

# **The Coase Theorem and Tax Law**

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## 1. Introduction

In his 1960 paper “The Problem of Social Cost,” Ronald Coase famously observed that, in a world with zero transactions costs, negotiation among interested parties can overcome the inefficiencies otherwise caused by externalities.<sup>1</sup> This is sometimes referred to as Coase’s “efficiency proposition.” Coase further argued that, in this frictionless world, the assignment of legal entitlements or obligations would not affect the ultimate allocation of resources, and therefore the efficiency of this allocation.<sup>2</sup> This is sometimes known as Coase’s “invariance proposition.”<sup>3</sup> These two propositions collectively make up the so-called Coase Theorem. Thus, for example, in the absence of transaction costs, it is irrelevant whether we give a manufacturer the “right to pollute” or we give the adjoining property owner the “right to be free of pollution.” Either way, the parties will agree to the same (efficient) amount of pollution. Coase also noted that the assignment of legal entitlements can have distributional consequences, despite the absence of transaction costs. Thus, although it makes no difference in terms of efficiency whether the polluter or the pollutee has the relevant legal entitlement, again assuming zero transaction costs, the assignment of the legal entitlement can make a big difference to the parties involved and can dramatically affect their relative wealth. We refer to this observation as the Coasean “distributional *variance* proposition.”

Although Coase’s original paper focused on a hypothetical world in which transaction costs were totally absent, Coase was well aware that in all real-world settings transaction costs are present and, in many settings, high.<sup>4</sup> For this reason, the Coase Theorem is perhaps most influential for what it says about a world *with* transaction costs: that in such a world the assignment of legal entitlements (or the choice of legal rules) *can* affect overall efficiency.<sup>5</sup> Indeed, this re-statement of Coase’s basic point can reasonably be understood as the conceptual foundation of the entire law-and-economics movement, which has risen to prominence within the American legal academy over the past several

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<sup>1</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

<sup>2</sup> Steve G. Medema & Richard O. Zerbe, Jr., *The Coase Theorem*, in *Encyclopedia of Law and Economics*, Volume I. The History and Methodology of Law and Economics 839 (Boudewijn Bouckaert, and Gerrit De Geest, eds.) (2000), available on line at <http://users.ugent.be/~gdegeest/0730book.pdf>.

<sup>3</sup> *Id.* at 840.

<sup>4</sup> Ronald H. Coase, *The Firm, the Market, and the Law* 174 (1988) (“The world of zero transaction costs has often been described as a Coasian world. Nothing could be further from the truth.”).

<sup>5</sup> A. Mitchell Polinsky, *An Introduction to Law and Economics* 15 (3<sup>rd</sup> ed. 2003)

decades. Most law-and-economics scholarship in the fields of torts, property, and contract law can be seen as attempting to assess whether existing legal rules are efficient or to ascertain the most efficient legal rule for a given situation, given the existence of transaction costs.

One famous example of this sort of scholarship would be the work of Guido Calabresi in tort law. In his seminal book, “The Cost of Accidents: A Legal and Economic Analysis,” Calabresi concluded that, assuming transaction costs prevent a Coasean result, the optimal tort liability regime is one that minimizes the sum of the cost of accidents and the cost of avoiding accidents, including the administrative costs of the tort system. Calabresi concluded that such a regime will sometimes call for assigning tort liability to the “cheapest cost avoider” – that is, to the party able to minimize negative externalities (or third-party harms) most efficiently. We refer to this party as the cheapest-cost or least-cost *harm* avoider.

Unbeknownst to most lawyers, but well known to economists, there is a theorem within the economic analysis of taxation that is, on its face, strikingly similar to the Coase Theorem. This notion, dubbed the “theorem of the invariance of tax incidence” by economist Hugh Dalton in the 1950s, has been present in the public finance literature for decades. Although this theorem is rarely stated formally, the informal version goes something like this: The incidence of a tax imposed on the sale or purchase of a good or service will be independent of the assignment of the legal obligation to remit the tax to the government.<sup>6</sup> That is to say, it does not matter if the obligation to remit the tax is imposed on the seller or the purchaser of a good or service: the result will be the same. By “obligation to remit” we mean the obligation imposed by law on a private party to transfer funds in satisfaction of a particular legal liability. (As we discuss more fully below, a precise statement of the Coase Theorem also requires the use of the concept of remittance.) As with the Coase Theorem, the tax remittance invariance conclusion depends on a number of assumptions, although in the tax remittance case the assumptions have largely been implicit. Because this version of the tax remittance invariance idea is

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<sup>6</sup> See, e.g., Harvey S. Rosen & Ted Gayer, *Public Finance* (8<sup>th</sup> ed. 2008); Joseph E. Stiglitz, *Economics of the Public Sector* (3<sup>rd</sup> ed. 2000).

about incidence, we will refer to it as the “Tax Remittance Invariance Proposition—Incidence,” or TRIPI for short.

The reasoning underlying the tax remittance idea also implies a parallel efficiency (or inefficiency) proposition. That is, under standard competitive-market assumptions, the allocation of resources — and therefore the welfare costs of a tax — do not depend on who (as between the two parties to the transaction) is required to remit the tax to the government. We call this the “Tax Remittance Invariance Proposition—Efficiency” (or TRIPE).

In contrast to the vast literature expanding on the Coase Theorem – exploring its implications for various areas of private law (including torts) and investigating its underlying assumptions<sup>7</sup> – little scholarly attention has been directed at understanding the key assumptions underlying the tax law invariance ideas.<sup>8</sup> What is even more puzzling is that, despite the general acceptance of the tax remittance invariance propositions within the public finance literature and the canonical status of the Coase theorem within the law-and-economics literature, the obvious parallels, and somewhat less obvious differences, between Coase and the TRIPs have gone completely unanalyzed. In this article, using examples from tort law as our primary analytical lens, we aim to fill these gaps in the literature. In addition, we explore the generality or lack of generality of the tax remittance propositions by incorporating some of the insights of the Coase literature; and we examine the extent to which the tax remittance invariance propositions depend on their underlying assumptions, just as is the case with the Coase Theorem.

One contribution of the Article to the Coase literature is to emphasize the importance of the distinction between two general types of situations: those in which the parties in question – the ones whose activities are jointly causing an external harm or cost – are in a contractual relationship with each other and those in which they are not. Furthermore, we show how the same distinction matters in the tax context. Thus, we explain how Coase’s distributional variance proposition applies only in non-contractual settings, such as those involving conflicting land uses – as in the classic case of the farmer and the rancher. In

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<sup>7</sup> Some of this literature is cited and summarized in Medem & Zerbe, *supra* note \_\_ and in David De Meza, *Coase Theorem*, in 1 *The New Palgrave Dictionary of Economics and Law* 270 (Peter Newman, ed.) (1998).

<sup>8</sup> One exception is Joel Slemrod, *Does It Matter Who Writes the Check to the Government? The Economics of Tax Remittance*. 61 *Nat. Tax J.* 251 (2008).

contractual settings, however, a sort of distributional invariance proposition will hold. That is, regardless of which party is assigned the obligation to remit a given cost, the actual burden of that cost remittance obligation will depend on the relative elasticities of supply and demand for whatever good or service is the subject of the contractual relationship and the origin of the incurred cost.<sup>9</sup> In the economics literature, of course, a version of the same point exists with respect to taxes (rather than harms) that are triggered by transactions; we gave it the name TRIPI above. As this Article shows, however, just as there is distributional *variance*, depending on the assignment of legal entitlements, in noncontractual Coasean settings (i.e., farmers and ranchers), there would be distributional variance in the assignment of tax remittance obligations in the noncontractual tax setting. This point is new to the tax literature.

The primary normative conclusion that emerges from this Article's blending of torts and tax can be summarized as follows: Parallel with Calabresi's formulation for the design of an optimal tort system, an optimal tax remittance regime requires that tax liabilities be assigned so as to minimize the overall social costs of compliance and administration, for a given level of achievement of the tax law's desired distributional and revenue goals. As is true with the administration of tort law, the overall compliance and administrative costs of a tax system will sometimes differ dramatically depending on which party or class of parties (e.g., employers versus employees; consumers versus retail businesses) is saddled with the legal obligation to transfer the tax monies to the government. Thus, optimal tax policy may in some situations call for assigning the tax remittance obligation to the lowest-compliance cost tax remitter – that is, the party with the lowest private compliance costs per dollar of tax remitted. In addition, however, it will sometimes be optimal to assign the remittance obligation to the party for whom the administrative (or enforcement) cost per dollar of tax revenue raised is lowest – or the lowest-administrative-cost tax remitter. For one example, if the remittance obligation is assigned to a party who is innately dishonest and who is engaged in a business that provides numerous low-cost opportunities for evasion, then either much of the tax will go

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<sup>9</sup> Richard Craswell ably demonstrates this point. Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 Stan. L. Rev. 361 (1990). Craswell's article focuses on the contractual relationship between injurers and victims (such as product manufacturers and product consumers). Our analysis focuses on situations in which two or more parties are collaborating in some activity that causes harm to a third party.

uncollected (if we imagine a fixed IRS enforcement budget) or the cost of collection for the government will be much higher than if the remittance obligation were imposed on a willing party. What this implies is that, contrary to the naïve interpretation of the Coase Theorem (but consistent with the Calabresian notion of the least-cost harm avoider), overall social welfare will be maximized only if the tax planning authority takes into account the relative compliance and administrative costs in assigning tax remittance obligations.

The Article proceeds as follows. Section 2 offers a primer on the Coase Theorem, beginning with the classic case of neighbor externalizing on neighbor (farmer and rancher), and explains the basic invariance propositions. Section 3 shifts the focus to Coasean situations involving buyers and sellers in a contractual relationship whose interactions cause harm to third parties. Using supply-and-demand diagrams, we illustrate (in a new way) some of the most basic findings of the economic analysis of law, including both the Coasean invariance and efficiency propositions and the Calabresian least-cost avoider idea. Also in section 3 we make an efficiency argument for vicarious employer liability for employee torts and suggest this doctrine could in theory be expanded in certain situations to (a) independent contractors and (b) torts beyond the scope of employment. Our analysis builds on the standard law-and-economics analysis of vicarious liability, but emphasizes the need to minimize not only the costs of third-party harms but also administrative costs.

Section 4 shifts from torts to tax – specifically, to taxes triggered by buyer/seller contractual relationships, such as employer/employee relationships. The section uses supply-and-demand curves to illustrate the tax remittance invariance propositions in their classic form, as found in every public finance textbook, under the assumptions of zero (or symmetrical) compliance and administrative costs. Section 4 then uses those same diagrams to explain how the invariance propositions no longer apply under the more realistic assumptions of asymmetric compliance and administrative costs. More specifically, we show that the optimal assignment of tax remittance responsibility (as between buyer and seller) turns on which assignment minimizes the sum of compliance and administrative costs incurred to raise a given amount of revenue. We argue that, in general, the least-overall cost tax remitter, for taxes triggered by buyer/seller transactions,

will be the larger, wealthier party – both because there are economies of scale to enforcement against large tax remitter and because wealthier taxpayers are less likely to be judgment proof.

Section 5 discusses some real-world implications of our analysis, both normative and positive. As a positive matter, our analysis provides an explanation for why the U.S. income tax system and most other income tax systems require employers to remit the bulk of their employee’s personal income tax liabilities. Likewise, our analysis explains why the remittance obligation for sales taxes is usually imposed on sellers rather than buyers. Our framework also explains why tax remittance obligations are generally made mandatory (or non-transferable) in the sense that Coasean bargaining over the tax remittance obligation is not permitted and the fact that, under the U.S. tax system, failure to remit payroll and labor income taxes will result in “responsible parties” being held jointly and severally liable for the full amount of the unremitted taxes. Our analysis also suggests some possible reforms of existing tax enforcement policy. For example, it may make sense to expand employers’ tax remittance obligation to include payments to independent contractors, as employers in those situations as well are more likely to be the least-cost remitters – both in terms of compliance and administrative costs. In other words, the existing distinction between employees and independent contractors, which may be optimal for tort law purposes, may not be optimally drawn for tax remittance purposes. In addition, we explore the possibility of expanding the role of employers as remitters for their employees’ tax liabilities even for income earned outside of the employment relationship. Also, we suggest that remittance responsibility for business or corporate remitters should be tied to the size of the remitter; that is, the larger the firm (in terms of gross revenue, profits, or assets), the stronger the argument for expanding their compulsory remittance responsibility. Moving beyond income taxes, our analysis explains why, under certain conditions, it will be more efficient to impose *in rem* tax liability for property taxes (where the remittance obligation is imposed, in effect, on a piece of property rather than on a person) rather than standard *in personam* liability and why “reverse withholding” regimes, under which remittance responsibility is triggered by any commercial interaction with difficult-to-tax parties, can achieve the desired level and distribution of tax collection at the lowest possible overall cost.

## 2. A Primer on Coase: Farmers, Ranchers, and Other “Neighbors”

The Coase Theorem makes what now seems like an obvious point: in a world with zero transaction costs, the initial assignment of a legal right or entitlement will not affect the allocation of resources, because the affected parties will always bargain to the efficient result, so long as everyone involved is rational (in the way that economists normally mean that term) and the entitlement in question is alienable (that is, the entitlement can be transferred). Before exploring this conclusion, it will be useful to clarify what is meant by the term “legal entitlement” in this context. In general, the Coasean logic has been applied to situations in which the action of one party causes some harm or imposes some cost on another party – the classic negative externality.<sup>10</sup> The *entitlement* at issue, then, is the right to avoid negative consequences of the action: either the right of “the injurer” to impose the cost on others or the right of “the victim” to prevent the harm or to insist on compensation for it.<sup>11</sup>

The quintessential example of the Coase Theorem in action, from Coase himself, involves conflicting land uses, specifically neighboring landowners, a cattle rancher and a corn farmer. The Coasean question, then, is who, as between the farmer and the rancher, should be legally responsible for the crop damage caused when the rancher’s cows happen to trespass on the farmer’s property and damage his corn. Or, put in terms of this Article’s framework, who should be assigned the *remittance obligation* with respect to the crop damage caused by any cattle that stray onto the farmer’s property. If the rancher is legally required to *remit* to the farmer an amount of money equal to his corn damage, we would say that the entitlement rests with the farmer and the remittance obligation with the rancher. And if the rancher is not required to remit the money for any harm caused by his straying cows on the farmer’s property, we would say that the remittance

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<sup>10</sup> Of course, a symmetrical Coasean story can be told for positive externalities, where the externality is not a cost or harm but some benefit that is bestowed unintentionally by one party on another. In those settings too, if transaction costs are zero, people are rational, and entitlements are freely tradable, parties will bargain to the efficient result. Following the literature, we tend to focus on negative externalities.

<sup>11</sup> If the victim (the party who suffers the harm in the first instance) is given the entitlement to be free from harm, a second issue is what sort of rule would be used to protect that entitlement: a property rule or a liability rule. Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harv. L.Rev. 1089 (1972). If the entitlement is protected by a property rule, then the victim has the legal right to get an injunction to stop the harm-causing activity in question. If it is protected by a liability rule, then the victim’s legal remedies are limited to an ex post suit for damages.

obligation rests with the farmer (and the legal entitlement with the rancher).<sup>12</sup> What Coase demonstrated was that, in a frictionless world, it does not matter (from an efficiency perspective) how the legal entitlement (or remittance obligation) is assigned. The efficient, joint-wealth-maximizing outcome will eventually be reached through a process that is now sometimes referred to as “Coasean bargaining.” If it is efficient to produce corn but not cattle on two adjoining pieces of property, or the reverse, the neighboring landowners will bargain to that result.<sup>13</sup> And they will do so whether the entitlement is placed with the farmer or with the rancher. If efficiency calls for both corn and cattle to be produced but for a fence to be erected between the two properties, then that is what will happen, and it will happen in the most efficient way possible, with the parties agreeing that the best fence builder should do the job.<sup>14</sup> This is Calabresi’s cheapest-cost harm avoider idea, and the law can achieve this result in a Coasean world simply by setting the initial legal entitlements one way or the other and letting the parties

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<sup>12</sup> Of course, however the remittance obligation for the costs of damaged corn is allocated between farmer and rancher, the actual economic burden of this obligation may then be “passed on” to the farmer’s employees or customers, or to those of the ranchers, depending on, among other things, the relative elasticities of relevant supply and demand in those markets. We have more to say about this sort of cost pass-through below.

<sup>13</sup> For example, imagine that the lost profit to the farmer of not being able to grow and sell his corn (should the rancher next door be given the entitlement to ignore the damage caused by his cattle) would be \$100; and the cost to the rancher of not being able to have cattle would be \$150 in lost profit. In that simple case, if the social planner were to give the entitlement initially to the rancher, the rancher would indeed decide to have cattle, letting them roam the countryside, and would make \$150 of profit; and the farmer, anticipating the rancher’s behavior (and the potential damage to his crops), would opt not to plant corn and would thereby lose \$100 of potential corn profit. So we would have cattle but not corn from these two landowners, and this, on the facts, would be the efficient result as it maximizes the joint benefit to the parties of their uses of their land net of costs.

