

Doctrine of Legal Mistake in Contracts: Is it Efficient, is it Fair?

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The court system is sometimes called on to rescind a contract between parties where one party has entered into the agreement based on faulty information. In some cases of mistake, courts will enforce the agreement as written, on the premise that the party claiming mistake accepted the risk of the mistake as part of the contracting process.¹ In other cases, courts may rescind or modify the terms if, in the event of a unilateral mistake, the other party knew of the mistake but made no effort to correct it leading to injury of the mistaken party to the contract.² This paper will endeavor to analyze the rules of contractual mistake through the economic concepts of efficiency, Pareto optimality, and the difference principle postulated by John Rawls.

Economic efficiency is defined as the maximization of wealth in a given society. A transaction is efficient when the transaction places a thing in the hands of the person in the transaction that values the thing the most.³ Wealth presumes that rational individuals will value the same thing

¹ See Restatement (Second) of Contracts §§ 152, 153, 154(b) (1981).

² See *Id.* at § 153.

³ Richard A. Posner, *Economic Analysis of Law* 10 (Sixth ed., Aspen Publishers 2003).

differently. Take water, for example. Water is required to live. Rational people want to live. The most that a person can live without water is a few days. Therefore, a person that has just had a drink necessarily values a portion of water less than someone who has not had a glass of water in two days. Wealth maximization means that transferring the water from the person who just had a drink to the other will result in a net increase in social wealth.⁴

Prior to the transfer, the following conditions are true. A (has water, is not thirsty) values water at one dollar per gallon. A has no money. B (has not had a drink of water in two days) values water at one thousand dollars per gallon. B has five hundred dollars. Total social wealth is five hundred and one dollars between A and B. After the transfer from A to B of a gallon of water at ten dollars, the following conditions are true. A has ten dollars. B has a gallon of water he values at one thousand dollars and has four hundred and ninety dollars in cash. Total social wealth is now fifteen hundred dollars. Total social wealth has increased by nine hundred and ninety-nine dollars as a result of the

⁴ This transaction could also be Kaldor-Hicks efficient so long as the sale of the water caused no harm to others, or caused a harm that had a value of less than nine hundred and ninety nine dollars. Presumably, if the transfer deprived a third party of any water and that person died, the transaction would not be Kaldor-Hicks efficient, but could still be Pareto optimal. See Posner, *supra* n. 3, at 13.

transfer. The change in total social wealth is based on the relative value that A and B placed on the water at the time of the transfer.

Table 1: Wealth Maximization Example

Party	Wealth Prior to Transaction	Wealth After Transaction
A (has water)	\$1/gallon of water	\$10
B (thirsty)	\$500	\$1000/gallon of water \$490
Total Wealth	\$501	\$1500

John Rawls postulated that rational persons, were they to establish a social order without prior knowledge of their position in it, would adhere to a definition of justice of two parts: "1) Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. 2) Social and economic inequalities are to be arranged so that they are both: (a) *to the greatest benefit of the least advantaged persons*, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."⁵ A corollary of 2(a) of the difference principle is that inequality of a social or economic good can only be tolerated in a just society if the

⁵ John Rawls, *A Theory of Justice* 266 (Rev. ed., Belknap Press 1999) (emphasis added)

unequal distribution directly benefits those least advantaged in society. There is some parallel between Rawls' conception of justice and Pareto optimality or efficiency.⁶ However, the difference principle requires a second step in that transactions that are unequal in their result must be for the benefit of the worst off. For example, if two parties were to split one hundred dollars, a fifty-fifty split would be Pareto optimal, but so would a one hundred-zero split because Pareto only requires that the transaction make at least one party better off without making any other party worse off. Pareto optimality would bar a distribution of one dollar to each party, because not distributing the remaining ninety-eight would not be optimal.⁷

The difference principle requires, however, that the least advantaged party benefit whenever a distribution is unequal among the parties.⁸ So, if A and B are the parties, and B is worse off in comparison to A in some essential way,

⁶ *Id.* at 58.

