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The Logic and Fairness of Joint and Several Liability, in Symposium, Comparative Negligence

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INTRODUCTION

In *McIntyre v. Balentine*,[1] the Supreme Court of Tennessee adopted a regime of modified comparative responsibility for negligence actions.[2] In so doing, the court removed Tennessee from the dwindling handful of states that have failed to repudiate the common law rule whereby the contributory negligence of the plaintiff, no matter how slight, formally barred the plaintiff from recovering any damages from a defendant who negligently caused the plaintiff's injury.[3]

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1. 833 S.W.2d 52 (Tenn. 1992).

2. *Id.* at 56-57. The court uses the term "comparative fault," which is adequate for negligence actions but inappropriate for strict liability actions, in which the conceptually confused term "comparative causation" sometimes is substituted. The best term, for both negligence and strict liability actions, is "comparative responsibility." *See* Wright, *Allocating Liability*, *supra* note *, at 1143-46.

3. Only Alabama, Maryland, North Carolina, and Virginia have yet to shift to comparative responsibility, and the Alabama Supreme Court has indicated it is prepared to make the shift. *See McIntyre*, 833 S.W.2d at 55 & n.2. In Tennessee, as in other jurisdictions, the harshness of the contributory negligence bar was substantially lessened by formal offsetting doctrines and, often, by judges' and juries' lenient application of the contributory negligence bar and other doctrines to permit (full or reduced) recovery in appropriate cases. *See id.* at 54; Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 208-27 (1990); *infra* text accompanying notes 71-74.

The shift to comparative responsibility usually results in reconsideration and adjustment of a number of interrelated doctrines. One of these is the common law doctrine of joint and several liability, which applies when more than one defendant tortiously contributed to the plaintiff's injury. The joint and several liability doctrine allows a nonnegligent plaintiff to recover the full amount of the damages arising from the tortiously caused injury from any one or any combination of the defendants who tortiously contributed to the injury; however, the plaintiff cannot recover in the aggregate more than the full amount of his damages. Under separate doctrines, the defendants who actually pay the plaintiff may be able to obtain indemnity (full reimbursement) or contribution (partial reimbursement) from the other responsible defendants, depending on their comparative responsibility for the injury.[4]

The status of the joint and several liability doctrine under a comparative responsibility regime was not raised or argued by any of the parties in *McIntyre*, and consideration of this issue was not necessary to decide the issues before the Tennessee Supreme Court. Nevertheless, in what thus could be considered *dicta*, the court stated that the joint and several liability doctrine would be abolished and would be replaced by a doctrine of proportionate several liability.[5] Under proportionate several liability, each defendant who tortiously contributed to an injury is only held liable for a fraction of the damages that she tortiously caused, corresponding to her percentage of comparative responsibility for the injury. The court's discussion of this issue, and the related issue of claims for contribution among the responsible defendants, was very brief:

> [T]oday's holding [shifting to a comparative responsibility liability regime] renders the doctrine of joint and several liability obsolete. Our adoption of comparative fault is due largely to considerations of fairness; the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely

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4. *See* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 10.1, at 3-7, 11, 17-20, 23-30, § 10.2, at 39-63 (2d ed. 1986) [hereinafter HARPER ET AL.]; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 268, § 47, at 328-30, §§ 50-52, at 336-55 (5th ed. 1984) [hereinafter PROSSER & KEETON].

5. *McIntyre*, 833 S.W.2d at 58; *see* Jerry J. Phillips, McIntyre v. Balentine *and the Activist Tennessee Supreme Court*, 23 MEM. ST. U. L. REV. 33, 37 (1992) [hereinafter Phillips, *McIntyre*].

> linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.
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> Further, because a particular defendant will henceforth be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence, situations where a defendant has paid more than his "share" of a judgment will no longer arise, and therefore [there no longer will be any need for a contribution action among codefendants].[6]

In response to a petition for rehearing, the court indicated that further guidance regarding "the advisability of retaining joint and several liability in certain limited circumstances . . . should await an appropriate controversy."[7]

However, there is an immediate need for a thorough reconsideration of the multiple-tortfeasor issues that were treated so summarily by the court in *McIntyre*. The *McIntyre dicta* reflect a basic misperception of the normative grounding and practical effect of the joint and several liability doctrine and its proposed replacement, proportionate several liability. As almost every other supreme court has concluded, both logic and fairness require that joint and several liability be retained rather than being replaced by proportionate several liability under a comparative responsibility regime.[8] This has long

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6. *McIntyre*, 833 S.W.2d at 58. Although the court provides no arguments supporting these conclusory statements, they echo the positions taken in Professor Carol Mutter's recent extensive discussion of the issues involved in moving to comparative responsibility in Tennessee. *See* Mutter, *supra* note 3, at 203-06, 303-19.

7. *McIntyre*, 833 S.W.2d at 60. The court similarly postponed reconsideration of "the Opinion's treatment of nonparty tort-feasors." *Id.* All parties generally agree that joint and several liability should be retained at least for defendants acting in concert. *See, e.g.*, U.S. ATT'Y GEN. TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 33-34 & n.29, 64-65 (Feb. 1986) [hereinafter REAGAN REPORT]; U.S. ATT'Y GEN. TORT POLICY WORKING GROUP, AN UPDATE ON THE LIABILITY CRISIS 78 (Mar. 1987) [hereinafter REAGAN REPORT UPDATE]; Mutter, *supra* note 3, at 305, 318 n.544 (concerted action and vicarious liability); Sidley & Austin, *The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations*, 10 HAMLINE L. REV. 345, 360 (1987) (originally published as a monograph in May 1986) [hereinafter Sidley & Austin, *Industry Report*]. During the political frenzy engendered by the latest insurance crisis, however, many legislatures failed to except even these situations from statutes eliminating or limiting joint and several liability. *See* Wright, *Allocating Liability*, *supra* note *, at 1165-68.

8. *See, e.g.*, Arctic Structures, Inc. v. Wedmore, 605 P.2d 426 (Alaska 1979); Walton v. Tull, 356 S.W.2d 20 (Ark. 1962); American Motorcycle Ass'n v. Superior Court, 578 P.2d 899 (Cal. 1978); Tucker v. Union Oil Co., 603 P.2d 156 (Idaho 1979); Coney v. J.L.G. Indus.,

been the consensus position of comparative responsibility jurisdictions outside the United States.[9] Until very recently, it was also the consensus position of comparative responsibility jurisdictions in the United States.[10] After thorough consideration by the Uniform Commissioners of State Laws, joint and several liability (in a modified form) was incorporated in the Uniform Comparative Fault Act.[11] One of the principal drafters of the Uniform Comparative Fault Act, who has strongly supported its joint and several liability provisions, is Tennessee's own eminent torts scholar, Dean John Wade.[12]

The Tennessee Supreme Court's brief discussion and rejection of the joint and several liability doctrine in *McIntyre* does not consider or refer to the substantial contrary authority that is noted in the prior paragraph. Instead, the *McIntyre dicta* simply states or implies, without elaboration, that joint and several liability "inconsistent[ly] . . . impose[s] a degree of liability that is out of all proportion to fault," holds "a particular defendant . . . liable for [more

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454 N.E.2d 197 (Ill. 1983); Rozevink v. Faris, 342 N.W.2d 845 (Iowa 1983); Maday v. Yellow Taxi Co., 311 N.W.2d 849 (Minn. 1981); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984); Seattle First Nat'l Bank v. Shoreline Concrete Co., 588 P.2d 1308 (Wash. 1978); Sitzes v. Anchor Motor Freight, Inc., 289 S.E.2d 679 (W. Va. 1982); Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 291 N.W.2d 825 (Wis. 1980).

9. *See* A.M. Honoré, *Causation and Remoteness of Damage*, 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, TORTS, PT. 1, §§ 7-141, 7-189(2), 7-193 (A. Tunc ed., 1983); Tony Weir, *Complex Liabilities*, 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, TORTS, PT. 2, §§ 12-79 to -86, 12-105 to -109, 12-131 to -133 (A. Tunc ed., 1983).

10. *See* Rozevink v. Faris, 342 N.W.2d 845, 849 (Iowa 1983) ("[O]f the thirty-eight other states that have adopted comparative negligence . . . twenty-nine have completely retained joint and several liability, five have retained the doctrine in a [limited or] modified form, and only three have done away with it (two by statute, one by court decision)."); 3 HARPER ET AL., *supra* note 4, § 10.1, at 29-30; 4 HARPER ET AL., *supra* note 4, § 22.17, at 413-16; PROSSER & KEETON, *supra* note 4, § 67, at 475-79; VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.4, at 258-61 (2d ed. 1986); William J. McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence—A Puzzling Choice*, 32 OKLA. L. REV. 1, 3-4 (1979). Professor Mutter attempts to convey the impression that the overwhelming retention of joint and several liability upon initially shifting to comparative responsibility usually resulted from a failure to consider the issue. *See* Mutter, *supra* note 3, at 304-05. The liability of multiple responsible defendants, however, was almost always a major topic of discussion.

11. UNIF. COMP. FAULT ACT § 2, 12 U.L.A. 49 (West Supp. 1992); *see infra* text accompanying notes 87-88.

12. *See, e.g.*, John W. Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 HOUS. L. REV. 81, 86-88, 96 (1987) [hereinafter Wade, *Insurance Crisis*]; John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors Be Abolished?*, 10 AM. J. TRIAL ADVOC. 193 (1986). The joint and several liability doctrine has also been championed by another of Tennessee's eminent torts scholars, Professor Jerry Phillips. *See* Jerry J. Phillips, *Comments on the Wright-Twerski Colloquy Concerning the Joint Liability Debate*, 57 TENN. L. REV. 321 (1990) [hereinafter Phillips, *Comments*]; Phillips, *McIntyre*, *supra* note 5, at 39.

than] the percentage of a plaintiff's damages occasioned by that defendant's negligence," and gives rise to "situations where a defendant has paid more than his 'share' of a judgment."[13]

These unelaborated statements echo the charges that have been made against the joint and several liability doctrine in recent years by the "tort reform" advocates who selected the joint and several liability doctrine as one of their principal targets. The charges, repeatedly pressed with little or no rebuttal on legislators who were under tremendous political pressure to do something in response to the latest liability insurance crisis, have led to a wide variety of legislative actions eliminating or, more commonly, limiting or modifying the joint and several liability doctrine in many United States jurisdictions.[14] The charges have also gained credibility with some judges, including, apparently, the justices of the Tennessee Supreme Court.[15]

The major charges made against the joint and several liability doctrine have been that: (1) it requires a tortfeasor to pay for more damages than she tortiously caused or for which she was responsible and therefore makes her responsible for others' actions in addition to her own; (2) it is applied to "deep pocket" defendants who have not behaved tortiously or are only "minimally responsible" and who thus are required to provide "social insurance" for others' wrongful behavior; (3) it is a recent and unjustified judicial departure from the common law, which imposed full liability for the injury on each

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13. *McIntyre*, 833 S.W.2d at 58; *see supra* text accompanying note 6.

14. *See infra* note 94 and text accompanying note 95.

15. *See also* Smith v. Dept. of Ins., 507 So. 2d 1080, 1091 (Fla. 1987) (statutory shift to proportionate several liability in certain situations does not violate the state's constitutional right of access to the courts because that right "does not include the right to recover for injuries beyond those caused by the particular defendant"); Walt Disney World Co. v. Wood, 515 So. 2d 198, 202 (Fla. 1987) (McDonald, C.J., dissenting) ("the law of joint and several liability should be repudiated and each defendant held accountable for only the percentage of damages found by the trier of fact to have been caused by his conduct"); Brown v. Keill, 580 P.2d 867, 871-74 (Kan. 1978) (construing statute as eliminating joint and several liability and observing that "[t]here is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss"); Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503, 505 (Ky. 1985) (Vance, J., concurring) (it is unfair "for a defendant who is only 50% responsible for an injury to be saddled with 100% of the liability"); Bartlett v. New Mexico Welding Supply, 646 P.2d 579, 582 (N.M. Ct. App.) (assuming the doctrine "hold[s] a person liable for an amount greater than the extent that person caused injury"), *cert. denied*, 648 P.2d 784 (N.M. 1982); Laubach v. Morgan, 588 P.2d 1071, 1074 (Okla. 1978) ("By doing away with joint liability a plaintiff will collect his damages from the defendant who is responsible for them."), *limited by* Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613, 616 (Okla. 1980) (noting criticisms of *Laubach* by McNichols, *supra* note 10, and retaining joint and several liability for innocent plaintiffs).

tortfeasor only when the tortfeasors acted in concert; and (4) it is inconsistent with the principle of comparative responsibility.[16]

As the remainder of this Article attempts to make clear, each of these charges is invalid. The joint and several liability doctrine does not result in a defendant's being held liable for others' tortious actions or for more damages than she tortiously caused; rather, it results in a defendant's being held liable only for the damages that she herself tortiously caused. The doctrine is not a recent invention, nor has it been radically expanded in recent years; rather, it has been part of the common law, in essentially its current form, for centuries. Finally, retention of the doctrine, at least in its modified form, is compelled by, rather than being inconsistent with, the logic of modern regimes of comparative responsibility and the principles of fairness or justice that underlie them.

