Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences

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Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences

Jane Stapleton*

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I. INTRODUCTION

The project to restate the law of torts offers a number of opportunities.¹ One is law reform, as the last two Restatements con-
cerning products liability illustrate. Another is to reflect on doctrinal history, both in the case law and in the academy. Yet another, and the one I focus on, is the opportunity to clarify legal concepts, if necessary by reformulation and restructuring, in order to assist courts to manage new challenges that have emerged since the last Restatement. Few areas in the law of tort are in more need of this re-evaluation than the area covered by the term “legal cause” as described in the earlier Restatements, where its treatment is opaque, confused, and contradictory. Perhaps even more impor-

rector of Research at the Tarlton Law Library, and his excellent staff for their assistance in using their outstanding collection.

1. Besides the obvious purpose of encouraging state jurisdictions to “fly in formation” for the sake of a national economy, a more Machiavellian purpose might be to restate legal principles so broadly that, behind this appearance of a national legal culture described at a high level of abstraction, diverse local legal cultures can still flourish.


Many other illuminating modern comments on specific legal cause issues have been written. See generally David A. Fischer, Products Liability—Proximate Cause, Intervening Cause, and Duty, 52 MO. L. REV. 547 (1987); William J. Powers, Cardozo: A Study in Reputology, 12 CARDOZO L. REV. 1941, 1951-52 (1991) [hereinafter Powers, Reputology] (discussing the role of Palsgrof in the eclipse of the earlier pseudo-scientific metaphors of legal proximate cause); William J. Powers, Judge and Jury in the Texas Supreme Court, 75 TEX. L. REV. 1699, 1701-04 (1997) [hereinafter Powers, Judge and Jury] (discussing the duty versus proximate cause debate between Leon Green and Dean Keeton); David W. Robertson, The Legal Philosophy of Leon Green, 56 TEX. L. REV. 393, 403-12 (1977) (describing Green’s “almost monomaniacal focus on the bundle of confusions that traversed under the label ‘proximate cause’ “); David W. Robertson, Negligence Liability for Crimes and Intentional Torts Committed by Others, 67 TUL. L. REV. 135, 138 (1992) [hereinafter Robertson, Negligence Liability] (urging that the duty and legal cause issues separate to promote clarity).

tantly, legal cause is especially ripe for reconsideration in light of its complementary relationship with concepts that define the incidence of the relevant tort obligation, such as the duty concept in the tort of negligence. As the reach of such incidence-defining concepts shifts, so too will the reach of the concept of legal cause.4

This Article has three main themes. First, earlier Restatements took as their paradigm of a negligence claim one where the careless (positive) act of a private defendant results in physical injury to the plaintiff, such as when I carelessly run over a stranger with my car breaking her leg. But such claims, which I call "traditional" cases or "simple running down" cases, are not the most important in the challenges they present to modern tort doctrine. Of much greater significance are non-traditional claims, such as those alleging a negligent failure to control a third party, which test the limits of the contours of the map of torts. The Restatement (Third) of Torts ("Restatement (Third)") should squarely address the challenge non-traditional claims pose to earlier dogmas such as the general duty owed to the whole world and the implicit assumption that a defendant will be liable for a consequence of tortious conduct unless, exceptionally, a rule restricting liability operates.

Secondly, earlier Restatements are coy about the institutional competition between judge and jury that underlies doctrinal arrangements. Yet often the relationship of duty and legal cause is something akin to a seesaw. Often there is a choice to package a particular issue as one of duty, and therefore one for the court, or as one of legal cause, and therefore one for the jury, with a resultant empowering of one of these institutions at the expense of the other. Even where there is, as I suggest there should be, a move towards spelling out the detailed legal concerns that arise out of the particular facts of the case and bear on jury determinations, such a move might be characterized as empowering courts relative to the status quo. The Restatement (Third) should admit frankly the political dimension to possible doctrinal arrangements.

Thirdly, the treatment of causation in earlier Restatements is incoherent. In places, there is the claim that causation in law is a pure question of fact, yet elsewhere this approach is betrayed by a reliance on the way the word is used "in the popular sense, in which

4. Thus, if no-duty rules are recognized in relation to the control of third parties, the role of legal cause is ousted. Conversely, where no-duty rules are denied in relation to the control of third parties, the spotlight shifts to legal cause to determine how far liability will stretch down the stream of consequences of the defendant's failure to control.
there always lurks the idea of responsibility." The *Restatement (Third)* should ensure that causation in law is a pure question of fact. It can accomplish this by both defining "cause-in-fact" in terms of factors that have played a role in the history of the relevant outcome, and asking this historical role question in relation to the defendant's alleged tortious conduct rather than his or her mere conduct. Remaining issues on which normative judgments need to be made, such as the appropriate approach to the characteristic problem in cases of over-determination (multiple sufficient historical factors), should then be handled under a second analytical element governing the appropriate "scope of liability for consequences of tortious conduct." The obfuscating terminology of legal cause, proximate cause, and substantial factor should be replaced by these two elements, which directly reflect the two enquiries, one factual and one normative, that underlie the current area described as legal cause. The *Restatement (Third)* can then proceed to set out the rules and legal concerns that bear on evidentiary gaps relating to cause-in-fact, and the rules and legal concerns that bear on the question of the appropriate scope of liability for consequences under the particular tort in the particular circumstances.

II. THE CHALLENGE OF NON-TRADITIONAL CLAIMS IN NEGLIGENCE

The *Restatement (Second) of Torts* ("Restatement (Second)"") reflected the dominant academic fashions of the time. In the tort of negligence, these included a skepticism about the role of the duty concept and a preference for jury judgment. The associated embrace of a general duty owed "to the whole world" left most issues to be dealt with under the rubric of the other recognized elements of the tort, including "legal cause." Whether or not the academic

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5. *Restatement (Second) of Torts* § 431 cmt. a (1965); *Restatement of Torts* § 431 cmt. a (1934); see discussion infra note 82.


7. Powers, *Judge and Jury*, supra note 3, at 1702-04 (regarding Dean Keeton's preference for jury judgment/power prevailing over the views of Leon Green on this point).

8. The *Restatement (Second)* gives as an example of an occasion where legal protection is accorded as "against the whole world" the negligent invasion of bodily security: "every man has a right, as against every other, not to have his interest in bodily security invaded" in this manner. *Restatement (Second) of Torts* § 1 cmt. d; see also *Restatement of Torts* § 1 cmt. d.

9. The relevant treatment of legal cause is contained in the first two "pamphlets" of the *Restatement (Second)* both adopted and promulgated by the ALI in May 1964 and published in 1965.
fashion has changed since 1965, it is certainly the case that the pressures on courts and legal doctrine have shifted dramatically. The emergence of a large, nation-wide, entrepreneurial, and intellectually inventive plaintiffs’ bar hastened the exposure of the intrinsically voracious nature of the negligence principle, putting pressure on court dockets and, of principal relevance here, on the assumption that liability could be adequately contained in the context of a recognized general duty.

Interestingly, a parallel challenge has emerged in foreign common law jurisdictions even though most lack the potent mix of a large aggressive plaintiffs’ bar, contingency fees, and jury trial. Over the past couple of decades, the appellate courts in these jurisdictions have faced a wave of non-traditional claims in the tort of negligence. By a traditional claim I mean one in which the careless (positive) act of a private defendant resulted in physical injury to the plaintiff, as where the defendant carelessly ran over a stranger with his/her car breaking the stranger’s leg; where the defendant carelessly discharged effluent into a river, physically injuring swimmers downstream; or where the defendant carelessly manufactured ginger-beer contaminated by a decomposing snail that poisons a consumer. Hereafter I will call such a case “the traditional case” or “the simple running down case.” Modern non-traditional claims do not fit this simple paradigm; they range from ones for pure nervous shock or pure economic loss to a diverse range of physical injury claims of affirmative duties (omission cases such as an allegation of wrongful failure to control a third party) that have proven particularly troublesome, especially when brought against deep-pocketed public authorities.

Under the pressure of such non-traditional claims, the views have crystallized in foreign common law jurisdictions that the negligence principle is one that requires tight and effective doctrinal control, and that society simply cannot and should not require the tort system to provide monetary compensation for every harm resulting from carelessness, not even every physical harm. Priorities

10. See Jane Stapleton, Good Faith in Private Law, 52 CURRENT LEGAL PROBS. 1, 28-31 (1999); Jane Stapleton, Duty of Care Factors: A Selection from the Judicial Menus, in THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMMING 59, 59-60 (Peter Cane & Jane Stapleton eds., 1998) [hereinafter Stapleton, Judicial Menus]. For example, a plaintiff will often be able to formulate a long list of omissions by others that she can plausibly allege to have played a role in the history of her injury. See discussion infra note 58.

11. “The branch of English law which deals with civil wrongs abounds with instances of acts and, more particularly, of omissions which give rise to no legal liability to the doer or omitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably
must be chosen, and boundaries for the obligation of care must be drawn by consideration of a variety of legal concerns, including distributive justice criteria. The earlier emotional allure of a general duty cut back only exceptionally on the basis of specific policy considerations has withered away in these jurisdictions. While these
distributive justice criteria.  

12. Distributive justice, as I will use the term, is the quality claimed by theories which set out how a resource should be distributed between parties, such as theories of taxation (flat-rate, progressive, etc.) and theories of social security benefits. Corrective justice is the quality claimed for theories about how disruptions to an initial distribution, such as exploitation of another's property, should be "corrected." A common law judgment that recognizes a new entitlement rule, such as MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), seeks to justify a shift in distribution and is therefore appropriately assessed in terms of theories of distributive justice. Later moves that purport to "apply" the rule are appropriately assessed in terms of theories of corrective justice.

Recently, distributive justice has been explicitly expounded as a factor relevant to the duty question in major decisions by the House of Lords. For example, Lord Hoffmann in White v. Chief Constable of South Yorkshire Police, noted that recognition of a duty here "would be unacceptable to the ordinary person because (though he might not put it this way) it would offend against his notions of distributive justice." White v. Chief Constable of S. Yorkshire Police, [1999] 2 A.C. 455, 510 (H.L.). It was also noted in McFarlane v. Tayside Health Board by Lord Hope that recent cases on duty of care had been "informed by considerations of distributive justice. It was a practical attempt to preserve the general perception of the law as a system of rules which is fair as between one citizen and another." McFarlane v. Tayside Health Bd., [2000] 2 A.C. 59, 96 (H.L.).

In the same case, Lord Steyn made these ringing statements about justice and the common law:

"It is my firm conviction that where courts of law have denied a remedy for the cost of bringing up an unwanted child the real reasons have been grounds of distributive justice. That is, of course, a moral theory. It may be objected that the House must act like a court of law and not like a court of morals. That would only be partly right. The court must apply positive law. But judges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right . . . . [In White,] Lord Hoffmann and I reasoned that it would be morally unacceptable if the law denied a remedy to bereaved relatives . . . but granted it to police officers who were on duty. Lord Hoffmann expressly invoked considerations of distributive justice . . . . Lord Browne-Wilkinson and I expressed agreement with this reasoning . . . . The truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and difficulty a choice sometimes has to be made between the two approaches . . . .

Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the costs of bringing up the child from a health authority or a doctor. If it were necessary to do so, I would say that the claim does not satisfy the requirement of being fair, just and reasonable.

Id. at 82-83; see also Hanoch Dagan, The Distributive Foundation of Corrective Justice, 98 MICH. L. REV. 138 (1999).

13. Such an approach famously was set out in the United Kingdom in Dorset Yacht Co., [1970] A.C. 1004 (H.L.) and somewhat notoriously in Anns v. Merton London Borough, [1978] A.C. 728 (H.L.). Even in the former era there were warnings at the highest appellate levels "as
foreign courts continue to accept that a duty is owed in the traditional case of the running down of an absolute stranger,14 in all other contexts they insist on being positively persuaded that the law should recognize a particularized or "relational" duty between the parties.15

In short, in these other common law jurisdictions, the "map" of the incidence of the tort of negligence is now viewed as consisting not merely of the continent of obligation in the traditional running down-type case. Elsewhere on that map there is a vast ocean of freedom from liability for one's unreasonable and injurious behavior, dotted with much smaller carefully charted islands of non-traditional duties.16 As appellate courts in these foreign common
law jurisdictions spend most of their time in tort cases charting these high seas of freedom from duties of care, this freedom is no longer regarded as exceptional. Indeed, it tends to be the main focus of academics and practitioners who are becoming at least as sensitive to the powerful legal concerns that weigh against the recognition of a duty as they once were to the powerful pro-liability ideas behind the simple legal response to the traditional running down case. Finally, there is now a general view that there is no single “test” that can be used to deduce where it would be appropriate for the law to recognize a duty of care in these non-traditional cases. To search for such a test in dicta, such as those contained in Heaven v. Pender or Donoghue v. Stevenson, is now widely recognized as futile.

It is a significant feature of the controls on negligence liability emerging in foreign common law systems that virtually all have been discussed and decided in the language of a denial of duty, rather than a denial of tortious conduct or in terms of the local equivalent of “legal cause.” At this point, it is worth digressing for a moment to defend the role of duty and other analytical elements of the negligence cause of action. It is true that the title of an analytical element such as duty or legal cause may have been abused by some courts as a mere empty label for the assertion, rather than detailed rationalization, of a decision. In particular, it may well be that many recent United States decisions of no-duty have been thinly reasoned. But that does not establish that the concept is without use. It does not show that the analytical element cannot be

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17. For example, there must be an extremely powerful and central libertarian principle at work to justify the law not imposing a duty on the stranger to rescue the toddler drowning in a puddle at his feet. It would be very odd and unconvincing to dismiss this result merely as some exceptional policy-generated immunity, rather than as a crystalline vindication of a broad-ranging and fundamental right of the stranger (that he or she is free to decide on his or her commitments to strangers even if that clashes with a collective goal).


21. In the United Kingdom and Australasia, the elements covered by legal cause are covered by “causation in fact” and “remoteness of damage,” though there is just as much vagueness and confusion in the area as there is in the United States. For example, a freakish intervention after the defendant's tortious conduct is sometimes treated as “truncating” the “chain of causation” so that the plaintiff is told she has failed even to establish causation. In other cases it is treated as rendering the damage “too remote,” even though “caused” by the tortious conduct.
made to do work, to display a particular reasoned message, of practical use to society. These particular messages might be stated as:

- The incidence of the duty of care: recognition that, in light of systemic concerns relating to the situation in which the defendant conducted himself, the defendant is obliged to conduct himself as a reasonable person would. These systemic concerns of the law might be quite general or they might be quite specific to the facts, for example, that denial of a duty would tend to discourage rescue or encourage abortion in the circumstances.

22. See Leon Green, Tort Law: Public Law in Disguise, 38 Tex. L. Rev. 1, 1 (1959) (stating that the functions of legal doctrine "are primarily those of communication"). One could, of course collapse all the elements of the tort of negligence into one amorphous unstructured proposition of law: that in the circumstances the defendant owed this plaintiff a duty of reasonable care not to cause the particular outcome of which the plaintiff complains. But this merges, and therefore dulls to the point of uselessness, any specific messages about, and themes within, the underlying legal concerns influencing the outcome of the case. Moreover, it does not help people understand, and to the extent possible, be guided by the law. See discussion infra note 142. Finally, recognition of the utility of the duty category does not depend on an embrace of rights-based reasoning. Compare Goldberg & Zipursky, supra note 6, with supra note 15 (argument in first paragraph).

23. By the "incidence" of an obligation I adopt the following, non-Realist, meaning: the contexts in which, were a defendant to have appropriate legal advice, he could be advised before he conducted himself that he owed "such and such" a legal obligation. In the tort of negligence, I describe the map of such incidence of obligation in terms of a continent of the obligation to take care (representing the traditional "running down" cases), and a sea of freedom from the obligation of care dotted with "islands" of duty in non-traditional cases.

24. For my explanation of the utility of the duty concept in these terms, see Jane Stapleton, Duty of Care: Peripheral Parties and Alternative Means of Deterrence, 111 L.Q. Rev. 301, 303-05, 315-16 (1995) [hereinafter Stapleton, Peripheral Parties]. Some of these concerns will, on the facts, support the imposition of a duty others will, on the facts, support its denial. For examples of dozens of both, see Stapleton, Judicial Menus, supra note 10, at 59, where I explain, for example, how in one context the law's concern not positively to encourage abortion weighs against the recognition of a duty of care, and in another context the same concern weighs in favor of such a recognition. My limited review of the foreign case law found only two legal concerns that act as a "trump," that is, when present, the factor secures a particular answer to the duty question. First, it is (in the absence of state immunity) always judged that the proper vindication of the law's concern with the physical security of persons and property justifies a duty being recognized on a party by whose careless (positive) act the plaintiff's person or property has been physically damaged. Secondly, it is always judged that the proper vindication of the law's concern with the liberty of the individual justifies a refusal to recognize any duty of affirmative action towards a complete stranger.

For an excellent recent Canadian example of this type of "legal concerns" type of duty reasoning in the judgments of the Supreme Court of Canada, see Winnipeg Child & Family Services v. G., [1998] 152 D.L.R. (4th) 193.

25. That is, when one ignores what the outcome of tortious conduct on this occasion happened to be.
• *Tortious conduct* (e.g., breach of duty in the tort of negligence): a finding that the defendant did not conduct himself as a reasonable person would have under the particular circumstances.

• *Legal cause*: that his tortious conduct was part of the history of the injurious outcome of which the plaintiff complains; and that this outcome was within the appropriate "scope of liability for consequences" under the relevant rule in the circumstances of the case. The role of the latter in defining and confining liability is critical in every legal obligation.²⁶ Even in traditional running down cases, where liability is not confined by using the duty concept, control is essential because it would be intolerable for a person to be held liable for all the consequences of his tortious conduct, even just for all the physical consequences. Moreover, a separate notion of the appropriate "scope of liability for consequences" allows the law to highlight and apply distinctions, not only between liability for outcomes of tortious conduct occurring at different times, but between liability for contemporaneous injurious outcomes, an apportionment that may well not be as convincingly achievable under any other element of the cause of action.²⁷

Let us return to the question of why the controls on negligence liability emerging in foreign common law systems have deployed the language of a denial of duty, rather than a denial of tortious conduct or "legal cause." In some cases, this choice of conceptual packaging is virtually dictated by the circumstances of the case. Consider the law's refusal to impose liability on the person who fails to rescue a stranger-infant drowning in a puddle at his feet. This could not convincingly be presented in terms of non-tortious conduct, that is of the person having acted "reasonably" or

²⁶. Since the areas covered by the term "legal cause" are common to all torts (indeed, to all obligations), the Restatement (Third) should set out general sections on these matters before dealing with the specific rules in relation to the different torts such as negligence and deceit. In contrast, the treatment of the area in the Restatement (Second) discusses "legal cause" in detail in relation to the tort of negligence, and these provisions are then obscurely extended to other torts by a mere comment in one section. *See infra* notes 72-74 (citing Restatement (Second)).

²⁷. *See infra* notes 127-134 and accompanying text.
in line with "the community's accepted way of doing things." The result can only be presented in no-duty terms.