⁷ *Id.*; See also Wikipedia, *Pareto Efficiency*, http://en.wikipedia.org/wiki/Pareto_efficiency (last updated Apr. 23, 2007); See also Posner, *supra* n. 3, at 13; Compare with Ronald Dworkin, *A Matter of Principle* 244-245 (Harvard U. Press 1985).

⁸ Rawls contemplates the difference principle in a more general fashion between discrete classes of people in society. So, for example, the least advantaged might be those in the bottom 10% income bracket of a given society. See Rawls, *supra* n. 5, at 82.

the difference principle requires an affirmative justification for not splitting the one hundred dollars evenly between the parties, particularly if the better off party, A, receives a greater share. One way to defend an uneven distribution is that A and B had a prior contract that specified A would get sixty and B forty dollars. Assuming that the parties had an enforceable contract that was entered into freely and was unambiguous, the uneven distribution could be defended on the basis that the certain enforcement of free, unambiguous contracts benefits all persons, particularly those in the least advantaged position in a given society.⁹ An alternative argument to support an uneven distribution is that the person getting the larger share will use that income to increase the overall wealth of society, thereby indirectly benefiting the less advantaged.¹⁰

I. Mutual Mistake: *Wood v. Boynton*

⁹ Rawls discusses unequal distributions that benefit the least advantaged in the context of education, so that the difference principle would require society to distribute more educational benefits to those with fewer natural talents. Reliable enforcement of rights under a contract could be considered a parallel interest because the least advantaged would be more likely to seek recourse in the law. See Rawls, *supra* n. 5, at 87-89.

¹⁰ For example, Rawls posits that raising the expectations of entrepreneurs also benefits less advantaged persons such as unskilled workers. Rawls, *supra* n. 5, at 68.

Wood v. Boynton was a case involving the sale of an uncut diamond by the plaintiff to the defendant jeweler, Boynton. After the sale of the stone for a dollar, Wood discovered the true value of the stone (on the order of about seven hundred dollars) and demanded the stone back or a payment of the difference between what she paid for it and what its "true" worth was. The court decided for Boynton on the theory that, absent specialized knowledge of uncut stones on the part of the jeweler, the sales contract should be enforced on its agreed upon terms.¹¹

Prior to the transaction, Wood possessed a stone that had nominal value to her (or presuming Wood was rational, she valued the stone at no more than one dollar, the sales price of the disputed transfer).¹² The value that Wood placed on the stone at this time was based on her understanding of the nature of the stone. Now, had Wood approached an expert in uncut diamonds to identify the nature of the stone, Wood would probably have valued the stone at one thousand dollars instead (based on what Wood demanded from the defendant at trial in damages).¹³ One of the results of the court's holding for Boynton is that the court put the duty of determining the true

¹¹ *Wood v. Boynton*, 25 N.W. 42 (1885).

¹² *Id.*

¹³ *Id.*

nature of an item for sale on the seller, because the court held that a seller's mistake as to the nature of the item is not ordinarily an excuse for voiding the contract between the parties.¹⁴

Based on efficiency as wealth maximization, Wood had a dollar, and Boynton had a stone worth to him a dollar plus his existing wealth, thus societal wealth was increased by one dollar as a result of the transfer. Interestingly, this transfer would also be Pareto efficient, because the transfer increased Wood's wealth while not decreasing anyone else's wealth as a result. And, at least until the uncut stone was determined to be a diamond, this transaction would also be considered fair under the difference principle, because the transaction was an even one between Wood and Boynton.¹⁵ In addition, based on the assumption that Boynton was not an expert in uncut diamonds, the court's holding is in accord with Restatement (Second) of Contracts Section 154(b), which assigns the risk for a mistake on the party making the mistake

¹⁴ *Id.* at 45; See Restatement (Second) of Contracts §§ 153, 154(b) (1981).

