators and therefore can more easily operate the fire extinguisher. But this fact is unknown to any of the other potential rescuers, and consequently, the deadlock among them cannot be resolved. The *ex post* imposition of liability on the cheapest cost avoider cannot provide her with sufficient incentives to intervene. Dilution of liability in this case is the byproduct of the difficulty in identifying the cheapest cost avoider.

Finally, it is possible that a single cheapest cost avoider exists amongst the spectators and that that spectator knows that she is the cheapest cost avoider, as do other potential tortfeasors. Yet, the injured party may find it too difficult to prove *ex post* who the cheapest cost avoider is or she may find it preferable to sue the entire group of tortfeasors rather than a single one. The injured party typically has an *ex post* interest in the court imposing liability on a group of individuals rather than on a single individual. The cheapest cost avoider knows, therefore, that *ex post*, her special status is unlikely to be acknowledged by the court. Dilution of liability in this case is the byproduct of the difficulty in identifying *ex post* (in court) the cheapest cost avoider.

However, were a more restrictive test to be used (one that selects from among the bystanders one or a few individuals and imposes upon her/them liability), the fire would be extinguished. Selecting a single individual on the basis of simple criteria (even if arbitrary), thereby making her salient, would provide incentives for people to act. This would eliminate the risk of

38 The main feature of indivisible harm is that there is only one unit of damage and it is impossible to attribute any part of it to any specific agent among the various tortfeasors. *See, e.g.*, Margaret Brazier & John Murphy, *Street on Torts* 595 (10th ed. 1999).

dilution of liability as well as the counter-risk, namely, the risk that a number of spectators will intervene and, consequently, that the costs of intervention will be higher than necessary.

Before we go on to examine the rationale for the numerous exceptions to the exemption of omissions from liability — that is, cases in which liability *is* attributed for omissions — let us first briefly contrast the example of the fire extinguisher with analogous cases involving actions (as opposed to omissions).

Assume now that one-hundred people, rather than failing to extinguish an existing fire, are holding torches that set a car on fire. Under current principles of tort law, all one-hundred presumably will be found liable. What can explain the difference between this case and the case of the failure to extinguish the fire is the fact that the latter involves an omission (failure to use a fire extinguisher) while the former involves an act (use of a torch). This explanation, however, is too hasty an answer and ignores a fundamental difference between the two cases. Unlike the fire extinguisher example, the torch hypothetical is not an alternative care situation. The car could have been damaged by any one of the individuals holding a torch. An analogous case would be one in which one-hundred people each emit one spark, and the total accumulation of the one-hundred sparks causes a fire. This is a true alternative care situation involving acts. However, it is also farfetched as an example, demonstrating that while cases of alternative care situations involving omissions are common, it is rare to find alternative care situations involving acts. The broad exemption from liability for omissions is, therefore, indicative of this reality.³⁹

Part III below examines in detail the exceptions to the liability exemption for omissions and demonstrates how the legal system sometimes overcomes the risk of dilution of liability in one of the following three ways: by creating salience; by exploiting "natural salience"; or by inducing self-generated salience.

³⁹ Of course, we do not deny that there are realistic cases of alternative care situations involving actions. A realistic case would be one in which several factories pollute the shared water source, but it is only the accumulation of the pollution from all the factories that causes significant damage to the water. In such cases, it may be justifiable to excuse tortfeasors in order to prevent the risk of dilution of liability.

III. ATTRIBUTION OF LIABILITY FOR OMISSIONS: THE CASE OF SALIENCE RULES

There are many ways to classify the exceptions to the rule exempting omissions from liability. We propose that all of the exceptions should be regarded as mechanisms for creating salience and that they should be distinguished according to the way in which the salience was created. There are three types of legal rules that can create salience: salience-creating rules; rules that exploit "natural salience"; and rules that induce self-generated salience.

First, salience-creating rules select a single agent from among multiple potential tortfeasors and impose liability on her. By thus singling-out one (or a few) liable agent(s), dilution of liability is prevented.⁴⁰

Second, tort law sometimes relies on salience that exists "naturally" under the particular circumstances — namely, circumstances in which certain individuals are most likely to be the only agents who are capable of preventing the harm. If there are very few potential rescuers, tort law can be more demanding and impose more extensive duties upon certain agents, without leading to dilution of liability.

Third, tort law can induce self-generated, or voluntary, salience, i.e., salience that is generated by an agreement between the potential tortfeasors. This third category applies in circumstances where potential tortfeasors can overcome the risk of dilution of liability by transacting among themselves to allocate *ex ante* the expected costs of an accident. Thus, by imposing liability on multiple tortfeasors, the law induces them to apportion the costs among themselves.

The doctrinal exceptions to the general exemption of liability for omissions

⁴⁰ Prosser and Keeton identified in their treatise on tort law a continuous process of carving out exceptions to the general principle of exemption from liability for omissions. They referred primarily to the ongoing process of establishing more salience-creating rules. In their view, "there is reason to think that ... [this process will] continue until it approaches a general holding that the mere knowledge of serious peril threatening death or great bodily harm to another, which an *identified* defendant might avoid with little inconvenience, creates a sufficient relation to impose a duty of action." Keeton et al., *supra* note 3, at 377 (emphasis added). Levmore believes that "[t]he presence of a single nonrescuer is at present a necessary but not a sufficient condition for liability; it is the growing number of special relationships that indicates an increasing likelihood of liability on the single nonrescuer." Levmore, *supra* note 13, at 936.

can, therefore, typically be rationalized as a way of preventing dilution of liability.

A. Salience-Creating Rules

Salience-creating rules are rules that single out one individual from among many as liable for damage resulting from a given omission. Often, all that distinguishes that person is her potential salience, namely, the mere fact that she can be singled out from among the potential tortfeasors and attributed with liability. While great efforts are made by moral theorists and economists to identify non-arbitrary features to single out someone from the group, our model abandons these heroic efforts and suggests, instead, that arbitrariness in attributing liability can be justified on efficiency grounds. The person to whom liability is eventually attributed need not necessarily be the person who in reality is at (moral) fault, or the cheapest cost avoider; she may simply be the person who can be most easily singled out.