But sometimes the court has a choice of conceptual packaging. For example, foreign systems might have chosen to impose the relational, temporal, and spatial controls on liability for pure nervous shock under the legal cause concept. But instead they chose the duty concept. Another important area where there seems to be a choice of packaging is where the complaint is of a wrongful failure to control the conduct of a third party (including the positive facilitation of such conduct described by Professor Rabin as "enabling torts"). There again, the preference abroad tends to be for the no-duty vehicle.

There are two reasons for these choices that are relevant to my topic. First, these courts correctly saw the advantage of the duty packaging in sending a powerful systemic message. This is something that treatment under other more case-specific concepts such as legal cause could not provide. For example, it allows a court boldly to signal that it will never impose liability for pure nervous shock unless the plaintiff witnessed a trauma or its immediate af-

28. Note the suggestion by Professor Kelley that the mapping of the incidence of legal duties can be helpfully assisted by a consideration of such "social duties associated with a community's coordinating conventions or practices." Kelley, supra note 3, at 87; see also Patrick J. Kelley, Who Decides? Community Safety Conventions at the Heart of Tort Liability, 38 CLEV. ST. L. REV. 315, 353-63 (1990). There is, however, an important point here about current conventions setting a maximum outer limit of tort liability in order that "pace-setting" standards are not imposed that might offend the requirement that the gist of the tort of negligence is "damage" to one's normal expectancies: If the social convention was that lifeguards never attempted to rescue children whose parents were nearby, a legal duty of affirmative action to do so would make such drowning children better off than they would have otherwise been! See Jane Stapleton, The Normal Expectancies Measure in Tort Damages, 113 L.Q. REV. 257, 275-282 (1997).

29. That is, this occurs under the foreign equivalent of this part of legal cause, known in the United Kingdom, for example, as "remoteness of damage."

30. Robert L. Rabin, Enabling Torts, 49 DEPAUL L. REV. 435 (1999). Of course, Rabin's definition of "in the enabling situations . . . defendant had affirmatively enhanced the risk of harm," id. at 442, hinges on a prior determination of what were the normal expectancies of risk the victim would otherwise have faced, Stapleton, supra note 28.

Note, however, that in the failure to control a third party area there may be sound legal reasons for preferring the packaging of the "scope of liability for consequences" rather than "duty": for example, to avoid distasteful classification of victims in relation to their protection from personal injuries in traditional cases. See discussion infra notes 33, 155. See generally Stapleton, Peripheral Parties, supra note 24, at 310-17. For an important analysis of many American "failure to control cases," see Robertson, Negligence Liability, supra note 3. For key cases in the United Kingdom, see Smith v. Littlewoods Organisations Ltd., [1987] 1 A.C. 241 (H.L.); Home Office v. Dorset Yacht Co., [1970] A.C. 1004, 1060 (H.L.) (Diplock, L.).

31. Stapleton, Peripheral Parties, supra note 24, at 303-05, 315-16.
termath,32 no matter how foreseeable and direct the risk of such injury might have been. As in the United States, the principles so far explicitly recognized as governing the equivalent of legal cause are too few and too crude to accommodate the specific messages of control that courts want to send in response to the highly diverse non-traditional negligence claims they face. Secondly, in these jury-free systems there is no cultural-constitutional price to be paid for dealing with issues under duty rather than elsewhere.

III. INSTITUTIONAL COMPETITION

Since the 1964 adoption and 1965 publication of the relevant sections on legal cause in the Restatement (Second), American courts have faced even greater pressures associated with non-traditional claims than courts in other jurisdictions. Relative to the rest of the common law world, the intellectual inventiveness of many American plaintiffs' lawyers, coupled with the willingness to back it with their own financing, is remarkable. Since the negligence principle invites invention, non-traditional claims have burgeoned in the United States, especially claims in the form of complaints of failure to control a third party. Many American courts now share the view that liability for harm resulting from carelessness in non-traditional cases can and should, at most, be limited to what I have elsewhere called "pockets" or "islands" of duty: that the negligence principle requires clear and tight control. But in the United States, the control of liability in non-traditional negligence claims by means of no-duty rules is significantly constrained.

There are the constraints that also operate in foreign common law systems. For example, if a court chooses to deal with an issue as one of duty so that it can use the no-duty strategy, this will tend to select the precedents with which their treatment should synchronize, namely earlier judgments concerning the duty issue. Sometimes this is awkward because the precedents under a different conceptual element of the tort provide a more convincing "fit" with the facts of the case. Similarly, by choosing the no-duty strategy of control, the court is also choosing to send a powerful systemic message. Again, this strategy may be constrained in certain situa-

32. Another signal, with which we are so familiar we scarcely notice it, is that there is no duty under the tort of negligence to avoid carelessly interfering with another by means of noise, light, or vibration. Contrast this with the tort of nuisance.
tions where such a powerful no-duty message is judged distasteful or dangerous.\textsuperscript{33}

But there are important additional constraints on the no-duty strategy of control that are specific to the jury-based system of United States tort law. First, identifying issues as ones of duty renders them issues of law for the court and not “issues of fact” for the jury.\textsuperscript{34} To the extent that juries hitherto handled such issues as “questions of fact,” say of breach or legal cause, the strategy results in a power shift from juries to the court. Since “rules of law” governing breach or legal cause are rare, the issue goes straight to the

\textsuperscript{33} For example, in jurisdictions that allow negligence claims by employees against employers, to justify the denial of liability on the basis that the employer owed no duty to the employee in the circumstances might well be regarded as provocative in the light of the past struggle by workers for health and safety at work. Similarly, to purport to justify the denial of the liability of a school to one of its pupils physically injured at the school on the basis that no duty was owed might also be regarded as risking a distasteful and perhaps dangerous message.

The possible distastefulness of a no-duty message is also an objection that can be made to Cardozo’s controversial judgment in \textit{Palsgraf v. Long Island R.R. Co.}, 162 N.E. 99 (N.Y. 1928). The judgment may not be objectionable because it found no liability, nor because it recognized that the issue was one of law rather than fact. But Cardozo’s choice of packaging his reasons in terms of “no duty” seems distasteful to us because \textit{in this traditional case} (i.e., of physical injury resulting from the positive act of the defendant) it sends the systemic message that there are circumstances where one citizen does not owe a duty of care not to break another citizen’s leg and so on. This callous message unacceptably appears to \textit{rank} different classes of citizens in relation to their entitlements to protection from having their legs broken by defendants. \textit{See supra} note 30; \textit{infra} notes 122, 155. These disadvantages are avoided by packaging the no-liability result in terms of the characterization of the injury, not the victim: Each citizen owes a duty of care (to act as a reasonable person) where there is (as there virtually always is) a foreseeable risk that his positive act might cause physical injury to others (the general duty of care owed to all in the traditional case), but the scope of that obligation does not extend to all physical consequences of the tortious conduct. This reformulation of the result in the case from one in terms of no-duty to one in terms of the injury falling outside the scope of the appropriate scope of liability for consequences allows a shift of focus from distinguishing between victims to distinguishing between consequences.

In non-traditional contexts (that is, contexts other than the entitlement not to suffer physical injury by the positive act of another) such as cases of pure economic loss and mental injury, we may not have such an objection, or at least not so strong an objection, to ranking the entitlements to protection according to the classification of the victim. Here no-duty distinctions between classes of citizens seem much more acceptable. For example, victims suffering from psychological injury being distinguished merely on the basis of family relationship, etc.

The acceptability of no-duty controls fluctuates. For example, consider the U-turn of the California Supreme Court analyzed in Stephen D. Sugaman, \textit{Judges as Tort Law Un-Makers: Recent California Experience with “New” Torts}, 49 DEPAUL L. REV. 455 (1999).

\textsuperscript{34} \textbf{RESTATEMENT (SECOND) OF TORTS} § 328B cmt. b. (1965) ("In general, the court must decide questions of law, and the jury questions of fact. But since a question of law may involve a ruling upon a question of fact, and a question of fact may involve the application of a rule of law, the two are often interwoven, and it becomes impossible to state the function of the court without reference to that of the jury, and vice versa."); \textit{Powers, Judge and Jury, supra} note 3, at 1704, 1711-12 (discussing this and other aspects of the judge/jury institutional competition such as the following point about the standard of review).
jury. Representatives of plaintiffs' interests will tend to oppose this potential increase in trial courts' power, and such opposition constrains American courts' adoption of the no-duty strategy with its associated stripping out of issues from concepts such as legal cause. Secondly, when we choose to identify issues as ones of duty, this has a direct impact on the vulnerability to review of trial outcomes. If one chooses to designate an issue as a "question of fact" for the jury (in theory, an evidence-influenced one for the jury), to be decided without the giving of reasons, one is also thereby choosing a very high threshold for appellate review. Conversely, by designating an issue as one of duty, one is choosing to allow a greater scope of review. Plaintiffs oppose the latter potential effect of the no-duty strategy of control of liability, and this in turn generates another "political" constraint on its adoption by United States courts.

This "institutional competition" between the court and the jury forms the critical backdrop to any restatement of the law that lurks behind the tag of legal cause. So a Restatement (Third) that does not explicitly approach the area in these terms will be inadequate. It is becoming evident to more American courts that liability in non-traditional cases must be confined. This is exposing the tension inherent in the United States system between an historical, or at least rhetorical, respect for jury decision-making and the concern that, to be most effective, control of liability should be defined sharply, in fine detail and, to the extent possible, it should be secured by precedent. Even those who do not trust juries must concede that, given the constraints on the no-duty strategy, there will be cases in which any control must be located under elements of the tort where juries decide the issue, such as tortious conduct (e.g. breach of a duty) and legal cause, where there are extremely few constraining rules of law. But while a British trial judge who delivers a no-liability result in terms of (the local equivalent of) legal cause must give at least some structured reasons in line with, and perhaps generating, precedent, a United States jury provides none.

How, then, can control be facilitated and even encouraged within these jury-judged elements of the tort? Given the high threshold for the reviewability of jury decisions on issues of "fact,"

35. I do not want, however, to suggest that British, Australasian, and Canadian judges invariably follow this rigorous route. There are regrettably quite a few judgments which merely assert that the defendant's tortious conduct was or was not a cause of the injury, that an intervening factor broke or did not break the chain of causation, or that the consequence was or was not too remote.
the best opportunity for structured control here is the explicit enunciation, with far greater clarity than they have been in earlier Restatements, not only of the few crystallized rules of law governing cause in fact and the scope of liability for consequences (the two elements of the amalgam concept of legal cause), but also of the diverse legal concerns relevant to the normative judgment of the facts by the decision-maker within the leeway of those rules of law. In any individual case, counsel for the parties could then address the jury, and trial judges instruct the jury, on those of these rules and concerns that arise as relevant from the facts.

Would this have any effect? Certainly, given the nature of jury trial procedures and so on, it is both logically untenable as well as politically unacceptable in our legal systems to treat the jury as an uneducatable "black-box." It is also implausible. For us to rely only on the jurisprudence underlying directed verdicts in favor of defendants in order to control liability is unnecessarily defeatist. There is no convincing evidence that American juries in general are running wild, or that they are impervious to reasoned argument. This means that open argument before and instruction to juries about the legal concerns arising from the facts of the case should succeed in going some way to enlightening jury members about the limited purposes of, and arguments countervailing to, liability in non-traditional claims of negligence. It would encourage them to see their judgment of the individual case in the wider context. Even though the end determination of cause in fact and the scope of liability for consequences are jury matters, and formally "questions of fact," appeal to a higher court would still be feasible on the basis that the trial judge did not adequately focus the jury's attention on all relevant legal concerns arising on the facts. Indeed, appellate courts have a central role to play in encouraging trial courts to abandon the current cryptic formulaic jury instructions concerning cause in fact and the scope of liability for consequences in favor of a more comprehensible rehearsal of the competing legal concerns that underlie the dispute between the parties on these issues.

All common law systems are marred by the crudity of their legal cause (or equivalent) concept. All would benefit from the elucidation of the questions that are in dispute in cases formulated in terms of legal cause. But I have suggested an American-specific reason why the Restatement (Third) needs to pay special attention to the clarification of the principles in this area of the law. This reason is that, in many cases, legal cause may prove to be the only context in which critical control can be exercised to contain the voraciousness of the negligence principle within tolerable bounds. At
the very least, the unpacking of the underlying questions in dispute in the area, plus the relevant legal concerns enunciated by courts, should encourage a more informed debate about whether a specific issue could or should be allocated as a question of law for the court, or kept as a "question of fact" embedded in the jury determination.

In short, I am not advocating that liability in non-traditional cases should be tightly confined. I am asserting that it has to be confined as a matter of common sense, and that that control should follow a rational debate about the reasons for and against duty in a particular case, if that is the locus chosen for control, and for and against a particular scope of liability for consequences, if that is the preferred analytical formulation for the facts of the case.

IV. UNPACKING THE CATCHMENT OF LEGAL CAUSE: THE TWO UNDERLYING ENQUIRIES

Legal cause is defined in the earlier Restatements as an amalgam of elements, but it is an incoherent amalgam. Outside the Restatements, courts used and continue to use other terms in this area that do not have a single agreed meaning. For example, the most important of these, "proximate cause," is sometimes used in a sense synonymous with the area covered by legal cause in earlier Restatements and sometimes used in a more limited sense. Less appreciated is the ambiguity that can arise with the use of the terms "cause-in-fact" and "factual causation," particularly in the courts' responses to the problem characteristically presented by over-determined events. At the heart of this terminological confu-

36. See Restatement of Torts § 9 cmt. b (1934); Restatement (Second) of Torts § 9 cmt. b. See generally infra Part VII.
37. The exact term "proximate cause" was not used by Prosser in the Second Restatement, though it was used by contemporaneous courts. See infra note 78.
38. Over-determined events are ones with multiple sufficient historical factors, such as the death in the double-hit hunters case: Two hunters, X and Y, carelessly shoot into a wood, both bullets hitting the victim, either being sufficient to kill. The definition of the event determines whether it attracts the characterization of an "over-determined" event: Had the event in the double-hit hunters case been defined as "death by two bullets in the brain" the event would not have been over-determined. See infra text accompanying note 50. For an appreciation of the normative nature of the challenge over-determined events pose for the legal system, Professor David Fischer provides an excellent series of articles. David A. Fischer, Causation in Fact in Omission Cases, 1992 Utah L. Rev. 1335, 1384 [hereinafter Fischer, Omission Cases] ("Searching for the definition of the word 'cause' simply cannot provide the answer."); David A. Fischer, Causation in Fact in Product Liability Failure to Warn Cases, 17 J. PRODS. & TOXICS LIAB. 271, 281-83 (1995) [hereinafter Fischer, Failure to Warn Cases]; David A. Fischer, Successive Causes and the Enigma of Duplicated Harm, 66 Tenn. L. Rev. 1127 (1999).
sion are the shifting uses made both in ordinary life and in legal discourse of the term “causation.”

Yet this is not a hopeless situation. It is possible to cut through these soft terms and to map, in non-causal language, the terrain over which they wander so confusingly. That terrain comprises the two principal and distinct enquiries that can be made about a transition to an outcome.39

A. First Enquiry: Playing a Role in the History of the Outcome; the “Targeted But-for” Test of Historical Involvement

First we might ask: How did the transition come about? Did factor40 X play a role in the history of the outcome? This is a question of scientific fact to which there is only one correct answer, though an infinite number of individual factors will satisfy it. If by “causation” we only meant the phenomenon covered by this first enquiry, then it would be true to say that “causation is a question of fact.” Chaos theory has revealed to us that many more factors preceding a transition to an outcome will have played a role in its history than our former understanding would have suggested. But it remains true that, for any one outcome, there is an infinite number of factors which simply played no role whatsoever in the history of how the transition to that outcome came about. Even chaos theory holds that the contemporaneous fluttering of a butterfly’s wings in the Upper Amazon played no role in the history of Mrs. Palsgraf’s injury.

Whatever the law means by the requirement that the tortious conduct “cause” the injury of which legal complaint is made, it means at least this: that it played a role in the history of the transition to that injury. But how can we test if a factor played a role in the history of a transition? The lawyer’s traditional but-for test, a test of necessity, is notoriously inadequate for this purpose, as we can see from over-determined events such as the following variant on the facts of Summers v. Tice.41 Suppose that two hunters, X and

39. The sketch that follows in Parts V and VI builds on the analysis in my other works. Jane Stapleton, Perspectives on Causation, in OXFORD ESSAYS IN JURISPRUDENCE (Jeremy Horder ed., Oxford Univ. Press, Series No. 4, 2000) [hereinafter Stapleton, Perspectives on Causation]; Jane Stapleton, Unpacking “Causation,” in RELATING TO RESPONSIBILITY (Peter Cane & Jeremy Gardner eds., forthcoming 2001) [Stapleton, Unpacking “Causation”].

40. The notion of “factor” includes a state of affairs, such as the presence of gravity, and behavior or such as an act or an omission.

41. Summers v. Tice, 199 P.2d 1 (Cal. 1948) (regarding a situation where only one bullet hit the victim).
Y, carelessly shoot into a wood, both bullets hitting the victim, either being sufficient to kill. Let's call this the "double hit hunters' case." Here, if we use the but-for test to see if they played a role in the history of the death, it would eliminate both hunters from the enquiry. Yet the history of the victim's death is easy to write, and it is obvious that both hunters played a role in it. It is clear, therefore, that the traditional but-for test, the test of necessity, is not what lies at the heart of our understanding of "playing a role in the history of an event." That is, it is not valid as a test of "cause-in-fact."

How then do we "test" whether a factor played a role in the history of a transition? I suggest the following "targeted but-for test," which builds on the "necessary element of a sufficient set" approach of Hart, Honoré, and Wright, and reflects the methodology of experimental science. The long version of this is: take all factors existing at the time of the actual transition, including the factor that we are investigating, say the tortious conduct of hunter X in the above example. If there is a notional sequence of removing factors from that set such that

- a stage is reached where, given the remaining factors the actual transition to the outcome might still have occurred, but that

- the further removal of the targeted factor leaves a set that would not (in the course of things that we now know happened) have produced the transition,

42. H.L.A. Hart and Tony Honoré formulated the notion of a necessary element of a sufficient set (the NESS "test"), see HART & HONORÉ, supra note 3, at 31, which was in turn elegantly developed and popularized by Richard Wright, see Wright, Causation, supra note 3, at 1745-50; Wright, Clarifying the Concepts, supra note 3, at 1018-42. These scholars describe NESS as a test "of causation." I believe that this is confusing. NESS is the correct approach to "historical involvement." My targeted but-for test uses that approach but also emphasizes the multiple perspectives that must be considered in applying NESS. In particular, the targeted but-for test must be applied separately to every element of the defendant's tortious conduct. The scientific-derived notion of historical involvement and the targeted but-for test of historical involvement emphasize the processes that create the elements of the setting in which conduct is seen, the various choices of perspective we have about how a piece of conduct might be viewed, and the importance of irrevocably narrowing a victim's "expectancies." Stapleton, Perspectives on Causation, supra note 39, at 61-84; Stapleton, Unpacking "Causation," supra note 39.

For the purposes of this Article, I ignore two important variables that affect the answer to the "historical involvement" question, Enquiry No. 1. The first is how the transition/end state/consequence is defined; or, to put it in recipe terms, what it is we are seeking the recipe for. For the other principal variable, how the factor in issue is defined (in tort, how the alleged tortious conduct is framed), see infra note 58.
then the targeted factor played a role in the history of the original transition.43

One might crudely call this a test of sufficiency, but I prefer to call it the “targeted but-for test”44 because, as the law tends to do, it focuses on the role of one factor at a time and asks whether there is some perspective from which that factor can be seen to have “made a difference.”