Moreover, it is clear from a perusal of the legislative materials and debates that the recent legislative actions abolishing or limiting joint and several liability have resulted from a combination of serious conceptual confusion by legislators and intense political pressure by defendants' lobbying groups. These legislative actions, which were relied upon by the Tennessee Supreme Court,[17] are not only poor precedents for other jurisdictions such as Tennessee, but also demonstrate the dangers of legislative intrusion on long-established common law principles of just liability in response to intense political pressure generated by special interest groups during temporary crises.

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16. *See, e.g.*, REAGAN REPORT, *supra* note 7, at 31-35, 64-65; REAGAN REPORT UPDATE, *supra* note 7, at 54, 76-78; Mutter, *supra* note 3, at 203-06, 303-19; Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DENV. U. L. REV. 651 (1988); Sidley & Austin, *Industry Report*, *supra* note 7, at 349, 359-61, 384.

17. *See McIntyre*, 833 S.W.2d at 58 n.7 (stating "[n]umerous other comparative fault jurisdictions have eliminated joint and several liability," and citing seven jurisdictions, erroneously including Alaska). *But see infra* note 94 and text accompanying notes 94-95 (noting that only a small minority of jurisdictions have eliminated joint and several liability in all or almost all situations). The Tennessee Supreme Court's reliance on legislative actions outside Tennessee as support for its decision to replace joint and several liability with proportionate several liability as part of its shift to comparative responsibility seems especially inappropriate given the fact that recent legislative efforts in Tennessee (and elsewhere) to shift to comparative responsibility have foundered precisely because those efforts incorporated a shift from joint and several liability to proportionate several liability. *See* Mutter, *supra* note 3, at 202-05 & n.21.

I. LIABILITY IN EXCESS OF RESPONSIBILITY?

The most powerful, and hence most frequently asserted, argument against the joint and several liability doctrine is that the doctrine results in a tortfeasor's being held liable for more damages than she tortiously caused or for which she was responsible and therefore unjustly makes her responsible for others' actions in addition to her own. This argument, which directly or indirectly underlies all the other arguments, is the argument that has been repeatedly emphasized in various forms by the "tort reform" advocates.[18] The argument made by the "tort reform" advocates in Maine is typical of those made throughout the country:

> It has been said: "What pure comparative negligence does is hold a person fully responsible for his/her acts to the full extent to which they caused injury. That is justice." [Replacing joint and several liability with proportionate several liability] achieves such justice, yet also insures that tortfeasors will not be held responsible beyond the extent to which they caused injury, in other words, for the extent to which someone else has caused injury. . . . The injustice of a 10% negligent defendant paying 100% of a damage award will be eliminated.[19]

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18. Contrary to Professor Twerski's implication, the tort reformers' basic argument has not been that it is unfair to hold a defendant liable for more than a proportionate share of the entire harm, even though her tortious behavior was an actual and proximate cause of the entire harm. *See* Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1128, 1130 (1989) [hereinafter Twerski, *Revolt*]. Instead, as indicated in the text, the tort reformers have hammered away on the argument that joint and several liability requires a defendant to pay for more damage than she tortiously caused or for which she is responsible, and thus makes her responsible for others' tortious actions in addition to her own. Twerski himself states that "industry advocates contend that joint and several liability is unfair because a defendant is held responsible to pay more than the proportional share of harm *which she caused*," and criticizes the doctrine because "ten percent liability . . . effectively means 100%." *Id.* at 1128 (emphasis added), 1139; *see* Wright, *Reply*, *supra* note *, at 1149-50; *infra* note 59.

19. MAINE LIABILITY CRISIS ALLIANCE, RESPONSE TO DRAFT OF THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE, *Appendix A: Joint and Several Liability*, at A-3 (October 1987) (footnotes omitted) [hereinafter MAINE LIABILITY CRISIS ALLIANCE] (restating arguments previously made to the Commission; similar arguments occur repeatedly throughout the appendix); *accord* 2 A.L.I., REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 149 (1991) [hereinafter A.L.I. REPORTERS' STUDY] ("comparative negligence can . . . be understood as an effort to fashion a closer fit between the scope of a defendant's liability and its true equitable contribution to the plaintiff's losses"); REAGAN REPORT, *supra* note 7, at 64 ("Joint and several liability . . . is now in many cases applied to all defendants, regardless of their connection to the injury."); REAGAN REPORT UPDATE, *supra* note 7, at 76 ("a 1% finding of liability will guarantee plaintiff a 100% recovery"); *id.* at 77 ("it is unfair for a defendant to bear the cost of another person's

This argument is the principal argument that has been made by opponents of the doctrine in every legislative debate that I have read.[20] I assume it was the principal argument that was made in the inconclusive legislative debates in Tennessee.[21] Only rarely has the

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responsibility"); *id.* at 78 ("A person [should be liable] only for those damages directly attributable to the person's pro-rata share of fault or responsibility . . . for the injury."); Damon Ball, *A Reexamination of Joint and Several Liability Under a Comparative Negligence System*, 18 ST. MARY'S L.J. 891, 891 (1987) (joint and several liability "can result in a defendant . . . paying not only the damage he caused but also the damage caused by others"); Sidley & Austin, *Industry Report*, *supra* note 7, at 360 ("[C]ourts have expanded the doctrine to require any defendant who is responsible for any portion of the plaintiff's injury to be jointly liable for all of the damage."); *id.* at 361 ("It is manifestly unfair that a [defendant] who is held to be only five percent liable (if that) for the economic loss may be forced to pay 100% of the damage."). For additional examples, see Bob Clark, Jr., *Joint and Several Liability: The Battle in California Moves to the Courts*, 16 LINCOLN L. REV. 121, 130-34 & n.55, 145-46 (1986); *supra* note 18; *infra* note 21.

20. For example, one of the principal critics of the doctrine in the Illinois debate stated:

> [T]ort law simply means if you do damage to someone . . . , you must pay for that and I totally agree with that. . . . [Under this provision,] [m]edical bills have to be paid 100 percent by the person that's not at fault or that maybe he's five percent at fault. . . . [W]hy should an innocent party pay for an injury that they didn't have much to do with[?]

ILLINOIS 84TH GEN. ASSEMBLY, HOUSE OF REP. TRANSCRIPTION DEBATE, June 30, 1986, at 67 [hereinafter ILLINOIS HOUSE DEBATE] (remarks by Rep. Regan); *see* ILL. 84TH GEN. ASSEMBLY, REG. SESS., SEN. DEBATES, May 21, 1986, at 84 [hereinafter ILLINOIS SENATE DEBATES] (remarks by Sen. Rupp) ("[I] have been adjudged to be . . . say six percent at fault and yet . . . I could be called on to pay not only what I have been adjudged responsible for but the main one, the highest percentage."); *id.* at 89 (remarks by Sen. Watson) (noting "the injustice [that occurs when] someone can be one percent liable and . . . end up being a hundred percent responsible for the award"); *id.* at 90, 119 (remarks by Sen. Barkhausen) (same). Similarly, the legislative critics of joint and several liability in Maine stated:

> A defendant found liable for any portion of a plaintiff's injuries should compensate the plaintiff to the extent of the defendant's responsibility . . . . However, it is not fair to that defendant that he act as a "deep pocket" for a plaintiff, regardless of the defendant's actual fault, simply because that defendant has assets and another blameworthy defendant does not.

MAINE STATE LEGISLATURE, DRAFT REPORT OF THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE 96-97 (Oct. 1, 1987) (minority report); *see infra* note 57 and accompanying text. For more extensive discussion of the debates in Illinois and Maine, respectively, see Wright, *Illinois*, *supra* note *; Wright, *Reply*, *supra* note *, at 1150-51 & n.15, 1154-56. *See also* TEXAS HOUSE/SENATE JOINT COMMITTEE ON LIABILITY INSURANCE AND TORT LAW AND PROCEDURE, MAJORITY REPORT 182 (filed with the 70th Leg., Jan. 1987) [hereinafter TEXAS REPORT] ("A defendant who is found jointly liable for the injuries of a plaintiff is liable for the *entirety* of the damages awarded in favor of the plaintiff even if he is only *partly* responsible for the injuries."), *quoted in* John T. Montford & Will G. Barber, *1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System [Part Two]*, 25 HOUS. L. REV. 245, 282 n.180 (1988); Clark, *supra* note 19, at 121-36, 145-49 (describing debate in California); Montford & Barber, *supra*, at 281-91 & n.180 (describing debate in Texas).

21. This assumption is based on the fact that it invariably has been the principal argument in every legislative debate that I have read, and the fact that it is the argument that is made

argument been challenged, especially in any strong or sustained manner.[22] Instead, both academic[23] and legislative[24] supporters of

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repeatedly by Professor Mutter, who was a consultant to the special committee of the Tennessee Senate which considered the issue. *See* Mutter, *supra* note 3, at 204 & nn.18 & 19; *id.* at 306 (under joint and several liability defendants are "forced to respond to damages to which they only partially contributed"); *id.* at 306-07 (the shift to proportionate several liability is necessary "to assure that each party, including the plaintiff, will be responsible for his fault and only his fault"); *id.* at 307-10 (numerous references to the "glaring" injustice of a defendant only "*X* percent at fault" or "*X* percent responsible" being held liable for more than *X* percent of the damages); *id.* at 312 ("[A] person should be held responsible only for *his* causative fault. Thus . . . if the jury finds a defendant to be ten percent negligent, he should be liable only for ten percent of plaintiff's damages."); *infra* note 59.

22. The only strong rebuttal that I have read was a statement by Mack Kidd on behalf of the Texas Trial Lawyers Association. *See* Mack Kidd, *Protecting the Innocent Victim: Joint and Several Liability, Hearings Before the Comm. on Economic Dev. of Texas Senate,* Mar. 2, 1987, at 1-3 (emphasizing that each jointly and severally liable defendant's negligence must have been a "but for" cause of an indivisible injury and thus "caused 100% of the damages," and noting that "being 50% at fault is like being 50% pregnant. To be sued successfully, you must have been jointly [sic] responsible for 100% of the damage. If you did not cause all of the damages, then you can't be held jointly liable."). For a weaker and much briefer statement of this argument, see MAINE TRIAL LAWYERS ASS'N, MAINE HAS AN INSURANCE PROBLEM—NOT A JURY PROBLEM 38-39 (Jan. 1988) (emphasis removed):

> There is a very important point which the insurance industry has tried very hard to obscure: under joint and several liability, the careless conduct of the wrongdoer must be a substantial factor in producing the consumer's injury. The industry slides past this point when it argues that it is "unfair for someone who is ten percent careless to pay the entire bill." The point is that, in almost every case, the accident would not have happened at all unless the "ten percent defendant" had been careless.

Compare ILLINOIS HOUSE DEBATE, *supra* note 20, June 30, 1986, at 76 (remarks by Rep. McPike criticizing "partially negligent" and "partial causation" arguments) *with id.* at 75 (remarks by Rep. McPike accepting the argument that joint and several liability results in excessive liability for governmental entities whose comparatively small "passive" negligence contributes to some injury), *discussed in* Wright, *Illinois*, *supra* note *, at 282-83; *see infra* notes 53-57 and accompanying text. In the only example I have come across of a sustained challenge to a critic's claim that joint and several liability results in defendants' being held liable for more damages than they tortiously caused, the critic became quite uncomfortable. *See Product Liability: Hearings on H.R. 2238 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 488-90 (1987) [hereinafter *Federal Hearings*] (colloquy between Rep. Florio and Alfred W. Cortese, Jr.).

23. *See, e.g.*, PROSSER & KEETON, *supra* note 4, § 67, at 475-76 ("the joined defendants [are] required to bear a greater portion of the plaintiff's loss than is attributable to their fault"); Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831, 833, 841-42, 846, 851, 855-56 (1989) (assuming that under joint and several liability negligent defendants are held liable not only for damages caused by their own actions (so-called "fractional share" liability) but also for damages caused by others (so-called "unitary share" liability)); Phillips, *McIntyre*, *supra* note 5, at 37 n.22 ("The term 'several liability' as used herein refers to the situation in which there are cotortfeasors but each is liable only for his own fault."); *id.* at 38 (apparently agreeing that joint and several liability "impose[s] a degree of liability that is out of all proportion to fault" and thereby "impose[s] the fault of a cotortfeasor on the defendant"); *id.* at 39-40 (assuming that under joint and

joint and several liability generally have explicitly or implicitly accepted the argument.

Not surprisingly, therefore, this first argument seems to be the principal objection made against the doctrine by the Tennessee Supreme Court, which assumed that abolishing the doctrine and replacing it with proportionate several liability was necessary to ensure that "a particular defendant will henceforth be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence, [so that] situations where a defendant has paid more than his 'share' of a judgment will no longer arise."[25]

If joint and several liability actually resulted in a defendant's being held liable for more damages than she tortiously caused or for which she was responsible, or held her liable for the actions of others rather than her own actions, it indeed would be unjust. The premise, however, is false. Joint and several liability only applies to injuries for which the defendant herself is fully responsible. She is responsible for the entirety of some injury only if her tortious behavior was an actual and proximate cause of the entire injury. She is not liable for injuries, including separable portions of injuries, to which she did not contribute. She is not liable unless the tortious aspect of her conduct was an actual cause of the injury. Moreover, even then, she is not liable if, for reasons of policy or principle, her connection to the injury is considered too remote or minimal to be "proximate."[26]

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several liability a defendant is held liable for the foreseeable misconduct of another, rather than for her own misconduct as evaluated in the light of the foreseeable misconduct of the other); *id.* at 40 (assuming that under joint and several liability the liability of an insolvent tortfeasor is shifted to a solvent cotortfeasor); *infra* note 57 (statement of Professor McGarity).