¹⁵ The difference principle would only be concerned about uneven transactions, which would only be fair if the transaction would benefit the least advantaged in the transaction.

when that party treats his limited knowledge of the thing to be transacted as sufficient to consummate the transaction.¹⁶

Table 2: *Wood v. Boynton* Transaction Analysis

Party	Wealth Prior to Transaction	Wealth After Transaction
Wood	Stone (of nominal value)	\$1
Boynton	Existing Wealth	Existing Wealth Less \$1 Stone valued at \$700
Total Wealth	Boynton's Existing Wealth	Boynton's Existing Wealth + \$699

However, requiring a jeweler like Boynton to disclose to a potential seller that the stone to be sold is in fact far more valuable is not necessarily more efficient. Section 153(b) requires a jeweler such as Boynton to correct a basic assumption of a prospective seller like Wood if Boynton knew of Wood's mistake about the nature of the uncut stone.¹⁷ So, placed in the context of *Wood*, had Boynton been an expert in uncut diamonds, he probably would have been required to disclose the fact that he was buying such a stone from Wood before completing the transaction.¹⁸ Otherwise, Boynton may

¹⁶ Restatement (Second) of Contracts § 154(b).

¹⁷ *Id.* at § 153(b). This was also the Court's conclusion in dicta to the opinion. See *Wood*, 25 N.W. at 44.

¹⁸ *Wood*, 25 N.W. at 44.

have faced a rescission of the sales agreement or damages to compensate Wood for the adverse result.¹⁹

The failure to disclose would mean that Boynton would get a seven hundred dollar diamond for one dollar, which means that the net increase in societal wealth would be six hundred and ninety-nine dollars instead of the increase of a mere one dollar as above. But, the same result would be had were Boynton to have disclosed the nature of the stone to Wood before the transaction. This is because Wood would have valued the stone at a higher amount (presuming she could translate this information into an argument to receive more for the stone), but the net increase in societal wealth would be the same. Such a transaction (considered alone) would also be Pareto efficient, because both parties gained something from the transaction (one dollar to Wood, six hundred ninety-nine to Boynton), and no party was made worse off as a result. However, this failure to disclose would probably run afoul of the difference principle, unless we can prove that the unequal transaction was of benefit to those least advantaged in society.

The difference principle would probably support disclosure for two reasons. First, the principle would require that we look at the value of the transaction and the

¹⁹ See Restatement (Second) of Contracts § 153(a), (b).

distribution of the wealth between the parties. Noting that the distribution is uneven, the difference principle would require that we then look at the status of the individual parties to identify the least advantaged, and determine if the least advantaged benefited from the exchange. Or, alternatively, the difference principle would ask if allowing this kind of transaction generally would be to the benefit of the least advantaged class (of which Wood was a member) in society at large.

To answer these questions, Rawls would have us place ourselves in the veil of ignorance so that we could examine the rule of allowing experts to not correct a mistake of a basic fact to non-experts before a transaction without knowledge of whether we will be an expert or a non-expert in the society we subsequently would form.²⁰ As rational persons, we would presume that the odds are there would be more non-experts than experts in uncut diamonds in society,²¹ making it

²⁰ Rawls, *supra* n. 5, at 118.

²¹ The US Department of Labor statistics web site suggests that less than 28,100 people were employed in the US in 2005 in the jewelry business of a total 130,307,840 positions, suggesting that the chance of being a jeweler in the United States is slightly less than 0.0023%. Of those, some lesser portion would be experts in uncut diamonds. See U.S. Dept. of Labor, *Occupational Employment Statistics*, <http://www.bls.gov/oes/home.htm>, select Create Customized Tables, One Occupation for Multiple Geographic Areas, Jewelers and Precious Stone and Metal Workers, National, May 2005 (last visited Apr. 30, 2007).

more likely that we would gain only one dollar far more often than we would gain six hundred ninety-nine without disclosure. Allowing a jeweler to keep the lionshare of the bargain, on its face, also does not seem to benefit us indirectly were we to belong to the least advantaged class, because there is no increase in total wealth as a consequence of not disclosing. The uncut stone is worth seven hundred dollars to Boynton whether he told Wood she was mistaken about the stone's nature or not. Therefore, assuming that we are generally risk averse, we would be more likely to adopt the rule requiring disclosure so that the exchange would be closer to equal between the two parties.

