

# Negligence in the Air

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*The article examines what has come to be known as "the risk analysis" in Anglo-American tort law and contract law. The risk analysis essentially consists of: (1) viewing negligence as a relational concept, so that a defendant is never simply negligent tout cour, but is negligent only with respect to certain persons and certain harms — other harms suffered by other persons are said not to be "within the risk" that makes the defendant negligent; and (2) the supplanting of proximate cause doctrine with doctrines of duty, the duty question being determined by the question of whether a certain person and a certain harm are within the risk that makes a defendant negligent.*

*The article aims to explode entirely the risk analysis. After beginning with an examination of the historical roots of the risk analysis, we then seek to show that the risk analysis is: (1) conceptually incoherent because it seeks to isolate a risk that makes someone negligent; (2) normatively undesirable because it allows quite blameworthy actors not to pay for the harms they culpably cause; and (3) descriptively inaccurate of the cases decided on the more traditional, proximate cause bases.*

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## INTRODUCTION

"Negligence in the air, so to speak, will not do." This old maxim from Pollock's *Torts*,<sup>1</sup> much quoted by Benjamin Cardozo in *Palsgraf v. Long Island R.R.*<sup>2</sup> and elsewhere,<sup>3</sup> is the battle cry for one side of one of the most famous debates in Anglo-American tort law and criminal law. This is the debate about the essence of negligence: Is negligence a relational concept, so that it is properly used only in relation to a person and a harm? Or is negligence non-relational, in the sense that it makes good sense to speak of a person being negligent, full stop, without any isolation of any particular person or harm?

Those who repeat the maxim take the relational view. On their version of the relational view, an actor is liable for negligence only when: (1) the harm caused to another is an instance of the type of harm the risk of which made the actor negligent; and (2) the person suffering the harm is a member of the class of persons the risk to which made the actor negligent. These two requirements of negligence are sometimes collapsed into the following question: "Was the defendant negligent as regards the victim's damage?"<sup>4</sup> Such an inquiry invites what is usually described as a "harm-within-the-risk" (hereinafter "HWR") analysis. The latter label comes from this formulation of the negligence liability question: Was the harm that happened to this plaintiff within the risk that made it negligent for the defendant to have acted as he did?<sup>5</sup>

Despite their unitary labels, it is both historically common and analytically helpful to separate the harm-relative from the person-relative aspects of negligence. Formally, one should represent the non-relational view of negligence as using a one-place predicate for negligence, as in: "x is negligent," or Nx. The relational view then comes in two flavors. A person-relative conception of negligence construes negligence as a two-place predicate, as in: "x is negligent to y," or Nxy, where x and y range over persons. A person-and-harm-relative conception of negligence construes negligence as a three-place predicate, as in: "x is negligent to y with respect

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1 Sir Frederick Pollock, *The Law of Torts* 455 (11th ed. 1920).

2 *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 102 (1928).

3 Cardozo also employs the quotation in his most famous *per se* negligence opinion, *Martin v. Herzog*, 126 N.E. 814, 816 (1920).

4 Glanville Williams, *The Risk Principle*, 77 *Law Q. Rev.* 179, 179 (1961).

5 For a classic, short, clear statement in unqualified form of the harm within the risk formulation, see Warren Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 *Harv. L. Rev.* 372 (1939).

to z," or  $Nxyz$ , where  $x$  and  $y$  range over persons and  $z$  ranges over harms. Let us henceforth call these the non-relational, the partially relational, and the fully relational conceptions of negligence, respectively.

When put formally (in terms of two- and three-place predicates), one might well wonder how tort and criminal law got embroiled in this debate over how negligence is best conceptualized. What moved courts and scholars to adopt one of these views of negligence and to defend it vigorously against the others? There are two ways of getting at this motivational question.

The first stems from some ideas about culpability generally (including but not limited to the culpability of negligence). As is well known, Anglo-American tort law and criminal law both grade the culpability with which an act was done by the mental state of the actor. Roughly, we distinguish intentional wrongdoing from reckless wrongdoing, and both of these from merely negligent wrongdoing. Culpability increases as we move up this list and more severe legal sanctions (such as greater punishments in criminal law and punitive damages in tort law) are attached to the more serious levels of culpability. Such a classification scheme demands that we be able to identify an intentional wrong, distinguish it from a reckless one, and distinguish both of these sorts of wrongs from a merely negligent wrong.