24. For example, Representative Greiman, the principal defender of joint and several liability in the debates in the Illinois House of Representatives, stated:

> [J]oint and several liability . . . means that if you are one percent negligent, you must pay the entire judgment . . . . We have changed that. We have heard from . . . people all across the state that we are concerned that we are minimally liable, five, 10 percent liable, 15 percent liable, and we're stuck for the whole thing. So we have said that there should be a threshold. If you are 25 percent liable, you are so much involved with causing that accident . . . that you should respond in damages for the entire amount. But if you are less than 25 percent, then you should pay only your share. . . . The minimally liable are no longer liable for any more than their share. Those people only who have a significant part of the liability will remain [jointly and severally] liable.

ILLINOIS HOUSE DEBATE, *supra* note 20, June 30, 1986, at 8-9 (remarks by Rep. Greiman); *see infra* notes 53-57 and accompanying text.

25. *McIntyre*, 833 S.W.2d at 58; *see supra* text accompanying note 6.

26. *See* 3 HARPER ET AL., *supra* note 4, § 10.1, at 3-7, 11, 17-18; 4 HARPER ET AL., *supra* note 4, § 20.3, at 114-15, 120, 122-24; PROSSER & KEETON, *supra* note 4, § 47, at 328-29,

A defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior is not diminished if some other person's tortious behavior also was an actual and proximate cause of the injury. Rather each defendant whose tortious behavior was an actual and proximate cause of the injury is individually fully responsible for the entire injury. This is most obvious when a defendant's tortious behavior was either necessary or independently sufficient for the occurrence of the injury, but it remains true whenever a defendant's tortious behavior was an actual and proximate cause of the injury.

If, as is usually the case, a defendant's tortious behavior was a necessary ("but for") cause of the plaintiff's injury, the plaintiff would not have suffered the injury if the defendant had not behaved tortiously. For example, consider a situation in which one defendant negligently was speeding through a parking lot, a second defendant negligently failed to pay attention as she drove through the same parking lot, and as a foreseeable result their cars collided and a nonnegligent pedestrian was injured. If the first defendant had not been speeding, or the second had been paying attention, there would have been no collision and the pedestrian would not have suffered any injury.

If, on the other hand, a defendant's tortious behavior was independently sufficient for the occurrence of the plaintiff's injury, then that defendant's tortious behavior was sufficient all by itself (in conjunction with the non-tortious "background" conditions) to produce the plaintiff's injury, regardless of any other defendant's behavior. For example, consider a situation in which two defendants, acting independently of one another, each negligently put enough white granular poison (which each mistook for sugar) in a cup of coffee to kill the person who drank it. Each defendant's negligence was sufficient by itself, independent of the negligence of the other defendant, to cause the death of the person who drank the coffee.

In either situation, as the courts consistently have held, each defendant clearly was a tortious cause of the entire injury and therefore is individually responsible for the entire injury.[27] Yet, assuming that the defendants were equally negligent, the opponents of joint and several liability would assert that to hold either defendant liable

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§ 52, at 345-46, 347-49; Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1741-77, 1788-1803 (1985) [hereinafter Wright, *Causation*].

27. *See* 3 HARPER ET AL., *supra* note 4, § 10.1, at 18-19, 23-25; 4 HARPER ET AL., *supra* note 4, § 20.3, at 114-15, 121; PROSSER & KEETON, *supra* note 4, § 52, at 347-48.

for more than half of the injury would result in "holding a 50% negligent defendant liable for 100% of the injury (or the damages)," "holding a defendant liable for more damages than she caused or were occasioned by her negligence," and "holding a partially [50%] responsible defendant fully responsible, thus making her shoulder the other defendant's responsibility in addition to her own."[28]

All of these statements reflect a fundamental confusion between each defendant's *individual full responsibility* for the damages that she tortiously caused and the *comparative responsibility percentages* that are obtained by comparing the defendants' individual full responsibilities for the injury. Neither defendant in either of these situations was merely "50% negligent" or "50% responsible." Such statements make as much sense as saying that someone is "50% pregnant."[29] Nor did either defendant's negligence cause or occasion only 50% of the plaintiff's injury. Rather, each defendant was 100% negligent, each defendant's negligence was an actual and proximate cause of 100% of the injury, and each defendant therefore is fully responsible for the entire injury. Only when we *compare* their individual full responsibilities, and assume that they were equally negligent, does it make sense to say that each defendant, *when compared to the other*, bears 50% of the total *comparative* responsibility for the injury.

The individual full responsibility of each tortfeasor is less obvious in two types of cases. The first type of case, typically a pollution or toxic tort case, involves situations in which the defendant's tortious behavior was neither necessary nor independently sufficient for the plaintiff's injury, but nevertheless clearly was a cause of the entire injury. Consider a variation of our poisoned coffee drinker hypothetical. Assume three drops of poison were sufficient for the coffee drinker's death, and four tortfeasors, acting independently of one another, each negligently put one drop of poison in the coffee cup. It would be silly to assert that each defendant was only "25% negligent" or caused only one-fourth of the coffee drinker's death. Rather, each defendant was 100% negligent, and each defendant's negligence was an actual and proximate cause of the coffee drinker's indivisible death and all the consequent damages.[30] Therefore, each

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28. *See* statements quoted throughout this Article.

29. *See Federal Hearings*, *supra* note 22, at 370-71, 373 n.9, 427, 429 (statement of Prof. David R. Smith).

30. *See* Wright, *Causation*, *supra* note 26, at 1789-93; Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001, 1018-23 (1988).

defendant should be individually fully responsible for the entire injury. If there had been only three defendants, each of them clearly would have been individually fully responsible as a necessary (but for) cause of the injury. There is no apparent reason why this individual full responsibility should be reduced to responsibility for only one-fourth of the injury merely because a duplicative drop of poison was added by a fourth defendant. As is noted below, such a result would subject plaintiffs to a perverse "tortfest," in which the more tortfeasors there were, the less liable each would be, although the tortious behavior of each defendant remained constant and was an actual and proximate cause of the plaintiff's entire injury.[31]

Some courts, however, have been reluctant to impose liability for the entire injury upon each defendant in these circumstances. They have treated the injury as being theoretically divisible into separately caused portions, even when it clearly is not, to justify a shift to proportionate several liability. Other courts, recognizing the indivisible and jointly caused nature of the injury, have held the defendants jointly and severally liable.[32] It has been suggested that the reluctance of the first group of courts was due to the then existing rule which did not allow the tortfeasor who initially paid for the injury to obtain contribution from the other tortfeasors.[33] When the tortfeasor was neither a necessary nor an independently sufficient cause of the injury, the unfairness of imposing liability for the entire injury upon her, with no ability to seek contribution from the other tortfeasors, seems most pronounced.[34] If the no-contribution rule was the source of some courts' reluctance to impose joint and several liability in these types of cases, that reluctance should be substantially diminished when, as is true in almost all jurisdictions today, contribution is permitted based on the tortfeasors' comparative responsibility. Indeed, ironically, two of the most frequent exceptions in the statutes eliminating, limiting, or modifying joint and several liability have been the exceptions for cases involving environmental pollution or

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31. *See infra* text following note 40.

32. 3 HARPER ET AL., *supra* note 4, § 10.1, at 25-29; 4 HARPER ET AL., *supra* note 4, § 20.3, at 120-21, 125-26 & nn.28-30; PROSSER & KEETON, *supra* note 4, § 52, at 345-46, 349, 351, 354-55.

33. PROSSER & KEETON, *supra* note 4, § 52, at 349.

34. Yet, as is discussed more fully below, this is an unfairness in terms of the equitable restitutionary claims among the tortfeasors themselves, an unfairness for which the injured plaintiff is not responsible, and an unfairness secondary to the injured plaintiff's corrective justice claim against each defendant who tortiously caused his injury. *See infra* text accompanying notes 42-44.

toxic substances.[35]

The second, a more difficult type of case involves situations in which there are, or may be, theoretically separable injuries attributable to distinct causes, but it is practically impossible to distinguish the separable injuries and their distinct causes. One major subcategory is the multiple collision cases, in which the first defendant negligently caused the initial collision, which resulted in some injury to the vehicle or person of the plaintiff, and a second defendant negligently caused the second collision, causing additional injury to the vehicle or person of the plaintiff. Assuming the second collision would not have occurred in the absence of the first collision, the first defendant's negligence was a necessary (but for) cause of both the initial and additional injuries, and she therefore is responsible for all of the injuries. The second defendant's negligence, however, was only a cause of the additional injury due to the second collision. Another major subcategory is the multiple animal cases, in which, for example, trespassing cattle belonging to different defendants consumed the plaintiff's crops, or dogs belonging to different defendants killed the plaintiff's sheep. In these cases, each defendant's animal caused theoretically separable injuries to the plaintiff (although it could be argued that the dogs "acted in concert," so that each dog, by encouraging the others, was a cause of all the killings). Cases involving multiple sources of pollution sometimes are analogized to the multiple animal cases, but most of the pollution cases are instead similar to the variation of the coffee drinker hypothetical, in which each drop of poison (pollution) contributed to the entire injury.[36]

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35. *See* Wright, *Allocating Liability*, *supra* note *, at 1165-68; Wright, *Reply*, *supra* note *, at 1147 n.2. The Reagan Administration's Tort Policy Working Group, while calling for the elimination of joint and several liability in suits by private plaintiffs, attempted to distinguish and preserve the government's ability to hold polluters jointly and severally liable under federal environmental statutes, which

> are founded upon congressional objectives which provide that those who contributed to the problem or profited from the manufacture which created the waste, ought to bear the cost of cleaning it up . . . . Without some degree of joint and several liability under [these statutes], the effective enforcement of these programs could be impeded as a result of protracted and costly litigation among responsible parties over the precise allocation of cleanup costs.

REAGAN REPORT, *supra* note 7, at 66 n.7, *quoted approvingly by* Mutter, *supra* note 3, at 317-18 n.544. The authors of the report failed to explain why there is not similar concern about the serious adverse impact that abolition of joint and several liability will have on the rights of plaintiffs to obtain full and prompt compensation from each defendant who, having been a tortious actual and proximate cause of the plaintiff's injury, is individually fully responsible for that injury.

36. *See supra* text accompanying notes 30-31. For a reference to dogs' acting in concert, see PROSSER & KEETON, *supra* note 4, § 47, at 325 n.3.

In these situations, when there are theoretically separable injuries attributable to distinct causes, but it is difficult or impossible to actually distinguish (in even a rough fashion) the injuries or their causes, the modern trend has been to hold each defendant who tortiously contributed to (at least some of) the injuries jointly and severally liable for all the injuries, unless the tortfeasor can prove that she did not contribute to some separable portion of the injury.[37] Especially when the plaintiff was not contributorily negligent, this approach seems preferable to proportionate several liability (which would have to employ arbitrary percentages in any event) as long as the resulting liability for any particular tortfeasor is not clearly in excess of what might have been caused by her tortious behavior.[38]

Contrary to the assertions of the opponents of joint and several liability, a defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior does not become "partial" or "minimal" simply because other defendants' tortious behavior was much worse, individually or in the aggregate.[39] Otherwise, plaintiffs would be subject to a perverse "tortfest,"[40] in which the more defendants there were, or the worse they behaved, the less individual responsibility each defendant would bear for the injury, even though her tortious behavior remained constant and was an actual and proximate cause of the entire injury.

For example, in the initial hypotheticals described above, one defendant's negligence might be deemed to have been three times

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37. 3 HARPER ET AL., *supra* note 4, § 10.1, at 26-29; 4 HARPER ET AL., *supra* note 4, § 20.3, at 117-18, 124 n.27, 127-29 & n.32; PROSSER & KEETON, *supra* note 4, § 52, at 345-46, 348-53.

38. *See* 2 A.L.I. REPORTERS' STUDY, *supra* note 19, at 147-48. Unlimited joint and several liability applied to small contributors to hazardous and solid waste disposal sites may sometimes raise such a problem. As illustrated by the variation on the poisoned coffee drinker hypothetical, however, even the wastes of small contributors often may contribute to the entirety of the injury, rather than contributing only to some separable portion of the injury. *See supra* text accompanying notes 30-31.

39. *See* REAGAN REPORT, *supra* note 7, at 33 ("[Joint and several liability] increasingly has been used to make a defendant with only a limited role in causing an injury bear the full cost of compensating [the] plaintiff. . . ."); *id.* at 64 (the doctrine "allows plaintiffs to recover the entire judgment from "deep pocket" defendants — even if such defendants are only found to be minimally at fault"); REAGAN REPORT UPDATE, *supra* note 7, at 76 ("[It is unfair to require] a defendant who bears only minimal responsibility for an injury to pay all of plaintiff's damages."); Sidley & Austin, *Industry Report*, *supra* note 7, at 360 ("This doctrine . . . can impose tremendous burdens on defendants whose responsibility for the injury is really quite minimal."); *id.* at 359-61 (similar statements); Mutter, *supra* note 3, at 306-10 (many similar statements).