This reduces to a simple forensic test that allows the plaintiff to ignore multiple sufficient factors when proving that the defendant’s tortious conduct was historically relevant to the outcome. For example, in the double hit hunters’ case, the plaintiff can show that the tortious conduct of hunter X satisfies this test of historical involvement in the victim’s death. This is because (a) by notionally removing the tortious conduct of hunter Y, the set of remaining factors is such that the victim would still have died, but (b) the further removal of the tortious conduct of hunter X leaves a set where the victim would not have died. If there is no notional sequence that shows the targeted factor making such a difference, as in the earlier butterfly example,45 then the factor (the butterfly) played no role in the history of the transition.

43. The qualification of “might” is required because we are dealing with hypotheticals.

The only constraint on this test of historical involvement is that the plaintiff is not allowed to remove a factor that had actually been present which had completely preempted the relevant effect of the defendant’s tortious conduct. For example, if D1 places a bomb under V’s car set to explode at Noon and D2 replaces it with another bomb set to explode at the same time, the plaintiff cannot ignore D2 (and thereby attempt to show that D1 played a role in the history of the death) because the conduct of D2 completely terminated the relevant effect of D1’s tortious conduct. D1 is not historically involved in V’s subsequent death by explosion at noon. In contrast, had D2 merely added his bomb to the scene, both D1 and D2 would have been historically involved in V’s subsequent death by explosion at noon (this being a case parallel to that of the double-hit hunters case).

Whether a factor is part of the history of a transition does not depend on whether a human could have foreseen its association with the outcome. Foreseeability may, however, be regarded as relevant to the second enquiry, depending on its purpose. For example, where the purpose of the second enquiry is the application of legal rules, foreseeability may well be relevant depending on the particular legal rule. See infra note 115.

44. Much scientific experimental design is based on a version of this “targeted but-for test.” A scientist will first define explicitly the parameters of the project, that is state formulations of “factor” and “transition” that would otherwise be variables, see supra note 42, then carry out the investigation by a series of experiments that strip out one by one the factors to be studied. In theory, that is given an exhaustive set of such experiments, any over-determination will be revealed.

45. In other words, there is no sequence of removing factors from the original scenario that produces a set of factors that might still have produced the death, but in relation to which the mere subsequent removal of the butterfly factor would leave a set that would not produce the death.
Of course, gravity also satisfies the targeted-but for test. So too do the decisions of the hunters’ great-great-grandmothers to have children. But, then again, these factors are part of the full history of the transition to the outcome. Moreover, to play a role in history, a factor does not have to be animate. A factor of human conduct does not need to be voluntary, careless, or intentional, nor need the person or anyone else be able to foresee the transition.

At its most curious, science is interested in the full list of factors satisfying the criterion of historical involvement; until the scientist selects a purpose for his or her enquiry, there is no basis on which to narrow the focus of the investigation. We may be stunned when lawyer-economists claim that the presence of the fetus in the womb was as relevant to the history of the diethylstilbestrol (“DES”) injuries as the manufacture and ingestion of the drug. But the claim resonates as true, and this reflects the same point that, until we choose the purpose of any more focussed enquiry, there is no basis on which to emphasize one historical factor over another.

Though this first, historical involvement, enquiry is a pure question of fact, a system of justice must reach a final determination of such issues in circumstances of evidentiary uncertainty. And so it is necessary for the law to choose rules by which this can be done. In relation to this first enquiry, evidentiary gaps constitute the pressure points for the law and where normative judgments are required. In general, there are two types of evidentiary gaps here.

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46. The accuracy with which we handle this criterion of historical involvement depends on our ability to conceive of certain hypotheticals, certain imaginary alternative universes. In other words, our capacity to appreciate that something played a role in history can be inaccurate because we lack relevant imagination. Plato may not have been able to conceive of a hypothetical world without gravity, of a set of factors from which one could remove gravity. He would not then have thought to consider whether gravity played a role in the history of the terrestrial processes he observed, though it did.

47. Sound scientific method requires the scientist to announce such a purpose and list the assumptions being made and formulations adopted. See supra note 44.

48. Consider, in contrast, the repeated-sequence experiments scientists might be able to run in order to fill in gaps. Of course, it is not just time and expense that prevents courts from doing this: One cannot re-run cases involving human behavior.

49. Although foreseeability is irrelevant to Enquiry No. 1, it may well be a factor the law regards as relevant to Enquiry No. 2. It may also be a factor the law regards as relevant to whether the plaintiff is granted the benefit of any special legal rule created to assist with evidentiary gaps. See infra note 53.
1. Evidentiary Gaps Concerning Past Facts

In some cases, we simply do not know critical facts, or we do not know them for certain. For example, in the “single hit hunters’ cases,” such as *Summers v. Tice,* it could not be determined from which hunter’s gun the fatal bullet had come. In some of these cases, the law has developed special rules to assist plaintiffs faced with such an evidentiary gap. Sometimes, for example, proof that the defendant by his or her tortious conduct foreseeably increased the risk of an outcome may be sufficient to allow an inference that the conduct did actually play a role in the history of that outcome.

50. *Summers v. Tice,* 199 P.2d 1 (Cal. 1948) (involving situation where only one bullet hit the victim); see also *Stubbs v. City of Rochester,* 124 N.E. 137 (N.Y. 1919) (regarding multiple possible sources of typhoid); *Cook v. Lewis,* 1952 D.L.R. 1 (involving another single-hit hunters’ case).

51. See David W. Robertson, *The Common Sense of Cause in Fact,* 75 TEX. L. REV. 1765, 1774-75 (1997). Regarding ideas for reform, see Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts,* 97 COLUM. L. REV. 2117 (1997). It is significant that the multiple possible sufficient historic factors in *Summers* were all pieces of tortious conduct (namely, all were breaches of a duty of care in the tort of negligence). *Summers,* 199 P.2d at 2-3; see also RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965) (“Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.”)

Sometimes the reverse may, controversially, occur as when courts set the evidentiary barrier at a particularly high level. For example, after the Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), some federal trial courts have been requiring plaintiffs to adduce conclusive epidemiological evidence to bridge the evidentiary gap even though this is unavailable and beyond the capacity of the plaintiff to collect or provide. Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges are Using Their Evidentiary Screening Role to Remake Tort Causation Rules,* 49 DEPAuL L. REV. 335 (1999).

52. Alternatively, if there was no apparent background risk, proof that the tortious conduct apparently created a risk will suffice. See infra note 135; RESTATEMENT (SECOND) OF TORTS § 433B cmt. b., illus. 3.

53. See, e.g., Reynolds v. Texas & Pac. Ry. Co., 37 La. Ann. 694 (1885); DAN B. DOBBS, THE LAW OF TORTS 420-22 (2001) (citing articles and cases); Robertson, supra note 51, at 1774-75; see also Zuchowicz v. United States, 140 F.3d 381, 388 n.7 (2d Cir. 1998) (Calabresi, J.) (citing Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980); Berry v. Sugar Notch Borough, 43 A. 240 (Pa. 1899)); Calabresi, supra note 3. Such cases are examples of where, though foreseeability is irrelevant to the historical question of Enquiry No. 1, it may be relevant to the legal issue of whether the assistance of some rule of law in relation to proof should be recognized. See supra note 49.

In the United Kingdom, *McGhee v. National Coal Board,* [1972] 3 All E.R. 1008 (H.L.), despite considerable controversy, see Wilsher v. Essex Area Health Authority, [1988] 1 A.C. 1074 (H.L.), has recently been critical to the success of the largest personal injury claim in British history, see the unreported judgment of Judge Turner in *Griffiths v. British Coal Corp.,* decided on January 23, 1998, by the Q.B.D. This judgment in turn led to a record settlement of £2 billion for the benefit of 100,000 ex-pitmen. This sum, payable by the taxpayer, is more than the Conservative Government had received from the privatization of the coal industry and associated asset sales. Seumas Milne, *Miner’s Payout is “a Debt” We Allow,* GUARDIAN WEEKLY, Apr. 4,
But sometimes this is not sufficient.\textsuperscript{54} Sometimes the plaintiff evades the evidentiary gap by reformulating the damage forming the gist of the action to the loss of a chance to avoid that outcome,\textsuperscript{55} but this is not uniformly allowed.

2. Evidentiary Gaps Concerning Targeted But-for; Hypotheticals and the Dependence on the Alleged Tortious Conduct

In some cases, we know exactly what the past facts were but we are uncertain whether the tortious conduct played any role in the history of the plaintiff's injury. This is because we do not know what would have happened in the hypothetical alternative universe that we need to consider if we are to determine whether the tortious conduct satisfies the targeted but-for test.\textsuperscript{56} For example, it may be

\textsuperscript{54} See, for example, the blue bus debate and Charles Nesson's notion that when proof of historical fact is appropriately based merely on statistics and when something more should be required is linked to the acceptability of jury verdicts on the particular subject-matter. Charles Nesson, \textit{The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts}, 98 HARV. L. REV. 1357 (1985).

\textsuperscript{55} See Herskovits v. Group Health Coop., 664 P.2d 474 (Wash. 1983). Similar suggested reformulations include that the wrong itself is constituted by the exposure to this increased risk of outcome rather than the outcome itself and the deprivation of an opportunity to pursue an alternative course of conduct. See generally DOBBS, supra note 53, at 434-41; David A. Fischer, \textit{Proportional Liability: Statistical Evidence and the Probability Paradox}, 46 VAND. L. REV. 1201 (1993); Nils Jansen, \textit{The Idea of a Lost Chance}, 19 OXFORD J. LEGAL STUDS. 271 (1999); John H. King, \textit{Causation, Valuation, and Chance in Personal Injury Torts Involving Pre-existing Conditions and Future Consequences}, 90 YALE L.J. 1353 (1981); Stephen R. Ferry, \textit{Protected Interests and Undertakings in the Law of Negligence}, 42 U. TORONTO L.J. 247 (1992); Jane Stapleton, \textit{The Gist of Negligence, Part II: The Relationship between "Damage" and Causation}, 104 LAW Q. REV. 389 (1988); Stapleton, supra note 28 (regarding "damage" to normal expectancies in failure to rescue cases); Aaron Twerski & Anthony J. Sebok, \textit{Liability Without Cause?: Further Ruminations on Cause-in-Fact as Applied to Handgun Liability}, 32 CONN. L. REV. 1379 (2000). Note that the "loss of a chance" formulation can apply both to question (a)—what if any were the physical effects of the defendant's conduct?—and to question (b)—what would have happened in the hypothetical world where the defendant did not commit the tortious conduct?

\textsuperscript{56} See RESTATEMENT (SECOND) OF TORTS § 433B cmt. b ("The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case. Thus when a child is drowned in a swimming pool, no one can say with absolute certainty that a lifeguard would have saved him; but the common experience of the community permits the conclusion that the guard would more probably than not have done so, and hence that the absence of the guard has played a substantial part in bringing about the death of the child. Such questions are normally for the jury, and the court may seldom rule on them as matters of law.").
clear that a product did not give an adequate warning of some risk involved with its use and yet there is evidentiary doubt whether, had the warning been given, the victim would have read it, heeded it, and thereby avoided the injury.

Again, the law has a choice as to the hurdle it places before the plaintiff faced with this sort of evidentiary gap. One of the most noteworthy examples of a pro-plaintiff rule in this area is the heeding presumption adopted by many courts in relation to product warnings.57

The content of the hypothetical is dependent on what is identified as the tortious conduct—what it is that the plaintiff claims the defendant ought to have done. A plaintiff may be unable to show that she would have used a safety device if it had been supplied by the defendant, but she may have sufficient evidence to show that she would have done so had he supplied it and exhorted her to wear it. In other words, she would lose if the allegation of tortious conduct is merely the allegation of failure to supply the device, but she would win if the allegation were that of failure to supply it and to exhort its use. Put generally, in omission cases we cannot answer the question of fact of historical relevance of tortious conduct until we have chosen the norm of what the defendant was legally obligated to do, if anything.58

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57. See, e.g., Coffman v. Keane Corp., 628 A.2d 710 (N.J. 1993); Fischer, Failure to Warn Cases, supra note 38, at 277-79; see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 2 cmt. i, 15 (1998) [hereinafter PRODUCTS LIABILITY]; Mark Geistfeld, Inadequate Product Warnings and Causation, 30 U. Mich. J.L. Reform 309 (1997). Note that this is not presumed elsewhere such as in the case of medical warnings. Perhaps one explanation is the perception that whereas product manufacturers are solely profit-oriented, those involved in the delivery of medical services are also motivated by altruistic goals such as curing disease. For discussion of profit as a relevant factor to the imposition of legal obligations, see infra notes 104, 110.

58. A distinction must be made between the defendant's conduct and the defendant's tortious conduct. For example, the conduct of a child's parent and of another citizen in failing to
B. Second Enquiry: Nature of the Role the Historic Factor Played in the History of the Outcome and Relevance to Purpose of Project

Quite apart from the history enquiry, there is a wholly different type of question we can ask about a transition to an outcome. We may have all the relevant past facts and know which factors played a role in the history of the transition. But most of our enquiries have a purpose, and the question then arises as to the relative importance of these historically involved factors in terms of our specific purpose and our views about how that purpose is best promoted. For example, in the history of most terrestrial processes, gravity plays a role. Yet it is rarely of purposive importance.

In contrast to science, sociology, and economics, the purpose of the law of obligations is to allocate legal responsibility for certain conduct and outcomes. How important a factor will be to that purpose will depend upon our individual view about the appropriate incidence, content and extent of legal responsibility in the context. These normative choices arise in two types of cases.

feed the child appear physically identical. Each piece of conduct would satisfy the question, "did the conduct play a role in the starvation injury of the child?" But this is a facile and banal route. The law must first determine what the incidence of the obligation was (were both the parent and citizen under a duty?) and what was the alleged tortious conduct—for example, the failure to act as a reasonable parent—and then ask the focused question of whether it played a role in the history of the injury. In other words, the clearest analysis is one where the issue of what should have been done by whom is addressed before the historical question so that the latter enquiry is focussed only on the alleged wrongdoers. See Dobbs, supra note 53, at 410 n.7; Robertson, supra note 51, at 1769-70; infra note 90. For an excellent discussion of the general area, see Wright, Causation, supra note 3, at 1769-74 & n.104. Section 324A of the Restatement (Second) is confused because it fails to elucidate this point.

Another way of putting this point is as follows: What is the comparator class against which we view the role of the defendant's omission, reasonable parents or strangers? One's selection of the appropriate comparator class is one way that subjectivity and normativity creep into the setting in which we address the factual question of historical role. They also creep into the application of the law to the evidence here because our personal experience, moral expectations, and so on, can influence not only our choice of the appropriate comparator class, and our judgment about the likely action of its members in the circumstances, but also our judgment of the likely effectiveness of that conduct. See Stapleton, Perspectives on Causation, supra note 39, at 66-70. For example, in the case of the lifeguard who fails to try to rescue a drowning child, see supra notes 28, 56, the comparator class that is likely to be selected is not that of the general public but of lifeguards. But the historical relevance point will also depend on judgments about what such a hypothetical lifeguard would have tried to do and its likelihood of avoiding the injury/death of the child. See RESTATEMENT (SECOND) OF TORTS § 433B cmt. b.

59. We may, for example, be certain what would have happened in our targeted but-for hypotheticals.
1. Whether it is Required that the Historic Factor also Played a Necessary Role in the Transition to the Outcome: Over-Determined Transitions

The characteristic problem in cases of over-determination, such as the double-hit hunters' case, does not involve a dispute about the facts. Indeed, one does not arrive at the characteristic problem in such cases unless it is established that both factors played an historic role in the history of the relevant transition. In other words, it must be established that the case is indeed one of over-determination. For example, in the hunters' case, it must be established that each gun discharged, that each shot a bullet that hit the victim, that each wound would have been sufficient to kill, and so on. Once those facts have been determined the characteristic problem of such cases emerges: Before a consequence can fall within the scope of liability, should the law choose to impose a requirement that the defendant's tortious conduct must have been necessary for that consequence?

For example, in the double hit hunters' case, the law could choose to impose a requirement of necessity before the tortious conduct of a defendant-hunter could be held responsible for the outcome. Since neither hunter satisfies the test of necessity—the traditional but-for test—neither would be held responsible under such a requirement. Alternatively, the law might choose not to require that the tortious conduct of each hunter played a necessary role in the death before it could fall within the scope of liability for that conduct. Courts and commentators often fail to recognize clearly the choices the law may make here; they erroneously urge one view, and only one view, as the natural or universal test. Yet the law

60. The challenge over-determined events pose for the legal system is normative. See supra note 38 and sources cited. Therefore, to describe this challenge, as traditional analysis does, as one going to "cause in fact" is dangerously misleading and generates sterile debates. See, e.g., Robertson, supra note 51, at 1766-67 & n.5, 1777-78. The law's responses to over-determined events are properly located within the evaluative Second Enquiry that, I argue in this Article, should be designated the "scope of liability for consequences of tortious conduct" category. Supra note 57.

61. Though the NESS approach of Hart, Honoré, and Wright correctly captures our understanding of historical involvement (such as our understanding of the double hit hunters' case), this is obscured by their description of NESS as a test "of causation." For example, it is only if we appreciate that Wright is addressing the issue of historical involvement (and not the normative choice in cases of over-determination) do certain of his statements hold. See, e.g., Wright, Clarifying the Concepts, supra note 3, at 1020 ("[T]he choice among these senses of necessity and sufficiency is not governed by policy considerations, but rather by how well each test corresponds with our intuitive concept of causation."). For criticism of "causal" approaches to over-
clearly chooses one approach in certain types of over-determination cases and the other in the remainder.62 This is why the issue of whether the law will choose to impose the conventional but-for test—the requirement of necessity—to the facts of a case is a normative one and not relevant to the factual issue of whether the tortious conduct played a role in the history of the consequence. It is an area of law, therefore, that does not belong in the Cause-in-Fact Chapter. It rightly belongs, along with other normative issues, in the Chapter on the Scope of Liability for Consequences.

The typical response of the law is to choose to impose a requirement of necessity, so that, unless the defendant’s tortious conduct made the victim worse off, the injury to the victim falls outside the appropriate scope of liability for consequences of that conduct.63 Of course, this might be rationalized in a number of ways, such as deterrence or fairness to defendants.

But in a case such as the double hit hunters’ case,64 where the simultaneous multiple sufficient historic factors are all pieces of tortious conduct, this requirement of necessity would result in the victim of two tortious acts being treated worse by the law than the victim of a single tortious act (i.e., if he had only been shot at and hit by one careless hunter). This is because, in the former case, the plaintiff would be unable to establish that the death came within the appropriate scope of liability of either tortfeasor, whereas, in the latter case, he would be able to establish that it came within the scope of liability of the lone tortfeasor. In such cases of simultane-

62. This choice might be reflected in different formulations of actionable injury that might be recognized. For example, if the law chooses to require that the defendant’s tortious conduct played a necessary role in the history of the consequence (otherwise that consequence lies outside the scope of liability for consequences), actionable damage would be satisfied only by a loss if that loss also represents “damage” to the normal expectancies of the victim viewed in the light of all other factors present. Where the law does not require necessity, actionable “damage” might be satisfied by a mere loss, that is, by a loss that might have happened anyway and so not be “damage” to the victim’s “normal expectancies.” See Stapleton, Perspectives on Causation, supra note 39, at 65-66, 82-84.