In drawing these distinctions, it is not enough to define each of these terms; that is, it is not enough to unpack "intentional" in terms of purpose or knowledge to a practical certainty, "reckless" in terms of conscious appreciation of an unjustifiable risk, and negligence in terms of an unreasonable risk not adverted to by the actor. It is not enough in part because any human action is both intended and foreseen under some description of it. This is because no event can be a human action unless it is both intended and done knowingly with respect to some aspects of it — such "voluntariness" is built into the very concept of human action. We thus also have to answer relational questions, such as: If the defendant intended some type of harm  $H$ , was the particular harm  $h$  that he in fact caused by his action an instance of  $H$ ? If so, he intentionally caused  $h$ ; if not, while he caused  $h$ , he did not do so intentionally. We have, in other words, to fit the particular thing done to the type of thing intended to see whether a defendant acted with the culpability of an *intentional* wrongdoer.<sup>6</sup>

The same is true of knowledge and recklessness. To be adjudged a

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6 The fitting of the objects of intentions to the actions done is explored in Michael S. Moore, *Intention and Mens Rea*, in *Issues in Contemporary Legal Philosophy* (Ruth Gavison ed., 1987), reprinted in Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* 449-77 (1997) (Chapter 11).

knowing or reckless causer of some harm *h*, it is not enough to be found to have consciously believed that one's act certainly would cause, or risk, some type of harm *H*; in addition, it also must be true that the harm that one's act caused, *h*, be an instance of the type of harm foreseen or risked (*H*). The harm that occurred, in other words, has to be "within the foresight" that makes one culpable or "within the risk" the conscious appreciation of which makes one reckless.

At first glance, the same would seem to be true of negligence. It would seem that one must do more than act in a manner that imposes an unjustified risk of some type of harm *H* on some class of persons *Y*. In addition, it would seem that the harm one's act causes, *h*, must be an instance of the type of harm *H*, and the person one injures, *y*, must be within the class of persons *Y*. It would seem, in other words, that the harm that occurs must be "within the risk" that made the action negligent to perform.

We may summarize this motive for adopting the HWR (or fully relational) view of negligence by saying that culpability assessments in general are incomplete until the content of the mental state that makes an actor culpable is compared to the actual results of his actions. Culpability, one might say, is inherently relational in this way, making one wonder whether negligence is too.

The second motive for getting interested in the relational nature of negligence stems from certain frustrations with the concept of proximate causation. It is well known that the tests for proximate causation in Anglo-American tort law and criminal law are elusive, multiple, and often conflicting in their implications for cases.<sup>7</sup> The interest in the relational view of negligence partly stems from the promise it holds of bypassing the thorny questions of proximate causation. The temptation is to think that perhaps the more tractable questions of culpability could be substituted for the vagaries of proximate causation. Perhaps instead of asking whether a defendant's act proximately caused some harm *h*, one could ask the more easily answered question of whether *h* was within the risk that made it negligent for the defendant to do the act.

Apart from these skeptical views about the consistency, determinacy, or coherence of the proximate cause tests, there is also the thought that these tests ask the wrong question. On this view the central problem the proximate cause tests address is the problem of lack of fit between what defendant

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7 For a summary of the various doctrines and the problems with each, see Michael S. Moore, *Causation*, in *Encyclopedia of Crime and Justice* (Joshua Dressler ed., 2d ed. 2001).

intended, foresaw, or risked, on the one hand, and what defendant caused in fact, on the other. Defendant intends to hit one person with a rock, but, in fact, hits the window belonging to another with the rock; defendant risked an injury to a passenger attempting to alight a moving train, but caused a different sort of injury to someone else. If such cases are illustrative of the central problem addressed by the proximate cause tests, then those tests are cast in the wrong terms. The issue, on this view, has nothing to do with causation but, rather, with culpability.

Both of these suspicions about the proximate cause tests motivate HWR theorists to seek to substitute the HWR test for the proximate cause tests.<sup>8</sup> A strong version of this motivation is the hope that a HWR analysis can wholly supplant the proximate cause tests. A weaker version is expressed by the hope that a HWR analysis can at least take some of the pressure off the proximate cause tests by excising at least these culpability questions (of mismatch between harm intended and harm done, for example) from the domain of proximate causation. A HWR test on this weaker version, supplements, but does not entirely supplant, the tests for proximate causation.

These two considerations, of culpability and proximate causation, converge to produce an idea of considerable interest — namely, relational negligence, or the view that negligence cannot be assessed without doing a HWR analysis. Not only does it seem that we must ask relational questions in order to complete an analysis of culpability, but it also seems that asking such questions helps us to cut the Gordian Knot of proximate causation at the same time. These are reasons enough to induce many legal theorists, not just to become interested in, but to adopt, some version of a HWR analysis.<sup>9</sup>

From the above discussions one can see that there are several varieties of HWR analyses. The fully relational, strong version of a HWR test holds that negligence is relative to both persons and harms and that the question of such fully relational negligence supplants entirely the traditional proximate

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8 For an expression of such a hope, see, e.g., Seavey, *supra* note 5. For a contemporary expression of the second of these ideas — that proximate cause problems are in reality problems of mismatch "between the actual result and the result intended or risked" — see Criminal Law and Its Processes 517 (Sanford Kadish & Steven Schulhofer eds., 7th ed. 2001). The three problems we introduce in *infra* Part IV — the problems of intervening causes, of pre-existing conditions, and of spatio-temporal remoteness — are intended to dispute this latter point.