40. *See Federal Hearings*, *supra* note 22, at 361, 371-72 (statement of Prof. David R. Smith).

worse than the other defendant's, so that the first defendant bears 75%, and the second defendant 25%, of the total *comparative* responsibility. Nevertheless, each defendant was still 100% negligent (rather than the first being "75% negligent" and the second "25% negligent"). In the pedestrian hypothetical, each defendant's negligence was still a necessary ("but for") actual and proximate cause of the entire injury; the pedestrian would not have been injured if either defendant had not been negligent. In the initial coffee drinker hypothetical each defendant's negligence was still an independently sufficient actual and proximate cause of the entire injury; it was sufficient by itself, regardless of the other defendant's negligence, to cause the death of the coffee drinker. Thus, in each hypothetical, each defendant is individually fully responsible for the entire injury. It is only when comparing their individual full responsibilities for the injury that one can say that the first defendant, having been three times more negligent than the second, bears 75% of the total *comparative* responsibility for the injury.

Assume in the coffee drinker hypothetical that the first defendant deliberately put enough poison in the coffee cup to kill the coffee drinker, while the second negligently put the same amount in, so that the first defendant's comparative responsibility might be set at 90% and the second defendant's at 10%. Can it really be that the first defendant, despite deliberately putting sufficient poison in the cup to kill the coffee drinker regardless of what the second defendant did, as a matter of logic or justice is only "90% responsible" for the coffee drinker's death and thus should receive only 90% of the specified criminal punishment for murder (*e.g.*, a 90% capital punishment) and be liable in tort for only 90% of the damages caused to the coffee drinker's survivors or estate? Can it really be that the second defendant, despite negligently putting enough poison in the cup to kill the coffee drinker regardless of what the first defendant did, is only "10% responsible" for the coffee drinker's death and thus is only liable for 10% of the damages caused to the coffee drinker's survivors or estate, even if for some reason no damages can be obtained from the first defendant?

Assume in the coffee drinker hypothetical that ten defendants acting independently of one another, rather than only two, negligently (or deliberately) each put enough poison in a cup of coffee to kill the person who drank it. Does logic or fairness really require that, as each defendant after the first adds her independently sufficient dose of poison to the cup, the first defendant's individual responsibility for the death of the coffee drinker must be lowered from

100%, to 50%, to 33%, and eventually to only 10%, although the first defendant's tortious behavior remained constant and was sufficient by itself, regardless of the other defendants' subsequent actions, to kill the coffee drinker?

Assume in the pedestrian hypothetical that there was only one tortfeasor, the defendant who negligently was failing to pay sufficient attention as she drove through the parking lot, who as a foreseeable result ran into the nonnegligent pedestrian. Instead of the second negligent defendant initially posited, assume that among the other necessary (but for) causes of the pedestrian's injury was a rain storm that made the pavement slippery and reduced visibility. If either the defendant had been paying attention or it had not been raining, the pedestrian would not have been injured. (It should be clear, once one thinks about it, that every tort action involves such "background conditions" in addition to the tortious conditions.) In this situation, even though the nontortious natural conditions might be deemed to be a much more important factor (e.g., three times more important) than the defendant's negligence in producing the pedestrian's injury, no one would assert that the defendant caused only 25% of the injury or was only 25% responsible. Rather, the negligent defendant would be individually fully responsible for the pedestrian's injury. It is difficult to understand how or why the defendant's inattentiveness should be considered to have caused only 25% of the injury or to be only 25% responsible for the injury if we substitute the originally posited second (negligently speeding) defendant for the rain storm without changing the inattentive defendant's behavior.[41]

The tortfeasor who initially pays the plaintiff has an equitable restitutionary (unjust enrichment) claim against the other tortfeasors for contribution or indemnity based on their *comparative* responsibility for the injury.[42] If she cannot obtain contribution from another tortfeasor because he is immune, insolvent or otherwise unavailable, this does not mean that she is being held liable for more than she tortiously caused, for more than she is responsible, for the other's tortious actions, or for his portion of the damages. Whether or not

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41. If the nonresponsible natural cause was, or would have been, independently sufficient for the occurrence of the injury in the absence of any tortious or otherwise responsible causes, then the tortious causes will not be liable, since there is no corrective justice claim for compensation if one's injury would have occurred anyway in the absence of any tortious behavior. *See* Wright, *Allocating Liability*, *supra* note *, at 1179-82; Wright, *Causation*, *supra* note 26, at 1798-1801.

42. *See* Weir, *supra* note 9, § 12-77; Wright, *Allocating Liability*, *supra* note *, at 1182-83.

she can obtain contribution, she is individually fully liable to the plaintiff for all the damages that were the actual and proximate result of her tortious behavior. Her paying for all these damages fulfills her own responsibility to the plaintiff; it is not a shifting to her of the unavailable tortfeasor's responsibility.[43] If one of the tortfeasors ends up paying all or a disproportionate share of the damages due to the immunity, insolvency, or unavailability of another tortfeasor, an unfair result unquestionably has occurred. But the unfairness exists only in the context of the first tortfeasor's equitable restitutionary claim against the other tortfeasor for contribution, which is secondary to the plaintiff's prior and independent corrective justice claim against each tortfeasor, who is individually fully responsible for the plaintiff's injury.[44]

A plaintiff necessarily faces the risk that any particular tortfeasor from whom he attempts to recover his damages may be immune, insolvent, or otherwise unavailable. The immunity or insolvency of one tortfeasor, however, does not, as the critics of joint and several liability sometimes argue,[45] provide any reason or justification for limiting the plaintiff's right to obtain full recovery from a different solvent and available tortfeasor, who is individually fully responsible for the plaintiff's injury. Indeed, such a limitation would be an unjustified shifting of the unavailable tortfeasor's formal or "de facto" immunity to the available tortfeasor, who has no such immunity.[46]

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43. *Contra, e.g.*, REAGAN REPORT, *supra* note 7, at 32-33 & n.26; Mutter, *supra* note 3, at 306-08, 313; Richard N. Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343, 367 (1980); Twerski, *Revolt*, *supra* note 18, at 1127-28, 1132-33, 1144.

44. *See* Wright, *Allocating Liability*, *supra* note *, at 1179-83; *see generally* Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992) (discussing the moral foundations and substantive content of corrective justice).

45. *See, e.g.*, Mutter, *supra* note 3, at 313; Pearson, *supra* note 43, at 363; Twerski, *Revolt*, *supra* note 18, at 1132-33, 1143-44.

46. Professor Twerski makes the novel argument that legislators have decided that nonimmunized tortfeasors as well as immunized tortfeasors should be the beneficiaries of formally enacted immunities (as well as "de facto" immunities that legislators allegedly have decided to grant to certain groups or activities through their failure to impose substantial insurance requirements on risky activities such as driving), and have eliminated or limited joint and several liability to spread the costs of these immunities to society as a whole. Twerski, *Revolt*, *supra* note 18, at 1132-33, 1143-44. However, there is no hint of these alleged legislative rationales in any of the materials that I have read. Moreover, the costs are not spread to society as a whole; they are concentrated on tort victims. Twerski recognizes the impact on tort victims; yet he does not falter. He argues that victims' inability to recover the portion of their damages that allegedly are immunized will have the beneficial effect of bringing greater pressure to bear on legislators to reexamine these immunities. *Id.* at 1144. But why should legislators want

II. Deep Pockets as Social Insurers?

The second argument against the joint and several liability doctrine is parasitic on the partial responsibility argument that was discussed—and rejected—in the previous section. The second argument is that the doctrine requires a "deep pocket" defendant to provide "social insurance" for harms that were tortiously caused by others and for which she allegedly was not responsible or was only "minimally responsible."[47] This argument depends upon the erroneous assumption that the joint and several liability doctrine results in a tortfeasor's being held liable for more damages than she tortiously caused or for which she was responsible and therefore makes her responsible for others' actions in addition to her own.

Sometimes the assertion is made that, in order to provide compensation to the plaintiff, "deep pocket" defendants are improperly held liable by juries in the absence of adequate proof of tortious conduct or of a causal connection between their tortious conduct and the damages for which they have been held liable. This charge was common in the "tort reform" debates across the country.[48] Yet there is no evidence that this is a pervasive or even significant problem. To the contrary, the data indicates that juries conscientiously attempt to assign responsibility only where it is supported by the evidence.[49]

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to put pressure on themselves to reexamine the immunities that they supposedly have decided to provide? And would not greater and more effective pressure be applied by nonimmunized defendants as well as plaintiffs if joint and several liability were retained? Finally, sacrificing joint and several liability and tort victims to bring pressure on tort immunities seems both harsh and naive, especially when not much prospect exists of modifying the immunities. In fact, at the same time that legislators were eliminating or limiting joint and several liability, they often were reenacting municipal and charitable immunities. When Twerski raised his bring-pressure-on-immunities argument at congressional hearings as a reason for eliminating or limiting joint and several liability, it was received with bewilderment and attracted no support. *See Federal Hearings*, *supra* note 22, at 474-76, 497-98 (remarks by Rep. Florio); *id.* at 484 (remarks by Gene Kimmelman).

47. *See, e.g.*, Reagan Report, *supra* note 7, at 31-35, 64; Reagan Report Update, *supra* note 7, at 54, 57, 76-77; Mutter, *supra* note 3, at 203, 307-10; Sidley & Austin, *Industry Report*, *supra* note 7, at 359-61; Twerski, *Revolt*, *supra* note 18, at 1133-43.

48. *See, e.g.*, Illinois House Debate, *supra* note 20, June 30, 1986, at 65-67 (remarks by Rep. Regan); *id.* at 75 (remarks by Rep. McPike); Reagan Report, *supra* note 7, at 31-35; Reagan Report Update, *supra* note 7, at 53-59, 76; Mutter, *supra* note 3, at 227 & n.126, 253-54, 306; Sidley & Austin, *Industry Report*, *supra* note 7, at 349, 356-59, 363-64, 367, 384; Twerski, *Revolt*, *supra* note 18, at 1128-29, 1133-40. For further discussion of these arguments, see Wright, *Allocating Liability*, *supra* note *, at 1145, 1149-52, 1154-56; Wright, *Reply*, *supra* note *, at 1156-58; *infra* note 49.

49. Empirical studies have routinely found that jurors generally act in good faith, rationally, and competently. *See, e.g.*, Valerie P. Hans & Neil Vidmar, Judging the Jury (Plenum Press, 1986); Reid Hastie et al., Inside the Jury (Harvard University Press, 1983);

More particularly, both surveys and investigations of highly publicized anecdotes have failed to establish that "deep pocket" defendants are being held liable in the absence of plausible evidence of tortious conduct or causation.[50]

SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL (Hemisphere Publishing, 1988); ROBERT J. MACCOUN, GETTING INSIDE THE BLACK BOX: TOWARD A BETTER UNDERSTANDING OF CIVIL JURY BEHAVIOR (Rand Corp., 1987); MICHAEL J. SAKS, SMALL-GROUP DECISION-MAKING AND COMPLEX INFORMATION TASKS (Federal Judicial Center, 1981); Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727 (1991); Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981). In a recent conference which drew together leading judges, plaintiff and defense lawyers, corporate officials, law professors, consumer representatives, and social researchers, there was a near unanimous consensus on the good faith, rationality, and competence of the civil jury and on the importance of retaining it, given the values that it serves in our society. *See* CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM: REPORT FROM AN AMERICAN BAR ASSOCIATION/BROOKINGS SYMPOSIUM 1-3, 8-11 (1992).

Empirical studies report a very high degree of agreement by judges with jurors' verdicts. *See* Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964) (judges and juries agreed on liability in 79% of the cases; in 10% judges would have found liability where juries did not, and in 11% juries found liability where the judges would not have; judges would have found liability in 54% of the total cases, whereas the juries actually held the defendants liable in 55%); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85 (1991) (similar results). Several empirical studies have reported higher plaintiff success rates with judges than juries in medical malpractice and product liability lawsuits. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992); Neil Vidmar, *The Unfair Criticism of Medical Malpractice Juries*, 76 JUDICATURE 118 (1992). One study of jury verdicts in 46 counties across the United States from 1981-1985 (the supposed highpoint of the "litigation explosion") found juries were much less likely to hold doctors liable than other defendants: plaintiffs won only 32.4% of the time in medical malpractice cases, compared to an overall success rate of 57%. *See* Stephen Daniels, *Verdicts in Medical Malpractice Cases*, TRIAL, May 1989, at 23.

50. *See* ILLINOIS HOUSE DEBATE, *supra* note 20, June 30, 1986, at 65 (remarks by Rep. Greiman); *Federal Hearings*, *supra* note 22, at 463 (statement of Gene Kimmelman); *id.* at 479, 500-01 (remarks by Gene Kimmelman and Rep. Florio); WISCONSIN COMM'R OF INS., FINAL REPORT OF THE SPECIAL TASK FORCE ON PROPERTY AND CASUALTY INSURANCE 18 (Aug. 1986); *Is There a Problem?*, 75 ILL. B.J. 162 (Keith H. Beyler, ed., 1986) (answers to questions 6 and 7 on jury fairness). For discussion of the misinformation that has fueled the "tort reform" and "civil justice reform" movements, see Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SYS. J. 321 (1986); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147 (1992); Wade, *Insurance Crisis*, *supra* note 12, at 81, 86-88, 95-96; Fred Strasser, *Have 'Anecdotes,' Not Facts, Fueled Tort Crisis?*, NAT'L L.J., Feb. 24, 1986, at 15; Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT'L L.J., Feb. 16, 1987, at 39; Gail D. Cox, *Tort Tales Lash Back*, NAT'L L.J., Aug. 3, 1992, at 1, 36-37; Margaret C. Fisk, *The Reform Juggernaut Slows Down*, NAT'L L.J., Nov. 9, 1992, at 1, 34-37; Andrew Blum, *Debate Still Rages on Torts*, NAT'L L.J., Nov. 16, 1992, at 1, 32-33, 35. In response to the most recent and comprehensive review of the empirical evidence (Professor Saks' article), the president of the American Tort Reform Association stated that he has little use for such articles

Even if in a few cases juries have found deep-pocket defendants liable in the absence of sufficient evidence of tortious behavior or causation, the obvious and usual remedy is policing of the juries' findings by trial and appellate judges, rather than the elimination of joint and several liability. In such cases the real problem is not joint and several liability, but rather *any* liability. Why sacrifice injured plaintiffs in every case involving multiple tortfeasors (by eliminating or limiting joint and several liability) to correct problems that arise, at most, in a very small percentage of cases and that can and should be handled by proper judicial supervision of juries?