1. Singling out Responsible Agents on the Basis of Special Professions or Relationships

Although the law exempts bystanders from liability for omissions, it does not recognize such an exemption when simple and easily applied criteria can be developed to single out one tortfeasor or a select group of tortfeasors. The Restatement (Second) of Torts recognizes several categories of personal relationships in the framework of which a special duty of care arises, which includes an affirmative duty to act and rescue another.⁴¹ Section 314a, as previously noted, imposes a special duty to aid or protect against unreasonable risk of physical harm if certain relationships exist between the parties. This section also imposes a duty upon someone who has custody of another, whether voluntarily or by legal obligation, under circumstances in which the latter is deprived of the usual ability to protect him or herself. Similar duties are imposed under section 314b of the Restatement, which deals with the relations between an employer (master) and an employee (servant). Section 314a ends with a caveat that reserves any opinion on whether or not there may be other types of relationships that impose a similar special duty of care. Some scholars, however, have made the claim that the relationships specified in the Restatement are only examples and that other relationships also can give rise to special duties. Thus, for example, a parent-minor relationship

⁴¹ See Dobbs, *supra* note 3, at 857.

would impose the same, or even more extensive, duties of care than those explicitly provided for in the Restatement.⁴²

A recent Israeli case is illustrative of the complexities of creating salience.⁴³ The plaintiff, while waiting for a bus in the Jerusalem Central Bus Station, was severely beaten. He sued the bus company, claiming his injuries had been the result of its negligence, for it had failed to take precautions to prevent acts of aggression by third parties. The district court granted the defendant's summary motion to dismiss the claim, mainly on the grounds that the bus company bore no special duty of care vis-à-vis the plaintiff. This ruling is presumably in keeping with tort law's traditional reluctance to attribute liability for omissions, particularly when the omission relates to a failure to prevent intentional activity by a third party.⁴⁴

The Israeli Supreme Court, however, rejected this conclusion, overruling the district court's decision and remanding the case to be retried on its merits. Surveying both American and Israeli case law in its reasoning, the Court pointed to an exception to the general rule exempting individuals from liability; namely, that liability for an omission is often imposed if a special relationship between the plaintiff and the defendant exists, particularly when the injury was a foreseeable risk. The Court also noted that even though liability for failing to prevent crimes is rare, the fact that the third party's assault was spontaneous and unprovoked is not sufficient to exempt the defendant, *ex definicio*, from liability.

The Court outlined a few parameters that should be taken into account in attributing liability in such cases, particularly the defendant's ability to foresee the criminal activity. The Court listed a number of factors in determining foreseeability, such as: whether the given activity or other criminal activity of a similar type was prevalent prior to the specific case; whether the situation was common or exceptional in nature; whether the defendant had control and supervision over the criminal act or over the place in which the criminal act was perpetrated; and whether, while taking into account the relationships between the parties, the plaintiff could have reasonably relied on the defendant to take reasonable precautions against the harmful activity. Moreover, the Court held that under the appropriate circumstances, broader issues of public policy should also be taken into account.

⁴² *Id.* at 858.

⁴³ C.A. 3510/99, Valaas v. Egged, 35(5) P.D. 826.

⁴⁴ *See, e.g.*, C.A. 350/77, Kitan v. Wiese, 33(2) P.D. 785; C.A. 796/80, Ohana v. Avraham, 37(4) P.D. 337.

Arguably, the exception to liability exemption for omissions in this case, along with numerous other exceptions to the rule, can be explained by the presumption that the person to whom liability is attributed is often the cheapest cost avoider. The criteria used by the Israeli Supreme Court to determine liability in the above case, such as foreseeability, seem to be correlated with the costs of prevention. Other common law exceptions also seem to support this interpretation. The innkeeper has better knowledge and information of the risks to her guests; similarly, the employer often has a better ability to prevent risks that relate to the workplace. Hence, it seems that it is not the fact that a single agent can be selected from among numerous potential tortfeasors that justifies imposing liability on her, but, rather, the fact that the selected tortfeasor is the cheapest cost avoider, which explains why a duty is imposed in these noted cases.

This explanation, however, does not provide a complete answer. For example, in the first burning car hypothetical, each one of the bystanders who can operate the fire extinguisher is also a cheapest cost avoider. Thus, the mere fact that a person is a cheapest cost avoider is not sufficient to justify imposing a duty on her; there also must be something to distinguish her from all others. In addition, it is necessary that she can be singled out, under the circumstances, as distinct. Moreover, it is not a necessary condition that she be a cheapest cost avoider to impose liability on her. Indeed, the law sometimes imposes liability on a person who is not a cheapest cost avoider if this will serve to produce salience.

The Israeli Supreme Court decision described above may demonstrate why the imposition of liability on *X* can be justified even if *X* is not the cheapest cost avoider. Assume that the bus company had been able to prove that the cheapest cost avoiders were the bystanders at the bus station, that hiring guards would be too expensive and reliance on the intervention of bystanders a much cheaper way to prevent harm from occurring. However, the plaintiff could have countered this argument by claiming that imposing liability on bystanders could result in the dilution of liability and, therefore, be ineffective. It is likely, under these circumstances, that even if the bus company were not the cheapest cost avoider, it is preferable to impose liability on the bus company than on the bystanders.

Whereas in this case, the need to identify a salient agent may have shifted liability from one potential defendant (the bystander) to another potential defendant (the bus company), sometimes this need results in a shift of the costs from one defendant to the plaintiff. The example of the bystanders who fail to use the fire extinguisher should be classified as falling into the latter category. Each of the bystanders is the cheapest cost avoider, but none

is salient. Hence, the cost is imposed on the plaintiff, who, under these circumstances, has stronger incentives to take precautions against fire.⁴⁵

Thus far, we have emphasized the potential conflict between the principle that liability should be imposed on the cheapest cost avoider and the necessity of salience to ensure efficient incentives. It is perhaps important to recall that in the typical case, the two factors operate in tandem.