9 See Seavey, *supra* note 5; Warren Seavey, *Principles of Tort*, 56 Harv. L. Rev. 72 (1943); Fleming James & Robert Parry, *Legal Cause*, 10 Yale L.J. 761 (1951); Williams, *supra* note 4; Robert Keeton, *Legal Cause in the Law of Torts* (1963); Wayne Thode, *A Reply to the Defense of the Use of the Hypothetical Case to Resolve the Causation Issue*, 47 Tex. L. Rev. 1344 (1969).

cause enquiries. This strong, fully relational version of the HWR test will be our principal stalking horse in this article. Also of interest, however, are the weaker types of HWR analyses. Largely because of the accidents of history, American tort law has tended to adopt only a weaker, partially relational HWR analysis. We shall thus want to examine the weaker and the only partially relational versions of a HWR test as well.

There is one kind of HWR analysis that we shall not consider at all, at least not explicitly. This is the analysis that seeks to duplicate the outcomes generated by a HWR test of negligence, but to do so as a matter of causation, not as a matter of negligence. There is a long tradition in Anglo-American tort law of distinguishing two different causal questions: (1) whether the act that was negligent was the cause of the plaintiff's harm; and (2) whether that aspect of that act that made it negligent was the cause of the plaintiff's harm. These are not the same questions. The act of an unlicensed driver may indisputably be the cause of some harm, while the fact that the driving was unlicensed may equally clearly not be a cause of the harm. As Robert Keeton shows in some detail,<sup>10</sup> the "aspect of some action that makes that action negligent" will also be the aspect upon which aspect-causation theorists will focus when asking their causal question; this means that the results of a HWR analysis of negligence will, by and large, be duplicated by a cause-in-fact test so long as the cause-in-fact test is limited to asking only aspect-causation questions.<sup>11</sup>

Since this aspect-causation approach does not substitute an analysis of negligence for an analysis of causation, we simply shall put it aside. When we speak of a HWR analysis, we will be referring to a negligence analysis, not to a causal analysis. Whether the aspect-causation theory, with its commitment to "tropes" (aspects of whole events), has the metaphysical wherewithal to be sustained is itself an interesting question — one that will be explored by one of us elsewhere<sup>12</sup> — but it is not the question here. We should note, however, that given the need of the aspect-causation theorist to isolate the aspect-that-risks so that she can ask whether this is an aspect-that-causes, the conceptual and normative arguments that we advance

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10 Keeton, *supra* note 9. See also James & Parry, *supra* note 9.

11 For some counterexamples, see Charles E. Carpenter, *Workable Rules for Determining Proximate Cause*, 20 Cal. L. Rev. 229, 396, 471, at 408 (1932). Richard Wright defends aspect-causation at length and seeks to distinguish it from the harm within the risk theory. Richard Wright, *Causation in Tort Law*, 73 Cal. L. Rev. 1737, 1759-66 (1985).

12 Michael S. Moore, *Causation and Responsibility* (forthcoming).

concerning a HWR theory of negligence in Parts II and III apply with equal force to an aspect-causation theory.

We shall proceed as follows. In Part I, we will further introduce the notion of a HWR test by sketching briefly its history in Anglo-American tort law and criminal law. This will not only situate the idea within legal theory, but it will also allow us to further refine the idea of a HWR analysis by winnowing out certain historical variations. In Part II, we will begin the task of critique by examining the concept of negligence generally. We will develop and defend a holistic view of negligence according to which all risks are taken into account in judging negligence. We will then examine two conceptual problems that exist for any version of a HWR analysis, weak or strong, full or partial. One of these problems stems from the holistic account of negligence. In Part III we will put aside problems for HWR stemming from the concepts of negligence and of risk and will discuss instead normative reasons why HWR is not a good test for liability. (Here we concede *arguendo* that the test is conceptually coherent, a point disputed in Part II.) Finally, in Part IV we will focus on the strong version of a HWR test, the version that would supplant entirely the proximate cause question with a HWR analysis. In this final Part, we will raise problems specific to this strong thesis, problems having to do with the inability of HWR to duplicate the results currently reached under proximate cause doctrines.