<sup>14</sup> Imagine that in the previous example the farmer could for \$75 build a fence that would make it possible for both the farmer to have his corn and the rancher to have her cattle but, for whatever reason, the rancher’s cost of building a fence was much higher—say, \$200. Obviously, the parties under the Coasean assumptions would agree to have the farmer build the fence, and this would happen regardless of the initial assignment of entitlements. (In our example, so long as a fully effective fence could be built for less than \$250 (the total combined profit of farming and ranching), then the fence would be built.) This conclusion follows from the fact that having the farmer build the fence would produce the highest joint value from the two properties. (\$150 cattle profit + \$100 corn profit - \$75 fence cost = \$175.) In Calabresi’s famous phrasing, the farmer in this situation would be the “cheapest cost avoider” and would therefore, under Coasean assumptions, end up with the responsibility for building the fence. In this Article we use the term cheapest-cost or least-cost harm avoider in cases where the private costs are also social costs; we use the term cheapest- or least-cost liability avoiders in cases where the private costs are not social costs or, in particular, when the private benefits of tax avoidance do not correspond to social benefits. This is just another way of illustrating that, in the absence of transaction costs, the parties will internalize all external costs and will therefore take all cost-justified measures to reduce those costs. And the same bargaining that will assign the entitlement to the party with the highest-valued use will also ensure that the party who is best able to reduce the size of the negative externality (the cheapest-cost harm avoider) will do so. It is all part of the Coasean bargain.

negotiate. The same analysis can be applied to any negative externality: pollution, automobile accidents, whatever.<sup>15</sup> As long as transaction costs are assumed to be zero (and everyone is rational), all affected parties will take part in the Coasean bargaining process; all externalities will be internalized. There will be the “right,” or social-welfare-maximizing amount of the activity and all cost-justified investments in cost reduction will be made. In the torts literature, these latter two effects are known as *activity-level effects* and the *care-level effects*.<sup>16</sup>

Numerous criticisms of the Coase Theorem have been advanced over the years, both of the efficiency proposition and the invariance proposition. Some scholars, for example, have pointed out that invariance will not hold when there is a divergence between the amount a party is “willing to pay” (WTP) to acquire an entitlement and the amount he is “willing to accept” (WTA) to give up the same entitlement, due perhaps to the kind of endowment effect discussed in prospect theory.<sup>17</sup> This kind of effect has been confirmed in empirical studies, and it can lead to invariance of outcomes – though not to inefficiency, assuming a world of zero transaction costs. In addition to the WTP/WTA critique, there are game-theoretic objections to both the invariance and the efficiency propositions. Many of the paradigmatic examples of Coasean bargaining involve situations that could give rise to strategic behavior by the parties, which may lead to a result that is not joint-wealth-maximizing. For example, if the interactions between the parties are modeled as a non-cooperative game with asymmetric information, strategic behavior of various sorts may prevent an efficient outcome.<sup>18</sup> This is sometimes referred to as the bargaining problem or the problem of bilateral monopoly. Some commentators argue that the bilateral monopoly critique fails to take seriously the zero-transaction cost assumption, which includes an assumption of perfect information on both sides (including information about the payoffs to each side of all possible outcomes). Under those assumptions, bargaining failures would not occur. But even so, it can hardly be denied that in many real-world settings between two (or relatively few) bargaining parties some value-maximizing outcomes are not achieved, either because of transaction costs

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<sup>15</sup> See, e.g., Polinsky, *supra* note \_\_.

<sup>16</sup> Steven Shavell, *Economic Analysis of Accident Law* (1987).

<sup>17</sup> See, e.g., Herbert J. Hovenkamp, *Marginal Utility and the Coase Theorem*, 75 *Cornell L. Rev.*, 783 (1990)..

<sup>18</sup> Donald H. Regan, *The Problem of Social Cost Revisited*, 15 *J. L. & Econ.*, 427 (1972).

(conventionally understood) or by strategic behavior; and the relevance of the Coase Theorem to those situations can reasonably be questioned.

Notably the traditional Coasean bargaining situation involves conflicting land uses in which there is no prior contractual relationship between the two parties. The injurer and the victim are not in a contractual seller-buyer relationship with each other. Rather, they are *just* neighbors; and their separate activities happen to conflict in the sense that, because the activities take place in close proximity to each other, a particular external cost arises, the remittance obligation for which needs to be assigned, explicitly or implicitly. The same would be true for the property owner whose manufacturing business pollutes the neighbors' air or water; in that case, the pollution would not arise out of the transaction between the manufacturer and its consumer/neighbors but is unrelated to any such transaction.

There are two interesting implications from this non-contractual setting. First, unlike a competitive market where the market price is set by the intersection of supply and demand, in a classic Coasean conflicting-land-use situation the distribution of the gains from trade is determined by bargaining between the parties. Thus, assuming some sort of bargain is reached (and the bilateral monopoly overcome), the distribution of the gains from trade will depend on the parties' relative bargaining positions.<sup>19</sup> The other interesting implication of the standard Coasean non-contractual setting is that, precisely because these are bargaining situations, the assignment of the legal entitlement to one side or the other will have distributional consequences. We have called this insight the Coasean distributional variance proposition.<sup>20</sup> The point is that having the legal right to impose costs onto your neighbor, or the legal right to prevent your neighbor from imposing costs onto you, is itself a distinct and valuable asset. Thus, if the rule has always been that ranchers are entitled to let their cattle roam the countryside,

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<sup>19</sup> Continuing with our example of the farmer and rancher who are neighbors (and whose land uses are incompatible), imagine what would happen in a Coasean world if the "entitlement" not to remit is given to the farmer. Given that the rancher can make \$150 ranching, and the farmer only \$100 farming, the rancher will presumably pay the farmer to purchase his entitlement – that is, pay him to remit. Thus, the efficient outcome would be achieved. However, the precise amount the rancher would end up paying the farmer is impossible to determine *ex ante*. It would fall somewhere between \$100 and \$150, with the exact amount depending on the relative bargaining power of the two parties.

<sup>20</sup> As we discuss below, the Coasean distributional variance proposition does not apply in competitive market settings where the harm (or the tax) in question arises out of a contractual market transaction.

switching the entitlement to farmers would cause a drop in the value of ranches relative to farms. In effect, one of the costs of farming would have disappeared and reappeared as a cost of ranching. Such a change in legal rules would be akin to a lump-sum transfer from farmers to ranchers. The same analysis could be applied to the example of the polluting manufacturer. If manufacturers suddenly become responsible for the pollution they impose on their neighbors, the manufacturing business would then be less profitable and precisely by the amount of the expected value of the cost of pollution or pollution abatement. Likewise, the value of owning a car is somewhat less if the owner has to pay for injuries to pedestrians than if he does not.

These distributional consequences are diminished to the extent the affected assets of the parties are costlessly convertible to another equally profitable use or, conversely, that free entry into an industry dissipates the long-run gain in profits that would otherwise accrue to those already in business.<sup>21</sup> Moreover, to the extent the harm in question can be prevented with a trivial investment on the part of either party. For example, in the extreme case, if ranchland could just as easily be used for farming (say the land is equally profitable put to either use such that the choice to farm or ranch was virtually a matter of indifference to the landowner), and assuming zero costs of converting from one to the other, there would be no distributional effect of altering the entitlement at issue. When the rule changes and ranchers were required to corral their cattle or pay for the damage caused, the rancher could simply switch to farming. Of course, if ranchland is not costlessly convertible to farmland or if the farmer has made ranching-specific investments in livestock or equipment, then a change in the rule will affect the value of the rancher's assets. The same would be true on the farmer side of things, as the value of farming-specific investments would presumably rise. We could tell the same story in the other direction, with farmers losing value and ranchers gaining; or we could substitute any other example of a negative externality for that the rancher/farmer scenario. Hence, if a polluter could cheaply make some change in their operations that would eliminate the resulting pollutants, then the polluter's entitlement to impose costs on its neighbor would not be worth very much. And so on. Of course, notwithstanding this caveat, there will

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<sup>21</sup> This argument would not apply if the change in entitlement applied to just one adjacent farmer and rancher pair; in this case it would be capitalized into the value of one or the other ongoing concern.

be substantial activity-specific investments on one side or the other in many situations such that distributional variance in these types of situations is a nontrivial possibility.

### **3. The Contractual Setting: Sellers, Buyers, and Injured Third Parties**

#### **a. Efficiency and Distributive Invariance: Assuming Zero (or Homogeneous) Compliance and Administrative Costs**

To move the analysis one step closer to our analogy between torts and tax, let us shift from the non-contractual “neighbor” setting to the long-run equilibrium of a contractual setting involving numerous buyers and sellers transacting over a homogeneous product in which no buyer or seller has market power.<sup>22</sup> Thus, imagine that there are two classes of parties who are buyers and sellers with respect to each other; and suppose further that the production or consumption of the good or service sometimes harm third parties. For example, the sellers could be makers of component parts that are sold to buyers who use those parts to manufacture a final product, which is then sold to retail customers -- some of whom end up being injured by the product. Alternatively, the sellers could be manufacturers of products that are sold to consumers who sometimes use the products in ways that injure third parties. For the purpose of illustration, we will for now presume that the market in question is a labor market and that the buyers are employers and the sellers are workers. The problem, then, is that these labor market transactions not only produce value for the parties involved (in terms of wages paid for services received and employer business profits), they also sometimes cause external harms to third parties.<sup>23</sup> Suppose for now that these harms arise within the workers’ “scope of employment,” in the sense that the harm can reasonably be said to be in connection with the job that the worker is doing for the employer. Imagine also that transactions costs between employers and workers are relatively low; that is, because we have a competitive labor market here, we assume that employers and workers reach joint-wealth-maximizing employment contracts. We also assume, however, that the third-party victims are not part of this competitive labor market and that transaction costs prevent them from engaging in

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<sup>22</sup> Although these competitive market assumptions are useful for purposes of illustration, as they allow us to construct simple supply and demand curves to demonstrate our basic points of efficiency and distributional invariance, these assumptions are not necessary to produce the invariance results.

<sup>23</sup> Below we draw an analogy between these harms caused to third parties and taxes owed to the government.

Coasean bargaining with either the employers or workers whose interaction generates the harm. Either employers or the worker can take steps to reduce or eliminate the expected harm that their joint actions impose on third parties, but that neither is a “cheaper-cost harm avoider” than the other; that is, the cost to either of them of reducing the expected harm is the same. The third parties can do nothing to reduce this expected harm. Finally, assume that the administrative costs associated with employer or worker liability are equal. (More on this assumption below.)

Now we have a classic negative externality, and the relevant policy question is to whom should we assign the remittance responsibility for this third-party harm: the workers (the sellers of labor) or the employers (the buyers of labor).<sup>24</sup> To answer these questions, we depict our hypothesized labor market in a series of standard supply-and-demand diagrams. We start with the long-run equilibrium condition prior to the discovery that the buyer/seller transactions are causing harm to third parties. This market is described in Figure 1.

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<sup>24</sup> Notice that we do not consider imposing the cost on the third-party victim. This is because we have assumed that either employers or employees could efficiently reduce or eliminate the expected harm, but that the third parties could do nothing to affect the expected harm. Also, an implicit assumption here is that the only available regulatory response is *ex post* liability for harm. In fact, as we discuss below, *ex ante* regulation is also an option; however, it is likely to be very costly, a fact that will obviously have implications for the choice of the optimal legal response to the externality. We return to this assumption below.

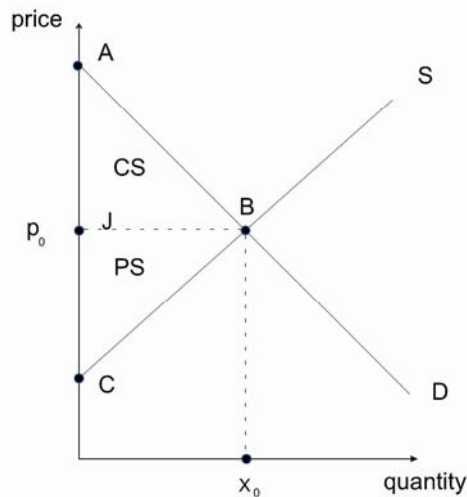


Figure 1

The aggregate demand curve in Figure 1, labeled D, shows for each price (or wage) the total quantity of units of labor that would be demanded by employers. The aggregate supply curve, labeled S, shows the aggregate quantity of units of labor supplied by employees at any given price. The equilibrium price is  $p_0$ , because only at that price will supply equal demand, and therefore will there be no upward or downward pressure on the wage. At the equilibrium,  $x_0$  units of labor will be provided by workers. The areas denoted by triangles CS and PS represent employer surplus and employee surplus, respectively, which is the total dollar value attributable to the ability to provide labor at the equilibrium wage and quantity.

Now suppose that it is discovered that the particular activity that the employees are engaged in on behalf of the employer will on occasion cause harm to third parties. The question then is whether that tort liability (the legal obligation to remit the tort damages to the injured plaintiffs) should be assigned in general to employers or to the employees – and whether it matters. Put in classic Coasean terms: what difference does the assignment of this entitlement/obligation make if we assume zero transaction costs (as between employer and employee), full rationality, and free transferability of legal entitlements? The answer is none, not even a distributional difference. This is because,

given the Coasean assumptions, market forces will in the long run push employers and workers to reach the efficient result. What's more, because of the price nexus here between employers and workers, the way in which this new external cost will be borne by the parties will depend entirely on the elasticities of supply and demand for the workers' labor and not at all on the initial assignment of the legal entitlement, i.e., the remittance obligation.

To illustrate this basic point, we add to our model a new cost, which we assume, for now, is equal to  $c$  per unit of labor sold no matter whether employers or workers are held liable. This assumption is built on two sub-assumptions. One, it entails an assumption that the cost rises proportionally with the aggregate amount of the good or service sold and consumed (here, labor). This assumption will produce a parallel shift in the supply or demand curve in the figures below. Two, it entails the assumption discussed above that neither employers nor workers are cheaper-cost harm avoiders than the other. That the per-unit cost of liability is  $c$ , whether employers or workers are assigned remittance responsibility, also implies that employers and workers have the same risk preferences or the same costs of purchasing liability insurance. With these new assumptions, Figure 2 depicts the situation in which the obligation to remit the cost of third-party injuries is assigned to workers, the suppliers of labor.

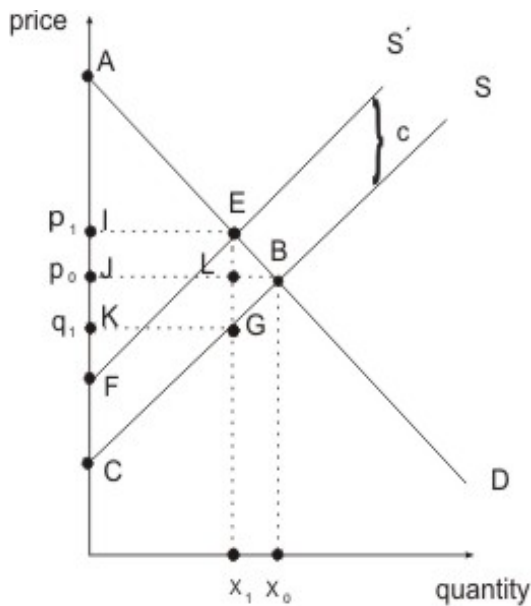


Figure 2

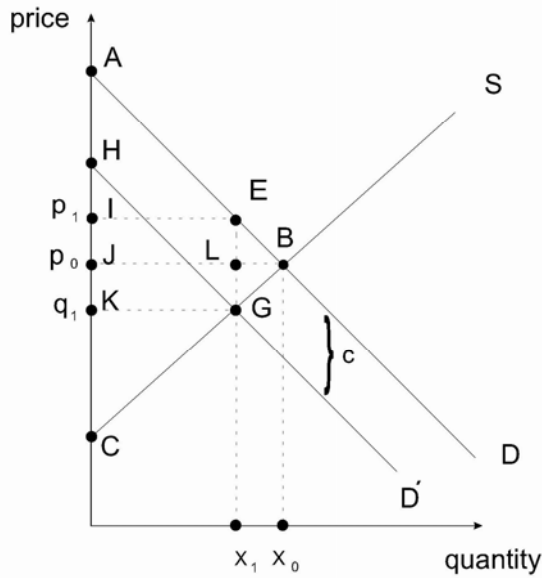


Figure 3

Because the remittance obligation for this per-unit cost is legally assigned to workers, it means that, at whatever price they would have required to provide any given output of labor previously, they now require a price that is  $c$  higher. This fact is represented by a parallel upward shift in the labor supply curve by a distance of  $c$ . The new supply curve is labeled  $S'$ , which means that, at any quantity of labor provided, the height of  $S'$  represents the wage received by workers that would have to be necessary to induce this output. The height of  $S$  at any given output represents what the worker would receive for labor, net of the new cost  $c$ , if that much labor were sold. After the introduction of this new cost, the new long-run equilibrium wage paid by employers is  $p_1$  and the equilibrium output is  $x_1$ ; the wage net of the cost is  $q_1$ , which is equal to  $p_1 - c$ .