63. See, e.g., Rudeck v. Wright, 709 P.2d 621, 628 (Mont. 1985).

64. There is an interesting comparison to be made here with ordinary non-legal attributions of responsibility. Consider how we might judge an individual soldier’s responsibility in the context of a legal firing squad, each member of which fired a shot that alone would have proved fatal.
ous over-determination by multiple tortious acts, the law often chooses not to impose the necessity requirement. This result can and should be explicitly defended, on the basis that the legal concern with upholding the “dignity of the law” outweighs concerns with deterrence, fairness to defendants, and so on. Certainly, if the hunters had fired at the victim intentionally and the criminal law allowed them to escape, the law would be brought into public disrespect. A similar argument can be made in the private law area.

Cases of sequential over-determination by multiple pieces of tortious conduct lie between these two extremes and, not unexpectedly, provoke varying responses from the law.

To sum up my point here, the factual issue of whether a factor played a role in the history of the consequence hinges only on whether the factor was in some sense sufficient for that outcome, a characteristic that will be revealed by application of the targeted but-for test. But when it comes to the appropriate scope of liability for consequences, the law has a choice of whether to impose a further requirement, that the factor was necessary to the outcome. This is a normative choice.

2. Disputes Concerning the Weight to be Placed on Historic Factors

Finally, for a range of moral, policy, and other reasons, a defendant is never held liable for all consequences flowing from his tortious conduct. A question arises, then, as to which consequences should be regarded as within the scope of legal responsibility and which outside it. There are cases in which the parties agree on the past facts and that the defendant’s tortious conduct played a role in the history of a particular consequence, but they disagree on the appropriate weight that the law should put on the defendant’s tortious conduct in the context of the particular cause of action. Sometimes the dispute is framed in terms of whether the “intervention” of another historic factor leading to the consequence rendered the defendant’s tortious conduct unimportant for the purposes of the cause of action. In other cases, the dispute is framed in terms of the nature of the consequence of which complaint is made: Was it “direct” or “remote”; Was it (reasonably) foreseeable or not; and so on. In terms of doctrinal rhetoric, these two formulations are often treated as distinct even though they are nothing more than differ-

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ent ways of describing how a transition to a consequence of tortious conduct proceeded.

Where an "intervention" description of the facts is plausible, the defense argument is often framed in the pseudo-scientific language of the "intervening factor" breaking the "chain of causation," so that the defendant's tortious conduct is not to be treated as a "legal cause" even though it has played a role in the history of the transition to the outcome. Such pseudo-scientific metaphors serve only to mask the nature of the underlying dispute about competing visions of the scope of liability (in terms of consequences) appropriate to the particular cause of action. If the intervention breaks anything, it breaks the chain of legal responsibility for consequences\textsuperscript{66} flowing from the tortious conduct. Similarly, in disputes presented as concerning the nature of the consequence of which a complaint is made, the vacuity of the mere assertion of an outcome being "too remote" or "not proximate" is patent, especially in cases where the effect is instantaneous and spatially very near.\textsuperscript{67}

The range of legal concerns that have influenced whether the scope of legal responsibility for tortious conduct extends to cover the victim's injury is large and diverse. Like the concerns relevant to duty, the concerns here may be general, such as the systemic concern with indeterminate liability, or quite specific to the facts. Also like those concerns affecting the duty issue, the concerns relevant in any particular case depend on the perceived purpose of the rule and tend to be buried deep in an opaque case law.

V. THE TREATMENT OF "LEGAL CAUSE" BY EARLIER RESTATEMENTS

A. Legal Cause as an Amalgam: General Comments

Having set out, in non-causal language, the two different enquiries (concerning a transition) that are cloaked by the term "legal cause," I now turn to the treatment of legal cause by earlier Restatements. Under Section 5 of the earlier Restatements, an actor could not be subject to liability for another's injury unless the ac-

\textsuperscript{66} Of course, the chain of consequences flowing from the tortious conduct (that is, in relation to which the tortious conduct played a role in their history) is endless. See Michael S. Moore, \textit{Causation and Responsibility}, SOC. PHIL. & POLICY, Summer 1999, at 1; Michael S. Moore, \textit{The Metaphysics of Causal Intervention}, 88 CAL. L. REV. 827 (2000).

\textsuperscript{67} Such as in a modern day version of Palsgraf or of \textit{In re Polesis}, 3 K.B. 560 (Eng. C.A. 1921). See Stapleton, \textit{Perspectives on Causation}, supra note 39, at 79.
tor's conduct was a legal cause of that injury. Both Restatements stated that legal cause was an amalgam: the actor's conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law which restricts liability because of the manner in which the conduct operated to bring about the invasion of the other's interest.

As the following subsections explain, whatever these two elements of the amalgam were intended to mean, they clearly do not correspond with the two separate enquiries we can make about a transition to a particular outcome that have just been discussed: the factual one, and the contextual/evaluative one. For example, at one point, the Restatements suggest that only some factors that played a role in the history of the outcome qualify as a substantial factor in bringing it about, which demonstrates that evaluative notions are

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68. RESTATEMENT OF TORTS § 5(a) (1934); RESTATEMENT (SECOND) OF TORTS § 5 (1965). For some torts, "legal cause" is also spelled out in a black-letter section as an element of the individual tort. See, e.g., RESTATEMENT OF TORTS §§ 37, 281, 430, 576 (false imprisonment, negligence, slander resulting in special harm); RESTATEMENT (SECOND) OF TORTS §§ 37, 281, 430 (1965) (false imprisonment, negligence); RESTATEMENT (SECOND) OF TORTS §§ 575, 632 (1977) (slander resulting in special harm, injurious falsehood). For other torts, the legal cause requirement is spelled out in a comment. See, e.g., RESTATEMENT (SECOND) OF TORTS § 13 cmt. d (1965); RESTATEMENT (SECOND) OF TORTS § 870 cmt. 1 (1977) (battery, liability for intended consequences). But see RESTATEMENT OF TORTS § 13 (spelling out the requirement for battery in the black-letter text of section).

As to the meaning of the term "legal cause," the Restatement (First) provided:

The words "legal cause" are used throughout the Restatement of this Subject to denote the fact that the manner in which the actor's tortious conduct has resulted in an invasion of some legally protected interest of another is such that the law regards it just to hold the actor responsible for such harm.

Id. § 9.

This was modified in the next Restatement to read:

The words "legal cause" are used throughout the Restatement of this Subject to denote the fact that the causal sequence by which the actor's tortious conduct has resulted in an invasion of some legally protected interest of another is such that the law holds the actor responsible for such harm unless there is some defense to liability.

RESTATEMENT (SECOND) OF TORTS § 9 (1965) (emphasis added).

69. Both the earlier Restatements noted:

In order that a particular act or omission may be the legal cause of an invasion of another's interest, the act or omission must be a substantial factor in bringing about the harm and there must be no principle or rule of law which restricts the actor's liability because of the manner in which the act or omission operates to bring about such invasion.

RESTATEMENT OF TORTS § 9 cmt. b; RESTATEMENT (SECOND) OF TORTS § 9 cmt. b (1965).

This amalgam definition of legal cause is explicitly repeated in relation to the tort of negligence in Section 431 of both Restatements. The Restatement (Second) extended this amalgam definition of legal cause to other torts: "the rules stated in this Section are . . . equally applicable where the conduct is intended to cause harm, or where it is such as to result in strict liability."

Id. § 431 cmt. e.

70. RESTATEMENT OF TORTS § 431 cmt. a; RESTATEMENT (SECOND) OF TORTS § 431 cmt. a.
in play to effect this filtering. Moreover, even where a defendant's tortious conduct qualifies as a substantial factor under the earlier Restatements, the issue of whether the consequence is within the appropriate scope of liability is not consistently acknowledged to be a purely evaluative issue but is couched in the ambiguous language of "causation."

In 1979, more than a decade after the legal cause chapter appeared, the final volume of the Restatement (Second) was published under the authorship of the new Reporter, Wade. In a Comment on his Section 870, Wade attempted a realignment of these elements by describing the earlier sections on substantial factor as being about "cause-in-fact." But this awkward maneuver simply introduced further anomalies within the Restatement (Second) when read as a whole. To eliminate these anomalies, the Restatement (Third) needs to restructure and rename the constituents of legal cause in alignment with the two separate underlying enquiries.

Another general criticism of earlier Restatements is their disjointed treatment of this area of the law in relation to torts other than negligence. This was one of the lamentable results of the Restatements' failure to incorporate adequately clear statements of issues of general application to all torts. Thus, the extension to other torts of the substantial factor sections, which are explicitly discussed in relation to the tort of negligence, is effected in the Restatement (Second) merely by a comment to one section. In relation to the second element of the amalgam, any "rule of law which restricts liability because of the manner in which the conduct operated," there is no general section indicating the necessity of truncation of liability for consequences and the dependence of the scope of liability for consequences on, inter alia, the perceived purpose of the particular tort in issue. Thus, there is no clear signal at the outset that, because the purpose of the tort of deceit is fundamentally different from that of the tort of mere negligence, the scope of liability for consequences is likely to be different. Instead, the Restatement (Second) contains only isolated sections dealing with some aspects

71. RESTATEMENT (SECOND) OF TORTS § 870 cmt. l. (1979) ("For liability to exist, the defendant's conduct must have been the cause in fact of the harm to the plaintiff. The rules on cause in fact for negligent conduct are applicable here in the case of intentional conduct."); see also RESTATEMENT (SECOND) OF TORTS §§ 431-34 (1965). For treatment of legal cause for intentional harm, see id. §§ 435A, 435B.

72. RESTATEMENT (SECOND) OF TORTS § 431 cmt. e (1965); see also RESTATEMENT (SECOND) OF TORTS § 870 cmt. l (1979); RESTATEMENT OF TORTS §§ 279-80 (1934).
of the issue in relation to intentional torts\textsuperscript{73} and strict liability torts.\textsuperscript{74}

\textbf{B. Substantial Factor\textsuperscript{75}}

Elaboration of the legal cause amalgam is set out in Chapter 16 of the \textit{Restatements}. Chapter 16 of the \textit{Restatement (Second)}, published in 1965 with Prosser serving as Reporter, contains no reference to “factual cause,”\textsuperscript{76} “cause-in-fact,”\textsuperscript{77} or “actual cause.”\textsuperscript{78}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{73} \textit{Restatement (Second) of Torts} §§ 435A, 435B (1965); \textit{see also Restatement (Second) of Torts} § 870 cmt. l (1979).
\item\textsuperscript{74} \textit{See, e.g., Restatement (Second) of Torts} § 519(2) (1977) (explaining that the scope of “strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous”).
\item\textsuperscript{75} For criticism of the differing meanings the \textit{Restatements} give to “substantial factor,” \textit{see} Robertson, \textit{supra} note 51, at 1776. Both earlier \textit{Restatements} also apparently use the term “substantial cause” as a synonym for “substantial factor,” \textit{Restatement of Torts} §§ 430 cmt. a, 431 cmt. a, 434 cmt. c, 458 cmt. c, despite warnings to the contrary, \textit{see Restatement of Torts} xv-xvi (1934) (providing in the “Principles of Terminology Employed” that “[t]wo or more words should not be used to express the same legal concept”). For discussion of the shifting history of the notion of “substantial factor,” \textit{see} Wright, \textit{Causation}, \textit{supra} note 3, at 1781-84.
\item\textsuperscript{76} There is also no reference to “factual causation.” The only reference to either term in the \textit{Restatement (Second)} is to “factual cause,” \textit{Restatement (Second) of Torts} § 874A cmt. j (1979), in volume IV published after Dean John W. Wade had taken over reportorial responsibility.
\item\textsuperscript{77} There are only two references to “cause in fact” in the \textit{Restatement (Second), Restatement (Second) of Torts} § 546 (1977); \textit{Restatement (Second) of Torts} § 870 cmt. l (1979), both also published—in volumes III in 1977 and IV in 1979, respectively—after Wade had taken over reportorial responsibility.
\item\textsuperscript{78} The only references to “actual cause” in the \textit{Restatement (Second)} also occurred in Volume IV published after Dean John W. Wade had taken over reportorial responsibility, \textit{Restatement (Second) of Torts} §§ 817 cmt. f, 874A cmt. j (1979).
\item In the \textit{Restatement (Third) of Torts: General Principles} (Discussion Draft), Professor Schwartz states that “[l]egal cause” includes the doctrines of both actual cause and proximate cause.” \textit{Discussion Draft, supra} note 14, § 3 cmt. a. This seems to suggest that he regards “proximate cause” as the separate rules addressed after “actual cause” is found. By contrast, in the \textit{Restatement (Second)}, the only mention of proximate cause treats it as synonymous with the legal cause amalgam.
\item [One explanation for the last clear chance rule] is that the plaintiff's negligence is not a “proximate” or legal cause of the harm to him, because the later negligence of the defendant is a superseding cause which relieves the plaintiff of responsibility for it. This is quite out of line with modern ideas as to legal cause.
\item\textsuperscript{78} \textit{Restatement (Second) of Torts} § 479 cmt. a (1965).
\item There is, however, one reference to “proximate” harm in the \textit{Restatement (Second)} that might correspond to the Schwartz usage:
\item [Any harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always “proximate,” no matter how it is brought about, except where there is such intentionally tortious or criminal intervention, and it is not within the scope of the risk created by the original negligent conduct.]
\item \textit{Id.} § 442B cmt. b.
\end{enumerate}
\end{footnotesize}
There is, however, a single and telling reference to "actual causation" in Chapter 16 that is worth quoting at length. The Reporter's Notes to Section 433 in the Restatement (Second) explained why the issue of how extraordinary the harm appears was not a relevant consideration in determining whether negligent conduct is a substantial factor in producing harm:

The "substantial factor" element [of the legal cause amalgam] deals with causation in fact while the other element deals with a legal policy relieving the actor of liability for harm he has, as a matter of fact, caused. The conclusion that it appears highly extraordinary that the conduct should have brought about the harm has nothing to do with the question whether it did actually "cause" the harm. The question of actual causation involves an application of the laws of physics to the data to determine whether there is an unbroken chain of causes and effects, starting with the negligent conduct and ending with the harm complained of. Once that question is answered "yes," the only remaining problem of actual causation is the determination of whether the negligent conduct played a "substantial" part in bringing about the harm. It seems obvious that the negligence may have been a "substantial factor" in a particular case regardless of how "highly extraordinary" the chain of events appears in retrospect. It is completely faulty analysis . . . to list the "extraordinary" element as a part of the "substantial factor "aspect of legal cause . . . . It is confusing the question of policy with the question of fact. Any rule of law which relieves an actor from liability for negligence because "it appears highly extraordinary that it should have brought about the harm" is a rule of policy which relieves the actor from liability for harm he has, in fact, caused. This conclusion is inevitable in the light of the Restatement's analysis of "superseding cause" as an intervening force which "prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."79

This suggests that the Restatement intended the issue of substantial factor to be approached as a question of pure historical fact.80 But the Note to Section 433 is misleading in a number of ways. For example, the reference to the laws of physics reflects a long-standing fallacy in traditional running down cases that control
of liability for consequences can be achieved by some “billiard ball” notion of the laws of physics. That is, this reference rests upon the faulty notion that “claims for physical damage, whether to person or property, are inherently limited by the laws of physics which teach that physical forces will ultimately come to rest.” After I have run you over and broken your leg, we have “come to rest” in a crude sense. Yet if you later suffer negligent treatment at a hospital that damages your other leg, the law may well say this injury is within the appropriate scope of my liability for consequences. What is doing the work in this judgment is not some inherent limit on my liability set by the law of physics but a judgment about the appropriate scope of liability for consequences in light of, among other things, the perceived purpose underlying the recognition of the obligation in the first place.

A second problem with the Note to Section 433 is that if, as it suggests, we adopt a factual construction of the issue of substantial factor, this will not fit in with a critical comment to Section 431:

Comment a. Distinction between substantial cause and cause in the philosophic sense . . . . The word “substantial” is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.82

81. This odd idea that how physical damage may come about is somehow limited by velocity is also evident in the Restatement (Second) in the notion of conduct that has created a force that is “in continuous and active operation up to the time of the harm.” RESTATEMENT (SECOND) OF TORTS § 433(b) (1965); see also id. § 439; RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 105 cmt. b (Preliminary Draft No. 2, May 10, 2000) [hereinafter Preliminary Draft No. 2] (“Most personal injuries and property damages are caused by physical forces that are inherently limited by the laws of physics. A speeding automobile will eventually come to rest . . . .”); id. cmt. e (“Most claims for physical damage, whether to person or property, are inherently limited by the laws of physics which teach that physical forces will ultimately come to rest.”). Compare id. § 2A cmt. b (“Theoretically it is possible to trace the consequences of conduct indefinitely for the flow of future events is forever altered by each person's conduct.”), with id. § 105 cmt. b (“The factual connection between conduct and harm may be unlimited . . . .”). Dobbs provides a useful discussion of why unpredictable ricochet effects may be included within the scope of liability for consequences. DOBBS, supra note 53, at 467-68.

82. RESTATEMENT OF TORTS § 431 cmt. a (1934); RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965). Remarkably, this crucial comment is ignored by Keeton, who asserts that the “1948 revision of the Restatement limited [the] application [of ‘substantial factor’] very definitely to cause in fact alone.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 278 (5th ed. 1984).
Both Restatements then list among the considerations that are important in determining whether the actor’s conduct is a substantial factor in bringing about harm: (a) the number of other factors that contribute to producing the harm and the extent of the effect that they have in producing it; (b) whether the actor’s conduct has created a force or series of forces that are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (c) lapse of time. While it may well be true that these considerations affect the way we use causal language, at least in a context of the attribution of responsibility, none is relevant to the scientific issue of whether a factor played a role in the history leading to the harm, which is the only real question of fact here. Moreover, at its most curious, science does not rank historical factors in terms of “significance,” for there are no criteria on which to do so without the purpose of the project first being set. It is the lawyer’s purpose in allocating legal responsibility that is driving this notion of significance, just as it is what drives other glosses put on the word “substantial” by the Restatements: that the factor must have “an appreciable effect,” even if another has a “predominant effect,” and must not be “so attenuated as to be insignificant and unsubstantial as compared to the aggregate of the other factors which have contributed.”

The nub of the problem reflected in Comment a to Section 431 is the superficial attraction of, and long-standing reliance on, causal usage, not merely as a shorthand for, but as a criterion by which to determine one of the pre-conditions of legal responsibility. The earlier Restatements are flawed by their incoherent insistence that the issue of substantial factor is a question of physics and yet also dependent on the usage of causal language, “in which there always lurks the idea of responsibility.” While so ever we continue to rely on causal usage in disputes couched as disputes about causation, causation in law will continue to be a black-box “concept” that encourages obfuscatory arguments by counsel and impenetrable decisions by courts and juries alike.