## I. A BRIEF HISTORY OF THE HARM WITHIN THE RISK IDEA

### A. The Doctrinal Development of the Harm within the Risk Test

The idea that there must be some relation between the type of harm intended or foreseen and the token of harm that some wrongdoer causes is as old as the ideas of intention and foresight. One cannot blame people for intentionally, knowingly, or recklessly causing a certain result, without asking and answering this relational question, however implicitly. The analogous relational question for negligence was a later development (as was the idea of negligence itself).

Often Baron Pollock is given credit for proposing a HWR analysis of negligence in his opinions in 1850.<sup>13</sup> Indeed, Pollock expressed the idea that the *extent* of liability for negligence should be no greater than the *basis* for

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<sup>13</sup> *Greenland v. Chaplin*, 155 Eng. Rep. 104 (1850); *Rigby v. Intewitt*, 155 Eng. Rep. 103 (1850).

liability; whatever risks, in other words, made one negligent should also be the only risks for which one should have to pay if they have materialized in actual harm. This thought came to be associated with a rather different proposal, however, for usually Baron Pollock is interpreted as laying down the foreseeability test of proximate causation. The leading work of Baron Pollock's grandson, (Frederick) *Pollock on Torts*, so construes these cases,<sup>14</sup> as do current hornbooks such as *Prosser and Keeton on Torts*.<sup>15</sup>

Foreseeability tends to be a different test than is the HWR test.<sup>16</sup> This is because the foreseeability question is usually asked on a stand-alone basis, that is, a basis not limited to negligence. "Was the harm foreseeable to the defendant when he acted?" or "Was the intervening action of some third party foreseeable to the defendant when she acted?" are the typical formulations of the foreseeability test. These questions do not call for an HWR analysis. They do not ask whether a type of harm, in light of its gravity and the justification for running it, was *sufficiently* foreseeable that its risk was unreasonable — the negligence question; and they do not ask whether the harm that was caused by the defendant's action was an instance of this sufficiently foreseeable type of harm — the HWR, or relational, question.

For this reason it is more accurate to trace the origins of a HWR analysis to the cases of the mid-nineteenth century that use criminal statutes to set the duty of care in negligence cases in torts. The usual citation is to *Gorris v. Scott*,<sup>17</sup> decided in 1874. In *Gorris*, the defendant shipowner violated the Contagious Disease (Animals) Act of 1869, which required carriers by water to provide separate pens for transported animals. The plaintiff's unpenned sheep were washed overboard by a storm, when arguably they would not have been had they been properly penned. In denying recovery

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14 Frederick Pollock, *The Law of Torts* 45 (1st Am. ed., 3d English ed., Thomas Law Book Co. 1894).

15 W. Page Keeton et al., *Prosser and Keeton on Torts* 281 (5th ed. 1984).

16 See, e.g., Kenneth Abraham, *The Forms and Functions of Tort Law* 118-29 (1997). Occasionally the foreseeability test is not asked on a stand-alone basis, but is rather asked in a way duplicating the full calculus of risk for negligence. In *Wagon Mound 2*, for example, the Privy Council asked whether the ignition of the furnace oil was *sufficiently* foreseeable, given the gravity of the harm threatened and the ease of the elimination of the risk, *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co.*, [1967] 1 A.C. 617 (P.C. 1966) (appeal taken from N.S. Wales). This way of framing the foreseeability test does make it equivalent to the HWR test. For that reason most commentators hew to the simple formulation of foreseeability, which is distinguishable from the HWR test. See, e.g., Leon Green, *The Wagon Mound No. 2 — Foreseeability Revisited*, 1967 Utah L. Rev. 197.

17 9 L.R.-Ex. 125 (1874).



to the plaintiff, the English Court of Exchequer held that the statute was aimed at preventing the spread of contagious diseases among animals, not at preventing their loss at sea, and that accordingly the harm the plaintiff had suffered was not within the risk the danger of which motivated the passage of the statute.

*Gorris* was translated early on into two questions: (1) Is the harm the plaintiff suffered within the type of harm the risk of which motivated the legislature to prohibit the defendant's conduct? and (2) Is the plaintiff within the class of persons the legislature intended to protect when it prohibited the defendant's conduct?<sup>18</sup> These two questions, staples of current American tort law,<sup>19</sup> are of course nothing other than the two questions that make up a fully relational HWR test, with the *caveat* that they are restricted to cases of negligence based on violations of criminal statutes.