Because there is a new cost that has been introduced into this market, it should not be a surprise that there is a loss of social welfare, which is represented by the decline in overall worker and employer surplus, shown as the area  $EBCF$  in Figure 2. The question

now is, given the particular assignment of remittance obligations (here to workers), who actually bears the burden of the cost, where by “bearing the burden” we again mean whose welfare or utility is reduced as a result of this new cost.<sup>25</sup> The naïve answer would be that the workers bear the cost, because they are legally responsible for remittance. However, because of the change in the prices of labor caused by the increased cost that shifts the supply curve, and because of the divergence between the wage rate paid by the employer ( $p_1$ ) and the wage net of cost received by the worker ( $q_1$ ) in the new equilibrium, the allocation of the economic burden of the new cost is *not* determined by the assignment of the remittance obligation. Rather, it is determined by the elasticities of supply and demand for the workers’ labor.

To see this point, refer again to Figure 2. How the discovery of the new labor cost will affect the welfare of workers and employers is approximated by the change in employer and worker surplus, respectively.<sup>26</sup> The decline in employer surplus is the area IEBJ, which represents the loss of utility to employers due to the increased price for labor and the reduced consumption of labor. IEBJ is equal to the rectangle IELJ (which is  $(p_1 - p_0)x_1$  – or the portion of the aggregate cost of third-party risk borne by employers at the new equilibrium quantity) plus the triangle EBL (which is the loss of value to employers resulting from the reduction in the quantity purchased). By similar logic, the loss in worker surplus is JBGK, which is due to the reduction in the net-of-cost price of the amount of labor produced, JLGK,<sup>27</sup> and the loss of value to workers from the reduction in quantity of labor supplied, the triangle LBG. The divergence between the equilibrium wage paid by the employer ( $p_1$ ) and the equilibrium net-of-harm-related-cost price received by the worker ( $q_1$ ) is key here. The extent to which these two prices will diverge from the original equilibrium price ( $p_0$ ) that prevailed prior to the discovery of the new cost, will determine how this new cost affects the welfare of employers and workers. This “split” of the new cost in turn depends on the relative elasticity of supply and demand: the higher is the relative elasticity of demand for labor (i.e., the flatter the

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<sup>25</sup> The loss of total surplus in Figure 2 is the area FEBC; this is the sum of FEGC, the cost  $c$  times actual output  $x_1$ , or  $cx_1$ , and the area EBG, which represents the social cost of forgoing the output  $x_0 - x_1$ . As we will see later, the triangle is analogous to the classic deadweight loss, or Harberger, triangle that is well-known in tax analysis.

<sup>26</sup> Here employer and worker surplus are just specific cases of consumer and producer surplus.

<sup>27</sup> This is calculated simply by multiplying the change in the price received by producers ( $p_0 - q_1$ ) by the new equilibrium quantity produced,  $x_1$

curve), the lower will be  $(p_1 - p_0)$  relative to  $(p_0 - q_1)$ , and the lower will be the relative burden borne by the employers. The same point could be made about supply: the more elastic the supply of labor, the lower will be  $(p_0 - q_1)$  relative to  $(p_1 - p_0)$ . In sum, as between workers and employers, the (relatively) more elastic party – the one with better alternatives to this particular employment relationship – will bear less of the economic burden of the new third-party liability.

Now for the invariance point mentioned in the introduction: The distribution of the economic burden imposed by these new costs of third-party liability between sellers and buyers (workers and employers here) will depend on the relative elasticities, and that distributional outcome will be invariant to the assignment of the initial legal obligation. This point is illustrated by changing the example to assign to employers rather than workers the legal obligation to remit the cost of the third-party liability. Figure 3 shows the results. The value of labor to employers, net of the new liability cost, is unchanged; therefore, the D curve still represents the willingness to pay net of this cost. However, the price employers are willing to pay is less than before. Thus, instead of a shift in supply, we have a downward shift in the demand curve, from D to D', by an amount equal to the new liability cost, c. The new demand curve intersects the supply curve at point G, and  $q_1$  is the new equilibrium price paid to the workers. The total cost to the employer is  $q_1 + c$ , which is equal to  $p_1$ . Comparing Figure 3 to Figure 2, we see that everything is the same, including the total wage paid by employers, the price received by workers, and the quantity of labor. Both the employer surplus and the worker surplus are the same in both situations, as is the loss of surplus caused by the discovery of the new liability cost. In Figure 3 the lost surplus is the area ABGH, which is exactly equal to area FEBC in Figure 2, and both are equal to  $cx_1 + EBG$ . The incidence and efficiency consequences are identical.

### **b. Differential Prevention Costs: The Least-Cost Harm Avoider**

Note that the invariance result just described remains unchanged if we relax the assumption that neither party is a cheaper-cost harm avoider than the other, so long as we maintain the Coasean assumptions of zero transaction costs as between buyer and seller and the free transferability of interests. Imagine, for example, that workers happen to be

the cheaper-cost harm avoiders, such that the per-unit cost to them of being assigned legal responsibility for third-party harms is not  $c$  but the smaller  $c'$ ; whereas the cost of third-party liability remains  $c$  for employers.<sup>28</sup> Thus, were it not for the Coase Theorem, one might conclude, by a comparison of Figure 4 and Figure 3, that the overall loss of social welfare caused by third-party liability would be lower if the legal obligation were assigned to workers. Not so, under Coase. That is, even if the remittance obligation were imposed initially on employers, competition would induce workers to offer to assume liability for the third-party harm (and to purchase insurance for the risk at cost  $c'$ ), which employers would accept, because the  $c'$  is by assumption lower than the cost,  $c$ , of the employers' purchasing insurance against the risk on their own. Thus, no matter how the initial legal obligation is assigned, with frictionless transferability the remittance obligation between employer and worker (between buyer and seller) would end up in the efficient place: on workers. And we would end up with Figure 4.<sup>29</sup> Obviously, the same sort of analysis could be done if the employer were the least-cost harm avoider, in which case, regardless of the law's assignment of tort liability, we would expect the parties to agree to employment contracts that placed tort liability on employers.

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<sup>28</sup> Thus, we are assuming for simplicity that either the employee can take steps to reduce the third-party accident risk or the employer can do so, but not both simultaneously. Thus, the question is which of them should be given assigned the legal responsibility for the full harm. In many situations, of course, it will be optimal for both the employer and the employee to make investments in "care" (expenditures to reduce the expected costs of third-party harm). In such situations, there is no single "cheapest-cost harm avoider." This complication will not matter in a contractual setting in which buyers and sellers, through their Coasean interactions with each other, can create incentives for both parties to take optimal care. We use the cheapest-cost harm avoider example for ease of exposition. We also assume that the only possible liability rule is strict liability for third-party harm, which will be imposed either on employers or employees. The analysis could also be applied to fault-based liability rules.

<sup>29</sup> In Figure 4, the reduction in equilibrium output is smaller compared to Figure 2 or 3. The increase in the wage paid is less, as is the decline in the wage received by the worker. Finally, the social cost is lower, being equal to  $F'E'BC$ , or  $c'x_1'+E'BG'$ .

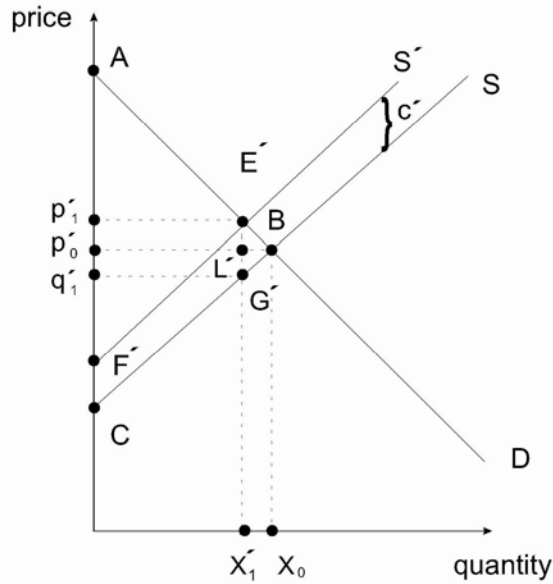


Figure 4

This invariance conclusion, of course, does not imply that the assignment of the legal responsibility for third-party liability is irrelevant in a world with *high* transaction costs (as between employer and employee) or in a world in which legal entitlements are *nontransferable*. For example, if we imagine that transaction costs are high, the efficient result would be to assign the responsibility for third-party liability to the least-cost harm avoider – whichever party faced cost  $c'$  rather than  $c$  – assuming the policy maker can determine with relative ease who that is.<sup>30</sup> If that happens to be the workers, the most efficient assignment of legal responsibility would entail worker liability; if the employer, however, is the least-cost harm avoider, then the rule should be employer liability. This is just standard Calabresi. Likewise, even if transaction costs are low as between the market participants whose transactions produce the third-party harm, if we imagine that the legal entitlement in question will be made nontransferable, then the initial legal rule

<sup>30</sup> More specifically, assuming the cost of identifying the cheapest-cost harm avoider is lower than the cost savings from moving from  $c$  to  $c'$ .

will matter. Thus, for example, if workers are the least-cost avoiders of third-party harm (i.e., the cost would be  $c'$  for workers and  $c$  for employers) and we place the legal responsibility on employers, and (importantly) we make that legal assignment nontransferable, then the parties will be made worse off. Indeed, even workers, the likely intended beneficiaries of such a rule, may be made worse off.<sup>31</sup>

### **c. Differential Administrative Costs: Insolvent Defendants, Least-Cost Liability Avoider**

In the last section we concluded that, under certain assumptions, it is optimal to assign the legal responsibility for a third-party harm to the least-cost harm avoider, assuming the cost of identifying the latter is relatively low.<sup>32</sup> In this section we address an important qualification to that conclusion. This qualification concerns the relative administrative costs of various alternative forms of regulation, as compared with the cost of the negative externality at issue. For example, consider how the analysis changes if the least-cost harm avoider is judgment-proof; that is, the least-cost harm avoider does not have assets sufficient to cover the potential tort liability and will therefore, *to the extent of the excess*, ignore the threat of *ex post* liability.

To see how this new assumption alters the analysis, let us also assume that workers are the least-cost harm avoiders. But imagine that they are entirely judgment-proof. This is not as extreme an example as one might suppose. If the only assets the workers have are the equity in their primary residences and their retirement accounts—assets that are to some extent protected from tort creditors under state bankruptcy laws—they would indeed be largely judgment-proof.<sup>33</sup> In such cases, the overall cost to the plaintiff (or to the legal system in general) of forcing the workers (and hence, through the price mechanism, employers) to internalize third-party harm would likely be extremely high. The reason is that policymakers would have to resort to some other form of regulation, such as *ex ante* command-and-control supervision of the worker's conduct, which is a type of regulation that is in many situations considered to be more expensive than simple

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<sup>31</sup> Craswell, *supra* note \_\_.

<sup>32</sup> Given that information is costly, it may be impossible at reasonable cost for the social planner to determine who the cheapest cost avoider is. That is, both  $c$  and  $c'$  may not be cost-justifiably observable by the legal authority. If that is the case, then the assignment of the obligation has to be made on some other basis.

<sup>33</sup> Many states limit the bankruptcy exemption available for retirement accounts and for primary residences.

*ex post* liability for harms caused.<sup>34</sup> In such a situation, the combined private and administrative costs associated with internalizing the third-party harm to the workers might well exceed the harm to the third-party. In that case, although the workers may be the least-cost *harm* avoiders, they are also the least-cost *liability* avoiders. Being the cheaper-cost liability avoiders, however, makes them decidedly not the overall least-cost alternative in terms of total social costs.

Because of this judgment-proof problem, then, if imposing liability on the least-cost harm avoider (here, the worker) were the only *ex post* liability option, the efficient result might simply be no liability. Leave the costs on the victims. However, that is not the only *ex post* liability option. It is also possible to impose the tort remittance responsibility on the next least-cost harm avoider – here the employers. And if employers are not judgment-proof, it may generate lower overall social cost to impose liability on them rather than either (a) to impose liability on the workers, (b) to engage in *ex ante* regulation, or (c) to leave the costs on the plaintiffs. To see this point, go back to our example and assume that if workers are assigned the third-party liabilities (and they are not judgment-proof), the per-unit cost of that liability will be represented by  $c'$ ; whereas, if the liability is assigned to employers the per-unit cost would be the larger cost,  $c$ . Thus, workers in this case are the least-cost harm avoiders. However, if employees are judgment-proof (requiring very expensive *ex ante* regulation to internalize the cost of third-party harms to this market), and if we include the administrative cost as part of the overall social cost, then the full cost of internalizing the third-party harm would not be  $c'$  but  $c''$ , which is, by assumption, even larger than  $c$ . In this situation, overall social welfare will be maximized by imposing liability on employers, who are, again, the next-least-cost harm avoiders

A version of the foregoing argument – the combination of the least-cost harm avoider story and the judgment-proof defendant story – is in fact the standard economic rationale

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<sup>34</sup> It is generally thought that, where the judgment proof problem is not present, *ex post* liability is a cheaper way of internalizing negative externalities, unless we believe that regulators are likely to know more about the relevant risks than the parties involved. The informational burden on the regulator of the *ex post* liability system is considered relatively low compared with *ex ante* regulation.. Steven Shavell, *Strict Liability versus Negligence*, 9 J. Legal Stud. 1 (1980); Donald Wittman, *Prior Regulation vs. Post Liability: The Choice between Input and Output Monitoring*, 6 J. Legal Stud. 193 (1977).

for the tort concept of vicarious liability.<sup>35</sup> “Vicarious liability,” in the most general sense, means to hold one party strictly liable for the tort committed by another. The leading justification for imposing this sort of secondary liability indeed builds on the idea that the former party may have some effective control over the harm caused by the latter and may be more amenable to regulation by *ex post* liability. For example, under the legal doctrine of *respondeat superior*, whenever an agent, who is under the control of a principal, commits a tort against a third party, the principal may be held liable for the third-party harm, assuming the agent committed the tort while acting within the scope of the agency relationship.<sup>36</sup> Thus, if an employee, while acting within the scope of her employment role, commits a tort and causes a harm to some third-party, the injured party can sue either the employee directly (for negligence) or the employer vicariously, assuming the plaintiff can establish the elements of a tort claim (duty, breach, harm, and causation) against the employee. In most cases, of course, the third-party will sue both the employer and the employee, who can be held jointly and severally liable for the employee’s tort.<sup>37</sup> Once a judgment is secured against both parties, the plaintiff can then seek to enforce it against either of them, or partly against one and partly the other, whatever is most convenient.<sup>38</sup> And if the employer is the only party who is not judgment proof (either because of its assets or its liability insurance), then the judgment will typically be enforced against the employer. If the employer is liable only vicariously (and not as a result of its own separate tort, such as negligence), then traditionally the employer has been allowed to seek “indemnity” from the employee.<sup>39</sup> Interestingly,

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<sup>35</sup> Alan O. Sykes, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 Yale L. J., 168 (1981); Lewis A. Kornhauser, *An Economic Analysis of the Choice between Enterprise and Personal Liability for Accidents*, 70 Cal. L. Rev. 1345 (1982); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L. J. 1231 (1984); Shavell, *supra* note \_\_\_ (1987); and Renier H. Kraakman, *Vicarious and Corporate Civil Liability*, in *Encyclopedia of Law and Economics*, Volume II. Civil Law and Economics (Boudewijn Bouckaert, and Gerrit De Geest, eds.) (2000), available at <http://users.ugent.be/~gdegeest/3400book.pdf>.

<sup>36</sup> Restatement (Second) of Agency, 1958, §§2, 219, 220, 229.

<sup>37</sup> Dan B. Dobbs, *The Law of Torts* 1078 (2000).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1079. In other sorts of joint-and-several liability tort actions, where the defendants are not merely being held vicariously liable but are themselves legal responsible at least in part for the tortious harm, then rather than indemnification, the defendant who is forced to pay the judgment can seek “contribution” for the fair shares owed by the other defendants. *Id.*

however, the right of indemnification from employees is not often invoked, perhaps because employers are, in effect, acting as the liability insurer of their employees.<sup>40</sup>

The two primary efficiency justifications for vicarious liability of employers for the torts of their employees involve either a least-cost harm avoider type of argument (on the theory that employers will often be in a better position than the employees to take cost-effective steps to minimize the relevant expected harms) or a judgment-proof or “deep-pocket” type of story.<sup>41</sup> And the two arguments work together in the way that is similar to the framework set out in this Article, although prior analyses of this question have not emphasized the comparative administrative costs argument. Thus, a case can be made that, in many situations, the employer will be, if not the least-cost harm avoider, at least a cheaper-cost harm avoider than the plaintiff. Moreover, employees will often be partially or fully judgment-proof with respect to a potential tort judgment and thus at least partially non-responsive to the threat of legal liability, thus strengthening the case for employer vicarious liability.

Similar arguments can obviously be made for other types of vicarious liability. For example, vicarious liability can also be imposed jointly and severally on all of the partners in a joint enterprise for the tort any other partner acting within the scope of the partnership.<sup>42</sup> In a more extreme example, although Congress and the courts have rejected this view, some scholars and lawyers have argued the gun manufacturers should, on one theory or another, be held vicariously liable for the injuries and deaths caused by gun violence.<sup>43</sup> Joint-and-several liability is sometimes also imposed in cases that are not normally characterized as instances of vicarious liability where several parties

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<sup>40</sup> Indeed, employers typically purchase liability insurance that covers the run-of-the-mill negligence torts committed by their employees within the scope of employment. If employers did starting seeking indemnification from their employees for these torts, presumably employees would then begin to purchase their own separate workplace liability insurance.