The factors specified by the Israeli Supreme Court as relevant for attributing liability therefore serve two goals. First, they work to identify the cheapest cost avoider. Control and supervision can be regarded as a proxy for the defendant's ability to prevent the harm and can determine whether the defendant is the cheapest cost avoider. Second, these factors also serve to single out from among numerous potential tortfeasors one individual who will bear liability, and consequently, they provide her sufficient incentives to prevent the harm. In the specific case, it would have been quite difficult to determine in advance whether the bus company had, indeed, been the cheapest cost avoider, and not the bystanders who witnessed the assault. There were numerous bystanders, and imposing liability on them all could have led to dilution of liability, due to their sheer numbers. Being in charge of the bus station (or any business as the case may be) is an easy means of singling out a single actor from among many potential defendants.

Moreover, sometimes the fact that a person is the cheapest cost avoider is the distinguishing factor that differentiates between that person and other potential tortfeasors. There is a common sense observation that serves to harmonize the concept of salience with the principle of the cheapest cost avoider: "The nearer to home the need for help is, the worse we think of a person ... for not responding to it; and the further away it is, the harder to think of those in need of help as having a moral claim on him ... or as being

45 Moreover, even when the law attributes liability to the cheapest cost avoider, it does not necessarily require or even permit her to act in a way that maximizes social utility. To demonstrate this, Woosley provides an innovative example of a father who lets his child drown in order to save the lives of two other children, who are not his. Woosley, *supra* note 15, at 1284. The father in this hypothetical cannot be exempted from his duty to save his child in order to save others toward whom he bears no duty, despite the fact that by doing so, he maximizes social utility. This anomaly is explained by considerations of salience: There is no attribute that clearly distinguishes the father's role vis-à-vis the two who are not his children from the roles of other potential rescuers. In contrast, there is a clear feature that singles him out with respect to his own son.

responsible for them."⁴⁶ Physical proximity thus can serve as both a proxy for the costs of prevention as well as a method for establishing salience.

A counterargument might be that this argument leads to counterintuitive implications. If, indeed, *any* salient rule can resolve the deadlock, why does tort law not simply adopt a rule that imposes liability on the oldest tortfeasor, or on the blue-eyed tortfeasor, or on the tallest person, or based on any other capricious criterion?⁴⁷ Even if our examples demonstrate that tort law sometimes resorts to arbitrary rules to determine liability — insofar as they cannot be fully rationalized on the basis of greater culpability on the part of the specific agent or in terms of the economic standard of the cheapest cost avoider — it is hard to think of capricious examples of this type. Presumably, however, under the above argument, such capricious criteria could be equally conducive for the purposes of tort law.

The reluctance to adopt capricious criteria is partly based on the fact that legal rules, including those that create salience, need to be internalized and accepted by the public. Rules that are based solely on capricious criteria are unlikely to be internalized. Furthermore, while efficiency concerns may dictate the adoption of capricious criteria to guarantee salience, there may be moral constraints that preclude the use of such criteria. Using purely capricious criteria could be justifiably condemned and rejected as discriminatory, despite being conducive to efficiency.

More fundamentally, however, capricious principles will not have the sufficient generality to promote the principle of salience. Principles of salience typically rely on intrinsic connections between the agent and the circumstances that single out the agent. Capricious criteria may be useful in certain circumstances, but typically, they are too specific and are thus inept as salience-creating mechanisms. Imposing liability on blue-eyed people may fail simply because there are no blue-eyed people or because there are too many of them. On the other hand, criteria based on the connections between the event and the agent, such as those based on the possession of land or control over a specific site, invariably operate irrespective of contingencies that may or may not apply under the circumstances. Salience has its own inner logic, and there is no capricious criterion that can equally satisfy the requirements of this logic.

In sum, salience-creating rules often exploit the traditional notions of

⁴⁶ *Id.* at 1282. The criterion of nearness is often used by continental legal systems. See F.J.M. Feldbrugge, *Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue*, 14 Am. J. Comp. L. 630, 634-35 (1966).

⁴⁷ We are grateful to Barak Medina for raising this point.

moral theorists (by relying on culpability) or those of law & economics theorists (by using the principle of the cheapest cost avoider). Yet, the traditional principles of moral or economic theorists are inadequate and need to be supplemented with additional criteria. Moreover, as we argued, the traditional moral or economic principles for selecting from among the numerous potential tortfeasors are neither necessary nor sufficient. Indeed, tort law often selects a party that may not be the cheapest cost avoider, because there are too many indistinguishable cheapest cost avoiders.

2. Singling out Responsible Agents on the Basis of Special Chains of Causation

Common law makes a sharp distinction between a person who creates a risky situation or causes damage without fault and a person who is a mere bystander and has no causal link whatsoever to the damage caused. An innocent driver who runs into a horse and kills it may be obliged to warn other drivers of the resulting risks or to have the carcass removed from the way;⁴⁸ in contrast, an innocent bystander who might be equally effective in preventing further damage to others will have no analogous duty to act.

The rule that liability is imposed on the person who directly causes the harm can be explained by the fact that this person is typically the cheapest cost avoider. The driver who ran into the horse has information about the accident and is typically in a better position to prevent future harm. However, there are examples of causation that contradict the conjecture that the person who causes the harm is the cheapest cost avoider. If, due to some natural disaster and without any fault on my part, my car starts rolling, thereby posing a risk to others, I have an obligation to prevent the materialization of this risk, even if the costs to me are much higher than the costs of prevention to others.