Interestingly, however, if we are allowed to look at the overall wealth of the jeweler and non-jeweler, and presume that the non-jeweler is already quite wealthy but the jeweler is substantially less so, it would seem that the difference principle might require non-disclosure by the jeweler, allowing the benefit of the exchange to flow to the jeweler. For this argument to hold, we would have to be convinced that in general, jewelers belong to the least advantaged in society in relation to non-jewelers who happen to discover uncut stones on the street. If so, the difference principle might lead us to a special legal rule that would allow jewelers to avoid contracts that are adverse to them if they make a

mistake, and to enforce contracts adverse to non-jewelers even when the jeweler knew of the other party's mistake. Such a result is not in accord with the Restatement, which puts the duty on the party with knowledge of the mistake by the other party (regardless of who is who), out of a sense of fair play.²² In the longer term, such a rule would probably be to the disadvantage of jewelers because no rational person would want to enter into a bargain with a jeweler, knowing that the jeweler could avoid personally disadvantageous agreements but enforce particularly advantageous agreements. Ultimately, such a rule would likely fail another requirement placed upon persons in the veil of ignorance – that rules made through this procedure must be rules of general applicability.²³

The jeweler's argument for not disclosing is that he should get the advantage of his investment of time and education in gaining expertise in accurately identifying uncut stones, and in taking on the risk of getting the stone cut and prepared for the cut diamond market. Effectively, the non-jeweler in the transaction is free-riding on the jeweler's expertise.²⁴ Our tolerance of free-riding could lead to a market failure, in that jewelers would have less incentive to

²² See Restatement (Second) of Contracts § 153(a), (b).

²³ See Rawls, *supra* n. 5, at 120-121.

²⁴ See Posner, *supra* n. 3, at 61.

gain expertise, thereby leading to fewer uncut stone buyers. Even under the difference principle, if allowing jewelers to benefit from their specialized knowledge increases the overall wealth of society, this benefit may be enough to improve the lot of the least advantaged in society, and therefore be a "fair" rule, even if this requires that we tolerate periodically uneven bargains.

As to the value of the information to the jeweler prior to disclosure, the question to be answered is how often the jeweler is uncompensated for his expert opinion on uncut stones, and whether he gains other benefits from his expertise that would compensate him for having to disclose to otherwise ignorant stone sellers. Assuming a functioning market for uncut stones with imperfect information, it still seems unlikely that many customers of jewelers present with stones found on the street that later turn out to be highly valuable. And it seems unreasonable to think that jewelers depend on ignorant customers alone (or even primarily) to operate in the jewelry business.

As to the risk the uncut stone could not be cut to a finished stone, assuming a functioning market for finished gems, the market price for uncut stones would probably be predicated on the value of the stone once it is cut into a finished gem. Therefore the market price would likely take

into account the risk that a particular stone could not be cut into a gem, and therefore the jeweler really is not taking the risk. As the jeweler would only be asked to pay the fair market value, it would seem that he is no worse off by being required to disclose. Moreover, the jeweler can resell the uncut stone to an expert and transfer this risk to a third party with little impact on himself (again presuming a functioning market for uncut stones).

Another argument for the jeweler is that the jeweler entered into the contract assuming the risk that the uncut stone would turn out to have no value at all (in other words, the uncut stone was not a diamond at all). From his perspective, the jeweler is taking a calculated chance, which is worth one dollar (plus some further cost to have the stone valued by an expert). Depending on the chance and the initial costs, a rational jeweler would take the risk of purchasing the stone in some instances. Furthermore, some of these hypothetical circumstances would be both efficient and fair under the difference principle (even though the transaction would be uneven). However, at some point where the chance is high that the stone is worth far more, the difference principle would part company with efficiency to declare the transaction unfair.