<sup>41</sup> See cites supra note \_\_\_\_.

<sup>42</sup> Id. at 413.

<sup>43</sup> E.g., Paul R. Bonney, *Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis*, 73 *Georgetown L. J.* 1437 (1985); Timothy Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 *Mo. L. Rev.* 1, 7-8 (2000); and Rachana Bhowmik, *Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 *J.L. & Pol'y* 67 (2002). In 2005 Congress enacted the Protection of Lawful Commerce in Arms Act, which exempts gun manufacturers and dealers from being held liable for crimes committed by people using guns. Pub. L. No. 109-92, 119 Stat. 2095 (codified as 15 U.S.C. §§ 7901-03) (2005)).

contributed to a single plaintiff injury. In any event, the argument for joint-and-several liability in these contexts (whether vicarious or not) can be put in efficiency, cost-internalization terms that should at this point be familiar. Consider the hand-gun example, which is admittedly extreme but makes the point: Even if the gun-toting criminals are obviously in some sense the least-cost harm avoiders with respect to gun violence, they are also very often judgment proof. What's more, individuals who are likely to use guns to intentionally harm others are also in many cases likely to expend considerable effort to avoid detection, which further raises the administrative costs of enforcing the tort liability against them. By contrast, the gun manufacturers may, if given the proper incentive, be able to do something at relatively low cost (even if not the "lowest possible cost") to reduce the risk of harm due to gun violence, perhaps by redesigning the guns or by altering the way in which they are distributed. That is the care-level argument. The activity-level argument would be similar: if we assume that gun makers are solvent whereas criminal gun users are not (or that, more generally, it is less expensive administratively to enforce the liability on gun makers than criminal gun users), then shifting liability vicariously to the manufacturers could have beneficial activity-level effects, as gun prices would adjust upward to include a larger share of the overall social costs associated with gun sales.

We should also emphasize here an important limitation on vicarious employer liability. As mentioned above, under the doctrine of *respondeat superior*, the employer is liable only for those torts committed by employees while acting *within the scope of employment*.<sup>44</sup> (And again, an efficiency argument can be made for expanding that liability to include independent contractors as well, at least in situations in which contractors are likely to be judgment proof.) Thus, if the worker causes a harm while engaging in some activity that has nothing to do with his employment relationship with the employer, then the employer cannot be held vicariously liable for that loss. The rationale for this so-called "scope-of-employment doctrine" is straightforward: Whereas it might make sense to force the cost of any harm that is "caused" by an enterprise to be borne by that enterprise and (through the price mechanism) the parties who benefit from

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<sup>44</sup> The classic discussion of the scope-of-employment doctrine is Young B. Smith, *Frolic and Detour*, 23 Colum. L. Rev. 444, 716 (1923).

that enterprise, the same argument does not apply to costs that are not caused by the enterprise.<sup>45</sup> The scope-of-employment doctrine is an example of a more general point in tort law: For a tort defendant to be held liable for the harm of another party, the injured party must establish, among other things, a causal link between the harm and the defendant.

Much turns then on what counts as a causal link. Alan Sykes has argued that the appropriate definition of causation in the vicarious liability context is similar to the one that economists have argued for in other tort contexts: “The crucial variable in this analysis is the extent to which the employment relation increases the probability of each wrong.”<sup>46</sup> Thus he argues that “an enterprise ‘fully causes’ the wrong of an employee if the dissolution of the enterprise and subsequent unemployment of the employee would reduce the probability of the wrong to zero.”<sup>47</sup> If no such causal link exists between the worker’s employment with the employer and the harm caused to the third party, then imposing liability for that cost on the employer would, he argues, be inefficient for two reasons. First, such an expansion of vicarious liability would in effect turn the employer into the worker’s general liability insurer, which is probably not the most efficient risk-spreading arrangement. Second, such an allocation of liability would, by imposing an arbitrary cost on the employer, have the effect of inefficiently reducing the scale of the enterprise.<sup>48</sup> To use an example outside of the employment context, it would be like making gun makers liable in tort not for the gun-related injuries caused by their customers, but for the *auto-related injuries* caused by their customers. Why should those auto-accident costs be assigned to the gun-manufacturing business merely because of the contractual nexus between the gun makers and the gun owners?

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<sup>45</sup> This idea, sometimes referred to as “enterprise liability,” can also be found in the early work of Calabresi. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L. J. 499, 500 (1961).

<sup>46</sup> Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563 (1988).

<sup>47</sup> Id.

<sup>48</sup> Again, this notion of causation has been applied more generally to tort law. Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. Legal Stud. 468 (1980) (“One action is a *probabilistic cause* of a consequence relative to another action if the probability of occurrence of the consequence is higher given the first action than given the second.”); Omri Ben-Shahar, *Causation and Foreseeability*, in *The Encyclopedia of Law and Economics* (“Under the normative economic analysis, the proximate cause doctrine’s designated role is to expand or shrink the scope of liability, in order to achieve efficient deterrence.”).

The scope-of-employment doctrine viewed this way seems sensible enough. This is not to say, of course, that vicarious liability beyond the scope of employment would never make sense. For example, if there are efficient care-level investments that the employer can easily make that would reduce the probability or severity of the harm to third-parties caused by their employees *outside of the scope of employment*, and if transaction costs would prevent the parties from bargaining to this result on their own, then assigning liability for the worker's beyond-the-scope-of-employment harm to the employer might be efficient. It is standard to assume that the cheapest harm avoider is one of the parties who caused the harm in the traditional sense of the concept "causation," but that need not necessarily be the case. Put differently, even if the disappearance of the employer and the employment relationship would not reduce the expected cost of the harm to zero (which is another way of saying, even if the employer and the employment relationship is not a "but for" cause of the third-party harm), the employer could conceivably still be the cheapest (or next cheapest) harm avoider. As unlikely as it may seem, it is at least possible that the employer could take steps on its own to reduce the risk of third-party harm – even if the activity in question is outside the scope of employment. For example, the employer could condition some portion of the workers' pay on their not causing any torts to third parties, for which the employer will be liable.<sup>49</sup> In addition, although it may not be the most efficient allocation of risk to have employers' act as general liability insurers for their workers (and not just as workplace liability insurers, as they currently do), it might be. That is, employers voluntarily provide health insurance for costs incurred by their employees that are unrelated to work, and some policymakers and experts (though obviously not all) believe that this is a sensible way of allocating health-care risks.<sup>50</sup> To do something similar with outside-of-employment liability risks should not, then, be dismissed out of hand. Whether it is in fact a good idea

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<sup>49</sup> This idea is consistent with Calabresi's notion of assigning liability to the "best briber." Calabresi, *supra* note \_\_, at 151-53. Calabresi argues that if it is difficult to *identify* the cheapest cost avoider, it might be efficient to assign liability to the party best able to identify the cheapest cost avoider and then to bribe them to make efficient investments in accident avoidance.

<sup>50</sup> Thus, employers in effect remit to insurers premiums that cover not only risks associated with the workplace (that would be workers' compensation coverage) but also health risks having little or nothing to do with the workplace. Because employer provided health insurance is subsidized by the federal income tax laws, however, the fact that the market provides such an arrangement cannot itself be persuasive evidence of its efficiency. But the fact that such a subsidy has been left in place for so many years suggests that policymakers must believe that the subsidy has had some beneficial effects.

is an empirical question that would require further investigation into the relevant factors.<sup>51</sup>

Of course, none of this is to say that deep-pocket vicarious liability, whether limited to the scope of employment or not, will *always* be efficient. It all depends on the comparison of the overall social costs (including the regulatory and administrative cost) of imposing and enforcing liability on the either the buyer or seller (employer or employee, gun-user or gun-maker) or the cost of leaving the liability on the injured victims. Moreover, in situations in which the worker is fully solvent, worker liability is likely the most efficient outcome. But if we assume judgment-proof workers and deep-pocket employers, and we assume that *ex ante* regulation is often extremely expensive, it seems likely that in some cases this sort of vicarious deep-pocket liability would make sense, especially (as mentioned) in situations in which there are reasons to believe that the deep pocket also happens to be the least (or a relatively cheap) cost harm avoider, as will often be the case in employer/employee relationships – even if not in the gun-maker/gun-user case. In other situations, the balance of costs may cut in the other direction, or there may even be situations in which the employers rather than employees happen to be the judgment-proof parties, in which case the efficient result may then be employee rather than employer liability.<sup>52</sup> We make an analogous point below with respect to tax remittance obligations.

It is also worth emphasizing that when and how to impose vicarious liability are complex questions that often present difficult line-drawing problems. For example, under *respondeat superior*, a principal is vicariously liable for the torts of its agent only if the principal had the power to control the manner in which the agent did his job and only

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<sup>51</sup> This argument suggests an immediate and obvious Coasean counter-argument: if the market does not already allocate these risks in this way (that is, employers do not already tend to provide their employees with general liability insurance as a fringe benefit), then why should the law require it? The failure of the market to provide such a benefit, in other words, could be seen as evidence against its efficiency. The problem with that argument, of course, is that it ignores the incentives – discussed immediately below – that employers and their workers have to structure their contractual arrangements so as to externalize such liability costs onto third parties. That is, even though it might be efficient in some situations to assign liability for outside-of-employment worker-caused third-party harms to the employer, we should expect Coasean bargaining between employer and employees to push in the direction of assigning those liabilities to employees, who can benefit from their relatively greater chance of being judgment proof when the time comes to pay the piper. Such an arrangement could be joint wealth maximizing for employer and worker although socially wasteful.

<sup>52</sup> Kornhauser, *supra* note \_\_\_\_.

if the agent commits the tort within the scope of the agency relationship. In the employment context, these requirements are manifest in the common-law distinction between “employees,” who are subject to the control of the employer in how they do their work, and “independent contractors,” who in theory are not. Thus, an employer can be held vicariously liable for the torts of its employees but not of independent contractors who have been hired to do a job. On its face this distinction is consistent with notions of efficient deterrence and least-cost harm avoider, in that the employer will only be liable if it is in a position to control the worker’s behavior. However, as soon as this sort of line is drawn, employers have an incentive to manipulate it, by hiring independent contractors to do the work that would otherwise (in the absence of this line in the doctrine) have been done by employees or at least to characterize employees as contractors, either of which could limit the employer’s liability. In addition, employers will have an incentive to hire contractors who are judgment proof, which enables the contractors to avoid liability and essentially allows the contracting parties – buyers and sellers – to externalize the third-party harm.<sup>53</sup> There are, to be sure, potential solutions to this problem. For example, instead of relying on the manipulable distinction between employees and contractors, courts could simply hold employers liable any time the employee is insolvent and the employer is both solvent and at least the next least-cost harm avoider. Of course, if the employee is expected to be solvent, then a rule that holds the employee liable can make sense as well.<sup>54</sup>

It should also be noted that *ex ante* regulation and vicarious deep-pocket liability are not the only possible solutions to the judgment-proof problem. For example, some have suggested the possibility of making the judgment-proof party purchase liability insurance that fully covers the potential liability.<sup>55</sup> For some situations this might be a plausible

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<sup>53</sup> Jennifer Arlen & W. Bentley MacLeod, *Beyond Master-Servant: A Critique of Vicarious Liability*, in *Exploring Tort Law* (M. Stuart Madden, ed.) (Cambridge University Press, 2005). Of course, if third parties are aware of this potential externality, they might be less willing to do business with the employer. Thus, there is a way in which the market could induce the employer either to hire only employees or only contractors who are demonstrably solvent or who have liability insurance. This is probably why, for example, building contractors often advertise when their workers are “fully insured” or “fully bonded,” so that potential customers will not be dissuaded by the fear of suffering an unrecoverable harm.

<sup>54</sup> Arlen and MacLeod, *supra* note \_\_, makes a similar argument.

<sup>55</sup> In the absence of such a requirement, judgment-proof parties will have an incentive to purchase only enough liability insurance necessary to cover their assets that are subject to liability. Shavell, *supra* note \_\_.

solution. For example, every state requires drivers either to purchase liability insurance or otherwise to demonstrate their “financial responsibility” before they are allowed to register their automobile. On the other hand, for other situations, compulsory liability insurance is impractical. And even in contexts where compulsory insurance is a realistic possibility, whether it will in general be efficient overall would depend on how the overall per unit cost of compulsory liability insurance (including the cost of administering such a system) would compare with the alternative costs –  $c$ ,  $c'$ , and  $c''$ .

A key lesson that emerges from this analysis is that in these settings Coasean bargaining will not always be welfare-enhancing, and that sometimes it will be socially optimal to make legal entitlements or obligations non-transferable. Why so? Imagine that assigning liability for third-party harms to employers rather than to employees minimized overall social costs (harm plus administrative cost) because employees are utterly judgment-proof and the next best alternative, *ex ante* regulation, is exorbitantly costly. In that situation, if we assigned the liability to the employers *but we allowed the obligation to be transferable*, competition would induce the employers, through Coasean bargaining, to shift the burden contractually to employees. Employers would initially save money by shedding the liability, and employees would be willing to accept this liability, knowing that they were judgment-proof. This general process might be thought of as a form of intentional or strategic judgment-proofing. It may be socially inefficient because shifting the liability (i.e, the remittance obligation) increases the enforcement costs, which is a social cost but not one that is internalized by either the employer or employee.

How likely is this sort of intentional judgment-proofing in the real world? We are not aware of any systematic empirical study of this question; however, the torts and the bankruptcy literatures both seem to assume that the problem is a real one. Some scholars have noted that there are substantial real-world incentives for parties intentionally to judgment proof themselves in order to externalize the costs of potential tort harms onto third parties. For example, a number of scholars have noted the externality that arises corporate defendants become judgment-proof because of the doctrine of limited shareholder liability, which provides that a corporate shareholder’s liability for the debts of the corporation cannot exceed that shareholder’s equity investment in the

corporation.<sup>56</sup> Moreover, some scholars have even observed that corporations have an incentive to strategically render themselves judgment-proof against large tort claims by shifting their most dangerous (or highest potential liability) activities into inadequately capitalized subsidiaries or brother-sister corporations.<sup>57</sup> In addition, corporate tort defendants may adopt the strategy of borrowing against their assets and giving the lenders security interests in those assets, which secured interests come before tort claimants in priority in the event of bankruptcy, thus increasing the chances that the tort victims will go uncompensated. Potential solutions that have been suggested for this sort of intentional judgment proofing include a range of policy proposals, including: imposing liability on shareholders (or, as some have suggested, on lenders as well), giving tort claimants a higher priority in bankruptcy proceedings, requiring corporations to purchase liability insurance, or even increasing the use of direct *ex ante* regulation by government agencies.

The more general point is that Coasean bargaining can lead to outcomes that are privately joint-wealth maximizing but inefficient for society overall. This problem will arise, among other places, when parties are allowed to shift a tort liability to the party with respect to whom, for whatever reason (including judgment proofness), enforcing the *ex post* liability would be most socially costly.<sup>58</sup> As we discuss below, there is an analogous set of problems in the tax context. That is, although the conventional wisdom among economists is that the assignment of tax remittance responsibility is irrelevant to efficiency and distributive outcomes, we show that, once enforcement and compliance costs are taken into account, those invariance conclusions may not obtain. We begin by presenting the conventional wisdom concerning the tax invariance results mentioned in the introduction.

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<sup>56</sup> Henry Hansmann, & Renier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 Yale L. J. 1879 (1991).

<sup>57</sup> See generally Lynn M. LoPucki, *The Death of Liability*, 106 Yale L. J. 1 (1996); Lynn M. LoPucki, *The Essential Structure of Judgment Proofing*, 51 Stan. L. Rev. 147 (1998). LoPucki contends that corporations have a strong incentive to (and in fact do) bifurcate their businesses into “operating entities,” which will face potential tort liabilities, and “asset-owning entities,” which will not – thereby effectively rendering the business judgment-proof. But see James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki’s “The Death of Liability”*, 107 Yale L. J. 1363 (1998) (arguing that LoPucki has overstated the problem of corporate judgment proofing).

<sup>58</sup> Below we discuss what changes when it is not socially optimal to completely enforce the liability.

#### d. From Torts to Tax

Before proceeding further to the tax analogy, we need to emphasize the fundamental differences between the tort and tax liabilities. In the tort scenario that we have been focusing on, private actions undertaken in the context of contractual relationships inflict harm or the risk of harm on other private parties. (There are of course many other tort settings that do not involve contractual relationships, but they are less relevant to the tax comparison.) The efficiency motivations for imposing tort liability in such a case are well known in the torts literature: to ensure that the right amount of the private activity is undertaken and also that the right amount of harm-reducing steps is taken (the activity-level and care-level effects mentioned above.) We might think of the costs incurred by parties to reduce the actual risks of harm to others as tort “compliance costs,” which are analogous to the costs incurred by taxpayers to comply with the tax laws. Once a tort liability regime is in place, however, private parties may also take steps (other than activity-level and care-level changes) to reduce their effective liability for a given harm. For example, they might attempt to judgment-proof themselves. Or they might even attempt to “cover up” their tort, by taking steps to make it difficult to trace the causal connection between the product and the harm.<sup>59</sup> We might think of these costs as being akin to “evasion” on the tax side. Therefore, enforcing the tort liability itself generates costs – the costs of running the court system and establishing causation and liability -- that we call “administrative costs.” To distinguish these issues, we have introduced the semantic distinction between the *least-cost harm avoider* (the party who can most efficiently reduce the harm or risk of harm by either care-level or activity-level changes, or both) and the *least-cost liability avoider* (the party who can most efficiently minimize the liability award).