In 1901, Francis Bohlen urged that the second of these questions — the one relating to classes of persons, not to types of harms — should be asked generally as part of the negligence issue in negligence tort cases.<sup>20</sup> Bohlen made no reference to the use of criminal statutes to set the duty of care, but rather regarded the negligence question generally. Bohlen urged that late-nineteenth century American cases already made negligence relational with respect to persons risked, so that a risk to *this plaintiff* must be shown before the defendant could be liable in tort to such a plaintiff. Bohlen did not think this risk-to-this-plaintiff question, categorized as duty, supplanted the proximate cause questions; quite the contrary. Bohlen gave both a general test of proximate causation — in terms of natural laws<sup>21</sup> — and a test specific to the intervening cause issue.<sup>22</sup>

It was only eight years later, in 1909, that the HWR analysis was presented at full flower. In 1909, Joseph Bingham proposed the expansion

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18 *E.g.*, *Osborne v. McMasters*, 41 N.W. 543 (Minn. 1889). For a history of the development of the *per se* negligence doctrine in the nineteenth century, see Patrick Kelley, *Who Decides? Community Safety Conventions at the Heart of Tort Liability*, 38 *Clev. St. L. Rev.* 315, 358-59 (1991).

19 *E.g.*, Keeton et al., *supra* note 15, at 222-27.

20 Francis Bohlen, *The Probable or the Natural Consequences as the Test of Liability in Negligence* (Pt. 1), 49 *Am. L. Reg.* 79 (1901) [hereinafter Bohlen, *Probable or Natural Consequences* (Pt. 1)]; Francis Bohlen, *The Probable or the Natural Consequences as the Test of Liability in Negligence* (Pt. 2), 49 *Am. L. Reg.* 148 (1901) [hereinafter Bohlen, *Probable or Natural Consequences* (Pt. 2)]. The person-relative nature of negligence is rather incidental to Bohlen's main purposes in the article. Bohlen, *Probable or Natural Consequences* (Pt. 2), *supra*, at 151-52.

21 Bohlen, *Probable or Natural Consequences* (Pt. 2), *supra* note 20, *passim*.

22 *Id.* at 162-64.

of a fully relational HWR test beyond cases of negligence based on statutory violations.<sup>23</sup> Without limiting himself to statutory violation cases, Bingham wrote a two-part article in which he distinguished two questions: (1) Bohlen's question, whether the plaintiff is within the class of persons owed a legal duty by the defendant and (2) if the plaintiff is owed some duty by the defendant, is the harm suffered by the plaintiff within the scope of that duty owed to the plaintiff by the defendant? These duty questions in turn were translated into risk questions. This was because, Bingham asserted, all legal duties are imposed for a reason. In torts, that reason is the prevention/compensation of certain sorts of harms to certain sorts of persons. (This, for Bingham, was as true of common law duties as of duties founded on criminal statutes.) Accordingly, to ascertain the scope of a defendant's duties (both with respect to persons and harms) is to ascertain which risks it was culpable of the defendant to take. To answer whether a particular plaintiff and a particular harm are within the scope of a defendant's duty is to ask whether this plaintiff's harm is within the risk that made the defendant negligent.

Bingham proposed a strong version of this fully relational view of negligence. That is, unlike Bohlen, Bingham saw a HWR analysis as fully supplanting the proximate cause enquiry. According to Bingham, proximate cause language only produces "a great deal of confusion."<sup>24</sup> The question is whether the defendant breached his duty, and this question is to be framed in terms of whether "the specific consequence comes within the limits of defendant's responsibility for his wrong."<sup>25</sup> To answer such a question, "we have to deal with no question of cause or consequences."<sup>26</sup>

Bingham's fully relational version of a HWR test was endorsed by Leon Green in 1923,<sup>27</sup> Warren Seavey shortly thereafter, and, eventually, Francis Bohlen<sup>28</sup> when he became Reporter for the American Law Institute's Restatement of the Law of Torts. Bohlen had drafted a section of the

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23 Joseph Bingham, *Some Suggestions Concerning 'Legal Cause' at Common Law* (Pt. 1), 9 Colum. L. Rev. 16 (1909) [hereinafter Bingham, *Suggestions* (Pt. 1)]; Joseph Bingham, *Some Suggestions Concerning 'Legal Cause' at Common Law* (Pt. 2), 9 Colum. L. Rev. 136 (1909) [hereinafter Bingham, *Suggestions* (Pt. 2)].