The inadequacy of causal usage as a guide to attribution of responsibility in legal disputes is worth emphasizing. Of course, it is true that there are areas where causal usage is uniform. At least

83. RESTATEMENT (SECOND) OF TORTS § 433; RESTATEMENT OF TORTS § 433.
84. RESTATEMENT (SECOND) OF TORTS § 433 cmts. d, f; RESTATEMENT OF TORTS § 433 cmts. d, h.
in the context of the attribution of moral or legal responsibility, no one would say that the decision of the great-great-grandmother of Lee Harvey Oswald to have children was a cause of the death of President Kennedy. Conversely, if I intentionally run you over with my car and your leg is broken, no one would say I was not the cause of that injury. The problem is that this uniformity of the way we use causal terms in these cases is based on our agreement about the underlying responsibility issue that is left un-enunciated. Yet unless we try to unpack the responsibility ideas in play behind causal language, and separate them from the question of historical fact, we cannot hope to clarify the law in this area. This is best illustrated by the many cases where courts face legal disputes presented as disputes "about causation" even where the facts are agreed. Here the framing of the disputes is testament to the lack of a consensus about how causal language should be used in each case. The parties disagree about causal usage, not because they disagree about the facts, but because they disagree about the underlying responsibility issue. So the fact that we can detect crude patterns of agreed causal usage in other situations such as that of Mrs. Oswald does not help the resolution of their dispute.

Prosser seems to have been aware of this incoherence in the treatment of substantial factor in the Restatements. In two places, he notes that particular features of a consequence, such as its freakishness or its occurrence after the intervention of another

85. See supra note 15; infra notes 88, 90, 112. Though in other contexts we may well use causal language to describe the link between the reproductive decisions of ancestors and the crimes of their descendents. For example, when two academics released their research showing a correlation between the increased use of abortion following the liberalization of its availability in Roe v. Wade and the recent reduction in the United States crime rate, the press reported that the goal of the researchers had been to "shed light on the causes of crime." Amy Goldstein, Theory Ties Abortion to Crime Drop, WASH. POST, Aug. 22, 1999, at A9. Their conclusion was that legalizing abortion in the 1970s may be a leading cause of plummeting crime rates in the 1990s. Id. Causal usage depends on our purpose in the context. See generally Stapleton, Unpacking "Causation," supra note 39.

86. Prosser also noted in the Restatement (Second): Analytically, the highly extraordinary nature of the result which has followed from the actor's conduct (with or without the aid of an intervening force) indicates that the hazard which brought about or assisted in bringing about that result was not among the hazards with respect to which the conduct was negligent. (See §§ 451 and 468.) Strictly, the problem before the court is one of determining whether the duty imposed on the actor was designed to protect the one harmed from the risk of harm from the hazard in question. (See § 281 Comment e, and § 449.) However, courts frequently treat such problems as problems of causation. (See § 281, Comment e, and § 430, Comment a.). Restatement (Second) of Torts § 435 cmt. c; see also supra note 79 (citing the Appendix to court citations).

Prosser also noted in the Restatement (Second):
relevant factor, raise the normative issue of the appropriate scope of liability for consequences and not the issue of substantial factor. Yet these are the very sort of features that may well influence the "popular sense" of how to use the term "cause," which elsewhere in the *Restatement* we are told governs the requirement of being a "substantial" factor. Prosser unsatisfactorily glosses over the problem by simply noting that courts often deal with these features in the language of causation and that treatment of these features would be "facilitated by an appreciation of the fact that the problem is a 'hazard problem' rather than a problem of causation."

This strongly suggests that the *Restatement (Third)* should abandon the "substantial" gloss on the notion of causation and ex-

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In the 1948 Supplement to the first Restatement, this Section was changed by the addition of Subsection (2), and corresponding revision of the Comments. The Reporter's Note explained briefly that "as pointed out in the reason stated in s 433, accuracy of analysis in the light of the modern emphasis on the hazard problem requires the change." . . .

The question of the effect of the unforeseeability of the impact or harm itself is inextricably interwoven with that of duty to the plaintiff. See § 281(b), and Comments and the Note to that Section. Where the issue of duty has been disregarded, it is usually held that the unforeseeability of the harm itself does not prevent liability for it . . . . In other cases the unforeseeability of the harm itself has been stated as a reason for denying liability. In these cases it is often impossible to determine whether the court is proceeding on the basis of the absence of any duty to the plaintiff (see § 281(b)), or on the basis of the highly extraordinary nature of the result, as stated in Subsection (2) of this Section, or is rejecting the rule stated in Subsection (1).

*Restatement (Second) of Torts* § 435 app., Reporter's Note (1966).

87. The *Restatement (Second)* discusses "[r]elation to legal cause" in a comment to Section 281:

The problem which is involved in determining whether a particular intervening force is or is not a superseding cause of the harm is in reality a problem of determining whether the intervention of the force was within the scope of the reasons imposing the duty upon the actor to refrain from negligent conduct. If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force, or by the effect of the intervening force operating on the condition created by the negligent conduct, then that hazard is within the duty, and the intervening force is not a superseding cause . . . . A completely accurate analysis of the hazard element in negligence would require the material on superseding cause in Chapter 16 to be placed in this chapter [on Negligence: General Principles]. However, in the past the courts generally have discussed the effect of intervening forces in terms of causation. The solution of the problem of determining whether the presence of an intervening force should relieve the actor from liability for harm which his conduct was a substantial factor in bringing about . . . is facilitated by an appreciation of the fact that the problem is a "hazard problem" rather than a problem of causation.

*Restatement (Second) of Torts* § 281 cmt. h (1965).

88. For example, these are the sort of reasons why few would, in the context of allocation of personal responsibility, say Mrs. Oswald was a cause or a substantial factor in President Kennedy's death. See supra notes 15, 85 and accompanying text; infra notes 90, 112. These insights emerged from the classic study in HART & HONORE, supra note 3, at lxviii.

89. *Restatement (Second) of Torts* § 281 cmt. h. For the full text of this comment, see supra note 87.
plicitly restrict the notion of causation in law to the purely factual question of whether the defendant's tortious conduct played a role in the history leading to the plaintiff's injury. Juries should be instructed to approach causation in law in this historical, scientific sense even though it may differ from ordinary usage of causal language. Then within this "cause-in-fact" chapter, the Restatement (Third) should set out the special rules of proof in relation to evidentiary gaps relating to cause-in-fact, such as the Summers v. Tice rule and the heeding presumption. In a completely separate chapter, entitled "Scope of Liability for Consequences of Tortious Conduct," the Restatement should then collect the issues concerning this entirely normative question of the appropriate scope of liability. These include rules relating to over-determined outcomes. The misleading and indeterminate terms, "legal cause," "proximate cause," and "substantial factor" should be abandoned.

C. Over-Determination

Another way normativity infects the notion of "substantial factor" in the earlier Restatements is that it is defined to accommodate both of the contrasting responses the law may take when confronted with over-determination. Section 432 provides:

NEGLIGENCE CONDUCT AS NECESSARY ANTECEDENT OF HARM

(1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.

90. Juries should do so just as a scientist in the context of measurement uses certain terms in a single precise factual meaning (e.g., "yard," "foot," or "stone"). Many of the incongruities that this non-ordinary usage might seem to threaten are avoided if the law addresses the issue of historical fact only in relation to a factor already formulated as the alleged tortious conduct, rather than merely the defendant's conduct. See supra note 58. For example, no one would, in the context of the allocation of any type of personal responsibility, say Mrs. Oswald was a "cause" of the death of Kennedy even though her reproductive decision was an historical factor. See supra notes 15, 85, 88; infra note 112. But my proposal that "cause-in-fact" in law should be equated with any factor that played an historic role in the history of the relevant consequence would never force a jury to abandon their "ordinary sense" usage and say Mrs. Oswald was a "cause" because the law should require the plaintiff first to formulate what it was about Mrs. Oswald's conduct that was the alleged tortious conduct. Only once this had been done would the jury be asked to determine if that aspect of her conduct was an historical factor and therefore a "cause-in-fact" in law of the death. But in cases such as Mrs. Oswald, the reason there is such a consensus about causal usage, i.e., the reason no one would say she was a cause of Kennedy's death in a context of the attribution of individual responsibility, is that it is agreed that her conduct in no arguable way contravened any type of responsibility rule. In such cases, the plaintiff never gets to the "cause-in-fact" point.
(2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.91

That the law has a normative choice whether to impose a requirement that the defendant's tortious conduct was necessary to the history of the outcome is not spelled out clearly, nor are the legal concerns that govern where the law chooses to impose this requirement and where it does not. In the Restatement (Third), these issues should be distinguished from the factual issue of whether the factor played any role in the history of the consequence. That is, they should be distinguished from the cause-in-fact enquiry, and they should be located within a Chapter dealing with the other normative issues raised by the question of: “For which consequences of tortious conduct should a defendant be liable?”

D. The Second Half of the Amalgam

Earlier I noted that both of the earlier Restatements stated that legal cause was an amalgam of two requirements: that the actor's conduct is a substantial factor in bringing about the harm, and that “there is no rule of law which restricts liability because of the manner in which the conduct operated to bring about the invasion of the other's interest.” While Sections 432-33 dealt with the issue of substantial factor, Sections 435-61 dealt with this second half of the amalgam and included discussions of freakish results, foreseeability, and intervening factors.

It is significant that the Reporters of the earlier Restatements couched the second limb of the amalgam in these terms, for it suggests that prima facie all consequences of the tortious conduct are within the scope of the obligation unless some special rule of law can be found to truncate responsibility. Indeed, in both Restatements, Sections 435-61 are referred to as “rules restricting responsibility”92 that operate only “occasionally”93 and the Introduc-

91. RESTATEMENT (SECOND) OF TORTS § 432. The corresponding provision in the Restatement (First) ends, “the actor's negligence may be held by the jury to be a substantial factor in bringing it about.” RESTATEMENT OF TORTS § 432 (1934). For an example of the use of “substantial factor” as a device to evade the normative issue presented by over-determined events, see generally Mitchell v. Gonzales, 819 P.2d 872 (Cal. 1991).

92. RESTATEMENT (SECOND) OF TORTS § 465 cmt. b; RESTATEMENT OF TORTS § 465 cmt. a.

93. “[S]uch rules as occasionally relieve a negligent actor from responsibility for harm which his negligence is a substantial factor in bringing about because of the particular manner in which his negligence produces the harm.” RESTATEMENT (SECOND) OF TORTS ch. 16, Scope Note; RESTATEMENT OF TORTS ch. 16, Scope Note.
tory Note to these sections states: "Only a few of the [s]ections in this Topic state rules which restrict liability short of holding the actor [liable] for all the harm of which his negligence is a substantial cause." 94 This pro-jury dynamic is evident elsewhere in the legal cause chapter (Chapter 16). Because of the challenge presented by non-traditional claims, especially in the tort of negligence, the Restatement (Third) should recast the separate, non-historical issue of the scope of liability for consequences in a more even-handed way. Professor Perlman's phrase that such restrictions on the "scope of legal obligations" 95 only occur "in unusual circumstances" 96 is, therefore, to be regretted.

The Restatement (Third) should acknowledge that liability for consequences of tortious conduct always has a limit and that the position of the limit for a particular tort is generated by a consideration of many specific legal concerns. 97 On occasion, consideration of these legal concerns, including the perceived purpose of the relevant tort, will be judged to warrant the crystallization of a rule of law governing the scope of liability for consequences. One example of such a rule in the tort of negligence is that foreseeability (of the kind/type/nature of the harm suffered) is a necessary requirement for the scope of liability for consequences. This is, of course, a notoriously malleable "rule" that will rarely provide control because it

94. RESTATEMENT (SECOND) OF TORTS ch. 16, tit. B, Introductory Note; RESTATEMENT OF TORTS ch. 16, tit. B., Introductory Note.

95. By using this phrase, Professor Perlman seems to mean restrictions of law under both the old incidence of obligation categories (such as the duty concept in the tort of negligence) and any restrictions of law in relation to the defendant's liability for consequences of his tortious conduct. See infra Part VI.

96. Preliminary Draft No. 2, supra note 81, § 105; see also id. § 105 cmt. a (stating "in limited circumstances").

97. Some of which will, on the facts, weigh in favor of a wider scope of liability for consequences and some of which will, on the facts, weigh in favor of a narrower scope of liability for consequences.

98. This is the approach with which "American cases are overwhelmingly consistent . . . although their manner of expression is often slightly different." DOBBS, supra note 53, at 455. The most commonly cited authorities for this foreseeability rule are Judge Cardozo's approach in Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928)—even though, as Dobbs explains, DOBBS, supra note 53, at 455-56, Cardozo did not couch his approach in terms of legal/proximate cause—and the Privy Council decision in Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., [1961] A.C. 388 (P.C.) ("Wagon Mound I").

The amplification or gloss on the rule that all that needs to be foreseeable is the kind/type/nature of the harm suffered is generally regarded as a necessary implication of the basic rule. DOBBS, supra note 53, at 460 n.15, 466 n.1, 468 n.7. Contra In re Kinsman Transit Co., 338 F.2d 708, 726 (2d Cir. 1964) (Friendly, J.). In the United Kingdom, the first enunciation of and prime authority for this gloss came soon after Wagon Mound I in Hughes v. Lord Advocate, [1963] A.C. 837 (H.L.). See MICHAEL A. JONES, TEXTBOOK ON TORTS 206-07 (5th ed. 1996); see also JOHN G. FLEMING, THE LAW OF TORTS 239 (9th ed. 1998).
crucially depends on how broadly or narrowly the kind/type/nature of the harm is described. Until its modern erosion, a more "bright-line" rule of law governing the scope of liability for consequences in the tort of negligence was the one limiting liability for consequences following the criminal interventions of third parties.

But rules of law governing the scope of liability for consequences are rare in any particular tort. In most situations, the law’s concerns are simply factors that the law regards as appropriate for the decision-maker to have in mind when exercising the discretion inherent in applying legal rules to a specific set of facts. The Restatement (Third) should, of course, record the rare rules of law governing the scope of liability for consequences for any particular tort, but it should also record those relevant legal concerns that arise out of the particular facts of the case, so that they can be included in counsels’ argument before, and trial judge’s instructions to, the jury.

As Prosser noted, though courts may have often dealt with issues of the freakishness/foreseeability of the outcome or the relevance of an intervening factor in causal language,99 neither issue arises as a dispute about the facts, but as a dispute about the issue of responsibility arising from agreed facts.100 Though Prosser was content to retain the title of “cause” in this field, both in “legal cause” and “proximate cause,” clarity of this area of law concerning the issue of which consequences of tortious conduct are appropriately within the scope of liability will not improve until the entire terminology of cause is “unpacked” and removed. Until then, the temptation will be too great for counsel and trial judges to mask the complex issues in play behind mere assertions that causal language can adequately guide juries and/or justify legal determinations. As noted earlier, my suggestion for a title for this area of the law and its chapter in the Restatement (Third) is the “Scope of Liability for Consequences of Tortious Conduct.”

VI. PROFESSOR PERLMAN’S DRAFT NOMENCLATURE

Professor Perlman has suggested that the phrase “scope of legal obligation” should be used to refer to those areas “in which courts have imposed limits on the legal obligation of an actor as a

99. Restatement (Second) of Torts §§ 281 cmt. h, 435 cmt. c (1965); Restatement (Second) of Torts § 435 app. (1966); see supra notes 86-87.
100. Dobbs neatly expresses this as “about the legal significance of causation, rather than the existence of causation.” Dobbs, supra note 53, at 409.
matter of law,”101 legal rules such as those relating to the incidence of the obligation. I think that this approach is unhelpful for two reasons. First, it adopts the idea that limits on the incidence of legal obligation will be exceptional, going merely to the scope of an existing general obligation rather than reflecting the powerful message of freedom from obligation that no-obligation findings (such as no-duty findings in the tort of negligence) can usefully provide in an era of ever-more ambitious non-traditional claims in tort.

Secondly, Professor Perlman contrasts the phrase “scope of legal obligation” with the phrase “scope of liability (proximate cause),” the former referring to the rules of law bounding the incidence and content of obligation, and the latter referring to the application of these rules to the facts by the jury. I agree that it is important for the Restatement (Third) to differentiate between legal rules and those legal concerns raised by the facts that should merely be brought to the attention of the jury. But I think it would be preferable if this were accomplished within broadly familiar doctrinal categories.

Moreover, the new arrangement suggested by Professor Perlman seems to strip out too much from the role of the judge. For example, he states that his draft Section 105 “also avoids use of ‘foreseeability’ as an element that defines the scope of an actor’s duty” to be decided by the judge, since the issue of “whether the accident was foreseeable is more properly a jury decision.”102 Yet, at least in the tort of negligence, foreseeability is inherent in the description of the legal obligation because the notion of reasonable care can only operate against the notion of some perception of foreseeable risk, howsoever generally conceived. One cannot conduct oneself unreasonably if there is no reasonably foreseeable risk involved. Now it is, of course, a matter for the jury in any individual negligence case to decide the foreseeability issue after evidence of the facts has been given. But it is not possible for the trial judge to describe the incidence of the legal obligation we call the tort of negligence without mention of foreseeability of risk at its most general.

Perlman’s suggested nomenclature raises graver questions. For example, it is not clear to which of his suggested areas—“scope of legal obligation” or “scope of liability (proximate cause)”—Professor Perlman would allocate the idea that foreseeability (of the

101. Preliminary Draft No. 2, supra note 81, § 105 cmt. c.; see also id. §§ 2A cmts. d, e, 105, Reporter’s Note.
102. Memorandum from Harvey Perlman to Advisers and Members Consultative Group 4 (May 3, 2000), in Preliminary Draft No. 2, supra note 81.
kind/type/nature of the harm suffered) is a necessary requirement for the scope of liability for consequences in the tort of negligence.\footnote{103. See supra note 98 and accompanying text.}

If courts are justified in keeping a negligence case from the jury because there is no evidence that the particular consequence was anything but completely freakish and "unforeseeable," even in hindsight, this sounds like a rule of law that Professor Perlman would allocate to the "scope of legal obligation" area. But by doing so he will lump together legal concerns (those bearing on the appropriate incidence of duty lumped together with those bearing on the scope of liability for consequences of tortious conduct) that are usefully distinguished, and have been, in the past, the subject of separate doctrinal categories.

In my view, it is best to regard the incidence of obligation question separately from the consequences question. Under the former, the law can explicitly weigh and expound general systemic issues, going to the question of whether an obligation should be owed at all, that are apparent at the time the defendant acted and that are not dependent upon how his conduct happened to turn out on a specific occasion. An example here is whether a commercial host owes a duty to conduct himself as a reasonable person in his position would, including in relation to controlling his patrons.\footnote{104. One example is the general view that, whereas a commercial host owes an obligation of care to the victim of a person to whom he serves alcohol, a social host does not. Preliminary Draft No. 2, supra note 81, § 105 cmt. b.} Where legal concerns in favor of the recognition of an obligation outweigh others, a "pocket" or "island" of obligation emerges. This analytical arrangement allows the law to recognize and signal areas of freedom as well as pockets of obligation. For example, it enables the law of negligence to give an appropriate advance-warning signal to alert actors about the occasions when they are vulnerable to liability if they fail to conduct themselves as a reasonable person would. This also allows the law to separate out the signal it gives as to what a person under such an obligation should have done in a specific factual context to satisfy the obligation. Failure to behave in this manner is tortious conduct.