Contrast the above-described tort situation with the case of a tax. First we need to distinguish two types of taxes: those designed to correct externalities (sometimes called Pigouvian taxes) and those designed merely to raise revenue to spend on public goods. Pigouvian taxes are used much like tort law, to internalize externalities. Thus, if a given activity produces negative externalities, levying a tax on that activity equal to the

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<sup>59</sup> The tobacco industry did this for many years, producing their own research results that supposedly disproved or undermined the link between smoking and various illnesses.

marginal external social cost can be efficiency-enhancing. Thus, the primary efficiency effect of a Pigouvian tax is the activity-level effect mentioned above, as the tax moves the amount of the externality-generating activity (down) toward its optimal level. A Pigouvian tax can also, in theory, have efficiency-enhancing care-level effects, insofar as the tax can be adjusted *ex post* for the harm-reducing steps that are undertaken. Such *ex post* adjustments to Pigouvian taxes, however, are rarely if ever actually made. The Pigouvian tax reduces the private utility of the parties involved in the market, but produces an offsetting social benefit to the extent the collected revenue is spent on public goods. In the case of non-Pigouvian taxes, the tax is not imposed with the objective of reducing the level of the taxed activity.<sup>60</sup> Indeed, any reduction in the amount of the taxed activity is an unintended, if unavoidable, negative consequence of a non-Pigouvian tax. Thus, an optimal non-Pigouvian tax system seeks, other things equal, to minimize the cost of these behavioral consequences, known as distortions. The only social benefit of such taxes arises from the uses to which the tax revenue is put. Because the revenue has social value, it is generally socially optimal for the government to expend resources to ensure that revenue is remitted. In drawing out the analogy between tort and tax below, we concentrate on *non-Pigouvian* taxes.

#### **4. Coase Meets the TRIPs**

##### **a. The Standard Tax Remittance Invariance Story: Zero Compliance and Administrative Costs**

We have argued that the Coase Theorem and the law-and-economics literature on torts, including Calabresi's notion of identifying the least-cost harm avoider, primarily address the problem of choosing the optimal legal responsibility for some expected harm. The problem to which we now turn, which is identical in some ways to the Coasean and Calabresian questions but different in others, is the problem of choosing the optimal assignment of the legal obligation to remit a given tax liability to the government. The standard view among economists is that the assignment of the tax remittance obligation has no effect on the incidence of the tax in question. This is the TRIPI notion mentioned

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<sup>60</sup> A negative Pigouvian tax, or a Pigouvian subsidy, is designed to increase the level of the activity. In general, then, Pigouvian taxes/subsidies aim to change the level of some activity, pushing in the direction of optimality.

in the introduction, and something like it (though without the catchy acronym) can be found in every modern public finance text. The assumptions that underlie the TRIPI assertion typically are left implicit, but the basic story goes something like this: As above, it is standard to assume a competitive market setting – many small sellers and buyers, free entry and exit, no externalities, perfect information, long-run equilibrium price and quantity. The setting is usually a tax triggered by sales of either commodities or labor. For simplicity, we assume, as does the literature, that the taxes are assessed on a per-unit basis, although a very similar sort of analysis, with essentially the same result, can be used for proportional taxes on value (i.e., so-called *ad valorem* taxes). It is also implicitly assumed in these models that there are no administrative costs or compliance costs (such as the costs of learning the tax laws, gathering the relevant information, and filing the appropriate forms), or the administrative plus compliance costs are exactly the same among all remitters. These are important assumptions that we relax below. Given all of these assumptions, the results follow immediately: no matter who – seller or buyer – is assigned the legal responsibility for remitting the tax to the government, the results will be the same. The distributional consequences of the tax will depend not on the assignment of the remittance obligation, but on the relative supply and demand elasticities. This is exactly the same as in the Coasean externality case above. In addition, the degree of inefficiency or deadweight loss generated by the tax will depend not on the remittance responsibility but on the relevant elasticities: the less elastic the supply *or* demand for the good or service is, the smaller the deadweight loss.

We can illustrate our points with another stylized example, this one taken straight from the pages of any public finance text. If we start from Figure 2, which again represents the market for labor provided by workers and purchased by employers, we see again that there is an initial equilibrium price and quantity of labor sold and consumed. Next Figure 5 depicts what happens when we introduce a per unit tax on labor earnings equal to  $t$ .

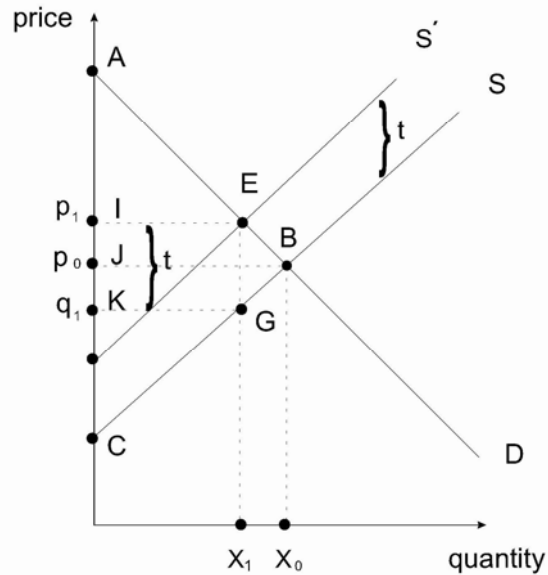


Figure 5

This figure deals specifically with a per-unit tax of  $t$  that must be remitted by the seller (here, the worker). As is standard, the consequences of such a tax (and remittance obligation) can be shown by a parallel shift upward in the supply curve, just as in Figure 2. Although the remittance obligation is placed on workers (the suppliers of labor), the economic burden of the tax will be shared by the suppliers and consumers, through the changes in the prices they receive and pay, respectively; and the sharing of this burden between suppliers and consumers will depend on the relative supply and demand elasticities for labor. Thus, the analysis of the sharing of the tax burden is identical to the analysis of the sharing of the harm in Figure 2. The analysis of the overall social cost created by the introduction of a tax, however, is different from the Figure 2 analysis, for

the simple reason that introducing a new tax (other than a Pigouvian tax) is different from introducing a new cost.<sup>61</sup>

The difference is straightforward: When the tax,  $t$ , is introduced, it produces tax revenue, represented by the area IEGK, which, unlike the same area in Figure 2, is not a deadweight loss to society, but rather represents a transfer of purchasing power from private agents to the government. In a baseline case where the social value of the tax revenue per dollar is the same as the social value of a dollar of foregone private surplus, the social (or deadweight) loss is the difference between the decline in consumer and producer surplus, IEBGK, and the increase in tax revenue, IEGK, which is equal to the classic Harberger triangle representation of deadweight loss, the area EBG. This social cost arises because the tax imposes a “wedge” between the price paid by employers and the price received by workers, causing labor output to fall. The area EBG represents the social cost of the distortion of output from  $x_0$  to  $x_1$ ; the vertical distance between the S curve and the D curve represents the social cost of each marginal unit of the forgone output, which is the difference between the value to the consumer and the value of the resources needed to produce it.

And now for the tax invariance result. Figure 6 shows the effects of a unit tax of  $t$  on wages in the case where the employer must remit.

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<sup>61</sup> We can imagine that the new cost assigned in Figures 2 and 3 are actually per unit Pigouvian taxes designed to internalize some external cost that is created by the production or use of widgets. The effect on prices and quantities would be the same, but the effect on social cost would have to reflect the social cost engendered by the externality.

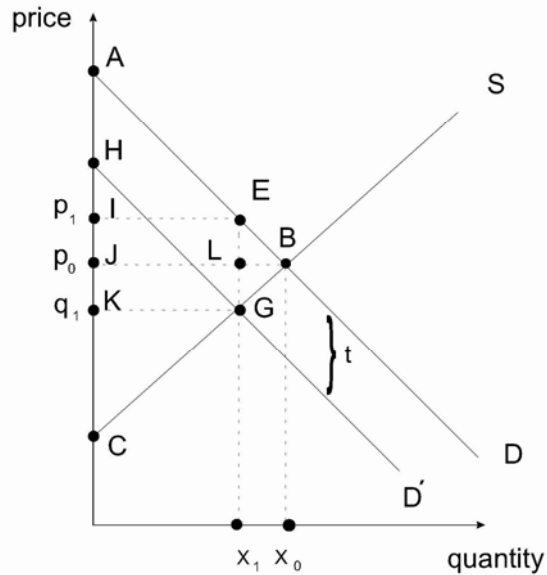


Figure 6

As in the comparison between Figure 2 and 3, everything is exactly the same as between Figure 5 and 6: the wage paid by the employer and the wage received by the worker, the change in employer and worker surplus, the change in output, the tax revenue collected, and the deadweight loss. Thus, not only is the allocation of the burden between employers and workers invariant (which we have called TRIPI), but also there is exactly the same degree of inefficiency (or deadweight loss) produced by either remittance assignment (TRIPE). Again, this is the standard tax invariance explanation that is conventional wisdom among tax economists.<sup>62</sup>

### b. Compliance Costs

As was the case with the invariance conclusions above in our contractual version of the Coase Theorem, a key implicit assumption of the standard demonstrations of these

<sup>62</sup> Slemrod addresses the situations under which TRIPI and TRIPE fail, without addressing the analogy to Coase and torts. Slemrod, *supra* note \_\_ (2008).

tax invariance propositions is that there are no administrative or compliance costs generated in the tax collection process, where administrative costs are again defined as those borne in the first instance by the government (but ultimately borne by individual taxpayers) and compliance costs are defined as those borne in the first instance by private parties (though these too may be shifted to parties other than those who “remit” the compliance costs). In the real world, of course, just as a tort system, or any other regulatory system, will generate administrative and compliance costs, so too do tax systems.

To expand our analysis to deal with these realities, we begin by assuming that taxpayers do indeed have to incur compliance costs to satisfy their tax obligations. They have to learn the relevant tax laws and regulations, gather financial information that bear on their tax remittance obligations, file forms of various sorts, calculate the appropriate amount of tax and then remit it to the government; or they have to pay someone to do all those things for them. Moreover, we assume initially that, as between employers and employees, compliance costs are exactly the same. Specifically, we assume that whichever party is assigned the remittance burden will have to incur a per-unit compliance cost of  $c$ , and the other non-remitting party will not have to incur any compliance costs. For simplicity, we assume that this compliance cost is a constant proportion of the amount of the good or service being produced in the transaction that triggers the tax. Thus, for every additional unit of labor sold and purchase in our example, the compliance cost goes up a proportional amount. These assumptions are obviously analogous to the assumptions in the previous section on tort liability. We put administrative costs aside for now. Given all of these assumptions, Figure 7 shows how to analyze compliance costs, when the per-unit tax of  $t$  is remitted by the supplier, who also directly shoulders the per-unit compliance cost of  $c$ .

The total deadweight loss to society is represented by the difference between the decline in consumer plus producer surplus,  $VUBNR$ , and the tax revenue collected,  $SMNR$ , which is equal to  $VUMS$  plus  $UBN$ .  $VUMS$  is the compliance cost and  $UBN$  is the social cost of distorting production/consumption from  $x_0$  to  $x_2$ .

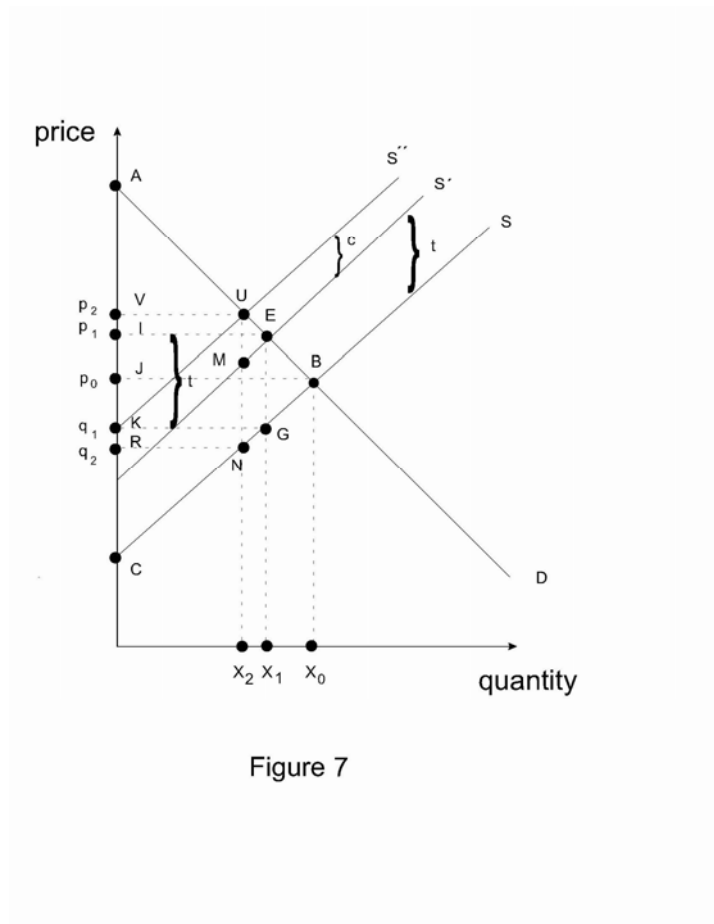


Figure 7

Figure 8 shows that the effect would be no different if remittance obligation were placed on the employer, which, again, would produce the same per-unit level of compliance cost.

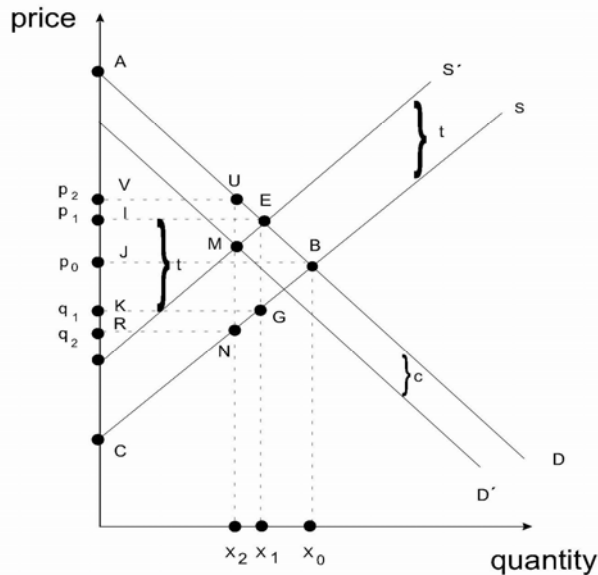


Figure 8

The point is analogous to the point that we analyzed in the comparison between Figures 2 and 3: the remittance obligation (and thus the identify of the party who directly incurs the compliance costs) is in equilibrium immaterial to the impact of these costs on the welfare of both parties and the allocation of resources.

Now we introduce the possibility of asymmetric compliance costs, where one class of parties (buyers or sellers, employers or employees) has lower compliance costs than the other. When might this be? Economies of scale to learning the tax laws, to gathering the relevant tax information, and to filing forms with the tax authorities, would suggest that bigger is better: that larger taxpayers would present lower compliance costs per unit of tax remitted and collected. For example, it seems likely that it would be cheaper to have the one employer (especially if it is a large employer) file the relevant forms and transfer the appropriate funds to the government rather than have dozens, hundreds, or thousands of employees do so separately. The same argument could be made about the sales tax: we would expect, in general, that large retail sellers will be the least cost remitters of the

tax on a given sale as compared with relatively small consumers. These conclusions are analogous to the assumptions sometimes made in tort law to justify *respondeat superior* liability of employers for employee torts: that the employer can reduce the harm at a cost both less than the reduction in expected accident costs and less than the compliance cost of the employees. Recall that this was part of the argument for deep-pocket vicarious liability above. Now we make a similar, and to our mind equally plausible, argument in the context of tax remittance. How would this fit with our model? Does it alter the standard tax invariance results that are so commonly demonstrated in public finance textbooks?

It depends. Are we in a Coasean world – with zero transaction costs and freely transferable entitlements and obligations – or are we not? If transaction costs between buyers and sellers (employers and employees) are zero, and if the parties are allowed to reallocate the remittance obligation between them as they see fit, then the parties will shift the remittance obligation to the least-cost remitter (here the party with the lower compliance costs), and, ignoring administrative and enforcement issues, social welfare will be maximized.<sup>63</sup> If, however, transaction costs prevent such efficient shifting of remittance responsibility, then overall social welfare will be maximized only by imposing the remittance obligation on the least-cost remitter.<sup>64</sup> Note also that, in terms of distribution, with either result (the efficient assignment of remittance responsibility to the least-cost remitter or the inefficient assignment to the other party) the distribution of utility between employers and employees will be determined by the relative elasticities of supply and demand.

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<sup>63</sup> An example is the remittance by the lender rather than homeowner for property taxes. This may be related to which party loses in the event of foreclosure. Slemrod, *supra* note \_\_ (2008).