Imposing liability on a person who innocently (without fault) caused a risk as in these two hypotheticals would, arguably, be puzzling. The person who created the risk resulting in harm is not necessarily, or even typically, the cheapest cost avoider; nor is she necessarily the most culpable agent. A bystander who did not cause the damage could, with equal effectiveness, warn other drivers of the risk. Yet, imposing liability on the agent who innocently caused the accident is a way to avert dilution of liability and guarantee the effectiveness of a duty to rescue. Thus, tort law, in singling out

⁴⁸ Pacht v. Morris, 489 P.2d 29 (1971).

an innocent agent and differentiating between her duty and that of others, overcomes the risk of dilution of liability.⁴⁹

3. Singling out Responsible Agents on the Basis of Voluntary Undertaking

What are the duties of a person who is in the midst of a heroic effort to rescue another? This question has been the focus of considerable interest among both lawyers and scholars. One school of thought holds that the only duty the rescuer bears is not to worsen the victim's position, while others hold that the duty is much broader, that a person who volunteers to rescue another is obligated to invest reasonable efforts in completing the rescue. Our analysis supports the latter view, explaining why even if the rescuer did not worsen the victim's position, efficiency may require imposing liability on her given her salience.

Section 324 of the Restatement (Second) of Torts clearly endorses the first duty (the duty not to worsen the victim's condition). Under this section, a bystander who, being under no legal duty to do so, takes charge of another is liable to that other person for any bodily harm caused to the latter by the actor's failure to exercise reasonable care to secure the safety of the latter while within the actor's charge. This section also provides that the rescuer will be liable for discontinuing the aid or protection, if by doing so, she leaves the victim in a worse position than when she took charge of him.

The approach endorsed by the Restatement rule was applied in *Farwell v. Keaton*.⁵⁰ This case involved a fight between teenagers against the background of alcohol and flirtations. As a result of the fight, one of the teenagers was severely beaten and was left lying under his car. He was found there by his friend, with whom he had begun the evening outing and who had also been involved in the fight. After applying ice to the victim's head, the friend took him away in the car, driving around for quite some time, eventually leaving the car with his unconscious injured companion in the driveway of the latter's grandparents. The grandparents found their grandson only in the morning, upon which they took him to the hospital, where he died of his wounds. The court found that the relations between the victim and his friend were sufficient to give rise to an affirmative duty of care on the part of the latter toward the former. The court held that the two friends had been companions together on a social outing. The defendant knew, or should have known, that under the circumstances, no one would provide the victim with the necessary medical assistance and to say that he had borne no duty to seek such assistance or

⁴⁹ *But see* Levmore, *supra* note 13.

⁵⁰ 240 N.W.2d 217 (1976).

at least to notify someone of his friend's condition would be "shocking to humanitarian considerations" and in total contradiction to "the commonly accepted code of social conduct."⁵¹

More generally, Epstein argues that if a defendant moved the victim's body from a public to a private place, where he was left to languish without receiving the necessary medical care, the defendant can be held liable for depriving the victim of the opportunity to be rescued by a third party.⁵²

This principle can be extended to the case of reliance. Section 323 of the Restatement (Second) of Torts imposes a duty of care whenever the defendant voluntarily undertakes to help a victim and the latter relies upon that undertaking. Dobbs offers the following illustration:

If a child is struck in an unguarded crosswalk where guards have always been provided before, liability for negligently failing to provide the guard follows if the parents relied on the guard. Reliance is possible only when the parent has knowledge of the undertaking and a choice whether to provide some other means of protection In the same circumstances, however, the reliance requirement can defeat the claim for the child's injury if the child's parent did not know that guards had been provided If two children are struck in the same crosswalk at the same time because the protection of a crossing guard had been discontinued, only the one whose parents could have themselves escorted the child could recover for withdrawal of the guard.⁵³

In this example, liability seems to arise from the fact that had the parents not relied upon the presence of a crossing guard, they would have taken other precautions vis-à-vis their child's safety. However, this explanation is inadequate since parents who do not know about the presence of a crossing guard could argue that they had relied upon the voluntary intervention of bystanders. Yet, the courts are reluctant to acknowledge reliance of this sort. Why, then, does reliance on the presence of a crossing guard give rise to liability, whereas reliance on the voluntary intervention of bystanders has no such ramification?

One possible explanation is that crossing guards are typically more reliable than bystanders, since they are, after all, hired to ensure children's safety

51 *Id.* at 222.

52 Epstein, *supra* note 29, at 291-95. The facts in this example are borrowed from *Zelenko v. Gimbel Brothers*, 287 N.Y.S. 134 (1935). Epstein points out that in *Zelenko*, the isolation from medical assistance occurred without any undertaking to assist on the part of the defendant.

53 Dobbs, *supra* note 3, at 863.

at the crosswalk. Reliance on them therefore is typically more justified. However, the Restatement (Second) of Torts does not restrict the duty to ensure safety to a guard, but, rather, imposes it on any potential tortfeasor who undertakes or assumes such a duty. Moreover, the alleged greater effectiveness of a crossing guard in ensuring the safety of the children may be the result of the fact that the courts do not recognize reliance on bystanders and, therefore, the latter bear no sense of responsibility. If courts were to recognize such reliance and attribute liability to bystanders for failing to come to assistance, bystanders could become more effective and reliable. The reluctance to recognize reliance on the willingness of bystanders to come to assistance can be rationalized in terms of salience. Reliance can operate as a salience-creating mechanism only when it is focused on a well-defined agent. In order for reliance to be an effective mechanism for creating salience, it must single out a particular individual; it cannot diffuse broadly on the public as a whole.

Indeed, reliance by potential tortfeasors on the intervention of a single agent among them could be sufficient to create salience, even when the victim herself is oblivious to the existence of that agent. This observation might underlie the view shared by many scholars that the decision in *Kircher v. The City of Jamestown*⁵⁴ is wrong.⁵⁵ In *Kircher*, a suit brought by a rape victim against the City of Jamestown, the court ruled that the plaintiff did not have a cause of action against the municipality arising from the fact that a police officer had failed to follow through on an initial eyewitnesses report of the alleged rapist's aggression against the victim immediately preceding the rape. The court found that although the officer had made a promise to the eyewitnesses that he would file a report, a promise upon which the *witnesses* could reasonably rely, the plaintiff could not claim similar reliance.