It further allows the law to separate out the question of those consequences of tortious conduct for which the defendant will be held liable and those for which he will not. An example of this question is whether the commercial host under a duty of care is liable when he fails to act as a reasonable person in his position would have, and thereby fails to control a drunk patron who then
injures the plaintiff, but in a freakish way. This "scope of liability for consequences" question is one to which a different set of concerns may be judged relevant than those that determined the incidence of the relevant "pocket" of obligation. It is important to separate these analyses and the signals that the conclusions to these separate questions send out to society. Perlman's suggestion of lumping together those elements of the two areas—of incidence of obligation and scope of liability for consequences—that happen to be accepted at the moment as issues for the judge,\(^1\) destroys the distinct signals and therefore the value of traditional doctrinal categories. This is a very high price to pay to retain the notion of a "general legal obligation of reasonable care" within the tort of negligence. In my view, we would gain much by keeping the incidence of obligation question separate from the consequences issue, and by detailing not only the very few ideas that have crystallized into rules of law but also those legal concerns the decision-maker may regard as relevant to its judgment in applying the rules of law to the facts.

VII. THE SCOPE OF LIABILITY FOR CONSEQUENCES OF TORTIOUS CONDUCT: GENERAL ASPECTS

One important point that the Restatement (Third) must make clear is that damage is not the gist of every tort. However, where damage does form the gist of the action, an historical relation between tortious conduct and the damage must be shown. The law's concern that a defendant not be held liable for the infinite stream of consequences flowing from tortious conduct requires the limitation of every obligation to a finite set of consequences.\(^2\)

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1. Id. §§ 2A cmts. d, e, 105 cmt. c, Reporter's Note.
2. Some argue that general strict liability is impossible and incapable of generating determinate results. See Stephen R. Perry, The Impossibility of General Strict Liability, 1 CANADIAN J. LAW & JURIS. 147 (1988); see also Ernest J. Weinrib, Causation and Wrongdoing, 63 COLUM. L. REV. 407, 419 (1987) ("The need for artificial limitation confirms that strict liability is not theoretically viable."). This is not one that distinguishes strict from fault-based liability. General fault-based liability is also "impossible." It is true that its incidence would be narrower, for only those plausibly "at fault" would be caught by it. Yet, as we are seeing with the explosion of non-traditional claims, the negligence idea is particularly voracious and can plausibly ground a vast range of allegations. See supra notes 10, 11 and accompanying text. More importantly, however, without restraining doctrines the scope of the defendant's liability for the consequences of tortious conduct under a general fault-based liability would be infinite.

In fact, what makes negligence possible and workable in the real world is exactly the doctrinal features that make strict liability possible and workable: a combination of incidence-limiting rules (producing the episodic recognition of the duty of care we see in the tort of negli-
Every obligation will be attended by legal concerns that influence the scope of liability for the consequences of tortious conduct. The perceived purpose of the cause of action will affect the range of such legal concerns and the weight accorded to each (e.g., the fact that the plaintiff is a public figure will be relevant in one tort, such as defamation, but will be of little or any relevance in another, such as trespass). The Restatement (Third) should make all these points in a general Section, that applies to all torts, dealing with the notion of the scope of liability for consequences of tortious conduct.

These legal concerns, like those relevant to the incidence of obligation, may cover a wide range including: (1) the perceived purpose of the recognition of a pocket of obligation in the circumstances; (2) the costs of legal rules and their administration; (3) the dignity of the law; (4) the interest in individual freedom; (5) the recklessness or intention to harm, if any, of the defendant; (6) the relative wrongfulness of different actors; (7) the concern that the extent of liability not be wholly out of proportion to the degree of wrongfulness; (8) the fact that the defendant was acting in pursuit of commercial profit; (9) whether allowance of recovery for...
such consequences would be likely to open the way to fraudulent claims;°° and so on. Some of these legal concerns may be quite specific to the unusual facts of a case, and others may be quite commonly raised by the facts of cases.

Describing all such concerns as "policy" is awkward and unnecessarily constricting. Imagine that the victim of a negligent driver is en route to the hospital in an ambulance when it is struck by lightning and the victim is killed. Describing all legal concerns relevant to the issue of the appropriate scope of the driver's liability for consequences as instrumentalist "policy" requires us to say that, though the negligent driver played a role in the history leading to the death, the reason the tort of negligence does not hold her liable for the death is a mere matter of policy. It would similarly require us to say the reasons Mrs. Oswald was not liable for Kennedy's death and the reasons the stranger is not liable for the death of the drowned infant-stranger were mere matters of "policy." Yet this does not seem to capture convincingly the core impulses (or at least all the impulses) underlying the legal judgment in these cases.\footnote{110. The fact that the defendant was acting in pursuit of profit has been cited by common law courts as one theme affecting the determination of duty. \textit{See supra} notes 57, 104 (United States); Crocker v. Sundance Northwest Resorts Ltd., [1988] 1 S.C.R. 1186 (Supreme Court of Canada); Jane Stapleton, \textit{Peripheral Parties}, supra note 24, at 341 n.143 (citing from the United Kingdom); Jane Stapleton, \textit{Judicial Menus}, supra note 10, at 79-82 (same). It is quite feasible and appropriate that juries might also regard it as relevant to the determination of the scope of liability for consequences.}

\footnote{111. \textit{Coffey}, 247 N.W.2d at 132; Kendall W. Harrison, \textit{Wisconsin's Approach to Proximate Cause}, WIS. LAW., Feb. 2000, at 20.}

\footnote{112. Some sort of rights language would seem to be at least as, if not more, convincing here. \textit{See supra} notes 15, 17, 85. As these examples show: Rights-reasoning is not necessarily pro-plaintiff in orientation, just as instrumentalist "policy" reasons can cut both ways. Sometimes, however, rights language can be misleading as a \textit{generator} of legal entitlements (as opposed to a way of expressing them). For example, most people would agree that a drowning child has, in a sense, a "right to life." Yet the stranger has no legal duty to rescue him, indeed we might well say that, in law, he has a "right" not to try. Whatever is involved in the social and moral notion of the child's "right to life," it is no trump in the tort of negligence which refuses to recognize that it grounds a legal entitlement to have the stranger attempt a rescue.

Of course, many legal concerns can be formulated either in instrumentalist or rights-based terms. Say an individual is legally allowed to carry on in some way (e.g., to choose not to rescue a drowning stranger-infant, or to choose an uneconomic crop for his land or to leave it fallow for a decade) that is not economically the most efficient use of resources judged from a wealth maximization point of view. From one perspective it may seem that a collective goal has been defeated by the individual's "right" so to act. But from another collective perspective this goal may seem merely short-term, and in conflict with the overall collective goal because it is judged that society works best \textit{long-term} if people believe they have, and do indeed possess, individual rights against the collective. Hence, the recognition of rights is utilitarian. The converse argument can also be made. For the argument that "there are both economic and non-economic ways of understanding deterrence," see Gary T. Schwartz, \textit{Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice}, 75 TEX. L. REV. 1801, 1802, 1828-33 (1997).}

\footnote{113. For the argument that "there are both economic and non-economic ways of understanding deterrence," see Gary T. Schwartz, \textit{Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice}, 75 TEX. L. REV. 1801, 1802, 1828-33 (1997).}
more satisfying exposition is one that embraces all legal concerns relevant to the scope of liability for consequences, including those that are couched in non-instrumental language. So, just as with the incidence of obligation issue, we will find that the legal concerns relevant in the “cause in fact” and “scope of liability for consequences” areas will sometimes be best expressed in instrumental terms and sometimes in rights language. It would be an advance if the Restatement (Third) did not describe this rich range of legal concerns by the term “policy.”

Identifying the legal concerns that have influenced past judgments relevant to the scope of liability for consequences will be even more difficult than the equivalent project to identify the legal concerns generating the incidence of the obligation. At least in the existing case law on the incidence of the obligation, the court should have attempted a reasoned justification for its decision (though many recent no-duty cases in the tort of negligence suffer from a lamentably thin attempt in this regard). In relation to the scope of liability for consequences, there are very few crystallized rules of law, for the good reason that this preserves essential flexibility and discretion in the system (as Commonwealth courts recognized when jury trials were abandoned in negligence claims in those jurisdictions). What this means is that, in the majority of cases, the most that the project of identifying the legitimate legal concerns relevant to the scope of liability for consequences will facilitate is more meaningful and comprehensible argument before the jury, and more precise jury instructions. There is potential thereby to influence the jury in its application of the law to the facts.

Of course, it has always been possible for such legal concerns to have been identified and fleshed out in jury instructions. But this does not seem to have happened: the inadequacy and vagueness of jury instructions on “proximate cause” is notorious. As a result, there is little trace in the case law of what legal concerns the issue of the scope of liability for consequences raises. Here, the academy can play a vital role in support of the Reporters by diversifying its interests from historical studies of the past evolution of broad doctrine and from the elucidation of abstract theories of liability to investigation of the diverse range of legal concerns that provide the fine-structure of the law in operation.

113. FRANCIS TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 401-02 (3d ed. 1999); id. at n.115 (citing appellate authorities).
VIII. THE SCOPE OF LIABILITY FOR CONSEQUENCES OF TORTIOUS CONDUCT: THE TORT OF NEGLIGENCE

A. Foreseeability of Some Risk Associated with the Tortious Conduct as a Necessary Requirement of the Incidence of Obligation; Distinguished from Foreseeability as a Necessary Requirement of the Scope of Liability for Consequences

If we maintain a distinction between the incidence of an obligation and the scope of liability for consequences of tortious conduct, we can see how the idea of foreseeability can operate differently in each. It is one question whether the law requires as a necessary (but not necessarily sufficient) requirement to the recognition of a pocket of a tort obligation that the defendant should reasonably have foreseen that his conduct posed some risk of harm to others. It is a different question whether foreseeability should be a necessary requirement of the scope of liability for consequences. Specifically, across the law of torts, a respectable argument can be made both for and against foreseeability as a necessary requirement for the scope of liability for consequences.  

114. This risk of harm would have to be a class of harm that is actionable under that tort.  
115. Some sources of these arguments are as follows:  
(1) Foreseeability relevant to incidence/tortious conduct and to scope of ability for consequences: the tort of negligence in a majority of American jurisdictions. DOBBS, supra note 53, at 458; see supra note 98.  
(2) Foreseeability relevant to incidence/tortious conduct but not to scope of liability for consequences: the tort of negligence in jurisdictions accepting In re Polenis. See, e.g., Pfeifer v. Standard Gateway Theater, 55 N.W.2d 29 (Wis. 1952); infra note 154 (regarding the tort of deceit in the United Kingdom referred to by Lord Steyn). The modern argument here is that, as between the innocent victim and the defendant whose conduct has at least been wrongful with regard to some foreseeable risk, it should be the latter who bears the risk of (some) unforeseeable consequences of his tortious conduct. See HART & HONORÉ, supra note 3, at 259-75; FLEMING, supra note 98, at 233, 238-39.  
(3) Incidence and tortious conduct do not require foreseeability but scope of liability for consequences of that tortious conduct does require foreseeability: the modern British interpretation of Rylands v. Fletcher. See Cambridge Water Co. v. Eastern Counties Leather Plc., [1994] 2 A.C. 264 (H.L); cf. Klein v. Pyrodyne Corp., 810 P.2d 917, 925 (Wash. 1991) (holding that under strict liability for hazardous activity the defendant was relieved of liability if the way the consequence came about was "unforeseeable in relation to the extraordinary risk created by the activity"), amended by 817 P.2d 1359 (Wash. 1991); see also PRODUCTS LIABILITY, supra note 57, §§ 2(a), 15 (regarding strict products liability for manufacturing errors). But see William J. Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. ILL. L. REV. 639, 668-72 (advocating a hindsight test for the scope of liability for consequences issue by "identifying the risks that we now use to determine that the product is defective and then asking whether the plaintiff's injury was one of those risks").
In the tort of negligence, foreseeability of some harm to others is an inherent requirement of the incidence of the obligation. In relation to the scope of liability for consequences in this tort, there has been a move across all common law jurisdictions this century towards requiring foreseeability (of the kind/type/nature of the harm suffered) as a necessary requirement. Yet in the United States, as elsewhere, the majority adoption of this rule has had an unfortunate effect on the approach to the general field of the scope of liability for consequences. The idea that foreseeability is a necessary requirement for the scope of liability for consequences in negligence tends to be conflated with the separate idea that the defendant should be liable for all such consequences of his tortious conduct. The arguments supporting the former idea do not extend to support the latter.

B. The Untenable Idea that Foreseeability is a Sufficient Requirement to Bring a Consequence Within the Scope of Liability for Consequences in Negligence

This becomes critical when we consider non-traditional negligence claims where, for example, the claim is that the defendant failed to control a third party. While the idea that foreseeability is a sufficient requirement to bring a consequence within the scope of liability for consequences may be tolerable in the traditional case where the conduct resulting in the physical harm was the positive act of the defendant himself, it becomes grossly over-inclusive when claims in relation to omissions are made. For example, if a prison


116. See supra text accompany notes 101-03.
117. See discussion supra note 98.
118. See DOBBS, supra note 53, at 454. At two points in the Second Restatement, Prosser suggested that in the tort of negligence mere satisfaction of the foreseeability criterion was sufficient to bring a consequence within the "scope of the risk," see infra notes 125, 129, 136-37 and accompanying text (regarding this phrase), and therefore of liability, RESTATEMENT (SECOND) OF TORTS § 442B cmt. e (1965) ("[C]riminal acts may themselves be foreseeable, and so within the scope of the created risk") (emphasis added); id. § 442B cmt. b ("[A]ny harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always 'proximate' ").
119. See Arthur L. Goodhart, The Unforeseeable Consequences of a Negligent Act, 39 YALE L.J. 449 (1930); Fleming James, Jr., Legal Cause, 60 YALE L.J. 761 (1951); Warren A. Seavey, Mr. Justice Cardozo and the Law of Torts, 39 COLUM. L. REV. 20, 34 (1939) ("Prima facie at least, the reasons for creating liability should limit it.").
120. Cf. HART & HONORE, supra note 3, at 254-84 (comparing the doctrine that only foreseeable harm is recoverable with the doctrine that all foreseeable harm is recoverable).
guard in a maximum security prison carelessly falls asleep on duty, allowing hardened criminals to escape, it is foreseeable that many people may become victims of the crimes of the escapees, not just during their escape but for the indefinite future while they remain at large. None of our systems of common law would seek to make the guard liable for all the crimes committed by the escapees.\textsuperscript{121}

Of course, one technique by which this truncation of legal liability for the stream of consequences of tortious conduct might be achieved is a no-duty holding in relation, say, to victims of crimes committed after a certain date. Initially, this route would seem to carry the disadvantage of signaling that prison guards owe only some members of the public a duty of care in relation to their safety. Such a signal of discrimination between citizens is distasteful in traditional cases and may also be regarded as such in certain non-traditional cases like the prison guard case.\textsuperscript{122} If so, the signal can be avoided if this limit of liability is packaged in terms of all citizens being equally owed the duty of care, but that the scope of liability for consequences of tortious conduct of the duty is severely limited; and that, in light of the balance of explicated legal concerns, including the perceived particular purpose of the pocket of obligation, the liability does not extend to all the foreseeable risks of the tortious conduct. This more palatable packaging, however, requires rejection of the idea that in the tort of negligence the defendant should be liable for all the reasonably foreseeable consequences of his tortious conduct.

The scope of liability for foreseeable consequences can also be controlled on the basis of the type of consequence with which the scope of the obligation is concerned. For example, the law might choose to limit the liability of the manufacturer of a security bolt, which fails and allows a door to swing open, to encompass only thefts and not to encompass the foreseeable consequence that the open door might catch in the wind and damage itself on the structure to which it is attached.\textsuperscript{123} But, as I argue later,\textsuperscript{124} this is not

\textsuperscript{121} For a characteristically illuminating treatment of some of these cases, see Robertson, \textit{Negligence Liability}, supra note 3, at 157-62. For a comparison from the United Kindgom, see Home Office v. Dorset Yacht Co., [1970] A.C. 1004 (H.L).

\textsuperscript{122} On the distastefulness of a legal signal that classifies people as to whether they are entitled to physical protection in traditional cases, see supra notes 30, 33; infra note 155. The issue may be seen differently in non-traditional cases even where the injury is physical, such as the failure to control others. For example, consider the law's recognition of a duty on commercial hosts to act reasonably when serving alcohol to patrons but its refusal to recognize such a duty on social hosts. See supra note 104.

\textsuperscript{123} The Restatement (Second) addresses this issue:
the same as saying that the duty is only owed with respect to one risk, which in my view is an incoherent approach. We should see the duty to act reasonably as either owed or not owed in the circumstances and we should not partition duty according to risks so that a defendant is under a duty with respect to one risk and not with respect to another. Similarly, whether the duty was breached depends on whether the defendant acted as a reasonable person would have acted. Breach also should not be partitioned according to risks so that a defendant must act as a reasonable person with regard to one risk but not with regard to another. The most analytically coherent location for the law to draw distinctions between those consequences of unreasonable conduct (i.e., in breach of the duty of care) for which liability attaches and those in relation to which liability does not attach is the analytical element focussed specifically on the scope of liability for consequences. Here, partitioning of risks can be drawn explicitly and coherently.

Later discussion will explain how the statement of the foreseeability rule applying to the scope of liability for consequences in the Restatement (Second) is cryptic and confused. At this point, it is enough to recommend that the treatment of this rule in the Restatement (Third) should allow a distinction to be drawn between types of foreseeable consequences, thereby facilitating the management of non-traditional claims. It should make clear that the law may well draw the scope of liability for consequences much more narrowly than simply within the scope of the foreseeable risks of tortious conduct. Moreover, in light of the increase in non-traditional claims, the Restatement (Third) should abandon the earlier suggestion that truncation of liability more narrowly than
the scope of foreseeable risks should only rarely be recognized by law.\textsuperscript{126}

Of course, the foreseeability rule applying to the scope of liability for consequences in the tort of negligence does not apply in all other torts. This is yet another reason why sections on general tort principles should be clearly separated from those relating to specific torts.

C. The Scope of Liability for Consequences Does not Cover a Foreseeable Risk if it is One a Reasonable Person Would not have Done More to Avoid than the Defendant Did

It is a well-known gloss on the foreseeability rule that it is only foreseeability of the kind/type/nature of the harm suffered that is a necessary requirement for the scope of liability for consequences in the tort of negligence.\textsuperscript{127} Another critical gloss on the foreseeability rule for the scope of liability for consequences is embedded in Dobbs' neat statement that "the great majority of cases hold negligent defendants liable only for harm of the same general kind that they should have reasonably foreseen \textit{and should have acted to avoid}."\textsuperscript{128} Often it is sought to capture this nuance by calling the foreseeability rule "the risk rule" or "the scope of the risk" rule.\textsuperscript{129} It also prompts cryptic comments such as: "the defendant is not liable for foreseeable harms unless the risk of such harms was one of the reasons for judging him to be negligent in the first place"\textsuperscript{130} and "foreseeability is a short-hand expression intended to say that the scope of the defendant's liability is determined by the scope of the risk he negligently created."\textsuperscript{131}

But these statements can be misleading. Consider the last-quoted statement. To say that the scope of liability for consequences in negligence is determined by the scope of the risk the defendant negligently "created" is ambiguous. Negligent conduct can "create" a consequence, in the sense of being a necessary factor in the his-

\textsuperscript{126.} \textit{Restatement (Second) of Torts} ch. 16, tit. B, Introductory Note (1965) ("Only a few of the Sections in this Topic state rules which restrict liability short of holding the actor [liable] for all the harm of which his negligence is a substantial cause . . . . [T]he restrictive rules are in almost every instance stated as being exceptions to rules which permit recovery . . . ."); id. §§ 5, 9 cmt. b, 431.