<sup>64</sup> Craswell, *supra* note \_\_.

### **c. Asymmetric Administrative Costs: Judgment Proof, Dishonest, or Hard-to-Reach Taxpayers**

At this point we introduce the possibility that shifting tax remittance obligations will produce asymmetric tax administrative costs as between buyers and sellers – in our continuing example, as between employers and employees. With respect to a tax on wages, for example, if it could be shown that the costs to the government of administering (i.e., enforcing) an employer-based tax remittance obligation is cheaper than the cost of administering an employee-based remittance obligation, that would be an independent justification for placing the remittance responsibility on employers – independent of the compliance-cost argument.<sup>65</sup> And the same could be said of a retail sales tax, assuming that the tax remittance obligations of sellers are cheaper to enforce than the tax remittance obligations of buyers.

What might be the source of such differential administrative costs? In the torts context, we focused on insolvency or judgment-proofness as the source of differential administrative expense, because internalizing costs to a judgment-proof party may require costly *ex ante* regulation or compulsory liability insurance. Judgment-proofness is relevant in the tax context as well, although it is somewhat less of a problem both because of the nature of tax liabilities (which arise more slowly and predictably than do tort liabilities) and because of the special privileges typically afforded the tax collector in bankruptcy.<sup>66</sup> Still, some individual taxpayers, especially taxpayers who live from paycheck to paycheck, may have relatively few resources with which to pay a large tax judgment. Indeed, one justification commonly given for the current remittance regime for employment taxes in the U.S. is precisely this concern about judgment-proofness. As one well-known commentator put it, “[w]ithout a pay-as-you-earn system making the employer a ‘deputy tax collector,’ it would be difficult if not impossible to collect taxes from employees who spend their wages as fast as they are received.”<sup>67</sup> Likewise,

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<sup>65</sup> For now we continue to assume that the government expends whatever resources are necessary to collect the entire legal tax obligation.

<sup>66</sup> For example, with U.S. federal taxes (income, gift, or estate), the U.S. government automatically receives a lien against *all* the assets of a taxpayer if the taxpayer does not pay the taxes upon “demand.” Sec. 6321. Such tax liens automatically take priority over the taxpayer’s own claim to the property and, shortly thereafter, over all other creditors other than secured creditors whose interests were perfected earlier.

<sup>67</sup> Bittker & Lokken, *Federal Income Taxation of Income, Gifts, & Estates* ¶ 111.5.2 (quoting *McGraw-Hill, Inc. v. US*, 623 F2d 700 (Ct. Cl. 1980)).

corporate taxpayers are vulnerable to bankruptcy, which can leave them with little money with which to pay its tax liability. In any event, if the tax remittance obligation is assigned to a party who ends up being insolvent, the tax is obviously less likely to be collected than otherwise *absent the expenditure of additional administrative resources*.

The possibility of an insolvent tax remitter is not the only potential source of asymmetric administrative costs. It could also be argued that it is inherently cheaper (per dollar of revenue raised) for the tax authority to police large taxpayers, because of the economics of scale in tax enforcement. It is cheaper, for example, for the government to audit a single large employer than to audit all of the employers' employees separately. In addition, wealthy corporate taxpayers may have more financially at stake in their reputations and may therefore be less willing to risk being found guilty of tax evasion. If that is true, the per-dollar cost of administering an income tax system in which the remittance obligation is placed on large employers would be lower than the per-dollar cost of a system that placed the obligation on employees. And the same argument could be made with respect to sales taxes. That is, imposing the sales tax remittance obligation on large retail sellers to remit is almost certainly less costly administratively than asking each retail purchaser to remit the tax. We acknowledge, of course, that large corporations also have agency problems; and sometimes corporate management may be more willing to engage in tax fraud than even the corporations' shareholders would prefer. On the other hand, the more employees are involved, the more difficult it is to maintain a pattern of outright tax evasion, as the possibility of detection rises with the number of potential whistleblowers.

What these arguments suggest is that, in situations in which the policymaker is choosing who among a group of contractually connected parties should bear the tax remittance responsibility, imposing the remittance obligation on the larger, wealthier party – the one most likely to have assets with which to pay the tax and the one whose tax compliance will be cheapest (per dollar of tax collected) to ensure – may come closest to achieving the policymaker's intended combination of tax revenue and distributional consequences at the lowest possible costs. It is worth making explicit here that this administrative cost argument seems to cut in the same direction as the least-cost remitter argument, which also would seem to point to the larger, wealthier party – the one who

could benefit from economies of scale with respect to tax compliance costs. This conclusion is similar to the convergence of arguments, discussed above, in favor of vicarious liability, as both least-cost harm avoider and administrative/enforcement cost arguments favored *respondeat superior* liability under certain assumptions. In sum, just as deep-pocket liability can be justified in the tort context on efficiency grounds, it can also be justified in the tax context on similar grounds.

We should also note another analog between the tax and tort remittance questions. In the tort context, we noted that it will not always be socially efficient to allow the parties to transfer the remittance obligation contractually between them; recall the discussion of strategic judgment proofing. A similar argument would apply in the tax context. Once we allow for such differential administrative costs, whether because of the economies of scale, the judgment-proof problem or because of differences in inherent willingness to evade taxes, then allowing the remittance responsibility to be transferable does not automatically lead to the socially efficient outcome because a transfer of remittance responsibility may reduce the sum of compliance costs but increase administrative costs by more than the compliance cost savings. In terms of the figures, an important difference between the analysis of Figure 4 and that of Figure 9 arises if the identity of the tax remitter affects the administrative cost of the tax collected. In this case the social cost of ILMS plus LBN shown in Figure 7 misses one component of the social cost. It is possible that moving to the low-cost remitter, where cost is measured in terms of compliance costs and distortion alone, might not represent the minimum social-cost remitter, if the former facilitates tax evasion or, in other words, makes tax enforcement more costly. The overall efficient tax remittance arrangement should minimize the sum of three cost elements: distortion cost, compliance cost, and administrative cost.

#### **d. Optimal Evasion and Taxpayer Heterogeneity**

So far we have implicitly assumed that compliance costs and, in particular, administrative costs may have to be incurred to achieve compliance with the tax laws, but that, once these costs are incurred, complete compliance is always achieved. In that context, we noted that the TRIPs do not hold, so long as there are asymmetric compliance or administrative costs as between the parties to the transaction that triggers the tax.

What changes if we recognize the fact that, despite optimal investments to ensure compliance, there will nevertheless be some successful evasion? Put differently, how does the analysis change if full compliance with the tax law is not a certainty? As we argue in this section, the tax invariance propositions still do not hold. What's more, to the extent residual non-compliance is distributed heterogeneously across the population of taxed parties, it turns out that (ignoring how the tax dollars are spent) the introduction of a non-Pigouvian tax actually improves the welfare of the noncompliant parties while decreasing the welfare of the compliant parties. A similar point can be made with respect to heterogeneous tort compliance.

Before we get to that result, however, notice that if tax compliance is uncertain the effect of a tax on equilibrium prices will depend on the expectations each side – buyer and seller – has about their eventual tax liability and on any attendant cost associated with (successful or unsuccessful) noncompliance. In the standard model of optimal evasion, individuals will evade as long as the reduction in their expected tax and penalty remittances exceeds the marginal private cost of the evasion, where private cost includes the costs to the tax remitters of disguising their behavior to the tax collector as well as the cost of remitters' increased risk-bearing owing to the uncertainty in after-tax income that the evasion creates. Because (it is assumed that) the marginal private costs are increasing with additional investments in evasion, whereas the private gain is not, eventually the private gain from evasion will fall short of the private expected tax saving. The total private gain will be less than the expected tax saving.<sup>68</sup>

Governments have access to a number of policy actions that can reduce evasion, but it generally is not socially optimal to eliminate evasion *completely*, just as it is not optimal to expend the resources necessary to eliminate all torts or to expunge all robbery. This is true even when one enforcement tool is the financial penalty for detected evasion, which is not a social cost, because very high penalties may have consequences that are socially costly. This conclusion has important consequences for our analysis. To see this, imagine that the remittance responsibility for a given tax is switched from one party from whom collection would be inexpensive (in terms of compliance and administrative costs), so inexpensive such that full compliance is socially optimal, to another from

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<sup>68</sup> Because of the penalty revenues collected on detected evasion, the private cost exceeds the social cost.

whom collection would be expensive. The optimal policy response would not in general be to maintain full compliance and incur the now-considerable administrative costs of so doing. Rather the optimal policy responses would be a combination of somewhat higher administrative expenditure plus allowing a lower level of compliance. This lower level of compliance entails social costs, including higher risk-bearing costs and perhaps the need to raise somewhat (not necessarily equal) more revenue in some other (costly) way. Thus, once the idea of socially optimal evasion is recognized, it is clear that the increase in administrative costs does not accurately measure the increase in social costs from moving to an inferior remittance regime; to reflect that, we will from now on often use the term *enforcement* cost to mean the social costs attendant to noncompliance.

Now recognize that the inclination and opportunity to evade successfully is heterogeneous.<sup>69</sup> *Ex ante*, people (including those people who make decisions for firms) differ both in their intrinsic honesty and in their available opportunities for evasion.<sup>70</sup> *Ex post*, some acts of evasion are detected by enforcement systems, while others are not; of those acts that are detected, the penalties may differ. Although it is the aggregate response to a tax hike that will determine how much a given tax rate change affects the consumer and producer prices, respectively, the effect on any one person or firm will depend on the price change and on their own exposure to the price, which now depends on their evasion behavior – which again turns on their *ex ante* characteristics and their *ex post* results – as well as their (other) preferences and technology.

To see the implications for the TRIPs of these more realistic assumptions, consider a tax on the income from house painting. Assume that the remittance obligation is placed on the painter rather than the paintee and that half of the housepainters are scrupulously honest while the other half are scrupulously dishonest. Assume further that there is no private cost incurred to effect the evasion, that the probability of detection is

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<sup>69</sup> Medema and Zerbe make a separate observation about the impact of heterogeneity: that when people have heterogeneous utility functions, the assignment of property rights can affect allocation because it changes aggregate demand functions, and therefore equilibrium production. For example, if the injurers have a higher wealth elasticity of demand for chili peppers than the injured, assigning the property rights to the injurers will increase the aggregate demand for chili peppers, and therefore their price, unless all goods are produced at constant cost (and therefore equilibrium prices are always unaffected by demand conditions). Medema & Zerbe, *supra* note \_\_\_\_.

<sup>70</sup> To the extent that heterogeneous evasion opportunities apply to categories of employer and employee, there will be market adjustments in the remuneration of that activity; the following examples therefore apply to heterogeneity not associated with such categories.

zero, and, of course, that all parties are fully informed of all of these facts. What happens when the tax is introduced? The supply curve shifts up by only one-half of the tax rate, since only the one-half of the painters who actually will remit the taxes they owe will require a higher pre-tax payment to elicit the same work. The impact on equilibrium prices as always depends on the relative supply and demand elasticities, here for house painting services. For the sake of simplicity, say that the supply and demand elasticities are equal (and not affected by the evasion possibilities—see Section 4.b below). In this case the price to consumers rises by exactly  $\frac{1}{4}$  of the tax: one-half of the one-half-of-the-tax upward shift in the supply curve. The price received by noncompliant painters is the same as the price paid by consumers; so the price they receive goes up by this same amount. As a result, the non-compliant painters are better off because of this tax. In contrast, the price received by honest housepainters falls by three-quarters of the tax (i.e., the full tax remitted offset by a price increase of  $\frac{1}{4}$  of the tax). An identical result could be reached if the heterogeneity was not with respect to inherent honest, but judgment proofness; for example, if we assumed that half were judgment proof, half were not, and detection was a certainty.

Consider now a slightly different example involving a more general labor income tax. Specifically, imagine a labor income tax that is to be remitted by employers, and assume that the pre- and post-tax wages have adjusted to reflect this tax. With one exception: one small firm does not remit the tax, and it costlessly and completely gets away with it. (The firm's employees do not suspect, and are unaware of, the evasion). In this situation, the owners of the lone non-compliant firm are better off because in the new equilibrium they incur the lower after-tax wage rather than the pre-tax wage incurred by all other firms—indeed, they are better off because of the imposition of the tax. This occurs because the market adjustment in wages depends on the responses of the preponderance of tax-complying firms, not on the behavior of the relatively few non-compliant firms. That is, so long as the non-compliant firms remain only a small part of the market, they benefit from the decline in the after-tax wage expected by their (assumed to be homogeneous) workers, but they do not remit the tax that is the cause of that decline. We might say, then, that this result follows from the heterogeneity of firms with respect to their inclination and ability to evade taxes. If, alternatively, the remittance

obligation were placed on employees instead of employers, then the employer heterogeneity would not matter, and what would matter is the heterogeneity of employees. Which side is given the obligation to remit will not affect the relative burden on average as between employers and employees, but will affect which particular parties (individuals and firms) win and lose, and by how much. Thus, TRIPI is violated in circumstances in which there is heterogeneity among taxpayers with respect to their willingness or ability to evade.

A similar analysis can be applied in the tort context. The best analogy would be the one discussed above involving parties who intentionally judgment proof themselves against potential tort liabilities. A firm or individual who knowingly engages in some activity that poses a risk of third-party harm that exceeds the injurer's ability to reimburse can be understood as a sort of tort liability evader. And the willingness and ability to engage in that sort of behavior is almost certainly heterogeneously distributed across parties, even within industries. As a result of this fact, of course, the naïve Coasean prediction that the assignment of liability should have no distributional consequences does not hold. Moreover, this argument lends credence to the familiar observation that the introduction of any tax or legal restriction actually increases the utility of the noncompliant parties (vis a vis the world without the tax or restriction), so long as there are enough compliant parties to cause an increase in the pre-tax price of the activity.

#### **e. Non-proportional collection costs**

To this point we have assumed that aggregate compliance costs are proportional to the aggregate quantity produced/consumed (i.e., they are a fixed per-unit constant), although we have allowed the costs at any aggregate output level to depend on what the remittance arrangements are. We have, though, hinted at the likelihood that the magnitude and nature of these costs may depend on the micro details of the markets involved. In this section we pursue the implications of looking at the microfoundations of enforcement and compliance costs.

To fix ideas, consider a stylized world in which remittance-related compliance costs are completely inframarginal, in the sense that the per-period cost is unaffected by the extent of a participant's involvement (i.e., how much they buy, or produce) in a taxed

activity, but only by the fact of participating in the market. In other words, there are fixed, but no variable, costs. Let the remittance burden be on firms. Some, presumably mostly small, firms will no longer be profitable, and will drop out of the market. This means that the supply curve shifts upward, and the new equilibrium price will be higher depending on the relative supply and demand elasticities. But the higher price is of greater value to bigger firms than to smaller firms (because they sell more), so that the new equilibrium will have implications for the industrial organization. The consequences would differ if the remittance responsibility was placed on consumers.

An analogous result would obtain if the remittance responsibility was placed on consumers, with a compliance cost triggered by participating in the market but unrelated to the extent of participation. Some consumers, presumably small ones, would be dissuaded from entering the market, and so the demand curve would shift down. This would cause a decline in the market price, depending on the relative supply and demand elasticities, but the decline would not offset the utility loss equally for small and large consumers; small consumers would be relatively worse off, because the price decline of relatively little importance compared to the fixed compliance cost.

With the possibility of evasion, having the remittance responsibility can change the elasticity of response. For example, consider the consequences if the private cost of an employee evading a given amount of labor income is lower when the true amount of labor income is higher.<sup>71</sup> This implies that the elasticity of labor supply with respect to the pretax wage rate will be different from its elasticity with respect to the tax rate. It also reduces the effective marginal tax rate on supplying labor, because of the “evasion-facilitating” character of labor supply, and will in general alter both the height of the labor supply curve and its elasticity. To the extent it affects the elasticity of labor supply, the incidence of imposing any cost, including a compliance cost, will be changed. If the elasticity of labor supply is larger (smaller) than otherwise, then any cost will be more shifted away from (toward) labor than otherwise. If alternatively the employer had to remit and had evasion possibilities, then it is labor demand that is potentially affected, with different consequences for the incidence of tax liability or compliance cost. Only if

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<sup>71</sup> Joel Slemrod, *A General Model of the Behavioral Response to Taxation*, 9 International Tax and Pub. Fin. 119 (2001).

the pretax wage elasticity and tax rate elasticity of labor supply bear a particular symmetric relationship with the pretax wage and tax rate elasticity of labor supply will the remittance responsibility be irrelevant for the pretax and after-tax wage rate.

#### **f. Equivalences**

A transitivity property applies to the tax remittance invariance principles: if tax system A has identical consequences as tax system B, and tax system B has identical consequences as tax system C, then tax system A has identical consequences as tax system C. Stringing together a series of transitivity relationships reveals some well-known equivalences among tax systems with very different remittance arrangements; here equivalence means identical incidence, allocation, and efficiency consequences. Consider the retail sales tax. We have already discussed that the tax triggered by retail sales could, in principle, be remitted by the consumers or by the retail establishments. In the latter case, which is the norm for all retail sales taxes for reasons already discussed, there must be a mechanism to distinguish business sales made to other businesses from business sales to consumers; in U.S. states' retail sales taxes this is done by issuing business exemption certificates to business purchasers.<sup>72</sup>

Now recognize that, in the absence of enforcement concerns, a tax that must be remitted by one party to a transaction in conjunction with an equal credit offered to the other party is equivalent to levying no net tax at all. Next observe that a value-added tax (VAT) is equivalent to a retail sales tax plus offsetting taxes and credits triggered by every business-to-business sale. Because each of these offsetting tax-and-credit remittance obligations net to zero, the value-added tax is—absent enforcement concerns—thus equivalent to a retail sales tax, as all tax textbooks note.