The more strongly pushed form of the charge that "deep pocket" defendants have been improperly treated as "social insurers" has

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("just show biz"), that there is no relationship between the tort reform movement and the perception or reality of a litigation explosion, and that his association is instead "concerned with the efficiency and fairness of the American justice system." Ken Myers, *Professor's Study of Tort System Finds No 'Litigation Explosion,'* NAT'L L.J., Sept. 7, 1992, at 4.

The pervasive and constantly repeated publication (on television, in the print media, and on billboards) of inaccurate information and innuendo on the good faith and competence of juries and the operation of the civil justice system as a whole has had a demonstrated negative impact on the objectivity of judges, jurors, and (less surprisingly) legislators. The misinformation, and the public pressure generated by it, resulted in numerous legislative and judicial "reforms" of tort law in the late 1980's. In addition to the sources cited above, see Theodore Eisenberg & James A. Henderson, Jr., *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992); Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303 (1991/92); Wright, *Allocating Liability*, *supra* note *, at 1147-68; Wright, *Reply*, *supra* note *. The misinformation has also affected jurors' objectivity. Recent empirical studies report that jurors are now skeptical of plaintiffs' torts claims against business and frequently mention the need to limit awards in the light of the perceived litigation crisis. *See* Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85 (1992); Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards*, 40 AM. U. L. REV. 805 (1991). Jurors are drawn from the general public, and public opinion surveys report that the public generally believes the misinformation regarding frivolous claims and out-of-control juries. *See Poll: Too Many Suits*, NAT'L L.J., Sept. 7, 1992, at 6 (residents in the Rio Grande Valley of Texas [where "tort reform" billboards are rampant] "believe frivolous lawsuits increase medical costs, consumer costs and insurance premiums"; three-fourths of respondents favored limiting lawsuit settlements and damage awards; a majority favored no-fault insurance); *Quayle's View on Liability Suits is Widely Held, Poll Shows*, WALL ST. J., Feb. 19, 1992, at B10 (Roper poll findings that 63% of respondents agreed that "people often start frivolous lawsuits because awards are so big and they have so little to lose"; almost 70% would limit punitive awards; a majority wanted to cap awards for lost wages and pain and suffering); SEAN F. MOONEY, CRISIS AND RECOVERY: A REVIEW OF BUSINESS LIABILITY INSURANCE IN THE 1980'S 17-19, 37 (Insurance Information Institute, May 1992) (identifying effects of "tort reform" debate on attitudes of the general public, juries, and judges as much more important than enacted "reforms").

been that the joint and several liability doctrine results in "minimally at fault" tortfeasors' being held liable in excess of their individual responsibility.[51] As was discussed in the previous section, however, all tortfeasors subject to joint and several liability, including so-called "minimally at fault" tortfeasors, were tortious, actual, and proximate causes of the plaintiff's entire injury and, as such, are individually fully responsible for the entire injury.[52] Infrequently, and usually briefly and obliquely, the supporters of the joint and several liability doctrine have noted that each defendant tortiously caused the entire injury.[53] Yet, even the supporters of the doctrine have often erroneously assumed that a tortfeasor who is held liable for a share of the damages which exceeds her percentage of comparative responsibility is being held liable for damages which are attributable to other defendants' tortious conduct but not to hers.[54]

Thus, the supporters of joint and several liability generally have relied solely or primarily on the plaintiff's need for compensation — a social insurance or loss spreading rationale — rather than on principles of just responsibility. For example, Senator Berman, the principal defender of the joint and several liability doctrine during the debates in the Illinois Senate, defended a proposal to replace joint and several liability with proportionate several liability only if the tortfeasor's comparative responsibility was less than the plaintiff's as follows:

> [I]t has been the social policy decision of the courts . . . that when a person who has been injured is entitled to compensation

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51. *See, e.g.*, ILLINOIS HOUSE DEBATE, *supra* note 20, June 30, 1986, at 19 (remarks by Rep. O'Connell); *id.* at 39 (remarks by Rep. Davis); *id.* at 59 (remarks by Rep. Homer); *id.* at 65-67 (remarks by Rep. Regan); ILLINOIS SENATE DEBATES, *supra* note 20, May 21, 1986, at 90, 119 (remarks by Sen. Barkhausen); MAINE LIABILITY CRISIS ALLIANCE, *supra* note 19, at A-4 to A-6; Mutter, *supra* note 3, at 306-11; Sidley & Austin, *Industry Report*, *supra* note 7, at 359 ("[T]he party responsible for the injury lacks adequate resources to compensate the victim and, therefore, courts permit the plaintiff to obtain recovery from a [defendant] which has a "deep pocket," even if [that defendant] is only minimally responsible for the injury."); Twerski, *Revolt*, *supra* note 18, at 1139; *supra* notes 18-21 & 39 and accompanying text.

52. *See supra* text accompanying notes 26-46.

53. *See, e.g., Hearings Before the Comm. on Economic Dev. of Texas Senate*, (Mar. 5, 1987) (statement of Joan Claybrook on behalf of Public Citizen, at 6) (noting that "[t]he doctrine only applies if each of the wrongdoers contributed substantially to the injury, that is, if the injury would not have happened but for the misconduct of any single wrongdoer," then stating that "[t]he doctrine's underlying principle is that an innocent victim who suffered a wrongful injury deserves full and prompt compensation, and that it is fairer that the other wrongdoers make up the difference than that the victim be left without compensation"); *supra* note 22; *infra* note 55.

54. *See supra* notes 23-24 and accompanying text; *infra* notes 55-57 and accompanying text.

> that they should go away with all of their compensation, and the people that contributed to some extent to that injury shall bear the cost of that injury . . . . [I]t is better that the people that were at fault shall pay the plaintiff rather than the plaintiff should go home with less than [he is] entitled to. That's the whole theory [behind] joint and several liability. Now this amendment says that in weighing those types of policy decisions we're going to modify it somewhat . . . . [T]he person who is liable less than the plaintiff won't have to pay more than what he is responsible for.[55]

Similarly, in Maine, the Commission to Examine Problems of Tort Litigation and Liability Insurance based its majority recommendation that no change be made in the joint and several liability doctrine squarely on the "innocent plaintiff needs compensation" rationale:

> The law of joint and several liability is a key to assuring that someone at fault, as opposed to an innocent plaintiff, bears the cost of the plaintiff's harm. Maine law, in most instances, permits a liable defendant to bear responsibility for only that portion of the plaintiff's damages attributable to his fault . . . . [W]hile in a few cases a defendant may pay more than his portion of a plaintiff's damages because another defendant at fault has no assets, this result is the fairest option. A more unfair

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55. ILLINOIS SENATE DEBATES, *supra* note 20, May 21, 1986, at 85 (remarks by Sen. Berman). Senator Berman at one point argued that, in a hypothetical involving two negligently driven automobiles that collided and caused injury to a pedestrian, the driver who was "twenty-five percent at fault" should be fully liable because "[i]f that car hadn't been in the intersection . . . , [the pedestrian] would not have been injured." *Id.* at 109-10. But he then immediately proceeded to return to his principal argument based on loss spreading rather than responsibility:

> You're only debating here as to whether somebody who is responsible should pay more than their share . . . . [T]he person who was hurt and [has] not contributed to his injury should he bear the loss or should the person that contributed to the injury pay more than their loss? And there's arguments on both sides. I suggest to you the more socially acceptable policy, the fairer policy, the more humane policy, the policy that spreads the risks and saves . . . the taxpayers an awful lot of money because . . . if the plaintiff is not made whole, it winds up on public aid and other types of taxpayer funded programs [is that the] person that has contributed to that injury should be the one that pays along with others that have contributed to that injury.

Id. at 111. Similarly, the exception of medical expenses from proportionate several liability was explained as furthering a policy of ensuring that no tortiously injured plaintiff would suffer "medical indigency." ILLINOIS HOUSE DEBATE, *supra* note 20, June 30, 1986, at 9 (remarks by Rep. Greiman); *id.* at 19-20 (remarks by Rep. O'Connell).

> option is to have an innocent or less blameworthy plaintiff absorb the loss.[56]

In the debates in the Maine legislature, both sides erroneously assumed that a defendant held liable for more than her percentage of comparative responsibility was unfairly being held liable for damages for which she was not responsible. The majority, however, thought that the balance weighed in favor of "fairness to the innocent plaintiff" based on the plaintiff's need for full compensation, especially given the lack of any evidence that elimination or modification of joint and several liability would improve insurance availability or affordability.[57]

The social insurance rationale can be, and was, easily rebutted by the critics of joint and several liability: Why should the defendant, rather than society at large, provide this social insurance? The critics argue that although holding a (supposedly) partially responsible defendant liable for the entirety of the plaintiff's injury might have been unavoidable in the all-or-nothing days of the contributory negligence bar to plaintiff's recovery and the no-contribution bar to sharing of liability among defendants, it is avoidable and therefore no longer justifiable under modern regimes of comparative responsibility:

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56. MAINE STATE LEGISLATURE, DRAFT REPORT OF THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE 95-96 (Oct. 1, 1987).

57. *See* MAINE LEGIS. REC., Mar. 16, 1988, at H-288 (remarks by Rep. Paradis defending joint and several liability); *id.* at H-290 (remarks by Rep. MacBride defending joint and several liability); *id.* at H-289 (remarks by Rep. Hanley opposing joint and several liability); *id.*, Mar. 17, 1988, at S-309 to -311 (remarks by Sen. Brannigan and Sen. Black favoring joint and several liability); *id.* (remarks by Sen. Collins, Sen. Whitmore, and Sen. Dillenback opposing joint and several liability). Similarly, a Wisconsin report stated:

> [A]bolishing joint and several liability for [noneconomic] damages would require defendants responsible for causing noneconomic injuries to pay the noneconomic damages. This should alleviate some concerns that wealthy defendants too often get saddled with paying . . . noneconomic damages when [they] did not cause the noneconomic injuries. The task force felt that joint and several liability should remain for economic damages to assure the victim of full compensation for economic injuries.

WISCONSIN COMM'R OF INS., FINAL REPORT OF THE SPECIAL TASK FORCE ON PROPERTY AND CASUALTY INSURANCE 19 (Aug. 1986); *see Hearings Before the Comm. on Economic Dev. of the Texas Senate* (Mar. 2, 1987) (statement of Prof. Thomas O. McGarity, at 2) (while noting the "harshness" of the doctrine, urging that it be retained to "ensure[] that the plaintiff will be compensated for his or her losses"; "as between an innocent plaintiff and a negligent defendant . . . the defendant ought to bear the loss."); Nevada Trial Lawyers Association, 1987 Press Packet, Statement on Joint and Several Liability 3 (1987) ("The law presently does not lose sight of who the victim is in a case. The company is a 'wrongdoer,' it has broken the law and caused the damage. Although it may not be fair for the one company to have to pay, it is more just than to let the victims become losers once again.").

> If we are to achieve a true fault based system of responsibility, pure [proportionate] several liability is essential. The various modified systems are only a partial solution to the injustice inherent in joint and several liability . . . . The advantage of these methods is that the plaintiff is guaranteed full recovery. To achieve this, however, defendants must act as insurers for the actions of others, over whom they exercise no control.[58]

In sum, both the "fairness to the defendants" and the "fairness to the plaintiff" arguments were fundamentally misconceived and were weighted heavily toward the defendants.[59] When the arguments

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58. MAINE LIABILITY CRISIS ALLIANCE, RESPONSE TO DRAFT OF THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE, *Appendix A: Joint and Several Liability*, at A-6 (October 1987); *see* ILLINOIS SENATE DEBATES, *supra* note 20, May 21, 1986, at 92 (remarks by Sen. Rupp) ("[W]hy should . . . you have to . . . because you have the money pay for my share of the loss that I cannot cover?"); *id.* at 90, 119 (similar remarks by Sen. Barkhausen); Mutter, *supra* note 3, at 306.

59. Professor Mutter states that "Dean Twerski pointed out, and supported with numerous citations, that pro-plaintiff arguments were continually made and fairness to plaintiffs 'unremittingly questioned.' " Mutter, *supra* note 3, at 311 n.524 (*citing* Twerski, *Revolt*, *supra* note 18, at 1130). Unfortunately, as I have indicated, the wrong and extremely weak "pro-plaintiff" argument was continually made: that a plaintiff's need for full compensation justifies shifting a nonavailable defendant's liability to an available defendant, even though this might make the available defendant liable for more damages than she tortiously caused or for which she was responsible. In the state legislative hearings and debates that I have read, which include those cited by Twerski, only rarely was there more than a passing reference, if any, to the argument that defendants held jointly and severally liable never have some other tortfeasor's responsibility shifted to them, as alleged by the critics, but rather are only held liable for the damages that they themselves tortiously caused and for which they themselves therefore are individually fully responsible. *Compare* sources cited in Twerski, *Revolt*, *supra* note 18, at 1130 nn.17-19, *with* notes 19-24, 48-58 *supra* and notes 60, 64, 90-93 *infra* and accompanying text.