Under our analysis, this decision was erroneous. Reliance can serve to single out a particular agent, even when it is not the injured party, but other potential rescuers, who have operated on the basis of that reliance. If indeed potential rescuers (in *Kircher*, the witnesses) rely on *X* to act and *X* is aware of this reliance, the imposition of liability can be justified, even if the victim herself does not share this reliance and is not even aware of it.

Section 324 of the Restatement concludes with an important caveat that supports the imposition of even broader legal duties than this analysis would suggest. This section states explicitly that it does not seek to determine whether liability may arise in circumstances where a rescuer abandons her

⁵⁴ 74 N.Y.2d 251 (1989).

⁵⁵ See Dobbs, *supra* note 3, at 863.

mission but leaves the individual she has assisted in no worse a position than when she first found him or began the rescue. For example, if the rescuer throws a drowning person a rope, pulls him to shore, and then suddenly changes her mind and, instead of completing the rescue, leaves the person to languish unattended, she might be liable even if under the circumstances, this did not worsen the victim's prospects for recovery.⁵⁶

Why should a "rescuer" bear liability if she does not impair the injured person's opportunities to be rescued by someone else? Why should the duty of a person who attempts to rescue another differ from that of a simple bystander who fails to act? Arguably, attributing liability to someone who abandons a rescue mission would be counterproductive, since it would deter people from intervening for fear of eventually being subject to liability. Moreover, it seems repugnant to moral intuitions to impose liability upon a well-intentioned individual who ceased her assistance only because it was too costly, while, at the same time, exempting a bystander indifferent to the victim's plight from liability. A possible explanation is that the rule that imposes liability on the good-willed rescuer and exempts from liability the indifferent bystander prevents the dilution of liability by its singling out of a salient agent.

B. Rules that Rest on "Natural Salience"

There are situations in which the problem of multiple tortfeasors seldom arises because under the particular circumstances, there is little likelihood of more than one potential rescuer being present. In such cases, the liable agent can be singled out without any reference to criteria limiting the scope of potential tortfeasors: she is salient by virtue of her being the sole potential rescuer. Here, the circumstances, and not the law, create salience by selecting the "natural rescuer." An example of this type of case can be found in admiralty law.

Duties of care under admiralty law are based not on the characteristics of the rescuer, but on the characteristics of the rescued. Under admiralty law, a person is held liable for any injuries caused to another by her refusal to render assistance to an individual found at sea. Section 2304, entitled "Duty to provide assistance at sea," states, "A master or individual in

⁵⁶ This illustration is taken from *id.* at 859-60. Prosser and Keeton also observed that while many of the decisions attributing liability presuppose that the defendant aggravated the risks facing the victim, there also are cases in which this requirement has been deemed unnecessary. Keeton et al., *supra* note 3, at 381-82. *See also* Levmore, *supra* note 13.

charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or individuals on board."⁵⁷ Many scholars view this provision as a sharp deviation from the common law no-duty-to-rescue rule. Imposing an affirmative duty upon individuals who are in charge of vessels to rescue those in peril at sea runs counter to the sharp distinction between misfeasance and nonfeasance in tort law.⁵⁸

Why, then, did the legislator abandon the traditional common law principles and instead adopt a new rule for admiralty law? Why the distinction between a rescue at sea and a rescue on land? Why should sailors in peril be privileged compared to, say, mountain climbers or innocent victims of natural catastrophes?

The rationale may lie in the fact that unlike other circumstances, the likelihood of being rescued at sea is quite low; the ocean's vastness makes it unlikely that several potential rescuers will be in the vicinity of a sinking ship at the same time, and less so in the case of someone who has fallen overboard. Cases involving such circumstances at sea can be characterized as cases of "natural salience." The small likelihood of the simultaneous presence of several rescuers guarantees that imposing an affirmative duty will not lead to dilution of liability.

Another illustrative example of circumstances leading to natural salience is cases involving landowners. Often the owner of the land is the only potential rescuer in the event of a catastrophe occurring on that land. Ownership of land gives the owner the ability to provide assistance to people in need, assistance that others are unable or legally barred from providing.

Principles that can be analogously rationalized in terms of natural salience can be observed in the area of social (as opposed to legal) norms. For example, a commonly practiced rule amongst nomads requires them to always provide help to strangers in need. The harsh conditions in which nomads tend to live perhaps give rise to the assumption that if a person is in a position to rescue another, she is most likely to be the only potential rescuer.

⁵⁷ 46 U.S.C. 2304 (1994).

⁵⁸ See, e.g., Patrick J. Long, Comment, *The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea*, 48 Buff. L. Rev. 591 (2000).

C. Rules Inducing "Self-Generated" Saliency

Sometimes the mere risk of liability being imposed upon multiple parties in alternative care situations is sufficient to induce the potential tortfeasors to decide how liability should be distributed among themselves in the event of harm. In such cases, saliency need not be created by a legal rule that singles out a particular tortfeasor. The law can, instead, rely on the relevant parties to determine who should bear the costs. Typically, these cases involve potential tortfeasors who are acquainted with one another and, consequently, can allocate the risks among themselves. The lower the transaction costs among the potential tortfeasors, the more likely that the parties will be able to allocate the risks among themselves.

1. Vicarious Liability

The vicarious liability of employers is rarely discussed in the context of the duty to rescue; yet, conceptually, it raises a similar problem.⁵⁹ Often, an employer can prevent damage caused by her employees to a third party by means of stricter supervision or by increasing her investment in workplace precautions. Yet, since failure to take such precautions would be an omission, in the absence of a specific rule imposing liability on the employer, she would expect to be exempted from liability for any damage resulting from her omission. Hence, the vicarious liability of employers can be conceptually characterized as an exception to the general rule exempting liability for omissions.