\textsuperscript{127.} See supra note 98.

\textsuperscript{128.} Dobbs, supra note 53, at 453 (emphasis added).

\textsuperscript{129.} See supra notes 118, 125; infra notes 136-137.

\textsuperscript{130.} Dobbs, supra note 53, at 463 n.1.

\textsuperscript{131.} Id. at 463.
tory of that consequence, and yet that consequence can fall outside the appropriate scope of liability for consequences because the consequence was unforeseeable. In other words, when the defendant's tortious conduct was historically necessary for the consequence, then, with hindsight, we know that it did not merely pose the risk\textsuperscript{132} of that consequence but completed the conditions that brought it about. In the context of those other conditions, the tortious conduct, in a sense, "created" that consequence. Yet if that consequence was unforeseeable, it will fall outside the appropriate scope of liability for consequences under the foreseeability rule.

The nuance these expressions are trying to capture is that the scope of liability for consequences does not extend to cover a foreseeable risk if it is one that a reasonable person would have done no more to avoid than the defendant did because, for example, a reasonable person would not foresee that risk as being increased by the defendant's tortious conduct or would have regarded the foreseeable increase in risk as trivial. For example,\textsuperscript{133} take the foreseeable risk of slipping on a sidewalk:

If a defendant [is obliged] to direct me where I should go and, at a crossroads, directs me to the left road rather than the right [and correct] road, what happens to me on the left road is, in a sense, the result of what the defendant has done . . . . But . . . if, being on the left road, I slip and fall, the fact alone that it was the defendant's direction, in breach [of obligation], which put me there will not, without more, make the defendant liable for my broken leg.\textsuperscript{134}

\textsuperscript{132} The concept of risk only plays a role in our understanding of the world where there are gaps in our knowledge.

\textsuperscript{133} Another well-known example that could be (though is not usually) explained in the following terms:

\textsuperscript{A} gives a loaded pistol to \textsuperscript{B}, a boy of eight, to carry to \textsuperscript{C}. In handing the pistol to \textsuperscript{C} the boy drops it, injuring the bare foot of \textsuperscript{D}, his comrade. The fall discharges the pistol, wounding \textsuperscript{C}. \textsuperscript{A} is subject to liability to \textsuperscript{C}, but not to \textsuperscript{D}.

RESTATEMENT (SECOND) OF TORTS § 281 cmt. f illus. 3 (1965); see also, e.g., Wright, Causation, supra note 3, at 1771-74 (discussing such scenarios).

Here we could explain the outcome on the basis that the handing over of the gun would have seemed careless to an observer at the time because it seemed to increase the risk of wounding by gunshot but would not have seemed to increase the risk of an injury from a dropped object (unless, for example, the gun was exceptionally heavy).

Similarly, take two cases where the victim of a careless driver is injured en route to hospital in an ambulance when it is (a) struck by lightning, see supra text accompanying note 112, (b) driven into a tree when the ambulance driver has a heart attack, see Fritham v. Cash & Carry Bldg. Ctr., Inc., 359 A.2d 193 (N.H. 1976). A critical difference is that whereas at the time of the tortious conduct there would have been some reason to foresee that it exposed the victim to an (albeit remote) increased risk of being further injured by the human weaknesses of those who would transport him to medical assistance, there was no reason to foresee that the tortious conduct had increased the risk of death by lightning.

\textsuperscript{134} Alexander v. Cambridge Credit Corp. Ltd. (1987) 9 N.S.W.L.R. 310, 333; see also Chappel v. Hart (1998) 156 A.L.R. 517, discussed in Jane Stapleton, Scientific and Legal Approaches
It would not have appeared to a reasonable person at the time of the advice-giving that the risk of slipping on the left was any greater than that of slipping on the right. Thus, a reasonable person would not have taken any more steps to avoid it than the defendant took (here, none). It was not reasonably foreseeable that the defendant's tortious conduct would make the plaintiff's prospects worse (though that was, in fact, the case as we now know with hindsight).

It is not feasible to accommodate this important nuance and to filter out liability for such consequences at any other analytical stage (e.g., the breach stage) than that of the scope of liability for consequences. It is therefore crucial that this nuance be reflected in the statement of the foreseeability rule governing this analytical stage of the scope of liability for consequences. This was not done in the earlier Restatements. Nor is it adequately captured by the sort of cryptic statements cited above. It is preferable to be explicit and so the Restatement (Third) should clearly state the crystallized foreseeability rule applying to the scope of liability for consequences as a rule that the consequence must be one of that array of foreseeable risks that a party under a duty of care should have done more to avoid than the defendant did.

D. The Incoherence of Owing a Duty to Act Carefully in Relation to Only One Foreseeable Risk

One of the incoherences that cryptic "scope of the risk" phrases can generate, especially in earlier Restatements, is the idea that in some cases it is the risk of a particular hazard that "makes to Causation, in CAUSATION IN LAW AND MEDICINE (Danuta Mendelson & Ian Freckolton eds., 2001).

135. In the Restatement (Second), Prosser stated that "any harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always 'proximate.'" RESTATEMENT (SECOND) OF TORTS § 442B cmt. b.

Yet this statement is ambiguous: Does the person giving directions "create" / "increase" the risk of the pavement injury because with hindsight we know that the person would not have been injured if the right directions had been given? In contrast, did Prosser instead implicitly mean what was required was that, judged at the time, the defendant's conduct appeared to create a risk that the victim did not seem otherwise to face (or appeared to increase the level of a risk that the victim seemed otherwise to face)? This ambiguity, which commonly arises when the idea of creating/increasing a risk is used without being clearly linked to the notion of foresight in a context of ignorance, see supra note 132, is evident throughout the Restatement (Second), see, e.g., RESTATEMENT (SECOND) OF TORTS §§ 435A cmt. a, 438 cmt. a, 442A cmt. b, 449 cmt. a.
the actor negligent" or in relation to which the duty was created “solely to protect” against. This, then, supports the conclusion that such a consequence is within the appropriate scope of liability for consequences under the rule. But this is an incoherent, or even circular, idea. It might make sense if we had decided to enfold all the traditional elements of the tort back into one single finely specified duty, one that specifies the consequence that it was “created solely to protect” against. But we would thereby lose the advantages of our separate analytical elements. Specifically, we would lose the value of the separate “scope of liability for consequences” enquiry which is, to paraphrase a statement in Professor Kelley’s classic article in this area: “[W]hen is breach of a community standard that harms plaintiff nevertheless not a personal wrong to the plaintiff?” In any case, the earlier Restatements do not embrace the “collapsed,” “enfolded” vision of an obligation but state that “legal cause” consists, inter alia, of “rules restricting responsibility” for consequences that would otherwise be generated by the other elements of the tort. While this “devolved” pattern of discrete elements remains, a duty of care in the tort of negligence cannot coherently be seen as directed solely to protect against only one specific foreseeable outcome.

Where it is recognized, a duty of care reflects the judgment that, in view of the context the parties were in at the time, including the dangers that seemed attendant thereupon, the defendant is obliged to conduct himself as a reasonable person would. For example, because it is foreseeable in the most general way that a person’s positive act might result in some type of physical injury to another, and because the law wants to signal the high value society places on a person’s physical security, the law subjects us all to the traditional duty to conduct ourselves reasonably so as to avoid physically injuring others. The obligation imposed by a duty of care here is to act as a reasonable person would to avoid any type of

136. RESTATEMENT (SECOND) OF TORTS § 449; see also id. §§ 448 cmt. c, 451(b). Contrast this with the competing idea in the Restatement that all foreseeable risks posed by the tortious conduct are within the “scope of the risk.” See supra note 118. On the “scope of the risk” idea, see generally supra note 125.

137. RESTATEMENT (SECOND) OF TORTS § 281 cmt. e.


139. See RESTATEMENT (SECOND) OF TORTS § 465 cmt. b (stating that these rules are set out in sections 435-61, while rules concerning the other aspect of “legal cause,” namely “substantial factor,” are set out in sections 432-33).

140. Contrast this with strict liabilities where the incidence of the obligation may well be sensibly limited in this way and linked to a correspondingly defined range of consequences. RESTATEMENT (SECOND) OF TORTS § 519(2) (1977).
foreseeable physical harm to others—no more, and certainly no less. The idea that the obligation is to act reasonably only in relation to one of the array of foreseeable risks is, in our devolved analytical regime, an incoherent one in theory and certainly extraordinarily awkward as a guide to conduct. How odd it is to say that the purpose of the legal rule that I must drive carefully, and the resultant instruction to me in regard to my conduct, is to avoid the risk that I will break your leg; to avoid the risk that your leg may be treated negligently in the hospital; but not to avoid the risk that it might be treated maliciously. The Restatement (Third) should reflect this point.

E. "Freakish/Indirect" Outcomes

Historically, in the case law on the tort of negligence, there have been two alternative general rules of law regarding the scope of liability for consequences. The directness rule extends to all outcomes, even if not foreseeable, so long as they are the "direct" result of the tortious conduct. The more popular modern rule is that of foreseeability: freakish, "unforeseeable" outcomes are outside the scope of liability. Though it is widely acknowledged that in practice both approaches produce, or can be made to produce, the same re-

141. Outside this continent of obligation (i.e., outside the traditional running down-type case), of course, the incidence of the obligation of care is episodic: only a few pockets/islands of duty of affirmative action to avoid physical harm; a very few pockets/islands of duty to avoid pure nervous shock; and a very few pockets/islands of duty to avoid economic loss. See supra notes 10-20 and accompanying text.

142. Failure to act as a reasonable person is "what makes the actor negligent." A reasonable person would not speed in a built-up area, so such conduct is a breach of this obligation (that is, it is tortious conduct). It is then a separate question to ask for which of the physical consequences of that tortious conduct the driver should be liable. Should he be liable, for example, for the inappropriate medical treatment given to his victim? See Restatement (Second) of Torts §§ 454 cmt. c, 457 (1965). Once it has been recognized that the defendant had been under a duty of care, the test of tortious conduct, of breach, is what a reasonable person would have done in all the circumstances. It is because the law then has special explicable reasons to limit the liability of defendants—such as that of the prison guard and of the manufacturer of the security bolt in earlier examples, see supra notes 121, 123 and accompanying text—to only some consequences of tortious conduct that it is useful to have a separate element of the cause of action: because it allows these special explicable reasons to be showcased. A collapsed/enfolded analytical arrangement prevents this. Moreover, such an arrangement may appear to present a ludicrous instruction to future drivers: that the motorist must approach driving under a duty to avoid producing injuries by his negligence that will be treated negligently by the later medical team, but owes no duty to avoid producing those injuries that will be treated recklessly by the medical team! A separate "scope of liability for consequences" category does not purport to give such messages to guide future behavior. See Dobbs, supra note 53, at 447.
In most cases, it tends to be the conventional doctrinal wisdom that the foreseeability rule generates a narrower scope of liability. The reason why this is misleading is important because it illustrates the close nexus between the legal concerns relevant to the scope of liability for consequences in an individual case and the legal concerns relevant to the recognition of that pocket of obligation. Moreover, it shows how this relationship, rather than the vague general concepts of foreseeability or directness, governs legal outcomes in this area.

Take injuries resulting from lightning. In one sense, these seem freakish and random injuries that are impossible to foresee. Moreover, any nexus to human conduct would, at most, seem "indirect." Yet there are contexts in which the law of negligence allows liability for such consequences: manufacturers whose lightning rods fail to work, careless installers of lightning rods, golf course operators who fail to warn or otherwise protect their customers, etc. Even the Restatement (Second) records such an example of liability for lightning injuries.

What this shows is that what is critical to the law is not some independent general quality of an outcome, the foreseeability or directness of its type/manner/extent, all of which can be manipulated to cover virtually any result that is desired on other grounds. What is critical is the nexus to the reasons the law has for imposing the obligation on the particular defendant in the first place. Certainly one of those reasons may be that, over time, a repeat-player such as a golf course owner should anticipate the risks.

143. See, e.g., RICHARD A. EPSTEIN, TORTS 264 (1999); Kelley, supra note 3, at 52, 94; Powers, REPUTATION, supra note 3, at 194. This can be affected, for example, by the manipulation of the ideas of the type, manner and extent of harm. See RESTATEMENT (SECOND) OF TORTS §§ 281 cmt. f, 435(1), 435 cmt. b (1965). The Restatement (Second) itself shifts between concepts of foreseeability, risks that were "recognizable" or "not highly extraordinary," and consequences that can be characterized with hindsight as "normal and ordinary." See, e.g., id. §§ 281 cmts. e-g, 435, 442(c), 443 & cmt. b, 444-46, 447, 460; see infra note 159.

144. White v. Schnoebelen, 18 A.2d 185, 185-88 (N.H. 1941) (regarding scenario where, carelessly installed in 1930, fire results from lightning strike of a rod in 1937).


146. The Restatement (Second) provides a hypothetical: A negligently fails to clean petroleum residue out of his oil barge moored at a dock, thus creating the risk of harm to others in the vicinity through fire or explosion of gasoline vapor. The barge is struck by lightning and explodes, injuring B, a workman on the dock. A is subject to liability to B.

RESTATEMENT (SECOND) OF TORTS § 442B cmt. a, illus. 1; see also Johnson v. Kosmos Portland Cement Co., 64 F.2d 193, 196 (6th Cir. 1933).
of lightning. But other factors also come into play. For example, the commercial representations of the lightning rod manufacturer and installer trigger classic legal concerns in favor of the imposition of such a duty of care. Similarly, the profit motivation of the golf course might be thought to justify not only the recognition of a duty of care to entrants but a wider scope of liability on it than on the owner of an equally popular beauty spot to which the owner allows free access.

In other words, the legal concerns raised by the position of the parties at the time of tortious conduct may justify not only the recognition of an obligation on the defendant (for example, in the tort of negligence, to conduct himself as a reasonable person would) but also justify a scope of liability for tortious conduct which extends to encompass outcomes that might generally be described as freakish acts of nature.¹⁴⁷

A consideration of other torts reinforces the point that the legal reasons for recognizing a pocket of obligation under a particular tort also affect the scope of liability for consequences. Thus, the injurious intentions of a person towards his victim may not only form part of the reason for the incidence of a tort, but also the view that a wholly freakish and "indirect" injury to the victim flowing from the wrongdoer's conduct is within the scope of liability for consequences of that tort.¹⁴⁸

F. Intervening Conduct of a Third Party

The dependence of the scope of liability for consequences on the perceived purpose of the liability as a whole is particularly evident in situations where emphasis is placed on the conduct of a third party who also played a role in the history of the plaintiff's injury. Even where this intervention was a tortious or even criminal act, the injury might still be within the appropriate scope of liability of a defendant, something the Restatement (Second) itself

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¹⁴⁷. Their outcomes may also be generally described as "indirect." For an amusing example of how easily notions of foreseeability, directness, type, manner and extent of harm can be manipulated, see United Novelty Co. v. Daniels, 42 So. 2d 395 (Miss. 1949). There, an employee was cleaning a machine with gasoline when a rat ran into a nearby furnace, returned in flames to the vicinity of the employee causing the machine to explode. Id. at 395-96. The employer was held liable for this consequence. Id. at 396.

¹⁴⁸. See RESTATEMENT (SECOND) OF TORTS §§ 435A cmt. a, 435B; supra note 108; infra notes 154, 170 and accompanying text. Regarding the wrongfulness of others, see RESTATEMENT (SECOND) OF TORTS § 442(e), (f), and for useful citations, see infra note 149.
contemplated. For example, the law's concern with freedom of action protects an ordinary citizen from the imposition of any duty to attempt to control a person assaulting the victim in a night-club (even if such an attempt was what a reasonable person would do), whereas other legal concerns may well justify the recognition of a duty to behave reasonably on the security staff of the club.

Again, what is doing the work here is not some independent quality or characterization of the intervening conduct of the assailant, as the vague, overlapping, and circular Restatement provisions on interventions would suggest, but the legal concerns arising out of the context in which the parties interacted, including the implied representation by the night-club that it would exercise reasonable care in relation to the physical security of its patrons.

Conversely, the balance of legal concerns raised by the facts of the case may be judged to pull in the direction of the consequence falling outside the appropriate scope of liability. For example, take the following case: the careless defendant inadvertently leaves a knife in the glove box of his unlocked vehicle in a high crime area. A thug steals the knife and proceeds to hold up a series of stores that same day, in each case stabbing the proprietor to death. Just as most jurisdictions now recognize, either by common law rule or statute, that justice requires the law of negligence to recognize the relative fault of the plaintiff and defendant, so too there are sound symbolic reasons why a comparative approach should be taken in

149. See Restatement (Second) of Torts § 442B cmt. e ("[Intervening intentionally] tortious or criminal acts [of a third person] may in themselves be foreseeable, and so within the scope of the created risk, in which case the actor may still be liable for the harm . . . ."); see also id. § 281 cmt. e (theft); id. §§ 302B & cmt. d, illus. 2 & cmt. g; illus. 14, 442B cmt. b. According to sections 447-46 and accompanying comments, whereas, to be within the scope of liability an "intervening" intentional tort or crime must have been one of which the defendant "should have realized" the risk, intervening negligence of a third party may still be within the scope of liability if it was merely a "normal" consequence and not "extraordinary" or "altogether unusual." The practical significance of these different shades of terminological meaning is debatable. See supra note 143.

150. See Restatement (Second) of Torts § 324A. However, care must be taken to avoid pace-setting obligations. See supra note 28.

151. See Restatement (Second) of Torts §§ 442-53; id § 439 (regarding the circular notion of testing whether conduct is operative by whether it is "actively operating"); Terry Christlieb, Note, Why Superseding Cause Analysis Should be Abandoned, 72 Tex. L. Rev. 161, 182-85 (1993). More generally, a particularly insidious aspect of the structure of the Restatement in the area of legal cause is the separation in treatment between the type of harm involved in the consequence, the manner in which it came about, and the intervention of other "forces." In fact, most disputes about the scope of liability for a particular consequence can be couched in any of these ways. Dobbs, supra note 53, at 452. So, in my opinion, the implication to be drawn from the structure of the Restatement that separate categorization is feasible, coherent, and appropriate is dangerously misleading.
relation to the relative blameworthiness of the defendant's lapse of care and the murderous intervening conduct of the thief. Relative to the thief's role in the history of the deaths, the law might judge the role of the defendant's tortious conduct to be of peripheral importance given its concern to give a focussed moral and deterrent message. To include the deaths within the scope of the motorist's legal liability, even if it is plausible to describe them as foreseeable, may be thought to dilute that message too much by spreading the responsibility for the series of heinous crimes too widely.

The Third Restatement should attempt to spell out these types of concerns to enable them to be used, where appropriate on the facts, in counsels' argument before, and in a trial judge's instructions to, the jury.