What is the advantage of adding remittance obligations (and credit entitlements) to a retail sales tax, and thereby involving all businesses in the tax system, even those with no sales to consumers? The answer lies in the administrative and enforcement implications. Because of the difficulty of involving the multitude of consumers in the tax system, a retail sales tax has no natural way to check that the retailer has remitted the correct amount. But business-to-business sales allow for the possibility of such a check, in that

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<sup>72</sup> Abuse of such exemption certificates is a major enforcement concern.

the credit of the purchasing business is contingent on an invoice provided by the seller attesting to its remittance. Moreover, under a VAT the identity of the purchaser (i.e., whether it is a final consumer or a business) is no longer relevant, so business exemption certificates (and the evasion they induce and the enforcement they require) are not needed.

The value-added tax is turned into the Hall-Rabushka flat tax by adding one more set of exactly offsetting tax obligations and credit entitlements—between firms and employees. The firm can deduct payments to workers (i.e., credit taxes) and the workers “owe” tax on their wages and salaries. If the business tax and labor income tax rate are equal, this is equivalent to levying no tax at all. In contrast to the equivalence of a retail sales tax and a VAT, though, the switch from a VAT to a Hall-Rabushka flat tax need not entail any change in remittance responsibility. Firms could continue to withhold and remit tax to fulfill their workers’ labor income tax obligations. The motivation for introducing these zero-net-tax obligations is that, by levying a tax on labor income, the tax obligation can be tailored to the individual worker’s situation. In particular, each worker can be allocated a fixed exemption of labor income.<sup>73</sup> Thus, the motivation of moving from a VAT to a Hall-Rabushka flat tax is to allow flexibility in implementing progressivity and not, as in the case of moving from a retail sales tax to a VAT, to improve administration and enforcement.

Introducing zero-net-tax remittance obligations and credit entitlements for administration and enforcement reasons is the same motivation behind reverse withholding requirements, discussed below in section 5d. These obligations and entitlements need not be triggered by exactly the same transactions as the underlying tax base; for example, in a VAT the value of any single business-to-business sale, which triggers tax remittance obligations and credit entitlements, is not consumption. Indeed, any tax system is defined by the remittance obligations (and credit entitlements), which may or not be equivalent (administration and enforcement issues aside) to a well-known tax base such as aggregate consumption or production.

Now consider harm related to the production or consumption of a good. We have already argued that, absent administration and enforcement concerns, the tort liability

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<sup>73</sup> In the X-tax championed by David Bradford, a graduated rate structure is applied to labor income.

could be placed on the producing firms or the consumers with equivalent consequences. We now see that liability could in principle also be placed on any party doing business with either the producing firms or the consumers and, furthermore, that the base of the tax need not be the same as the harm-producing action. Pursuing the analogy with VAT, if final consumption produces harm, the “remittance” liability could be placed not only on the retail business and consumer, but also on businesses throughout the production and distribution chain that precedes the retail transaction. The chain of contracting businesses can, in the absence of administrative and enforcement concerns, generate an equivalent set of consequences and, in the presence of these concerns, can sometimes produce a superior set of outcomes.

## **5. Applying the Least-Cost-Remitter Idea**

### **a. Wage Withholding as Vicarious Employer Tax Liability**

Our analysis provides an explanation for a number of aspects of current tax law in the U.S. and other countries and suggests some possible reforms. First, consider wage withholding. In our view, this is a form of vicarious employer liability (or remittance responsibility) for taxes triggered by the employee’s work. (And not entirely different from vicarious employer liability for the harms caused by employees, except for the inherent differences, already discussed, between taxes and torts.) To be more specific about the rules, under the U.S. tax system, both the employers and the employees have remittance obligations with respect to the taxes owed on, or triggered by, an employee’s wage income. The Internal Revenue Code, for example, imposes on employers an obligation to “deduct and withhold” a given percentage of the employee’s wages as “employment taxes,” to hold these funds in trust for the U.S. Treasury (typically in a special account in a bank that is qualified to accept tax remittances), and then eventually to remit those funds to the government. Employment taxes include Social Security and Medicare taxes, federal unemployment taxes, and federal income taxes. With respect to the Social Security, Medicare, and unemployment taxes, the amounts to be withheld are

strictly prescribed by law.<sup>74</sup> With respect to income tax withholding, although the employee has some say as to the amount that is withheld (through the filing of his Form W-4), in general the rules encourage withholding that approximates the employee's overall income tax liability. If the employee wants to withhold more than the minimal amount, she can do that as well, as many wage-earners do, and then file for a refund.

Once the employer withholds and subsequently remits the portion of the income tax liability for which it is responsible, the employee also has a separate legal responsibility to remit any income tax she owes in excess of the amount remitted on her behalf by her employer. That is, if the employee withholds less than the full amount of income tax that she owes, she must file a tax return by the filing deadline with a check for the difference. This is obviously what many individual taxpayers do every year when they send a check in with their 1040s each year. Of course, if an employer withholds and remits more in tax than is owed with respect to the employee's income, the government refunds the excess back to the employee. Thus both the employer and employee have a remittance responsibility with respect to the income tax triggered by an individual employee's income.

Note that under current U.S. tax law, if the employer fails to withhold (and remit) the amount required by law from the employee's wages, the government can seek payment for that amount not only from the employer but also from the employee. Thus, as to the employer's remittance obligation, if the employer fails to withhold, the employer is the primary obligor and the employee is the secondary obligor. Because the employer did not "deduct and withhold" the amount from the employee's pre-tax wages, that amount is not credited to the employee for purposes of her year-end remittance obligation.<sup>75</sup> In such a situation, however, if the IRS ultimately recovers the tax from the employer for the unwithheld taxes, the employer may then seek recovery of that amount from the

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<sup>74</sup> In common parlance Social Security, Medicare, and unemployment taxes are typically described as being split between the employer and the employee – with the employer "owing" part of the tax and the employee "owing" the other part. However, the employer is required to remit both amounts, with the employee's portion being considered an amount deducted and withheld from the employee's wage. As we summarize in section \_\_ above, so long as the remittance burden for both amounts is placed on the employer, the two portions of these taxes are identical to each other in terms of efficiency and distributional effects.

<sup>75</sup> *Church v. CIR*, 810 F2d 19 (2d Cir. 1987) ; *Goins v. CIR*, 75 TCM (CCH) 1243 (1998) ; *Edwards v. CIR*, 39 TC 78 (1962), *aff'd*, 323 F2d 751 (9th Cir. 1963).

employee.<sup>76</sup> The basis for the employer's claim against the employee would be contractual rather than statutory. That is, the employer implicitly agrees to pay the employee the post-withholding amount; therefore, if the employer fails to withhold, it has in effect overpaid the employee by the unwithheld amount and can, contractually, seek recovery for that amount – though perhaps unenforceable if the employee proves to be judgment proof. This rule is akin to joint-and-several liability, in that the government can go after either the employer or the employee, with a right of contribution available to the employer if the government ends up collecting from it the unwithheld tax.

Interestingly, if the employer does in fact withhold the relevant amount of tax (i.e., it pays the worker the agreed-upon gross-of-tax wage less some purportedly remitted tax liability) but then, for whatever reason, fails to remit it to the government, the IRS may not go after the employee for the unpaid tax. That is, once the tax is withheld from the employee's pay, the employee receives a credit for that amount on her tax return regardless of whether that amount gets remitted. This result obviously diverges from the joint-and-several liability notion. Why not make the credit given to the employee for withheld taxes conditional on the money actually being remitted by the employer to the government? The answer may lie with the judgment-proof problem. That is, the rule may derive from the assumption that employees, who are expecting their employer to remit the tax on their behalf (since they have actually withheld the amount), will not be setting aside money to cover the tax liability and will not have the cash to cover the tax. Moreover, it is probably understood that most employees have little control over whether their employers actually remit the taxes they have withheld from their wages. Thus, it is not as if placing secondary liability for the withheld tax would create significant beneficial compliance incentives. Rather, it would be better to place such liability on the parties who actually do have control over whether the employer remits the withheld taxes. And that is precisely what the law does. One wonders whether the same absence of joint-and-several responsibility of the employee would persist if it could be shown that the employee not only knew of the employer's non-remittance, but was party to a collusive arrangement of which the non-remittance was a part – and which produced

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<sup>76</sup> Bittker & Lokken, *supra* note \_\_\_, at 111.5.

gains that the parties (employer and employee) presumably shared *ex ante*. We suspect that the IRS would seek recovery from the employee in those cases.

### **b. Joint-and-Several Responsible Party Liability and Tax Insurance**

One part of employment tax withholding law explicitly invokes the concept of joint-and-several liability. Specifically, the Code imposes liability for withheld but unremitted tax not only on the employer but also on any “responsible party” who willfully fails to remit the tax.<sup>77</sup> This is sometimes referred to as “trust fund liability,” as the withheld taxes are supposed to be held “in trust” by the employer for the federal government. Potential responsible parties include virtually anyone who has had a significant degree of control over the withheld taxes or has had some degree of authority over whether those taxes were remitted to the government. For example, the government can seek remittance from individual employees of the employer, such as officers of the company, who were in a position to have control over and responsibility for the withheld tax funds. In some situations, the government has been allowed to seek remittance from members of the company’s board of directors. Liability has even been extended to lenders of the employer in cases in which the lenders were found to have exercised control over the relevant funds. Liability in all of these cases is explicitly joint and several, which means that the IRS can go after *any* responsible party for the full amount of the unpaid tax; and whatever party is required to remit the tax can then seek contribution in a separate action from any other responsible party or parties.<sup>78</sup>

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<sup>77</sup> More precisely, IRC § 6672(a) says that any person “required to collect, truthfully account for, and pay over any tax”—a so-called responsible person—who fails in these duties or who “willfully attempts in any manner to evade or defeat any such tax” is personally liable for a penalty equal to the amount of tax evaded, not collected, or not accounted for and paid over.

<sup>78</sup> If more than one person is liable for the penalty, each person who paid the penalty is entitled to recover from other persons who are liable for (but did not pay) the penalty an amount equal to the excess of the amount paid by such person over such person’s proportionate share of the penalty. IRC §6672(d). The practice of the government, however, has been to go after the full amount of unremitted tax from each of the available responsible parties and then to hold on to that amount until the government’s entitlement to the money has been established (and the statute of limitations for a refund claim has passed), at which point the government then refunds the excess portion of the collected tax to one or more of the responsible parties. IRS Field Service Advice 199904032 . Of course, if the IRS fails to rebate the appropriate amount, taxpayers can seek abatement through the courts. *McCollum, Neal v. U.S.*, (1988, DC KS) 703 F Supp 71 , 89-2 USTC ¶9589 , reconsideration den (1989, DC KS) 90-1 USTC ¶50127 .

Does such joint-and-several tax liability of responsible parties make sense within the framework of this article? Even if we assume that the employer will usually be the lowest-compliance-cost remitter with respect to taxes triggered by wages paid to employees, the employer may not always be overall lowest cost remitter because of enforcement costs. Under some conditions, enforcement of the remittance obligation against the employer will incur extraordinarily high enforcement costs, as when the employer is bankrupt or otherwise judgment-proof, which is precisely when trust-fund liability generally comes into play. In this case the employer may be the least-compliance-cost remitter but is also the least-cost liability avoider, and therefore a high-enforcement-cost remitter. In those situations, it is the individual officers and directors of the company, or perhaps company's lenders, who will be the deep-pocket optimal remitters. The effect of such a rule, according to standard argument for vicarious liability in tort law, will be to give all of the responsible parties the *ex ante* incentive, before the employer becomes judgment-proof and the withheld taxes are dissipated, to make sure that the government gets its money – just as the threat of tort liability would give the parties *ex ante* incentives to minimize the expected harm of accidents.

The threat of this potentially large tax liability on individual directors and officers also imposes risk-bearing costs on the individuals who might be deemed responsible parties. That is, given that most individuals are thought to be risk-averse, such risk-bearing itself is a social cost. Indeed, this concern is probably the reason why corporate officers and directors are not generally made strictly vicariously liable for the torts of the corporation. That is, for officers and directors to be held liable, the plaintiff must establish all of the elements of a tort claim (duty, breach, causation, harm) with respect to the officers and directors themselves; it is not enough to demonstrate that the corporation committed a tort. Of course, it is also possible for officers and directors to be help personally liable to the shareholders and creditors of a corporation for decisions they make that cause harm to the corporation, but even there plaintiffs must demonstrate that the officers and directors breached either their duty of care or duty of loyalty to the corporation. That being said, these potential personal liabilities do impose risks on the directors and officers, risks that the directors and officer generally do not want to bear personally. That is why most corporations purchase both general liability insurance (to

cover the employment-related torts of their directors and officers, as with their other employees) as well as “Directors and Officers (D&O) liability insurance” to cover shareholder and creditor suits for breach of their duties to the corporation. However, although such insurance can serve to reduce the risk borne by directors and officers, it can also undermine the law’s *ex ante* deterrence effect by creating problems of moral hazard.<sup>79</sup> However, in the context of tax liability, where the point of the liability insurance (besides reducing the risk to individual directors and officers) would be to make sure that the appropriate amount of tax gets remitted to the government, it is not clear that moral hazard would be as great a concern. That is, moral hazard in the context of tort liability insurance would mean increased harms to third parties, which are a social waste; whereas, moral hazard in connection with tax liability insurance would mean, ultimately, higher taxes being paid, which constitute a transfer.<sup>80</sup>

So why not allow, or even require, that directors and officers of corporations (or at least those at greatest risk of bankruptcy) purchase D&O insurance or general liability insurance that covers their potential Trust Fund tax liability? Such insurance could conceivably minimize the enforcement cost of collecting the relevant tax with respect to the employment transactions in question. This would be the case if the additional insurance premium (the portion of the liability insurance premium attributable solely to the potential liability for unremitted withholding taxes and accompanying compliance/administrative costs incurred by the insurer) were less than the cost of alternative administrative expenses necessary to collect the tax, and less than the cost (in terms of overall reduction in overall social welfare) that would result from simply not collecting the withheld but unremitted taxes at all. Presumably, in order to combat moral hazard problems (that is, the problem that, once the insurance was purchased, the responsible parties would have no incentive to remit the taxes), the insurers would actually require the responsible parties, or the corporation on their behalf, to make regular deposits of employment taxes with the insurer or with a bank that is unrelated to the

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<sup>79</sup> Tom Baker and Sean S. Griffith, *The Missing Monitor in Corporate Governance: The Directors and Officers Liability Insurer*, 95 *Georgetown L. J.*, 1795 (2007) (reporting empirical findings suggesting that D&O insurance companies do a poor job of monitoring for bad or risky corporate governance behavior).

<sup>80</sup> This conclusion assumes that amount of the liability insurance purchased is sufficient to cover the full potential liability. However, if the potential liability exceeds the assets of the insured parties (i.e., the insured parties are at least partially judgment proof), they will not have an incentive to purchase full liability insurance. This concern underlies the argument for compulsory liability insurance.

employer-corporation. Interestingly, such an approach is not entirely different from the current system, in which the IRS essentially has the power to force employers to make deposits into qualified accounts. Thus, the main difference with the withholding tax liability insurance idea would be to shift that responsibility from a government agency to a private insurer; in effect, by making the liability insurer the surety for the payment of employment taxes, we would be privatizing some small portion of the tax collection enterprise.

**c. Expanding the Remittance Role of (Large) Employers: Overcoming Nonoptimal Coasean Allocations of Remittance Responsibility**

We have shown that the current rules that make employers primarily responsible (and the directors and officers secondarily responsible) for remitting taxes on employee wages are arguably consistent with optimal tax remittance policy. Also consistent with this rationale is the fact that the remittance responsibility under U.S. tax law, as well as under ever other tax regime we are aware of, is largely nontransferable. That is, tax laws generally do not allow Coasean bargaining with respect to tax remittance obligations, in the sense that the parties to the transactions that trigger taxation are not generally allowed to elect which of them will be responsible for remitting the tax.<sup>81</sup> There are some exceptions to this rule. As mentioned above, individual employees can submit W-4 forms requesting the employer not to withhold any tax from their checks, but the IRS will scrutinize such requests fairly closely, and will not permit such an allocation of remittance responsibility solely to the individual employee if it appears to be abusive. Why not? Probably for just the sort of enforcement-cost reasons that we have been discussing, which are analogous to the concerns about strategic judgment-proofing from the tort context. That is, if buyers and sellers were allowed to engage in Coasean bargaining over the allocation of the tax remittance responsibility, there would be an incentive for them to allocate that responsibility not necessarily to the one with the lowest compliance costs (which would be socially optimal) but to the one with the best chance

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<sup>81</sup> In U.S. states' retail sales tax, the retailer is generally responsible for remitting the tax liability. When a consumer purchases goods by mail order, Internet, or otherwise from outside the state, a use tax at the same rate is due to be remitted by the consumer if the seller does not remit on the purchaser's behalf. The compliance rate for such use taxes is generally considered to be close to zero.

of evading the tax – and thus the party for whom the government’s cost of enforcing a given tax liability is highest. Using the modified Calbreisan language, they would not necessarily choose the least-cost harm avoider, but would also consider who is the least-cost liability avoider, which is the higher-cost enforcement cost remitter. This sort of bargain would be joint-wealth maximizing for the parties involved, but may not be socially optimal. Hence, it is no surprise that tax remittance obligations are not generally made transferable.