There are two reasons why attributing liability to employers is unlikely to lead to dilution of liability. First, the typical employee in this type of situation is generally too poor to be effectively deterred by the imposition of liability. Thus, the employer knows that joint liability will not effectively dilute her liability. The party injured by the employee's action normally prefers to sue the employer, who has "deeper pockets" than the employee, which is why the employer usually cannot recover from the employee.

The second reason is that the transaction costs between employers and employees are typically low. When transaction costs are low, the parties assign the risk to the cheapest cost avoider, who, under these circumstances, will have sufficient incentives to take precautions against the occurrence of the harm.

Explaining vicarious liability in terms of "self-generated saliency" serves to shed some light on the exceptions to the attribution of liability to employers

⁵⁹ See Smith, *supra* note 13, at 69.

for the injurious actions of their employees. The traditional explanation for exempting employers from liability when employees deviate from their designated tasks is that the employer's costs of prevention in such cases are high relative to those of the employee. Thus, if an employee takes his employer's pistol and uses it to commit an assault, the employer is exempt from liability.⁶⁰ In cases such as this, the common law does not regard the two as joint tortfeasors, and liability is borne solely by the employee.⁶¹ We offer an alternative explanation for this exception that revolves around the employer-employee transaction costs: the less related the agent's actions are to his designated tasks and the more the employee deviates from his duties, the higher the transaction costs between the parties.

This explanation also explains the reluctance of most legal systems to expand the doctrine of vicarious liability to people who contract with independent contractors for the latter's injurious actions. The high transaction costs between these parties prevent an efficient allocation of risk *ex ante*. The independent contractor, unlike the typical employee, does not always have a long-term relationship with the person who hired him. It is, therefore, inevitably more costly for the parties to allocate the risks between them *ex ante*. Furthermore, because independent contractors frequently work simultaneously for a number of people, holding all of the latter liable as principal tortfeasors would exacerbate the risk of dilution of liability.⁶²

2. Agents Realizing a Common Goal

When several individuals act jointly to realize a common goal, tort law typically attributes liability to all of them jointly for any damage resulting from that activity. Fleming has outlined the following necessary conditions for attributing liability in such cases.

The critical element ... is that those participating in the commission of the tort must have acted in furtherance of a common design. There must be 'concerted action to a common end', not mere parallel

60 See C.A. 350/77, Kitan v. Wiese, 33(2) P.D. 785.

61 Unless specific conditions are being established. See generally Rogers, *supra* note 26, at 224. See also section 25 of the Israeli Civil Wrongs Ordinance (New Version), 2 L.S.I.: New Version 5, 12 (1968-72), which states, "Notwithstanding anything contained in this Ordinance, no principal or employer shall be liable for any assault committed by his agent or employee unless he has expressly authorised or ratified such assault."

62 The relations among the contractor's employers also fall into the category of alternative care situations. Moreover, in such situations, the transaction costs are high. See Epstein, *supra* note 29, at 245.

activity or ‘a coincidence of separate acts which by their conjoined effect cause damage’. Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong ...⁶³

These cases would appear to fall outside the scope of our discussion, since they usually involve acts and not omissions. However, under our model, the exemption from liability for omissions is justified on the grounds that joint liability in alternative care situations may lead to a dilution of liability. Thus, it is not some intrinsic difference between acts and omissions that justifies the exemption; rather, the exemption is based on the general assumption that the risk of dilution of liability arises more frequently in cases of omissions than in cases of acts. It is therefore important for the purposes of our discussion to note that our model explains why liability is normally attributed in cases involving common design amongst actors, despite the fact that such cases usually involve alternative care situations. The intimate relationships between the parties allow them to interact and reduce transaction costs. This, in turn, facilitates the spontaneous creation of salience by the parties themselves through negotiations. It seems reasonable to assume that the common law would adopt the same approach towards individuals who intentionally seek to achieve a common goal by means of an omission.

IV. OBJECTIONS

Numerous objections can be raised against the claim that what ultimately distinguishes between acts and omissions is that omissions are attributable to multiple agents in alternative care situations. Some of the objections challenge the economic rationale of this claim; others are based on the observation that alternate doctrinal tools could be developed to prevent the risk of dilution of liability. Finally, some objections argue that the explanation we propose cannot accurately explain existing doctrines.

A. The Imposition of Liability in Alternative Care Situations Undermines the Pursuit of Efficiency

It seems that even if the imposition of liability on multiple injurers in cases of alternative care situations is ineffective, it cannot be harmful. The failure

⁶³ John J. Fleming, *The Law of Torts* 255 (8th ed. 1992).

to impose any liability reduces the incentives to act even more than when liability is at risk of being diluted. This argument is flawed, however, because the imposition of liability on multiple injurers in alternative care situations can, in fact, have negative effects. More specifically, imposing liability on multiple injurers in alternative care situations is likely to deter the potential victim from taking precautions to prevent the harm, since she knows that she will be fully compensated in the event of that harm materializing. The failure of the injurers to invest in precautions (because of a lack of incentives due to dilution of liability) and the failure of the potential victim to invest in precautions (because she knows she will be compensated fully by the tortfeasors) inevitably lead to an inefficient outcome.

Let us assume, for example, that there are 100 potential rescuers, each of whom can prevent an expected harm of 50 by investing 10 in precautions. Assume that the potential victim also can prevent the harm, but by investing 20. In these circumstances, if liability were imposed, none of the potential rescuers would prevent the harm since the cost to each potential rescuer of preventing the harm (10) would be higher than the expected costs of the accident for each potential rescuer (0.5); the victim also would have no incentive to invest in precautions since he would be fully compensated by the rescuers in the event of the harm materializing. Hence, if liability were imposed on the potential rescuers, nobody would invest in precautions and the expected costs would be 50, whereas if liability were not imposed, the victim himself would invest in precautions and the overall cost would be 20. It is therefore preferable in such circumstances to exempt multiple potential rescuers from liability.⁶⁴ Thus, imposing liability on multiple injurers in alternative care situations is not only futile, it also might inefficiently diminish the incentives to the potential victim himself to take optimal precautions.