For example, suppose that the jeweler had to spend an hour with an uncut stone expert to determine the true nature of the item, and that time is worth fifty dollars. The jeweler would be irrational to take the stone if he thought the stone only had a five percent chance of being worth seven hundred dollars (the risk adjusted value would only be thirty five dollars), but he would be rational to take the stone if he thought the stone had a ten percent chance of being worth that much (the risk adjusted value would be seventy dollars, leaving him with a net increase of nineteen dollars). The transaction would continue to be efficient at a ninety percent chance the stone was a diamond, because overall wealth would still increase as a result of the transaction. However, the difference principle would probably hold this latter transaction to be unfair. Whereas, in the ten percent hypothetical, we could tolerate the inequality to encourage the transaction to occur at all, no such encouragement is needed when the jeweler is ninety percent certain of the stone's true nature. Unless the jeweler has some other argument for the uneven distribution of wealth from the transaction, fairness would require that the contract not be enforced.²⁵ This conclusion of the difference principle is in

²⁵ See Rawls, *supra* n. 5, at 68.

accord with Section 153 of the Restatement.²⁶ A marginal case would be in between an estimated ten and ninety percent chance the uncut stone was far more valuable; the Restatement reflects a balancing between encouraging the assumption of some risk against basic fairness in transactions.²⁷

Table 3: Risk/Benefit Analysis²⁸

Scenario	Costs	Adjusted Value	Take Risk?	Unfair?
5% chance of being worth \$700	\$1 for stone \$50 for analysis	\$35	No	No
10% chance	\$51 total	\$70	Yes	No
90% chance	\$51 total	\$630	Yes	Yes

Now, if the jeweler had rationally²⁹ taken the stone for a dollar, investigated for another fifty dollars, discovered the stone was worthless, and sued Wood for his loss of fifty-one

²⁶ See *Id.* at § 153(b). Here, the jeweler would seem to know that the other party was mistaken about the nature of the uncut stone but the jeweler did not make any effort to correct this mistake, resulting in an adverse effect on the seller.

²⁷ See Restatement (Second) Contracts §§ 153, 154.

²⁸ For a discussion of risk adjusted value, See Posner, *supra* n. 3, at 10.

²⁹ Which is to say that the jeweler believed the stone had a risk adjusted value that was greater than the actual costs to determine its nature.

dollars,³⁰ Boynton would probably lose based on Restatement (Second) of Contracts Section 154.³¹ Here the Restatement would likely hold that the jeweler knowingly took a risk that the uncut stone was worth more than one dollar and the contract as stated adequately distributed that risk among the parties. Interestingly, the Restatement would probably allocate the risk the same way even³² if the jeweler was mistaken³³ about the chances that the stone was a diamond (the jeweler thought the chance was fifty percent, but objectively the stone only had a one percent chance of being a diamond on examination). From an efficiency perspective, if the risk adjusted value of the stone at the time the contract was formed was greater than the cost to determine its actual value (scenario A below), the transaction should be enforced on its terms. But if the risk adjusted value is less (scenario B), the resulting transaction is inefficient (or simply amounts to a forced transfer payment to the stone inspector), and the

³⁰ Either because the jeweler's estimate that the stone had only a ten percent chance of being worth more or he just estimated wrong and the chance was really only one percent.

³¹ See Restatement (Second) Contracts § 154(b).

³² See *Id.* at § 153(a)-(b) (the Restatement is only concerned if the other party knew the jeweler was mistaken about the likelihood of the true nature of the stone).