Twerski himself states that "[t]he issue of who should bear the *loss caused by an insolvent defendant*—an innocent plaintiff or a faulty defendant— . . . was the *only* subject that weighed on the legislators' minds." Twerski, *Revolt*, *supra* note 18, at 1129-30 (emphasis partially added); *see id.* at 1127-28; *supra* note 18; *supra* notes 43 & 45 and accompanying text. Mutter herself assumes that the supporters of joint and several liability rely primarily on the "plaintiff needs compensation" social insurance argument. *See* Mutter, *supra* note 3, at 311-13 ("While recognizing its occasional unfairness to tangentially-involved defendants, proponents of the traditional joint and several rule urge that these results are preferable to the alternative of an undercompensated plaintiff."); *supra* note 21. Mutter briefly mentions the (incomplete) argument that each defendant's negligence was a "but for" cause of the entire injury, but she does not seem to understand the argument, since she dismisses it with a nonsequitur:

> Those who oppose joint and several liability stress that a person should be held responsible only for *his* causative fault. Thus [sic], they argue, if the jury finds a defendant to be ten percent negligent, he should be liable only for ten percent of plaintiff's damages. They view the argument that plaintiff's harm is indivisible for purposes of defendants' responsibility as fundamentally inconsistent with the fault allocation concept underlying comparative fault.

Mutter, *supra* note 3, at 312. Recent studies have also ignored the corrective justice argument (that there is individual full responsibility for the injury based on each defendant's tortious conduct having been an actual and proximate cause of the entire injury), and have instead

are correctly perceived, there is no place for weighing or balancing. The "fairness to the defendants" argument is a "fairness *among* the defendants" argument which applies only to the restitutionary contribution claims among the defendants and which is secondary to the plaintiff's corrective justice claim against each defendant for full compensation for the injury that the defendant tortiously caused.

III. DEPARTURE FROM THE COMMON LAW?

The third argument commonly made against the joint and several liability doctrine is that the doctrine as it currently exists in the United States is an unjustifiable judicial departure from the common law, which supposedly imposed full liability for the injury on each tortfeasor only when the tortfeasors acted in concert.[60] This argument is based on a confusion between the substantive and procedural aspects of joint and several liability.[61]

Originally under the common law, the term "several liability" referred to the individual full liability of each tortfeasor for the entirety of the damages that were an actual and proximate result of her tortious conduct, whereas the terms "joint liability" and "joint tortfeasors" referred to the procedural permissibility of a plaintiff's joining multiple tortfeasors together for suit in the same action. Initially in the United States, and still in England, only tortfeasors acting in concert could be joined together procedurally for suit in the same action. Independently acting tortfeasors who tortiously contributed to the same injury, who in England are called "concurrent tortfeasors" rather than "joint tortfeasors," could not be joined in the same action.[62]

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balanced the "plaintiff needs compensation" social insurance argument against the "fairness to defendants" argument. *See, e.g.*, 2 A.L.I. REPORTERS' STUDY, *supra* note 19, at 130-31, 141, 148 n.25; AMERICAN BAR ASSOCIATION, ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM, REPORT TO THE HOUSE OF DELEGATES 22-24 (Feb. 1987) [hereinafter ABA ACTION COMMISSION].

60. *See, e.g.*, ILLINOIS SENATE DEBATES, *supra* note 20, May 21, 1986, at 91-92 (remarks by Sen. Kustra); REAGAN REPORT, *supra* note 7, at 33-34 & n.29, 64-65; SCHWARTZ, *supra* note 10, § 16.3, at 257, § 16.5, at 261 n.74; Mutter, *supra* note 3, at 305-07; Sidley & Austin, *Industry Report*, *supra* note 7, at 360.

61. The confusion exists despite explicit warnings, in the sources relied upon by those who make this argument, not to confuse the several distinct meanings and issues covered by the terms "joint tort," "joint tortfeasors," and "joint liability." For the warnings, see 3 HARPER ET AL., *supra* note 4, § 10.1, at 1, 3-5, 7-10; PROSSER & KEETON, *supra* note 4, § 46, at 322, § 47, at 324-25, 328-29.

62. *See* C. BAKER, TORT 142-43 (4th ed. 1986); 3 HARPER ET AL., *supra* note 4, § 10.1, at 1-3, 7-9; PROSSER & KEETON, *supra* note 4, § 46, at 322-23, § 47, at 324-25. An employee and

Nevertheless, substantively, each concurrent tortfeasor was severally (individually) liable for the entirety of the injury, in England as well as in the United States. The only change has been that, in the United States, procedural joinder of such independently acting tortfeasors is now allowed, and it therefore is customary in the United States to refer to such independently acting tortfeasors, as well as tortfeasors acting in concert, as "joint tortfeasors." But, contrary to the assertions of the critics, this procedural change in the United States did not result in any change in substantive liability. Both before and after the change, in England as well as the United States, concurrent tortfeasors, whether acting in concert or independently, were each fully liable for the entirety of the plaintiff's injury.[63]

IV. Inconsistency with Comparative Responsibility?

The final argument against the joint and several liability doctrine is that it is inconsistent with modern regimes of comparative responsibility, which replace the former all-or-nothing rules of the common law with rules that apportion liability between the plaintiff and the defendants, and also among the defendants, according to their comparative responsibilities for the injury.[64] This final argument, like most of the other arguments, is based on the erroneous assumption that a tortfeasor who is held liable for a share of the damages which exceeds her percentage of comparative responsibility is being held

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the employer who was vicariously liable for the employee's torts also were treated as joint tortfeasors and hence could be joined in the same action. *Id.* § 47, at 325 n.3.

63. *See* 3 Harper et al., *supra* note 4, § 10.1, at 7-10; Prosser & Keeton, *supra* note 4, § 47, at 324-29; *Federal Hearings*, *supra* note 22, at 358-59, 363-67, 428-30 (statement of Professor David R. Smith); Wade, *Insurance Crisis*, *supra* note 12, at 86-87. Pressler and Schieffer cite an article by Wigmore to support their claim that, until recently, full liability applied only to tortfeasors acting in concert. Pressler & Schieffer, *supra* note 16, at 660-62 & n.49 (citing J. H. Wigmore, *Joint-Tortfeasors and Severance of Damages: Making the Innocent Party Suffer Without Redress*, 17 Ill. L. Rev. 458 (1923)). Wigmore, however, was discussing the cases involving theoretically divisible injuries caused by successive impacts, rather than the more usual cases involving a single indivisible injury caused by multiple independent tortious actions. *See supra* text accompanying notes 36-38. In the latter cases, each tortfeasor has long been severally (individually) liable for the entire harm. As indicated in the text, the lack of "jointness" was procedural rather than substantive: the independently acting tortfeasors could not be joined in the same lawsuit.

64. *See, e.g.*, ABA Action Commission, *supra* note 59, at 21-22; Reagan Report, *supra* note 7, at 64; Reagan Report Update, *supra* note 7, at 76; Montford & Barber, *supra* note 20, at 262 (remarks by Sen. Caperton), 282-83 n.180 (quoting Texas Report, *supra* note 20, at 184); Mutter, *supra* note 3, at 204, 306-07, 312-13, 318-19; Pearson, *supra* note 43, at 361-63. The ABA Action Commission's distinctive arguments are discussed in Wright, *Allocating Liability*, *supra* note *, at 1153-60.

liable for damages which are attributable to other defendants' tortious behavior but not to hers. It is based, once again, on a confusion between a tortfeasor's *individual full responsibility* for the entirety of the damages that were actually and proximately caused by her tortious behavior and the *percentages of comparative responsibility* that are obtained by comparing the tortfeasors' individual full responsibilities for the injury.[65]

Although the opponents of joint and several liability generally fail to do so, it will be useful to distinguish situations in which the plaintiff was "innocent" (not contributorily negligent) from those in which the plaintiff was contributorily negligent. If the plaintiff was not contributorily negligent, he himself bears zero responsibility for any portion of his injury. The only responsible parties are the tortfeasors. The comparative responsibility principle therefore can only apply to the legal and equitable relationships among the tortfeasors themselves.[66] Those relationships consist of their positions as cotortfeasors, each of whom is individually fully liable to the plaintiff for the entirety of the harm that actually and proximately resulted from her tortious behavior. When one tortfeasor fulfills her own individual full responsibility to the plaintiff by paying for all of the plaintiff's damages, she has an equitable restitutionary (unjust enrichment) claim for contribution against the other tortfeasors, each of whom also is fully liable for the plaintiff's injury. The extent of this equitable claim is based on the tortfeasors' comparative responsibilities.[67]

As has been emphasized before, this equitable restitutionary claim for contribution among the tortfeasors themselves is independent from and subsidiary to the plaintiff's corrective justice right to obtain full compensation from any defendant whose tortious behavior was an actual and proximate cause of his injury. If some of the tortfeasors are insolvent or otherwise unavailable, an unfair apportionment of liability among the tortfeasors results, but the unfairness is solely a matter among the tortfeasors. The plaintiff is not a part of, and is not responsible for, that unfairness; whereas each tortfeasor is individually fully responsible for the plaintiff's injury.

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65. *See supra* text accompanying notes 26-46.

66. *See, e.g.*, American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 922 n.4 (Cal. 1978) (Clark, J., dissenting); 4 HARPER ET AL., *supra* note 4, § 22.17, at 412 & n.15; John G. Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with American Motorcycle Association v. Superior Court*, 30 HASTINGS L.J. 1464, 1482-83 (1979).

67. *See supra* note 42 and accompanying text.

The plaintiff's corrective justice claim against each tortfeasor has priority over the tortfeasors' equitable restitutionary (unjust enrichment) contribution claims against one another.[68]

Some opponents of joint and several liability argue that it is fair to require innocent plaintiffs to give up their previous ability to obtain full compensation from any responsible defendant as a quid pro quo for allowing contributorily negligent plaintiffs (who used to be formally barred from obtaining any compensation) to receive reduced recovery under the new comparative responsibility regime.[69] There are numerous serious problems with this argument. First, there is no apparent reason why *any* quid pro quo should be required for rectifying the injustice formerly done to contributorily negligent plaintiffs. Second, even assuming that some quid pro quo is justified, there is no apparent reason why an *innocent* plaintiff should have to sacrifice *his* corrective justice right to receive full compensation from a defendant who tortiously caused his injury as a quid pro quo for removing the injustice formerly done to *other* (contributorily negligent) plaintiffs. The innocent plaintiff himself gains nothing from this trade (nor is it likely that he would gain overall, due to reductions in expected liability, in the fantastic *ex ante* expectations world of the legal economists).

Third, under the modified comparative responsibility regimes that prevail in most jurisdictions (now including Tennessee), many contributorily negligent plaintiffs do not gain from the shift to comparative responsibility, since they are still completely barred from recovering any damages if their comparative responsibility exceeds or equals the defendants'. Fourth, conversely, many defendants as well as plaintiffs gain by the shift to a comparative responsibility regime. While defendants used to be unable to obtain contribution from other responsible defendants, or could only obtain per-capita (equal share) contribution that often diverged substantially from the tortfeasors' percentages of comparative responsibility, they can now obtain contribution from each other based on their percentages of comparative responsibility.[70] Since, overall, defendants may well

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68. *See supra* text accompanying notes 43-44.

69. *See, e.g.*, Mutter, *supra* note 3, at 319. A similar rationale has been given for denying contributorily negligent plaintiffs the benefit of the joint and several liability doctrine. *See, e.g.*, 2 A.L.I. REPORTERS' STUDY, *supra* note 19, at 150.

70. *See* Wade, *Insurance Crisis*, *supra* note 12, at 86-87; Wright, *Allocating Liability*, *supra* note *, at 1158-60, 1162.

gain at least as much as plaintiffs by the shift to a comparative responsibility regime, it is not clear why some quid pro quo should be demanded of plaintiffs.

Fifth, although contributorily negligent plaintiffs formally were barred from recovering any damages prior to the explicit adoption of comparative responsibility, this formal bar was substantially mitigated by formal offsetting doctrines and, often, by judges' and juries' lenient application of the contributory negligence bar and other doctrines, so that, even prior to the formal shift to comparative responsibility, contributorily negligent plaintiffs actually were able to recover reduced, or even full, compensation in many cases. As a matter of formal doctrine, the defendant was still fully liable, despite the plaintiff's contributory negligence, if the defendant had the last clear chance to avoid the injury and negligently failed to do so, acted intentionally or recklessly (unless the plaintiff also acted intentionally or recklessly), or (in some jurisdictions) was grossly negligent or otherwise had a degree of fault substantially higher than the plaintiff's.[71] The informal practices were even more significant. Consideration of the plaintiff's and defendant's relative degrees of responsibility often influenced decisions that were formally based on the doctrine of last clear chance or the related doctrine of proximate causation.[72] Plaintiffs, having exposed themselves rather than others to a risk of injury, were held to a more lenient standard of care than defendants.[73] Most significantly, the contributory negligence issue almost always went to the jury (indeed, in some states the constitution forbids taking the issue away from the jury), and it was a well

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71. *See* 4 HARPER ET AL., *supra* note 4, § 22.2, at 278, § 22.3, at 287-89 & n.4, § 22.5, at 293-95, § 22.6, at 299-303 & n.15, § 22.12, at 352-74; PROSSER & KEETON, *supra* note 4, § 65, at 451-52, 461-62, § 66, at 462-68, § 67, at 469-70 & n.8.