24 Bingham, *Suggestions* (Pt. 1), *supra* note 23, at 25.

25 *Id.*

26 *Id.*

27 Leon Green, *Are Negligence and 'Proximate Cause' Determinable by the Same Test?*, 1 Tex. L. Rev. 243-60 (1923).

28 Bohlen's early views were not those of a fully relational HWR. See his once very influential article *The Probable or the Natural Consequences as the Test of Liability in Negligence* (Parts 1 and 2), *supra* note 20. As Prosser tells the tale, Bohlen became convinced by the mid-1920s that the risk-duty approach of a fully relational HWR

Restatement adopting Bingham's expansion of Bohlen's earlier views, and Justice Benjamin Cardozo joined Bohlen, Green, and Seavey for discussion of this draft in 1926 in New York.<sup>29</sup> (Cardozo, Green, and Seavey were Advisors to Bohlen as Reporter for the Restatement of the Law of Torts.)

Such background facts make very clear what Cardozo was up to in his majority opinion in *Palsgraf v. Long Island R.R.* in 1928.<sup>30</sup> Cardozo was attempting to write Bingham's strong version of a fully relational view of HWR into law. Unfortunately for Cardozo's purposes, the facts of *Palsgraf* (as Cardozo saw them) only allowed a partially relational view to emerge as the holding of the case. In that case, the defendant's employee negligently assisted a passenger to board a moving train. Mrs. Palsgraf, the plaintiff, was standing so far down the platform that it was highly unlikely that the employee's negligence would cause her any harm. The facts allowed Cardozo to write Bingham's first duty question into law: to recover, Mrs. Palsgraf had to show that she was within the class of persons foreseeably injured by the defendant's negligence. Negligence, Cardozo intoned, was at least person-relative. In Cardozo's famous words, "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension."<sup>31</sup>

In *dicta*, Cardozo sought to write the rest of a HWR analysis into law as well. Thus, he opined,

There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as e.g., one of bodily security.<sup>32</sup>

This is Cardozo anticipating the second of Bingham's two duty questions. Where plaintiff is owed some duty (because the risk to her is one of the risks that makes a defendant negligent), there remains Bingham's second question about the scope of that duty, *viz*, was the harm that happened of a type the risk of which made defendant negligent?

And if a fully relational HWR test were in place, Cardozo could also adopt

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was preferable to the alternative proximate cause approach to these issues. William Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 4 (1953).

29 See Robert Keeton, *A Palsgraf Anecdote*, 56 Tex. L. Rev. 513 (1978).

30 *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (1928).

31 *Id.* at 100 (citing Warren Seavey, *Negligence, Subjective or Objective*, 41 Harv. L. Rev. 6 (1927)).

32 *Id.* at 101.

the strong version of it that supplants entirely the proximate cause question. As he says, "The law of causation, remote or proximate, is thus foreign to the case before us. ... We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary."<sup>33</sup>

Cardozo's fully relational HWR analysis found immediate acceptance in the Restatement of the Law of Torts section 281(b) (which is hardly a surprise given the influence that Bohlen's draft of that section had on Cardozo's *Palsgraf* opinion). Section 281(b) adopted not only the holding of *Palsgraf* but also its *dicta*: "The actor is liable for an invasion of an interest of another, if ... (b) the conduct of the actor is negligent with respect to such interest."<sup>34</sup> As the Comments make plain,<sup>35</sup> this abbreviated language was meant to capture both the risk-to-the-class-of-persons question and the risk-of-the-type-of-harm question (although the latter question is further subdivided between types of harm and types of interests harmed). With regard to the latter question, the Comments gave what was to be an often-cited example of a HWR analysis: If defendant negligently gives a loaded revolver to a youngster to carry, and the youngster drops it, both crushing the foot of *B*, a bystander, and firing the revolver so as to wound *A*, defendant is liable to *A*, but not to *B*.<sup>36</sup> Only *A*'s harm is within the risk that made it negligent to entrust the revolver to the youth; the risk of injuring someone by crushing is too slight to make the act negligent.

As Warren Seavey noted in his well-known retrospective on Cardozo and the law of torts,<sup>37</sup> the Restatement did not adopt a strong HWR test. Rather, it merely confused things (in Seavey's description) by still requiring a finding of "legal cause" in addition to asking HWR questions,<sup>38</sup> and it pretty much threw in the kitchen sink in its sections on legal cause.<sup>39</sup> (This, of course, was consistent with Bohlen's endorsement thirty-three years earlier of only the weak version of HWR.<sup>40</sup>)

The American Law Institute retrenched even further in the version of the HWR analysis that emerged in the Restatement (Second) of the Law of

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33 *Id.*

34 2 Restatement of the Law of Torts: Negligence 734 (1934).

35 *Id.* at 735-38.

36 *Id.* at 736.

37 Seavey, *supra* note 5.

38 2 Restatement of the Law of Torts: Negligence § 281(c).

39 *Id.* §§ 430-62.