B. Apportionment of Liability among Tortfeasors to Overcome the Risk of Dilution of Liability

Can the risk of dilution of liability be overcome by using more sophisticated rules of apportionment of liability among tortfeasors?

Our assumption thus far has been that if liability is imposed upon multiple tortfeasors, the cost will be divided equally among all of them. However,

⁶⁴ Moreover, imposing a duty entails its own costs, and if the duty is ineffective, the costs may outweigh the benefits. For example, imposing a duty may lead to multiple investments in precautions. It is therefore often better to develop mechanisms that select from among the numerous potential tortfeasors a single tortfeasor and impose liability upon her.

tort law often endorses more sophisticated rules for apportioning liability. For instance, rather than exempting injurers from liability, tort law imposes joint and several liability upon all the injurers, but then selects a single agent who must indemnify the others. Arguably, by using such apportionment mechanisms, society provides potential tortfeasors with optimal incentives, while, at the same time, providing potential victims with "insurance." If, for some reason, the victim cannot sue one defendant, she can still sue the other tortfeasors, who, in turn, can sue one another for indemnification.

Consider the following scenario: Two persons, *A* and *B* are engaged in a dangerous activity that has an expected cost of 20. Either one of them could invest in precautions and prevent the harm. *A*'s precaution costs are 15, while the cost to *B* is only 13. If they were to be held severally liable for 50% of the total costs each, neither would act because each would be liable for only 10. The law, however, sometimes adopts a more sophisticated principle under which the plaintiff can sue either *A* or *B* or both. In the event that the plaintiff sues one of them, say *A*, successfully, *A* can then sue *B* for full indemnification for the entire amount of 20. If *B* knows that she will ultimately have to bear the entire expected cost of the activity, she will take the proper precautions at the lower cost of 13.⁶⁵

Landes and Posner have suggested a solution along these lines, arguing that joint tortfeasors should be fully indemnified by the cheapest cost avoider, thus giving the latter incentive to take precautions to prevent the damage.⁶⁶ But Landes and Posner concede that sometimes the "full indemnification solution" is inadequate, for reasons that were raised earlier.⁶⁷ Often, there are a number of cheapest cost avoiders. Moreover, even when the costs of prevention are not equal amongst the injurers, they often do not have sufficient information to know *ex ante* the identity of the cheapest cost avoider. The full indemnification solution therefore raises precisely the same problems that initially motivated the discussion in this paper: either dilution of liability or excessive investment in precautions. In the absence of specific information and with the high cost of obtaining it, potential tortfeasors may assume that the probability of their being the cheapest cost avoider is $1/N$, where N is

65 This would also be the case when one of the parties is judgment-proof. If *A* knows that *B* is insolvent and that consequently she will bear the full burden of any potential damage, *A* will make an optimal investment in precautions. The insolvency of one party reduces the number of potential tortfeasors and thereby eliminates the risk of dilution of liability.

66 William Landes & Richard Posner, *The Economic Structure of Tort Law* 198-201(1987).

67 See the efficiency-based argument at *supra* pp. 484-86.

equal to the number of people involved. The bigger N is, the smaller the individual risk exposure, and the greater the likelihood of each one preferring to bear the expected cost of the harm, should it materialize, over investing in precautions. Alternatively, the uncertainty may induce the parties to invest excessively in precautions, particularly if they are risk averse.

The full indemnification solution is effective only when a single injurer can be easily identified at the time that potential injurers are expected to invest in precautionary measures. Identifying a single injurer and imposing liability on her is, however, precisely the difficulty that gives rise to dilution of liability in the first place. Indemnification presumes the existence of mechanisms that can differentiate among potential tortfeasors and, therefore, of a salience-creating mechanism of the type analyzed above.

C. Apportionment of Precaution Costs among Tortfeasors as a Possible Solution for Dilution of Liability

Our analysis has thus far ignored another possible solution to the problem of dilution of liability, namely, apportionment of precaution costs. We will now argue that there are cases in which the efficient rule would be to allow one potential injurer (or more) to invest in precautions and later sue for contribution from her fellow potential injurers, who would be jointly and severally liable along with her if the harm is not prevented. A potential injurer who invests in (efficient) precautions should be allowed to recover her "excessive" costs from the other potential injurers.

This argument can be demonstrated by the following example. Assume that 100 potential injurers can each prevent an expected harm of 50 by each investing 10 in precautions. In these circumstances, if liability is imposed, none of the potential injurers will prevent the harm, since the cost of prevention for each potential injurer (10) is higher than the expected cost each would have to bear should the damage occur (0.5).

In the absence of transaction costs, the parties would take the precautions to prevent the harm, without the intervention of the legal system. However, given the existence of transaction costs, the harm would not be thus prevented by the potential injurers. In Part II, we argued that in such circumstances, efficiency sometimes warrants imposing liability not on the potential injurers, but on the victim himself.⁶⁸ Our example here provides an opportunity to

⁶⁸ If, for instance, the victim can prevent the harm by investing 20 in precautions, attributing liability to the tortfeasors would be inefficient. If liability were attributed to the tortfeasors, neither the victim nor the tortfeasors would invest in precautions. The victim would not invest because she would be "insured" by the tortfeasors;

investigate another proposal, one that seems to reconcile the conflict between the principle of the cheapest cost avoider and the principle of salience. Ideally, the conflict could be resolved by adopting both of the following two principles: one, liability can be imposed on all potential injurers; and two, a particular potential injurer should be reimbursed for her "excessive" prevention costs by all other potential injurers. Thus, all the potential injurers will share equally the costs of preventing the harm. If both these principles are adopted, the actual rescuer's cost will be only 0.1, which will be equal to the cost borne by every other individual potential rescuer. If all potential injurers fail to take preventive measures, the cost to each one of them will be 0.5.