³³ Or the jeweler's risk seeking behavior resulted in magnifying the chance the stone was worth more than a risk averse person would have valued the stone.

contract should be rescinded. While the difference principle might endorse the former transaction, it would likely condemn the latter because the transaction was uneven and resulted in less overall wealth (a reduction in overall wealth does not benefit anyone in society).³⁴

Table 4: Jeweler's Mistake Hypothetical

Scenario	Costs	Adjusted Value	Take Risk?	Change in Wealth
(A) 50% chance of being worth \$700	\$1 for stone \$50 for analysis	\$350	Yes	+ \$299
(B) 1% chance	\$51 total	\$7	No	- \$41

The problem here is that the seller of the stone did nothing to cause the jeweler's mistake of a fifty percent chance for a one percent chance of the stone being worth more. Nor did the third party expert from whom the jeweler sought an opinion on the nature of the stone. From the perspective of the legal system, a mistake such as this would probably stand outside of the power of the court to remedy. This is because the concept of legal mistake is described in Section 151 as a mistake of a "basic fact" of the contract between the parties.³⁵ In this case, the basic fact would be whether the stone was a diamond or a worthless object, not a derivative

³⁴ See Rawls, *supra* n. 5, at 68.

³⁵ Restatement (Second) Contracts § 151.

fact like the jeweler thought the stone had a fifty percent chance of being a diamond when he should have thought it only had a one percent chance.

This situation might be analogous to the risk preferring jeweler who would take a ten percent chance on any uncut stone being worth seven hundred dollars.³⁶ Those that prefer risk see a ten percent chance of one hundred dollars as equivalent to ten dollars.³⁷ If we also assume the jeweler is irrational³⁸, then even a one percent chance at one hundred dollars for ten dollars is equivalent, even though this bargain actually reduces net social wealth (unless we can assign a positive value to the happiness of the irrational jeweler at taking on irrational risks). But irrationality is not a basis for rescission of a contract under the Restatement.³⁹

Another hypothetical is where the jeweler takes two, independent risks on the value of the stone, one where he is relatively likely to gain a small amount on his investment, and a second one where he is relatively unlikely to gain a large amount on his investment, but the jeweler must be able

³⁶ See Posner, *supra* n. 3, at 11.

³⁷ *Id.*

³⁸ See Posner, *supra* n. 3, at 19.

³⁹ Restatement (Second) of Contracts at § 154(c).

to make the relatively small gain to justify the risk of the larger gain. If, for example, the jeweler is certain the uncut stone is worth five dollars, but only seven percent sure the stone might be worth seven hundred, the net social gain of the one dollar exchange is three dollars.

Table 5a: Jeweler's Dual Risk Hypothetical

Scenario	Costs	Adjusted Value	Take Risk?	Change in Wealth
100% chance of being worth \$5	\$1 for stone (no analysis required)	\$5	Yes	+ \$4
7% chance of being worth \$700	\$1 for stone \$50 for analysis	\$49	No	- \$2
Total increase	\$51	\$54	Yes	+ \$3

Based on efficiency as wealth maximization, this transaction is efficient because of its net increase in social wealth. Effectively, the smaller but uneven transaction allows a rational jeweler to engage in a slightly riskier investigation of the nature of the uncut stone which he would not otherwise engage in if that were the only risk adjusted value of the stone.⁴⁰ Using this as a model, then a more extreme hypothetical would be where the jeweler is certain the uncut stone is worth at least forty-five dollars, but only one

⁴⁰ Or another way of looking at this is the jeweler is using the uneven transaction as an insurance policy to subsidize a greater level of risk on the possibility of the stone being worth a lot more than one dollar.

percent certain the stone is worth seven hundred dollars.

These two chances together amount to a net increase in social wealth and are therefore efficient.

Table 5b: Jeweler's Alternate Dual Risk Hypothetical

Scenario	Costs	Adjusted Value	Take Risk?	Change in Wealth
100% chance of being worth \$45	\$1 for stone (no analysis required)	\$45	Yes	+ \$44
1% chance of being worth \$700	\$1 for stone \$50 for analysis	\$7	No	- \$44
Total increase	\$51	\$52	Yes	+ \$1