40 Bohlen, *Probable or Natural Consequences* (Pts. 1, 2), *supra* note 20.

Torts in 1965.<sup>41</sup> Like the first Restatement, the current section 281(b) rejects a strong version of the HWR analysis, but unlike the first Restatement, section 281(b) now only requires a partly relational HWR analysis.<sup>42</sup> It adopts, in other words, the holding, but not the *dicta*, of *Palsgraf*, so that the plaintiff must be within the class whose risk made the defendant's action negligent, but the harms caused to the plaintiff by the defendant need not be among those that prompt the court to find him negligent.

Here American tort law has rested, roughly in the position outlined by Bohlen one-hundred years ago.<sup>43</sup> The older chorus of scholars called for a strong version of a fully relational HWR test, starting with Seavey and continuing on with Fleming James, Roger Parry, Wayne Thode, and others.<sup>44</sup> Given the only partial endorsement of *Palsgraf* by the Restatement (Second) and by the case law, however, these proposals are more in the way of normative recommendations than restatements of the law. The one area of tort law in which this is not true is the area in which a HWR analysis started, namely, in cases in which criminal statutes are used to set the standard of care. Here the fully relational, strong version of a HWR analysis dominates. Here courts still ask both of Bingham's questions, about harms risked as well as about persons risked. Here there is no proximate cause inquiry to pursue once a court has decided the HWR questions, for the legislature is held to have determined that there is proximate causation as a matter of law if the harm that occurs is within the risk that motivated the enactment of the statute.

Current tort theorists seem content with the Restatement (Second)'s acceptance of only a partially relational, weak version of HWR. In a recent symposium on the late Gary Schwartz's discussion draft of Restatement (Third) of Torts: General Principles,<sup>45</sup> such contemporary torts scholars

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41 Restatement (Second) of the Law of Torts § 281(b) (1965).

42 Since William Prosser was the Reporter for the Restatement (Second) of Torts this is not surprising. Prosser claimed to be unable to find any case support for Cardozo's *dictum* in *Palsgraf*. William Prosser, Torts 259 (4th ed. 1971). Yet Prosser was not looking in the right places, for he didn't see that Cardozo was simply adverting to a fully relational harm within the risk test.

43 Bohlen, *Probable or Natural Consequences* (Pts. 1, 2), *supra* note 20.

44 *See supra* note 9. *See also* Henry Foster et al., *The Risk Theory and Proximate Cause — A Comparative Study*, 32 Neb. L. Rev. 72 (1952).

45 Restatement (Third) of Torts: General Principles (Discussion Draft, Apr. 5, 1999).

as Benjamin Zipursky,<sup>46</sup> John Goldberg,<sup>47</sup> Ernest Weinrib,<sup>48</sup> Robert Rabin,<sup>49</sup> David Owen,<sup>50</sup> Patrick Kelley,<sup>51</sup> and Richard Wright<sup>52</sup> unanimously criticize the proposed Restatement (Third) for its seeming overruling of *Palsgraf's* holding. Although none of such scholars (save perhaps Richard Wright and Patrick Kelley) plumps for the fully relational, strong version of HWR that moved two earlier generations of torts scholars,<sup>53</sup> all defend at least the partially relational, weak version of HWR that constitutes the *Palsgraf* holding.

Rather remarkably, the current doctrinal home for any *general*, strong, fully relational HWR test is in American criminal law. In 1962, the American Law Institute adopted section 2.03 of its proposed Model Penal Code. This section is the exclusive section defining proximate causation in the Code, and it replaces a proximate cause analysis with a HWR analysis. MPC section 2.03(1) provides that "conduct is a cause of a result when: (a) it is an antecedent but for which the result in question would not have occurred; and (b) the relationship between the conduct and result satisfies any additional causal requirements of the Code." The only other "additional causal requirements" are those of the succeeding subsections of

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- 46 Benjamin Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 Vand. L. Rev. 1 (1998).
- 47 John Goldberg & Benjamin Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657, 709-12 (2001).
- 48 Ernest Weinrib, *The Passing of Palsgraf*, 54 Vand. L. Rev. 803, 807-11 (2001).
- 49 Robert Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 Vand. L. Rev. 787, 798 n.50 (2001).
- 50 David Owen, *Duty Rules*, 54 Vand. L. Rev. 767, 778 (2001).
- 51 Patrick Kelley, *Restating Duty, Breach and Proximate Cause in Negligence Law*, 54 Vand. L. Rev. 1039, 1061-62 (2001).
- 52 Richard Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 Vand. L. Rev. 1071, 1092-96 (2001).
- 53 By our lights, the first generation of HWR theorists holding the fully relational and strong version of HWR consisted of Green (*supra* note 27), Bingham (*supra* note 23), Seavey (*supra* notes 5, 9), and Cardozo (*supra* note 2). The second generation consisted of Glanville Williams (*supra* note 4), Robert Keeton (*supra* note 9), Fleming James and Roger Parry (*supra* note 9). Of the present generation of torts theorists represented above (*see supra* notes 46-52), only Patrick Kelley could clearly be classified as a strong, fully relational HWR theorist. *See* Patrick Kelley, *Proximate Cause in Negligence Law: History, Theory and the Present Darkness*, 69 Wash. U. L. Q. 49 (1991). We would also classify Richard Wright as a strong, fully relational HWR theorist — even though that classification requires one to overcome Wright's own protestations that his aspect-causation theory is no kind of HWR analysis.