D. Criminal Law

Criminal law, like tort law, treats acts and omissions differently. The principles that govern criminal liability in criminal law are similar in many respects to those that apply under tort law. Ashworth has classified five categories of cases in which criminal law enforces a duty to act.⁶⁹ These include: the duties of a person who inadvertently creates a potentially harmful situation; the duties arising from certain relationships, including the parent-child relationship; and the duties arising from ownership or control of property. Some of these categories are strikingly similar to the exceptions to the general principle of no liability for omissions under tort law. However, our analysis would seem to be inapplicable to criminal law, because criminal law can impose sanctions that exceed the cost of the harm caused by the omission. Hence, attributing criminal liability to multiple offenders in alternative care situations typically will not lead to dilution of liability, for the severity of the criminal sanction is independent of the *number* of offenders.

There are two possible explanations for the similarity between tort law and criminal law in this context. First, one could argue that although the doctrinal exceptions recognized in both areas of the law are similar, the rationales underlying the doctrinal *principles* are different. Hence, there is no structural similarity between criminal law and tort law; it is mere coincidence that the exceptions to the respective rules seem so similar in the two branches. A second, more compelling explanation relates to the fact that

the tortfeasors, on the other hand, would not invest because of dilution of liability. Hence, we argue that the legal system should exempt the tortfeasors from liability in order to induce the victim to invest in precautions. If liability is not imposed, the victim himself will invest in precautions and the overall societal cost will be 20.

⁶⁹ Andrew Ashworth, *The Scope of Criminal Liability for Omissions*, 105 Law Q. Rev. 424 (1989).

although the presence of multiple co-offenders in alternative care situations does not give rise to a risk of dilution of liability in criminal law, it does raise other structural problems, specifically, the likelihood of an excessive investment in precautions. Alternative care situations are characterized by the fact that a single individual's investment in precautionary measures is sufficient to prevent the harm from occurring; investment in precautions by two or more people is, therefore, wasteful. Hence, the imposition of criminal sanctions may overcome the problem of dilution of liability in such situations, but it inevitably leads to excessive investment in precautions.

While the risk of excessive investment explains why the structure of criminal liability for omissions is analogous to tort liability for omissions, it is nonetheless true that criminal law can afford to be more lenient in attributing liability to multiple offenders in alternative care situations. This is because there are circumstances in which dilution of liability is a far more serious concern, while excessive investment in precautions is not. In cases in which a rescue operation is initiated by a single rescuer, other potential rescuers can learn of the rescuer's activity and, consequently, be unlikely to invest in excessive measures. Moreover, criminal law can mitigate the risk of excessive investment by allowing potential rescuers the defense of reasonable belief that another potential rescuer was already engaged in a rescue operation.⁷⁰

CONCLUSION

The principle of salience is not a rule of liability; instead, it should be understood as imposing constraints on the rules of liability. The principle of salience dictates that liability should be concentrated rather than spread among many different agents. This article argued that this principle helps to explain why tort law typically imposes liability upon agents who commit actions rather than omissions. The exemption from liability for omissions under tort law can be justified on the grounds that attributing liability to all those who fail to act would lead to dilution of liability. The exceptions to the exemption from liability can also be rationalized as ways of overcoming the risks of dilution of liability. In some cases, tort law narrows the scope of liability for omissions by applying salience-creating rules that single out a single tortfeasor from among the many potential ones. In other cases, omissions are committed in circumstances giving rise to "natural salience," where the attribution of

⁷⁰ See Murphy, *supra* note 19, at 620-21; Feldbrugge, *supra* note 46, at 641.

liability does not lead to dilution of liability. Finally, tort law sometimes induces potential tortfeasors to allocate liability *ex ante* among themselves.

The need for a principle of salience is hardly surprising to the public law practitioner. It is not uncommon to find that administrative law designs principles that are intended to guarantee that liability is concentrated.⁷¹ It is important that liability, whether public or private, rest with one or a few identifiable agents. However, the principle of salience in tort law has largely been ignored by tort scholars. The substantive principles governing liability, such as the principles of corrective justice or the principle of the cheapest cost avoider, seem, to their advocates, sufficient to explain the doctrinal complexity of tort law. This disregard for the principle of salience can perhaps be explained on the grounds that the substantive principles of liability seem less arbitrary and more principled than the principle of salience. The inherent arbitrariness of the principle of salience — namely, the fact that it sometimes dictates selecting an agent who is not the "best agent" in some important respect (e.g., the cheapest cost avoider or the most culpable agent) — might be regarded by scholars as intellectually inelegant and perhaps even morally repulsive. This article, however, exposes the fact that the principle of salience is necessary for achieving the very same objectives that the rule of the cheapest cost avoider aims to achieve and that it often explains why the substantive principles governing liability deviate from what theorists would (or should) imagine them to be.

Our analysis was framed in terms of economic efficiency; but an analogous analysis is applicable to non-economic theories. Attributing liability typically requires distinguishing between the status of one person and that of others, and law is a tool for accomplishing this. This distinction is a key feature of the concept of liability. A person is held liable if she is perceived as *particularly* affiliated to the harm in contrast with others who are less affiliated or even not affiliated at all. The phrase "we are all to be blamed" may sometimes have political and moral appeal, but as a general principle of liability, it is inept. Legal liability is a concept that serves to differentiate the status of one person from that of another. Such a differentiation makes good economic sense, but it also fits with a preexisting non-economic understanding of the concept of liability. Hence, it seems dilution of liability can be condemned not merely as inefficient, but also as disharmonious with the very essence of the concept of liability.

⁷¹ The no-delegation doctrine and its principles can serve as a good example. See Lisa S. Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass'ns*, 87 Cornell L. Rev. 452 (2002); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002).