G. Attenuation/Lapse of Time; Coincidence; and Bad Luck

Finally, the project to help the Reporters by unpacking the slogans infecting the law on the scope of liability for consequences must tackle the hackneyed and unhelpful notion that, over time, "the effect of an actor's conduct . . . may . . . become so attenuated as to be insignificant and unsubstantial as compared to the aggregate of the other factors which have contributed." I have already explained that it is only in light of the purpose of the enquiry that we can rank historical factors leading to an outcome in the order of their "significance." We also know that the passage of time and distance in space do not themselves deprive tortious conduct of its significance for the attribution of legal responsibility. The careless breach of the manufacturer of the faulty lightning rod will be just as significant in this respect whether the rod's failure results in the destruction of a house almost immediately after supply or years later, whether the house is nearby or on the other side of the country.

What is doing the work behind the label of attenuation, I would argue, is the law's concern with the unfairness of imposing responsibility for compounded bad luck. Take the following example. Before leaving on vacation, the defendant farmer carelessly
leaves an insecticide by his front gate where his neighbor's dog is able to, and later does, eat it. The dog gradually becomes listless, but the harried neighbor does not notice for some weeks. When he does notice, he reasonably believes that the dog will pick up if he is forced to exercise strenuously. After some weeks of this regime, the dog is no better. With difficulty, for it is harvest time, the neighbor arranges for a visiting friend to take the dog to a vet in a nearby town. En route, the reckless friend gets lost on the narrow, unfamiliar roads and arrives after the vet has closed for the day. The neighbor re-arranges for the friend to try again the next week. The vet reports that the dog has probably been poisoned by a powerful insecticide and recommends a serum that is immediately ordered from the nearest supplier. The arrival of the serum is delayed many weeks by a labor dispute at the post office and by the negligence of the delivery personnel. The serum is administered, but just too late, and the dog dies of the effects of the insecticide.

These are facts that might, perhaps, attract a description in terms of the farmer's inadvertent tortious conduct (his breach of duty to act as a reasonable person when acting positively) being so “attenuated” as to be insignificant compared to the aggregate of other factors that have contributed. Yet each other factor in the story was foreseeable and non-freakish. Each could simply be described as bad luck. Defendants are often held liable for a coincidence of bad luck that completes the history linking his tortious conduct with the outcome. But the legal concern underlying the attenuation tag is that, where there is an extended sequence of these factors that combine to compound severely the degree of coincidence and bad luck, it would be unfair to hold the defendant liable for the outcome. There comes a point, in other words, in relation to extremes of bad luck where the law refuses to intervene to shift

154. Of course, if the defendant farmer had intended the dog to die, the sequence can no longer be smoothly described as "bad luck," as he achieved his bad purpose. This is one of the threads by which the more extensive scope of legal liability for intended consequences can be rationalized. See supra text accompanying notes 108, 148; infra note 170. For discussion of the early surreptitious identification of the moral blameworthiness of the defendant as a factor relevant to the issue of the scope of liability for consequences, see Kelley, supra note 3, at 59. This is a theme of the law in other common law jurisdictions. See, e.g., McFarlane v. Tayside Health Bd., [2000] 2 A.C. 59, 82-83 (H.L.). In Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd., [1997] A.C. 254 (H.L.), the House of Lords differentiated between the measure of damages for fraudulent and negligent misrepresentation. Pointing out that tort law and morality are inextricably interwoven, I said (with the agreement of Lord Keith of Kinkel and Lord Jauncey of Tullichettle) that as between the fraudster and the innocent party, moral considerations militate in favor of requiring the fraudster to bear the risk of misfortunes directly caused by the fraud. Id. at 280B-C.
losses. In relation to vulnerability to suffering loss from such extremes, the law judges it best to leave us all in the same boat.

Now we can see the indirect relevance that lapse of time can have in a case concerning the scope of liability for consequences: the longer the lapse, the more coincidences of bad luck might occur, all of which are necessary to the history linking the tortious conduct to the outcome.

IX. PARALLELS WITH DUTY DEBATE

As a final point, I will draw a few parallels between the duty debate and the scope of liability for consequences project I have been promoting. As I have defined them, non-traditional claims in the tort of negligence are ones that do not fit the simple formula of "the careless (positive) act of a private defendant resulting in physical injury to the plaintiff." The rise of non-traditional claims, such as omission cases, highlights a range of concerns with the state of doctrine in the area described in earlier Restatements as "legal cause." Many of these have parallels with problems that non-traditional claims are also highlighting in relation to the incidence of obligations: In both areas, there is a need to recognize the range of legal concerns in operation, not all of which are helpfully described as ones of policy, and to examine the (often inadequately reasoned) case law closely so that the specific legal concerns that have influenced and should influence the law and jury determinations can be spelt out.

In particular, just as there is a need to spell out the concerns countervailing to the recognition of a pocket of obligation, say a pocket of the duty of care in negligence, there is a need to spell out the concerns supporting the confinement of the scope of liability for consequences. The treatment of legal cause in earlier Restate-

155. This is probably also a useful way to look at why the prison guard in the earlier example, see supra notes 121-122 and accompanying text, is not liable for every future crime of the escapees even though these were easily foreseeable. A more adventurous way of expressing the result might be that it reflects a concern that here people should bear the risk of random crime equally, because no (potentially socially divisive) distinction should be made by the law between classes of crime victim on the basis merely of the long-past history of the criminal. See Home Office v. Dorset Yacht Co., [1970] A.C. 1004, 1070 (H.L.) (Diplock, L.); see also supra notes 30, 33. Consider also Lord Hope's view that distributive justice is a legitimate consideration if law is to be seen as a system of rules which is fair as between one citizen and another. See supra note 12.

156. That concerns are the rich variety of legal concerns weighing in favor of a no-duty holding. See supra notes 17, 24.
ments evinced a bias in favor of jury decision-making.157 This found expression in the presumption that, if the tortious conduct qualified as a substantial factor in producing the outcome, the outcome would be within the scope of liability unless, exceptionally,158 a rule of law operated to restrict liability. It was also reflected by the adoption of a notion of “normality” of consequence that was judged with hindsight.159 It was further evident in the relegation of the foreseeability requirement to a minor qualification of the scope of liability for consequences,160 rather than as the major symbolic definition of the appropriate maximum reach of the scope of liability for consequences in the tort of negligence. In light of the rise of non-traditional claims, the Restatement (Third) should take a more even-handed approach to these issues.

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157. It is arguable that this bias was also, at least to some extent, evident in the area of the incidence of obligation in the tort of negligence by an embrace of the idea of a general duty. See supra note 8.

158. Restatement (Second) of Torts ch. 16, tit. B, Introductory Note (“Only a few of the Sections in this Topic state rules which restrict liability short of holding the actor liable for all the harm of which his negligence is a substantial cause ... the restrictive rules are in almost every instance stated as being exceptions to rules which permit recovery ...”); id. §§ 5, 9 cmt. b, 431.

159. The idea that the border issue in the scope of liability for consequences is one of the “normality” of a consequence (being anything short of “highly extraordinary”), and that this is to be assessed in the light of hindsight, occurs in a number of places. Restatement (Second) of Torts § 281 cmt. e (“harm of a kind normally to be expected”); id. § 281 cmt. g (“resort to hindsight”); id. § 435 & cmts. d, e (viewing “after the event”); id. § 438 cmt. a (a result that “after it occurs appear[s]”); id. § 443 cmts. b, c (“[N]ormal’ is not used ... in the sense of what is usual, customary, foreseeable, or to be expected. It denotes rather the antithesis of abnormal, of extraordinary.”). “Normality” is to be judged “in retrospect,” that is, “after the event.” Id. § 447 cmts. c, e. Thus, in preference to the term “foreseeable risk,” the more ambiguous terms “recognizable risk” and “recognizable tendency” are often used. Id. §§ 281 cmts. c, f, j, 430 cmt. c, 436 cmt. d, 442B cmt. b, 448 cmt. b. The hindsight approach of the Restatement has not been favored by United States courts. John L. Diamond et al., Understanding Torts 216 (1996) (“Instead of accepting a proximate cause theory based on what is, in hindsight, viewed as extraordinary, courts are embracing the general notion that consequences should be reasonably foreseeable.”); see also supra note 143. Dobbs suggests that the hindsight approach of the Restatement (Second) is “no more certain than the foreseeability rule, and it may only be a way of saying that the exact harm or the manner of its occurrence need not be foreseeable. If it is anything different from this, it seems to lack the moral basis of the foreseeability test.” Dobbs, supra note 53, at 452 n.2.

160. See supra note 98. In the Restatement (Second), the requirement that the injury was foreseeable is stated as an exception to the black letter rule that “the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.” Restatement (Second) of Torts § 435. Moreover, the notion of foreseeability is attenuated to a notion of “normality” assessed with the benefit of hindsight. See supra note 159.
X. SUMMARY OF RECOMMENDATIONS TO REPORTERS

- **The Challenge of Non-Traditional Claims.** The challenge of non-traditional claims to tort doctrine should be addressed directly by the *Third Restatement*. For example, in the tort of negligence, these claims make manifest that a legal approach to liability based crudely on foreseeability or the "scope of the risk" created by the tortious conduct is too cryptic to provide sufficiently tight control of liability. Yet if courts are inhibited from controlling these non-traditional cases under no-obligation rules, it will become critical to have finely reasoned control elsewhere. The academy and practitioners should help the Reporters establish a fine-tuned understanding of the diverse legal concerns that can justify truncation of liability for consequences of tortious conduct. There should be more work on the "unpacking" of the content of "Legal Cause."

- **The Institutional Competition between Judge and Jury.** The institutional competition between judge and jury needs to be made explicit in the *Third Restatement*. Though it is an individual "political" judgment how much one trusts the competence of the jury, and which normative issues one prefers to keep free of precedent by allocating them to the discretion of the jury, it is appropriate and necessary for courts to lay down rules of law here as well as enunciating legal concerns about which the jury should receive guidance. There are few legal rules in this area, but they include rules in relation to evidentiary gaps in the cause-in-fact area, and the rule governing the outer scope of appropriate liability for consequences. Legal concerns about which the jury should merely receive guidance are far more numerous and diverse. One example is the concern with the unfairness of holding a merely inadvertent defendant liable for the consequences of a protracted sequence of bad luck. The *Third Restatement* should record and differentiate the

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161. *See supra* Part II.
162. *See supra* Part III.
163. *See Powers, Judge and Jury, supra* note 3, at 1712.
164. *See supra* note 98 (regarding a majority of states).
few crystallized rules of law here as well as the legal concerns of relevance to jury decision-making.

- **General Sections on Cause-in-Fact and Scope of Liability for Consequences Covering all Torts.** The areas covered by the term "legal cause" are common to all torts (indeed, to all obligations). Hence, the Third Restatement should set out general sections on these matters (within each of the two recommended Chapters) before dealing with the specific rules in relation to the different torts such as negligence and deceit.

- **Replace Legal Cause and Associated Terminology.** The confusion generated by terms such as legal cause, proximate cause and substantial factor, all exacerbated by the underlying ambiguity and shifting meaning of causal language, should be eliminated. To the extent possible, the issue of fact should be identified and separated from the normative issues. In particular, the amalgam concept of legal cause should be reformulated and renamed as two separate elements of the tort: (1) cause-in-fact; and (2) scope of liability for consequences of tortious conduct.

- **The Cause-in-Fact Chapter.** Cause-in-Fact should be located in a separate Chapter and defined in the Third Restatement to ensure that it is a purely factual question. This can be achieved by requiring that, to qualify as a cause-in-fact, a factor must be an historic factor—one that played a role in the history of the outcome in issue. To establish that the tortious conduct was an historic factor, the plaintiff must show, if necessary by ignoring the presence of other (non-preempting) historic factors, that, but for the tortious conduct, the particular outcome would not have occurred. The normative issues that the characteristic problem in over-determined cases present should not be located in the Cause-in-Fact Chapter, but

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165. See supra notes 26-27, 72-74 and accompanying text.
166. See supra Parts VII-X.
167. See supra Part V.
168. Here I am somewhat simplifying the targeted but-for test. See supra text accompanying notes 42-47; see also supra note 43 (regarding the preemption qualification).
in the Scope of Liability for Consequences of Tortious Conduct Chapter.\cite{169}

- **Normative Rules Relating to Proof of Cause-in Fact.**\cite{170} Whether a factor played such an historic role depends on past facts and what would have occurred in certain hypothetical situations. Where the plaintiff faces evidentiary gaps in relation to either of these, specific legal concerns (including the perceived purpose of the specific tort obligation) may lead the law to adopt special rules to alleviate such difficulties. These should be set out in the *Third Restatement*’s Cause-in-Fact Chapter.

- **The Scope of Liability for Consequences of Tortious Conduct Chapter.** Even if the defendant’s tortious conduct played a role in the history of the outcome, the plaintiff must show that the outcome was a consequence that was within the appropriate scope of liability for consequences of the particular cause of action. This is an entirely normative issue. It should be dealt with in a Chapter separate from that dealing with cause-in-fact. Determining the appropriate scope of liability for consequences requires attention to a number of general legal rules/principles. For example, in most jurisdictions in the tort of negligence, these include:
  1) That foreseeability (of the kind/type/nature of the harm suffered) is a necessary requirement for the scope of liability for consequences;\cite{171}
  2) That foreseeability is not a sufficient requirement for this;\cite{172}
  3) That, to be within the scope of liability, a consequence must be one of that array of foreseeable risks that a party under a duty of care should have done more to avoid than the defendant did;\cite{173}
  4) That the conclusion that a consequence is within the scope of liability cannot coherently be based

\begin{itemize}
  \item \textsuperscript{169} See supra Part IV.B.1.
  \item \textsuperscript{170} See supra Part V.A.-B.
  \item \textsuperscript{171} See supra note 98.
  \item \textsuperscript{172} See supra Part VIII.B.
  \item \textsuperscript{173} See supra Part VIII.C.
\end{itemize}
on the assertion that the duty was created “solely to protect” against the risk of that consequence.\textsuperscript{174} When determining the appropriate scope of liability for consequences, attention must also be paid to a range of legal concerns, including the perceived overall purpose of the specific tort obligation. Examples of legal concerns of relevance include:

1) The question of whether the law should choose to impose a requirement that the historically involved tortious conduct was also necessary to the history of the outcome. Usually the law does not regard it as appropriate that the scope of a cause of action extends to a consequence that would have occurred even in the absence of the defendant’s tortious conduct. So usually a threshold requirement before a consequence can be found to be within the appropriate scope of liability for consequences is that the tortious conduct satisfy the test of necessity, the traditional but-for test in relation to the outcome.

But in certain circumstances of over-determination (that is, circumstances involving multiple sufficient historic factors), a consideration of legal concerns specific to such cases\textsuperscript{175} may lead the law not to impose a requirement of necessity before the consequence can be found to be within the appropriate scope of liability. In cases of simultaneous over-determination by tortfeasors,\textsuperscript{176} this concern has produced a crystallized rule of law governing liability for the scope of consequences of tortious conduct. Elsewhere, it might be appropriate to give guidance to the jury about these relevant concerns.

2) Whether the consequence is wholly “disproportionate” to the degree of wrongfulness involved in the tortious conduct.\textsuperscript{177}

\textsuperscript{174} See supra Part VIII.D.
\textsuperscript{175} For example, a consideration that the law would be brought into disrepute if the victim of one tortious hunter was better off in terms of legal entitlement than the victim of two tortious hunters. See supra note 64 and accompanying text.
\textsuperscript{176} That is, situations that have multiple sufficient historic tortious factors.
\textsuperscript{177} See supra note 109 and accompanying text.
3) Whether wrongful conduct of another party is also an historic factor in relation to the outcome, especially: (a) its relative wrongfulness; (b) the nature of the relationship, if any, between the defendant and the other party; and (c) the nature of the relationship, if any, between the defendant and the victim.178

4) The role of compounded bad luck and coincidence in the interval between tortious conduct and outcome.179

5) The degree of wrongfulness of the defendant's tortious conduct—for example, whether the defendant was reckless or intended harm to the plaintiff.180

6) The seriousness of any intended harm.181

7) The social costs (including legal administration) of including such consequences within the scope of liability.182

8) The dignity and integrity of the legal system.183

9) Whether allowing recovery for such consequences would encourage fraudulent claims.184

10) The concern with the freedom of action of the plaintiff/defendant.185

11) Any prior dealings between the parties, especially any specific explicit or implicit undertakings by the defendant or the plaintiff.186

12) Whether the defendant was acting in pursuit of commercial profit.187

178. See Restatement (Second) of Torts § 442(e), (f) (1965); see also Robertson, Negligence Liability, supra note 3, at 138-39, 144-47.

179. See supra Part VIII.G.


181. Restatement (Second) of Torts § 435B.

182. Preliminary Draft No. 2, supra note 81, § 105 cmts. d, e; see also Pitre, 530 So.2d at 1161.

183. See supra note 64 and accompanying text.

184. See Preliminary Draft No. 2, supra note 81, § 105 cmt. e; supra note 111 and accompanying text.

185. See supra note 17.

186. Such as that which might be implied by the presence of security guards at a nightclub. See supra text accompanying notes 150-151.

187. See supra notes 57, 104, 110.
13) The moral expectations of society of the defendant, etc.\textsuperscript{188}

14) Whether the injury is physical, or whether it involves some other type of harm (that is, the nature of the interest of the victim affected by the defendant's tortious conduct).\textsuperscript{189}

15) Whether the defendant had a reasonable opportunity of limiting his liability for the consequence by an agreed term.\textsuperscript{190}

16) The degree to which, at the time of the defendant's tortious conduct, it was foreseeable to a prudent party in his/her position that the kind of risk that actually occurred would arise.

It is important to stress that none of these legal concerns is a "trump."\textsuperscript{191} Similarly, they do not provide some sort of recipe list. It is even misleading to see them as guidelines, so diverse and complex are the fact situations in which they will be raised. They are simply the concerns the law brings into consideration in the general area.

- \textit{Relevant Legal Concerns are Diverse and Not Just "Policy."}\textsuperscript{192} The legal concerns relevant to the appropriate scope of liability for consequences are diverse and not adequately described merely as ones of policy. The \textit{Third Restatement} should make these points clear.

- \textit{Abandon Implied Tone in Favor of Liability for Consequences.}\textsuperscript{193} The widespread introduction of comparative fault and the rise of non-traditional claims since the \textit{Restatement (Second)} suggest that the \textit{Restatement (Third)} should eliminate the earlier tone that consequences of tortious conduct are within the appropriate scope of liability unless some exceptional reason can be established.

\textsuperscript{188} See supra note 58.


\textsuperscript{190} Cooke, supra note 189, at 298.

\textsuperscript{191} Compare the duty analysis where there are "trumps." \textit{See supra} note 24. And just as to pursue a single formulaic "short-cut" test for the duty of care in non-traditional cases is to pursue a "will-o-the-wisp," \textit{see supra} note 20, so too should the existence of some formulaic approach to the scope of liability for consequences be recognized as "illusory," Cooke, \textit{supra} note 189, at 297.

\textsuperscript{192} \textit{See supra} notes 15, 112.

\textsuperscript{193} \textit{See supra} note 158 and accompanying text.