The question is whether the Restatement or the difference principle should condemn these hypothetical transactions because the jeweler does not disclose the certain market value of the stone. Based on the language of Section 153(b), the Restatement would seem to make both of the above hypothetical transactions rescindable, on the premise that the jeweler was certain the stone was worth more than one dollar but did not disclose that fact prior to the sale.⁴¹ The difference principle, however, might allow both of these hypothetical transactions on the premise that the smaller, uneven gain allows for a broader range of riskier transactions that otherwise would not occur at all, and encouraging rational risk leads to greater social wealth for all, including the

⁴¹ Restatement (Second) Contracts § 153(b).

least advantaged in society. Interestingly, the difference principle might condemn any transaction where the jeweler was certain to gain more than forty-five dollars because any additional amount is unnecessary to incent a rational jeweler to engage in the transaction, and there would not be an alternate justification for the uneven distribution.

While the Restatement speaks of a harmed party avoiding a contract in the event of unilateral mistake,⁴² no mention is made of equitable reformation of the contract terms as a remedy. However, at least federal common law supports this alternate remedy (at least in cases of mutual mistake) so long as the reformed contract would be one that the other party would have agreed to at the time of the original transaction.⁴³ Reformation makes it possible for the two parties to split the discovered value of the stone so that the transaction would be both fair and efficient (with consideration for the inspection costs of the jeweler to discover the true nature of the stone). A rational jeweler and stone seller would both still engage in such a contract because both would enjoy a net increase in wealth without having to return the stone or its market value to the otherwise injured seller.

⁴² Restatement (Second) Contracts § 153.

⁴³ See *Nat'l Presto Industries, Inc. v. U.S.*, 338 F.2d 99, 108 (Ct. Cl. 1964) (mutual mistake); *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 665 (Fed. Cir. 1992) (unilateral mistake and misrepresentation).

Table 6: Shared Risk Hypothetical

Scenario	Costs	Adjusted Value	Take Risk?	Change in Wealth
90% chance of being worth \$700	\$1 for stone \$50 for analysis	\$630	Yes	+ \$579
90% chance of being worth \$700, split between parties	\$1 for stone \$50 for analysis (split with seller)	\$315 for jeweler, \$315 for seller	Yes	+ \$289 to jeweler + \$290 to seller

Reformation would also allow the resulting contract to be fair under the difference principle because the exchange would be even between the parties (presumably the reformed contract could also allow for sharing the initial cost of analysis of the stone between the parties as well). And, reformation would allow for a jeweler to engage in more transactions (ones where the jeweler is more certain of the value of the stone), while leaving avoidance as appropriate where the jeweler is one hundred percent certain of the stone's value but fails to disclose.

Making reformation a remedy might also be appropriate in the hypotheticals considered above in 5(a) and (b), to still incentivize the jeweler to take on a lower chance of the stone being worth a lot more while still taking into account the relative fairness of the transaction to all the parties.

II. Conclusion

The principle of efficiency gives a reasonably precise answer to whether the doctrine of mistake is just or not: if the principle results in more wealth, the principle is just. Deciphering whether legal mistake is fair according to the difference principle, however, is a different matter. The difference principle asks whether uneven transactions that result in more primary goods being distributed to a more advantaged group have some ultimate benefit for the least advantaged in society. As a result, it is debatable whether persons in the original position would agree that recognizing legal mistake to excuse a contract is fair because fairness depends on how the legal rule would affect a class of persons. The doctrine of legal mistake, however, does not allow a party to avoid a contract solely because of their class in society. Yet, the doctrine does take some sense of fair play into account, in some cases even at the expense of efficiency.

In addition, the difference principle was conceived of as a way to form society. As such, it is inherently more speculative and less exact than a principle of wealth maximization. However, unlike efficiency as wealth maximization, the difference principle does seek to limit the unequal distribution of primary goods like income. The common law doctrine of mistake appears to take a more middle-of-the-

road approach between fairness and efficiency, condemning some efficient transactions, while condoning others that the difference principle would condemn. The doctrine of legal mistake in combination with the remedy of reformation (rather than rescission) opens up the possibility of allowing for more efficient and fair transactions, assuming that reformed contract reflects the intent of the parties at the time the original contract was formed.