Which is not to say that taxpayers do not still *try* to transfer those remittance obligations. For example, as already mentioned, U.S. tax law imposes on employers obligations to withhold and remit taxes on employee wages. By contrast, with respect to nonwage payments made to independent contractors (ICs), the remittance obligation rests with the payee rather than the payer. Why would that be the case? Arguably, with payments by employers to ICs, it is the latter who would incur the lower overall compliance costs. Unlike employees (who tend to work for relatively few employers), many independent contractors tend to work for multiple employers. Rather than require multiple employers to gather the same information on the same contractor (i.e., all of the information provided on the W-4 that enables the withholding amount to be tailored to the circumstances of the individual), it makes more sense in those cases to let the contractor sort out its own tax remittances by itself. This does not mean, of course, that the employer/payer is given no tax compliance-enforcement role with respect to independent contractors. To the contrary, when employers make payments to the contractors, they are required by law to submit information returns (Form 1099) to the IRS conveying information about the identity of the payee and the amount transferred. This sort of information reporting certainly lowers the cost of enforcing the tax laws against the contractors, by giving the IRS a means of cross-referencing returns to ensure proper remittance. Thus, in theory, the line between employees and independent contractors could be appropriate in that it allows the remittance obligation to be assigned to the least cost remitter.

But there is the now familiar problem. For the reasons already discussed, the administrative costs of enforcing remittance compliance against ICs, especially small ones, will be very high. First, with small independent contractors, especially those that

are merely self-employed individuals who do work for larger employers but who happen to have independent contractor status, there is a significant possibility of their being judgment-proof. For those individuals, the fact that their payments are not called “wages” does not diminish the concern that led to the adoption of a pay-as-you-earn wage withholding in the first place. Second, with the job of auditing millions of small ICs, there are not the economies of scale of enforcement costs that there are with auditing relatively fewer and much larger employers. It is widely known that the largest source of tax noncompliance in the U.S. lies with self-employed parties.<sup>82</sup> These are taxpayers who are receiving the vast majority of their payments as independent contractors. For both of these reasons, if the tax liabilities triggered by the transactions between ICs and their payers are not remitted by the employer, they will often never be remitted at all.

This asymmetry creates an incentive for employers to shift their labor force from employees to ICs – or, in some cases, simply to characterize employees as ICs for tax purposes. As we discussed earlier, the tort doctrine of *respondeat superior* creates a similar incentive, as employers seek to limit their vicarious tort liability by shifting liability-creating activities to ICs, or by shifting the status of the workers in those areas. And if those workers happen to be judgment proof, so much the better for the employers and workers. Not so great for society, however, as an externality is caused. In this section we have identified a tax motivation that has the same effect: If employers and workers both expect that the worker (with IC status) will be judgment proof, or otherwise prohibitively costly for the government to tax effectively, then those employer/worker pairs will fair relatively well, to the detriment of everyone else – especially the compliant

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<sup>82</sup> Evidence from the IRS National Research Program shows a huge variation in the rate of misreporting as a percentage of actual income by type of income (or offset). Only 1 percent of wages and salaries, and 4 percent of taxable interest and dividends, are misreported.<sup>82</sup> Of course, wages and salaries, interest, and dividends must all be reported to the IRS by those who pay them; in addition, wages and salaries are subject to employer withholding. Self-employment business income is not subject to information reports, and its estimated noncompliance rate is sharply higher. An estimated 57 percent of non-farm proprietor income is not reported, which by itself accounts for more than a third of the total estimated underreporting for the individual income tax; over half of the individual income tax underreporting gap is attributable to the underreporting of business income, of which non-farm proprietor income is the largest component.

Other components of taxable income for which information reports are nonexistent or of limited value, such as other non-wage income and tax credits, also have relatively high estimated misreporting rates. The IRS (2006) reports that the net misreporting rate is 53.9, 8.5, and 4.5 percent for income types subject to “little or no,” “some,” and “substantial” information reporting, respectively, and is just 1.2 percent for those amounts subject to both withholding and substantial information reporting.

employer/worker pairs. Indeed, as discussed earlier in the self-employed painter example, an argument can be made that the parties who will benefit most from this arrangement will be those self-employed ICs who are most willing to evade their tax remittance responsibilities.

In sum, the Coasean market left to its own devices will, in some situations, tend to produce assignments of tax remittance responsibility that are suboptimal from society's perspective, just as the Coasean market may do with tort remittance obligations. One possible solution would be to expand the role of employers, or of large employers, as tax remitters. For example, overall welfare might be increased – considering both the sum of compliance and administrative costs and the allocational and distributive goals of tax law, if we did away with the employee/IC distinction at least as it is currently defined and made employers generally responsible for remittance. Presently, whether a payee/worker is considered an employee or IC turns on the definition of an employee from agency and tort law. Although a multi-factor test is generally used, the core of the test is control: if the employer is contractually empowered to control the way in which worker does his job (i.e., the worker does not exercise “independence” and “discretion” with respect to how he does the work), then he is an employee. That definition makes sense for tort law, when a key concern is to assign tort liability to the least-cost harm avoider. It does not make sense, however, for determining which party would be the optimal tax remitter. A better way to draw the line would be to impose the remittance on the obligation on the party who is likely to produce the lowest combination of compliance and administrative costs. For the reasons already discussed, that will usually be the employer in cases in which the employer is a large corporation and the worker is an individual (or even a small firm).

#### **d. The Limits of Vicarious Employer Tax Liability: Scope of Employment**

In the analysis in this Part, we have borrowed ideas from the literature on vicarious tort liability to suggest ways in which an analogous efficiency argument can be used to justify what amounts to vicarious employer tax liability for the taxes owed by employees. That is, because of the asymmetric cost of enforcing tax remittance obligations imposed on workers (at least when the workers are individuals – whether employees or

independent contractors – and the employers are relatively large companies), an efficiency story can be told for placing the remittance obligation on the employer rather than on the worker. (As we have emphasized, this fact is inconsistent with the tax remittance invariance propositions that are conventional wisdom among economists.) Here we discuss whether this idea of vicarious employer tax liability should be limited by a tax version of the scope-of-employment doctrine.

Recall from the discussion in section \_\_\_ above the nature of the scope-of-employment doctrine in tort law: It says that employers can be held vicariously and strictly liable for the torts of their employees only insofar as those workers commit torts within the scope of their work for the employer. The efficiency justification for the rule is that the employer is not the best insurer of the employee’s non-job-related liabilities; and imposing those costs on employers would inefficiently reduce the scale of the employer’s enterprise. The counter-argument is that perhaps the employer might be, in some cases, the best insurer of such risks and might even be, if not the cheapest harm avoider, someone who is in a position to “bribe” the cheapest harm avoider (probably the worker) to do just that--avoid the harm.

What would the tax analog of vicarious tax liability with a scope-of-employment limitation look like? It would look very much like the current system for withholding and remittance for Social Security, Medicare, and unemployment insurance taxes. For those taxes, the employer is required to withhold and remit an amount that is calculated based exclusively on the wage paid by that employer to that employee.<sup>83</sup> Thus, in a sense, those tax remittances are presently limited to the scope of employment, as they are calculated by applying the relevant rates exclusively to the wages paid by the employer with the remittance responsibility. As a result, if a worker receives wages from more than one employer, each employer is responsible for remitting the employment taxes that are attributable to the wage that they pay the worker.

What would the tax analog of vicarious tax liability *without* a scope-of-employment limitation look like? Interestingly, it would look something like the current rule for income tax withholding in the U.S. With income tax withholding, the idea is that, in

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<sup>83</sup> A portion of the tax is formally “owed” by the employer and a portion is “owed” by the employee. However, the employer is responsible for remitting both parts of the tax.

most cases, the employer withholds and remits enough to cover the individual taxpayer's entire income tax liability, not merely their income tax liability generated by the wage paid by the employer.<sup>84</sup> In general, as a first approximation, the law allows employers to withhold in income tax the amount that their employees tell them to withhold, that is, whatever amount is determined by the employee's Form W4, which lists the number of exemptions to be used in calculating the withholding amount. Indeed, an employee can request that no income tax whatsoever be withheld. However, if the withheld amount proves to be too low (and does not at least approximate the employee's overall tax liability), the IRS has the power to send the employer what is called a "lock-in" letter, which will require the employer to withhold an amount that more closely approximates the employee's true tax liability. If the employer fails to enforce the lock-in withholding amount, the IRS will collect the difference from the employer.<sup>85</sup> Indeed, the lock-in withholding amount probably often results in overwithholding and the need for the employee to file for a refund.

Of course, employees who have both employment income and non-employment (or self-employment) income can avoid the compulsory lock-in withholding by simply filing estimated tax returns and remitting the tax liability triggered by the other income. But they have to pay the extra tax. What the employer and employee cannot do – at least not without the possible consequence of the lock-in letter – is to collude (in one of those nefarious Coasean tax externalizing transactions) to shift all of the remittance responsibility to the employee, who then fails to pay the tax. The combination of information reporting (on Form W2s) and lock-in letters deter this possibility. The key observation is that, under present withholding regulations with respect to federal income tax withholding, the general rule is that employers are expected to remit (i.e., are held vicariously liable for) tax owed by the employee not only on income triggered by the

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<sup>84</sup> Taxpayers are encouraged to submit W4 forms that fine-tune the exemptions so that this result is approximately achieved. For example, on the IRS web page, there is a withholding calculator that takes the employee-taxpayer through a number of questions designed to help him arrive at a withholding amount that approximates not merely the tax triggered by the wages paid by the employer, but the overall likely tax liability of the employee-taxpayer from all sources.

<http://www.irs.gov/individuals/article/0,,id=96196,00.html>. Of course, as with the Form W4, this calculator is relatively easy to manipulate simply by inflating the number of dependency exemptions. However, as discussed in the text immediately below, the law has ways of policing such abuse.

<sup>85</sup> Internal Revenue Service, Withholding Questions and Answers, Question 6 (available at <http://www.irs.gov/individuals/article/0,,id=139412,00.html>).

work with the employer but also from income generated outside of the employment context – unless the tax on other income is paid via separate estimated tax payments. And this regime is considered neither controversial nor unusual, even though it is a form of expanded—and vicarious—employer tax liability.

#### **e. In Rem Taxation**

To this point we have been focusing on the tax remittance analog to tort liability, and for the most part we have been concentrating on income taxes, with some discussion of sales or other consumption taxes. Turning briefly now to property taxes, we see an example of a very different sort of remittance regime, but one that has obvious Coasean roots: *in rem* taxation – or taxation “against the property.” All individual and sales taxes are, in the first instance, *in personam* liabilities in the following sense: They are initially enforceable against the person who is the remitter (or, if there are multiple or overlapping remittance obligations, enforceable against the remitters). Of course, even with income taxes, if the person with the remittance obligation fails to remit, the taxing authority can convert that personal liability into a claim against taxpayer’s personal and real property – an *in rem* liability.<sup>86</sup> With an *in rem* tax liability, as with any *in rem* liability, the obligation “runs with the land.” Thus, if the property is transferred and the *in rem* tax liability has not been satisfied, that liability follows the property; and the party to whom the *in rem* liability is owed, here the government, has the power to force a foreclosure sale to satisfy the obligation. One difference between an *in rem* and an *in personam* liability is that if an individual who is personally liable goes through a personal bankruptcy proceeding, her *in personam* liabilities will be eliminated; whereas, *in rem* liabilities, again not being personal liabilities, remain enforceable. Thus, the remedy that is available to the *in rem* creditor, here the government, would be seizure and sale of the property.

How are these *in rem* tax liabilities enforced? Normally the taxing authority will have on file the name of one party who is primarily responsible for remitting the tax, the party to whom the periodic tax bill is sent. This is usually the owner of the property. If

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<sup>86</sup> In fact, as mentioned in note \_\_ above, with U.S. federal income, gift, or estate taxes, the U.S. government automatically receives a lien against *all* the assets of a taxpayer if the taxpayer does not pay the taxes upon “demand.” IRC § 6321.

the owner fails to pay the tax, the tax collector can then initiate steps to foreclose on the property. Notice may also be sent to other parties with an interest in the property, who may have the option to pay the delinquent tax and assume ownership of the property. In any event, as the foreclosure process goes forward, all parties with a financial interest in the property become aware of that fact. And through a public auction, the property will eventually end up in the hands of the highest valued user.<sup>87</sup>

What does all of this have to do with optimal tax remittance policy? In fact, *in rem* tax liability amounts to a sort of modified joint-and-several liability for the tax that is attributable to a given piece of property. That is, the tax collector (like the tort plaintiff) can in effect bring its cause of action against any party with an interest in the property in question, whichever one has the deepest pocket or is otherwise easiest, or cheapest, to identify. *In rem* tax liability, of course, is not exactly like joint-and-several liability, since none of the potential remitters (and potential owners of the property) would be held personally liable. However, because of their financial interests in the tax-encumbered property, they would have an incentive, at least to the extent of their financial stake, to pay the outstanding tax liability. The protection in this situation against potentially judgment proof taxpayers, of course, is not their personal deep pockets, but the value of the property subject to the tax liens. Thus, *in rem* tax liability provides an alternative to deep pocket vicarious tax liability as a response to the sorts of compliance obstacles we have been discussing. What's more, as we have noted, this sort of *in rem* liability is in fact already present not only for local property taxes, but also for federal income taxes, in circumstances in which the taxpayers in question have assets that can be attached.

#### **e. Small Business Withholding**

It will come as no surprise that developing countries, where administrative resources are relatively scarce, make use of a wide variety of tax remittance regimes. Because the

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<sup>87</sup> As John Youngman explains, two of the consequences that may be intended by terming a tax *in rem* are (i) that assessments may name the property but not rely on the identification of the owner to establish tax liability, so that publication may be deemed to notify all interested parties of this claim, and (ii) there may be a corresponding absence of personal liability, the remedy for nonpayment being limited to seizure and sale of the property itself. See Joan Youngman, *Tax on Land and Buildings*, in *Tax Law Design and Drafting* (1996) (Victor Thuronyi, Ed.). Youngman counsels against *in rem* taxes that limit the liability, and favors listing as liable for remittance obligation anyone "owning, claiming, possessing, or controlling" an interest in the property on the lien date. This language is taken from Cal. Rev. and Tax. Code §405.

income of small businesses is particularly hard to measure and tax, in some countries there is withholding on business income, under which tax must be remitted in conjunction with certain purchases from small businesses, on the grounds that these payments presumably reflect or indicate taxable income of the recipient. In a few cases, there is “reverse” withholding, under which tax must be remitted in conjunction with certain sales to small business taxpayers. Here the link to income is less direct, although arguably there is an indirect relation, if the transaction is expected to result in taxable profits, as when importers, wholesalers, or retailers, purchase goods for resale.<sup>88</sup> These withholding remittances can in principle be credited against the income tax liability of the small businesses, but the presumption is that these businesses often are not in the tax net, i.e., are not filing tax returns and remitting any tax liability. Countries that require withholding on payments to certain businesses usually exclude as withholding agents individuals in their capacity as consumers because they are too numerous and otherwise not suitable as withholding agents. One important result of excluding individual consumers is that most retail establishments remain unaffected by withholding. There have been exceptions, though. At one time individual consumers in Japan and Australia were required to withhold and remit in certain cases, and in Japan individual consumers are required to withhold and remit for business income if they are withholding agents for employment income.

## **6. Conclusions**

Two venerable but heretofore parallel scholarly traditions, tax remittance invariance propositions and Coasean variance and invariance assertions in a product liability context, share much in common. In both settings an equilibrating price will determine which side of the market bears the costs, either of a harm or a tax obligation, and in both settings there is the possibility of “off-market” negotiation that will reach private-cost reducing agreements.

They differ in the centrality for the TRIPs of the enforcement of tax obligations by the government. In contract law, for example, the presumption that maximizing joint

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<sup>88</sup> Withholding for small business income tax is discussed in Pirooska Soos, *Self-Employed Evasion and Tax Withholding: A Comparative Study and Analysis of the Issues*, 24 U. C. Davis L. Rev. 107 (1990).

benefit is efficient presumes that there are no third parties involved, but introducing a third party is not central. In tax the third party (the government, as an agent for all citizens) is central, and in particular bargains that reduce joint compliance costs may, by increasing enforcement costs of raising revenue may not be socially optimal. To clarify that difference, we introduce the semantic distinction between the least-cost *harm* avoider, a modification of a standard term in tort analysis that corresponds to tax compliance costs, and least-cost *liability* avoider, which is critically important in tax because the private cost saving due to evasion of tax liability does not correspond to social cost saving, and in fact entails *additional* enforcement costs.