72. *See* 4 HARPER ET AL., *supra* note 4, § 22.1, at 263 n.6, 266-67, 273-75, § 22.14, at 374-84; PROSSER & KEETON, *supra* note 4, § 65, at 457-59, § 66, at 462-68; SCHWARTZ, *supra* note 10, § 1.2(B), at 7-8; Malcolm M. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940); Watermeyer, *Causation and Legal Responsibility*, 58 S. AFR. L.J. 232 (1941), 62 S. AFR. L.J. 126 (1945) (author identified in H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 303 (2d ed. 1985)).

73. *See* 3 HARPER ET AL., *supra* note 4, § 16.2, at 391-93; 4 HARPER ET AL., *supra* note 4, § 22.4, at 293-94, § 22.10, at 334-42; PROSSER & KEETON, *supra* note 4, § 65, at 453, 455 & nn.36, 37 & 41, 457-58, 459; SCHWARTZ, *supra* note 10, § 1.2(B), at 6-8; Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067, 1073 & n.29 (1986); Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 716-17 & nn.88 & 94, 722-25 & n.117 (1978) [hereinafter Schwartz, *Contributory Negligence*]; Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1759-62 & n.333 (1981); Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 7-8 & n.7 (1927); *infra* note 77.

known fact that the jury often refused to find contributory negligence even when such contributory negligence actually existed, sometimes (but not always) reducing the damages awarded to the plaintiff by the plaintiff's percentage of comparative responsibility.[74] In sum, a rough and uneven de facto comparative negligence existed in practice prior to the formal adoption of the comparative responsibility principle. Thus, the value of the alleged quid pro quo for eliminating joint and several liability — the supposedly new ability of a plaintiff to recover (reduced) damages even if he was contributorily negligent — is questionable.

Indeed, the formal shift from contributory negligence to comparative negligence provides greater assurance than before of a fair apportionment of the loss between the plaintiff and the tortfeasors. Under the formal all-or-nothing rules and the informal send-it-to-the-jury approach that prevailed in actual practice under the formal contributory negligence bar, the negligent plaintiff might receive full compensation rather than reduced compensation. Under a formal comparative responsibility regime, on the other hand, the jury is explicitly instructed to reduce the negligent plaintiff's liability claim against each tortfeasor in accordance with the plaintiff's comparative responsibility for his injury. Thus, once again, defendants may well gain as much or more than plaintiffs by the shift to a comparative responsibility regime.

The opponents of the joint and several liability doctrine also sometimes argue that there is no significant distinction between an innocent plaintiff and a "minimally negligent" plaintiff or defendant — e.g., a plaintiff or defendant determined to be "only 1% negligent" or "only ten percent at fault" — so there is no reason to treat innocent plaintiffs different from, or better than, contributorily negligent plaintiffs or even negligent defendants. Rather, all should be treated equivalently by adopting proportionate several liability.[75]

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74. *See* 4 HARPER ET AL., *supra* note 4, § 22.1, at 263 n.4, § 22.2, at 285 n.41, § 22.3, at 290 & nn.15 & 16, § 22.14, at 376-77 & nn.8 & 9; PROSSER & KEETON, *supra* note 4, § 65, at 455-56 & nn.42 & 44, § 67, at 469; SCHWARTZ, *supra* note 10, § 1.2(B), at 6-7; Robert E. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 504-08 (1962); Wex S. Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 63, 65-67 (1945); Schwartz, *Contributory Negligence*, *supra* note 73, at 726; Symposium, *Comments on* Maki v. Frelk—*Comparative or Contributory Negligence: Should the Legislature Decide?*, 21 VAND. L. REV. 889, 892, 913, 934 (1968); Wright, *Allocating Liability*, *supra* note *, at 1156-58, 1160.

75. *See* Mutter, *supra* note 3, at 315 n.536, 319. Professor Richard Pearson finds this argument logically sound, but senses unfairness in making an innocent plaintiff worse off under

This argument, however, once again confuses a tortfeasor's or negligent plaintiff's individual full responsibility for the injury that she negligently caused with her percentage of comparative responsibility. Each tortfeasor or contributorily negligent plaintiff, even if only one or ten percent *comparatively* negligent or responsible when compared with the other responsible parties, nevertheless was herself 100% negligent, was an actual and proximate cause of 100% of the injury, and therefore is 100% responsible for the injury. The innocent plaintiff, on the other hand, has zero responsibility for the injury. There thus is a world of difference between an innocent plaintiff and even a "one percent [comparatively] negligent" plaintiff or defendant.[76]

In sum, when the plaintiff was innocent, there is no principled justification for shifting from joint and several liability to proportionate several liability. Doing so erroneously converts the tortfeasors' equitable restitutionary (unjust enrichment) claims against one another into unjustified limitations on the innocent plaintiff's prior and independent corrective justice right to obtain full compensation from each defendant whose tortious behavior was an actual and proximate cause of his injury.

The appropriate rule is less obvious when the plaintiff was contributorily negligent. Having negligently contributed to the injury, the plaintiff, like each tortfeasor, is a responsible cause of the entire injury. Should the contributorily negligent plaintiff's own responsibility for his injury not only be used to reduce his corrective justice claim against each tortfeasor by his percentage of comparative responsibility, but also be treated as equivalent to each tortfeasor's responsibility for the injury, so that the equitable contribution claims among the tortfeasors can now be extended to include the responsible plaintiff as well? Stated more practically, should the contributorily negligent plaintiff share with the available and solvent tortfeasors the portion of the damages that equitably should have been shouldered by insolvent or otherwise unavailable tortfeasors under the comparative responsibility principle?

The courts have almost universally answered this question negatively. They note, correctly, that the negligent plaintiff's responsibility for his injury is analytically and qualitatively different than the

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comparative negligence than he was under contributory negligence. Pearson, *supra* note 43, at 366.

76. *See supra* text accompanying notes 26-41.

tortfeasors' responsibility. Each tortfeasor's responsibility for the injury is based on her tortious causation of injury to another (the plaintiff), which gives the plaintiff a corrective justice claim against each tortfeasor for compensation for the injury. The plaintiff, on the other hand, cannot be a tortfeasor in relation to his own injury. The plaintiff's responsibility for his injury is not based on any tortious causation of injury to another, but rather on his having negligently contributed to his own injury. Thus, any equitable restitutionary (unjust enrichment) claim for contribution among the tortfeasors, based on one of them having fulfilled the others' corrective justice obligation to the plaintiff as well as her own, cannot extend to the plaintiff. The tortfeasors have no corrective justice claim against the plaintiff to offset or match against the plaintiff's corrective justice claim against each of them. Rather, they only have the argument that the plaintiff's corrective justice claim against each of them for compensation for the entire injury should be reduced (or, under the modified approach, sometimes barred) in proportion to the plaintiff's own comparative responsibility for his injury. But the reduction is precisely that, only a reduction. Each tortfeasor remains jointly and severally liable for the full amount of the reduced claim.[77]

I myself have supported this argument previously,[78] and I still think it has some force. Indeed, it reflects the position that has been

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77. *See, e.g.*, American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 906 (Cal. 1978); Coney v. J.L.G. Indus., 454 N.E.2d 197, 204-06 (Ill. 1983). Professors Mutter, Phillips, and Twerski question the analytic and qualitative distinction between the plaintiff's self-endangering behavior and defendants' other-endangering behavior, correctly noting that behavior which endangers oneself often also endangers others. Mutter, *supra* note 3, at 312-13; Phillips, *Comments*, *supra* note 12, at 323 & n.17; Twerski, *Revolt*, *supra* note 18, at 1127 n.9. Yet the other-endangering quality of a person's conduct is relevant in tort law only when that person is being sued as a defendant for harm that she caused to others; only then does it give rise to a corrective justice claim. When the person is suing as the plaintiff for harm that she suffered, only the self-endangering aspect of her conduct is relevant; her contributory negligence is analyzed solely in terms of the risk that she created to herself. *See* RESTATEMENT (SECOND) OF TORTS § 463 & cmt. b, § 464 cmt. f (1965); PROSSER & KEETON, *supra* note 4, § 65, at 451, 453. Although both claims may arise from the same accident, they are independent claims that require separate analysis. The qualitative distinction between self-endangering and other-endangering behavior has also led to, and justifies, a more subjective and lenient standard of care for plaintiffs than is applied to defendants. *See supra* note 73 and accompanying text. In any event, as Twerski apparently realizes, even if the plaintiff's negligence were deemed analytically and qualitatively equivalent to the defendants' negligence, the maximum supportable change to joint and several liability would be modified joint and several liability rather than proportionate several liability. The latter, without any justification or explanation, treats the plaintiff's contributory negligence as being analytically and qualitatively *worse* than defendant's negligence. *See* Twerski, *Revolt*, *supra* note 18, at 1127 n.9; *infra* text following note 80.

78. *See* Wright, *Allocating Liability*, *supra* note *, at 1191-93; *accord* Weir, *supra* note 9, §§ 12-86.

adopted by countries around the world and by almost all the courts in the United States that have addressed the issue.[79] Nevertheless, regardless of the analytic and qualitative distinction between the negligent plaintiff's responsibility and the tortfeasors' individual responsibilities, the fact remains that the plaintiff, as well as each tortfeasor, bears responsibility for the entirety of the injury. The plaintiff has behaved negligently and his negligent conduct, as well as each defendant's tortious conduct, was an actual and proximate cause of the entire injury. As such, it seems fair that the negligent plaintiff should share with the available and solvent tortfeasors the portion of the damages that equitably should have been shouldered by insolvent or otherwise unavailable tortfeasors under the comparative responsibility principle.[80]

There is absolutely no justification, however, for treating the contributorily negligent plaintiff worse than the defendants who tortiously injured him. Yet, although the advocates of proportionate several liability carefully avoid mentioning this fact, this is the result that is reached under pure proportionate several liability, according to which the share of the damages that equitably should have been shouldered by insolvent or otherwise unavailable tortfeasors is placed entirely on the plaintiff, rather than being shared between the plaintiff and the available and solvent tortfeasors. Allocating the uncollectible share solely to the plaintiff makes him liable for more than his percentage of comparative responsibility, while limiting each solvent tortfeasor's liability to her percentage of comparative responsibility, which is an unjustified disparate treatment under the comparative responsibility principle. At the very least, the uncollectible share should be reallocated among the negligent plaintiff and the available and solvent tortfeasors, according to their relative percentages of comparative responsibility.

The only argument that would support pure proportionate several liability is the argument that holding a tortfeasor liable for a share of the damages which exceeds her percentage of comparative responsibility results in her being held liable for more damages than she tortiously caused or for which she was responsible, and thus makes

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79. *See* sources cited *supra* notes 8-10 and accompanying text.

80. *See* American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 922-23 (Cal. 1978) (Clark, J., dissenting); Fleming, *supra* note 66, at 1483-84, 1491-93. Professor Fleming notes that the analytic and qualitative distinction between a defendant's other-directed and the plaintiff's self-directed negligence "ought, of course, to be heeded in apportioning shares of fault, but does not seem to justify treating the shares, once ascertained, differently under the [comparative responsibility] principle." *Id.* at 1483.

her responsible for others' actions rather than her own. Yet, as we have noted many times above, this argument is invalid. Each tortfeasor was a tortious, actual, and proximate cause of the entire injury and thus is individually fully responsible for the entire injury. The contributorily negligent plaintiff is also individually fully responsible for the entire injury. The contributorily negligent plaintiff should at least be on an equal footing with the tortfeasors who injured her. Thus, liability for the share of the damages which equitably should have been borne by an insolvent or otherwise unavailable tortfeasor should be shared between the contributorily negligent plaintiff and the available and solvent tortfeasors, in proportion to their comparative responsibilities, rather than being placed entirely on the plaintiff, as occurs under pure proportionate several liability.[81]

The final issue is whether the sharing of liability for the uncollectible equitable shares of insolvent or otherwise unavailable tortfeasors should be accomplished under a rule of modified joint and several liability or a rule of modified proportionate several liability. Under modified joint and several liability, the contributorily negligent plaintiff can initially recover the full amount of his reduced claim from any available and solvent tortfeasor, who then bears the expense of locating the other tortfeasors, preparing and proving contribution claims against them, and collecting on those claims, as well as the expense and risk of trying to obtain proportionate reimbursement from the contributorily negligent plaintiff for any uncollectible equitable restitutionary shares of these other tortfeasors. Conversely, under modified proportionate several liability, the plaintiff must bear the expense of locating each tortfeasor, preparing and proving liability claims against each of them, collecting each tortfeasor's initial proportionate several liability share, and then coming back to each (hopefully still) available and solvent tortfeasor to collect her share of any uncollectible shares.

Even when all the tortfeasors are available and solvent, joint and several liability and proportionate several liability are neither functionally nor practically equivalent, as some have assumed.[82] The significant costs in time and dollars of locating, preparing and proving liability claims against, and collecting the appropriate equitable

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81. *See* 2 A.L.I. REPORTERS' STUDY, *supra* note 19, at 147-48, 150-51, 157; Fleming, *supra* note 66, at 1483-84, 1491-93; Pearson, *supra* note 43, at 364; Wade, *Insurance Crisis*, *supra* note 12, at 87-88.

82. *See, e.g.*, 2 A.L.I. REPORTERS' STUDY, *supra* note 19, at 140-41; 4 HARPER ET AL., *supra* note 4, § 22.17, at 412; Pearson, *supra* note 43, at 362. *But see id.* at 364-65 & n.92.

restitutionary share of damages from each tortfeasor will be allocated to the initially liable defendant under joint and several liability, but to the plaintiff (thereby significantly delaying and reducing the plaintiff's ultimate recovery) under proportionate several liability. The costs in time and dollars will be even more significant when all the tortfeasors are not available and solvent, so that an additional step must be taken: redistributing the insolvent or otherwise unavailable tortfeasors' equitable restitutionary shares between the contributorily negligent plaintiff and the available and solvent tortfeasors.

Generally, the injured plaintiff can least afford these expenses and delays.[83] Moreover, the analytic and qualitative distinction between the contributorily negligent plaintiff's responsibility for his injury, on the one hand, and each tortfeasor's corrective-justice responsibility for the injury, on the other, should at least justify putting these costs on the tortfeasors rather than on the contributorily negligent plaintiff, by adopting the modified joint and several liability rule.[84] As the critics of this rule point out, it subjects the solvent tortfeasor who initially pays the plaintiff to the risk of not being able to obtain reimbursement later from the plaintiff for the plaintiff's share of any uncollectible shares. For this reason alone, apparently, they conclude that modified proportionate several liability is preferable to modified joint and several liability.[85] This risk, however, could be dealt with in appropriate cases under the modified joint and several liability rule by requiring the plaintiff to provide some financial guarantee or by allowing the solvent tortfeasor to pay an appropriate portion of the damages into the court until the risk is resolved.

Moreover, the modified joint and several liability rule has the advantage of being able to be applied across the board, in situations involving innocent plaintiffs as well as contributorily negligent plaintiffs, whereas the modified proportionate several liability rule has not the slightest bit of justification in situations involving innocent plaintiffs.[86] No doubt for these sorts of reasons, the modified joint and several liability rule was incorporated, after extensive and careful deliberation, in the Uniform Comparative Fault Act[87] and has been

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83. *Cf.* 4 HARPER ET AL., *supra* note 4, § 22.17, at 413 (defendants are more likely to be insured).

84. *See supra* note 77 and accompanying text.

85. *See* 2 A.L.I. REPORTERS' STUDY, *supra* note 19, at 154-55; Pearson, *supra* note 43, at 364-65 & n.92.

86. *See supra* text accompanying notes 66-76.

87. UNIF. COMP. FAULT ACT § 2, 12 U.L.A. 49 (West Supp. 1992). The Reporters' Study prepared for the American Law Institute erroneously states that the Uniform Comparative

endorsed by leading tort scholars.[88] It is the minimum acceptable position that can be defended, as a matter of either logic or fairness, by any court or legislature considering whether there should be a retreat from the traditional joint and several liability doctrine under a comparative responsibility liability regime.

CONCLUSION

The current situation with respect to joint and several liability in the United States is one of confusion and chaos, as even the defense advocates have admitted.[89] Even for tort lawyers, the joint and several liability doctrine apparently is not a simple concept. For nonlawyers and even many non-tort lawyers, the doctrine often seems to be a mystery. As Representative Greiman remarked in initiating the debate on joint and several liability in the Illinois House of Representatives, "I suppose that four months ago in this General Assembly, a discussion of joint liability would be [about] the penalty imposed for a violation of the marijuana statute."[90] Legislators and others, including supporters as well as opponents of the doctrine, clearly have failed to understand the true basis and effects of the joint and several liability doctrine and its proposed replacement, proportionate several liability.[91]

At the same time, legislators were under tremendous political pressure to do something—anything—as a tangible response to the latest insurance crisis, and the joint and several liability doctrine typically was the principal target of the defense lobbyists.[92] As Senator Berman noted in explaining his support of a limited modification

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Fault Act adopts modified proportionate several liability, rather than modified joint and several liability. The study also greatly understates the burden that is imposed on a plaintiff by modified proportionate several liability, ignores the significant adverse impact that burden can have in delaying and reducing the plaintiff's ultimate recovery, and, without any explanation or justification, apparently contemplates imposing that burden on innocent plaintiffs as well as contributorily negligent plaintiffs. *See* 2 A.L.I. REPORTERS' STUDY, *supra* note 19, at 154-55.

88. *See, e.g.*, Fleming, *supra* note 66, at 1483-84, 1491-93; *supra* text accompanying note 12 (Dean John Wade).

89. *See* REAGAN REPORT UPDATE, *supra* note 7, at 77; Mutter, *supra* note 3, at 304-05, 318.

90. ILLINOIS HOUSE DEBATE, *supra* note 20, June 30, 1986, at 8.

91. The misunderstanding has been amply documented in this Article. Some legislators have explicitly noted their confusion over the doctrine. *See, e.g.*, MAINE LEGIS. REC., Mar. 16, 1988, at H-288 (remarks by Rep. Paradis).

92. *See, e.g.*, ILLINOIS HOUSE DEBATE, *supra* note 20, June 30, 1986, at 59 (remarks by Rep. Homer); ILLINOIS SENATE DEBATES, *supra* note 20, May 21, 1986, at 89 (remarks by Sen. Barkhausen); James Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J., July 1985, at 61; Mutter, *supra* note 3, at 202-05.

of the joint and several liability doctrine in Illinois, despite his belief that the facts failed to justify any modification of the doctrine, "[n]ow I don't like to try to hold the ocean back, this is a compromise amendment."[93]

Given these two factors, it is remarkable that elimination of joint and several liability in all or almost all situations occurred in only a few states. Apparently, many legislators had an innate sense of the justice of the joint and several liability doctrine and the injustice of its proposed replacement, proportionate several liability. This innate sense, combined with the pervasive misunderstanding of the doctrine and the tremendous political pressure for its abolition, resulted in legislatures taking a wide variety of actions, thereby introducing a major amount of nonuniformity into what was previously a fairly uniform tort law throughout the United States.[94] As of 1988, only

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93. ILLINOIS SENATE DEBATES, *supra* note 20, May 21, 1986, at 86; *see id.* at 93 (remarks by Sen. Rock); ILLINOIS HOUSE DEBATE, *supra* note 20, June 30, 1986, at 59 (remarks by Rep. Homer). Similar statements were made in the legislative debates in other jurisdictions.

94. Professor Twerski steadfastly maintains that legislators were not confused and did not succumb to political pressure, but rather "fully appreciated the underlying issues" and "for the most part responded with considerable moderation." Twerski, *Revolt*, *supra* note 18, at 1127. Twerski does not argue that the joint and several liability doctrine itself is illogical or unfair. Indeed, he states that "Professor Wright's critique of the movement to abolish or modify the . . . doctrine raises perceptive and troubling questions as to the fairness of the proposed legislative solutions." *Id.*; *see id.* at 1145 ("The formal structure of [Wright's] arguments cannot be assailed."). Rather, Twerski argues that joint and several liability has been, and apparently should be, eliminated or limited because it exacerbates the adverse effects of independent problems in the tort liability system — problems that allegedly cannot be resolved through judicial or legislative action. He asserts that state legislatures overwhelmingly rejected total elimination of joint and several liability (which Twerski apparently concedes is unjustified) and instead acted rationally and moderately by (1) establishing "minimum validation level" comparative-responsibility thresholds to guard against the alleged problem of unfounded findings of "minimal" or "miniscule" fault and (2) abolishing joint and several liability for noneconomic damages (only) to ameliorate the alleged problem of unreasonable awards of noneconomic damages. *See id.* at 1129-32, 1133-43; Aaron D. Twerski, *The Baby Swallowed the Bathwater: A Rejoinder to Professor Wright*, 22 U.C. DAVIS L. REV. 1161 (1989); *see also supra* note 46 (discussing Twerski's novel immunity-related arguments). He concludes, with what might be considered a less than ringing endorsement of the legislatures' actions, that "[m]y own sense is that the more moderate statutes are not half-bad." Twerski, *Revolt*, *supra* note 18, at 1145.

As I have argued elsewhere, it is doubtful that the independent problems that Twerski discusses are significant or, in any event, that it is proper or wise to attempt to solve them indirectly by dismantling the joint and several liability doctrine. *See* Wright, *Allocating Liability*, *supra* note *, at 1145, 1149-52, 1154-56; Wright, *Reply*, *supra* note *, at 1156-58; *supra* notes 49 & 50 and text accompanying notes 48-51. Moreover, as a descriptive theory, Twerski's rationalization of the legislative actions is contradicted by the evidence. Only nine of the thirty-five states that had eliminated, limited, or modified joint and several liability through 1988 had adopted the threshold approach, and each adopted a threshold higher than

eight states had replaced joint and several liability with proportionate several liability in almost all tort actions. At the other end of the spectrum, fifteen states and the District of Columbia had made no changes in the doctrine. The rest of the states had adopted a wide variety of intermediate positions. A few states shift to proportionate several liability only for actions against certain categories of defendants. Other states use proportionate several liability only if the plaintiff was contributorily negligent, or only for a tortfeasor whose comparative responsibility was less than the plaintiff's or less than a certain percentage. Some states apply proportionate several liability only to noneconomic damages. Some states put a cap or limit on the tortfeasor's joint and several liability. Other states reallocate any uncollectible shares that equitably should have been borne by insolvent or otherwise unavailable tortfeasors among all the responsible parties, including the plaintiff if the plaintiff was negligent. Some states

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would be needed to handle the alleged problem of improper findings of "minimal" or "minuscule" tortious conduct: Hawaii (25% for noneconomic damages), Illinois (25%), Iowa (50%), Montana (50%), New Jersey (60% for noneconomic damages, 20% for economic damages); New York (50% for noneconomic damages), Oregon (15% for economic damages), Texas (20% if plaintiff negligent, 10% otherwise), West Virginia (25% in medical malpractice and governmental liability cases). *See* Wright, *Allocating Liability*, *supra* note *, at 1166-67 & nn.79, 83-84, 87, 89; Wright, *Reply*, *supra* note *, at 1147 n.2. Only four states eliminated joint and several liability for noneconomic damages only: California and Ohio if the plaintiff was contributorily negligent, and Hawaii and New York subject to percentage thresholds. Florida and Oregon, in addition to eliminating the doctrine for almost all noneconomic damages, also limited the doctrine's applicability to economic damages. *See* Wright, *Allocating Liability*, *supra* note *, at 1167 & nn.85-89.

The approaches adopted in the other states varied widely, from complete or almost complete elimination in eight states (Arizona, Colorado, Idaho, Kansas, North Dakota, Utah, Wyoming (perhaps only if plaintiff was contributorily negligent), and Vermont) to substantial elimination in another eight states (Georgia (discretionary), Indiana, Kentucky (discretionary), Louisiana, New Mexico, Nevada, Oklahoma, and Washington) to minimal elimination in one state (Maine) to caps in four states (Alaska, Louisiana, Missouri, and South Dakota) to reallocation of uncollectible shares in four states (Connecticut, Michigan, Minnesota, and Missouri). *See id.* at 1165-68 nn.74, 76-78, 80-82, 90-93.

Many states, including many which adopted thresholds or eliminated joint and several liability for noneconomic damages only, retained joint and several liability in precisely those areas in which Twerski indicates the greatest concern about improper findings of "minimal" tortious conduct: environmental and toxic torts and products liability. In general, the statutes are riddled with exceptions. *See id.* at 1165-68 nn.74, 78-81, 83-84, 87-89, 91-93; Wright, *Reply*, *supra* note *, at 1147 n.2. In sum, Twerski's rationalization does not explain the legislative actions. My analysis, which notes the varying mix of political pressure, confusion and misunderstanding generated by misleading arguments, and a gut sense of the justice of joint and several liability, does explain the widely varying legislative actions (but does not justify them).

combine these various approaches. Most states which replaced, limited, or modified the joint and several liability doctrine made exceptions for certain types of actions. Some of the statutes are riddled with exceptions.[95]

Given the difficulty of repealing or revising legislation that is strongly favored by a powerful combination of business and governmental entities, it may be a long time, if ever, before the joint and several liability doctrine is fully reestablished in those jurisdictions in which legislatures were stampeded during the latest insurance crisis into replacing it with proportionate several liability in some or all circumstances.[96] In jurisdictions like Tennessee, however, in which there as yet is no such statutory barrier and there is opportunity for a calmer, more objective, and better informed consideration of the issue, there is reason to believe that joint and several liability (preferably in its modified form) will be retained, given the logic and justice of joint and several liability on the one hand and the illogic and injustice of proportionate several liability on the other. The Tennessee Supreme Court or legislature, upon a more careful consideration of the issue, should follow the urgings of Tennessee's eminent tort scholars and do the right thing by retaining (modified) joint and several liability.

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95. For descriptions of each state's rules on joint and several liability, *see* Mutter, *supra* note 3, at 304 n.491, 315-18 & nn.535-46; Wright, *Allocating Liability*, *supra* note *, at 1165-68 & nn.74 & 76-93; Wright, *Reply*, *supra* note *, at 1147 n.2.

96. The statutes eliminating or limiting joint and several liability might be struck down as being unconstitutional under various states' due process, equal protection, and access to the court provisions. Prior decisions upholding such statutes have based their decisions on faulty understandings of the basis and effect of the joint and several liability doctrine on the one hand and proportionate several liability on the other. *See, e.g., supra* note 15 (constitutional challenge to Florida statute).