section 2.03, all of which (with certain qualifications that we shall examine later) are framed in terms of culpability requirements, not proximate cause requirements. With respect to negligence, section 2.03(3) provides that "when ... negligently causing a particular result is an element of the offense, the element is not established if the actual result is not within the risk of which the actor ... should be aware."<sup>54</sup> Section 2.03 has been adopted in about a dozen of the American state criminal codes, but the cases decided under it give room to doubt how many judges and scholars really understand the HWR test that the Code adopts. Meir Dan-Cohen, for example, discusses the Model Penal Code test in his encyclopedia article on causation in criminal law and treats the Code as if it uses a "justly attachable cause" test rather than a fully relational HWR test.<sup>55</sup>

### **B. The Historical Argument for the Harm within the Risk Test Based on the Concept of Negligence as Undue Risk**

The early proponents of the HWR test certainly sought to justify the test on normative grounds, roughly those of Baron Pollack earlier quoted: in torts, liability must be limited, and what better limit to liability but the extent of the risk that is the ground of that liability. This normative argument shall be examined in Part III. But early HWR analysts also thought the test to be justified on conceptual grounds, that if one understands the concept of negligence, one is driven to adopt a HWR test. It is this historically important argument that we shall here examine, because to do so will help sharpen just what the relational view of negligence amounts to.

In his *Palsgraf* exposition of a HWR test of duty, Cardozo appears to have believed that a HWR analysis is as conceptually necessary as it was normatively desirable. It is this claim of conceptual necessity that is our focus here. As Cardozo opined,

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54 Model Penal Code § 2.03 (Proposed Official Draft 1962).

55 Meir Dan-Cohen, *Causation*, in 1 Encyclopedia of Crime and Justice 162 (Sanford Kadish ed., 1983). For a similar confusion in the case law, see, e.g., *People v. Acosta*, 284 Cal. Rptr. 117, 126 n.19 (1991). What misleads courts and commentators here is the language of the Model Penal Code providing for no liability in cases where the harm caused is an instance of the type of harm the risk of which made the actor negligent yet the harm is intuitively regarded as "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability ... ." *Id.* § 2.03(3)(b). As we discuss in *infra* Parts IV.A. and IV.C., this qualifying language is not a sufficient test of proximate causation but is rather an invitation to courts to qualify the HWR test when confronted with cases of intervening causes or spatio-temporal remoteness.

Negligence, like risk, is a term of relation. Negligence in the abstract, apart from things related, is not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right. ... But [such rights are] protected, not against all forms of interference or aggression, but only against some. ... [One] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. ... The victim ... sues for breach of duty owing to himself.<sup>56</sup>

If we summarize Cardozo's chain of inferences, it goes like this: negligence *implies* (in the sense of presupposes) wrongdoing; wrongdoing *implies* a rights-violation; a rights-violation occurs only when the rights-holder is unreasonably risked, not when the rights-holder is caused harm. This latter is true because a victim's rights (with respect to non-intentional interference) are rights against being placed at risk of harm. A victim whose rights are not violated has not suffered a wrong that entitles him to compensation. This, because only those who are themselves wronged (by having their rights violated) are the beneficiaries of the wrongdoer's duty to correct the injustice his actions have produced.

We should separate two distinct strands of Cardozo's argument. One is what we shall call the object-of-the-duty strand; the other, the relational strand. With regard to the object-of-the-duty strand, Cardozo's insight is that the concepts of wrongdoing, rights-violation, and duty-violation all are ambiguous between two views of their objects. One view is that our rights are rights against being *caused* harms of certain kinds; the correlative duties of others are thus duties not to *cause* such harms, and wrongdoing consists of such (rights-violating and duty-violating) *causings* of harms. The second view is that our rights are rights against having others *intend or risk* harms of certain kinds; the correlative duties of others are thus duties not to *intend or risk* such harms, and wrongdoing consists in forming intentions or creating risks of such harms. Having isolated such an ambiguity, Cardozo then plumps for the second view with respect to negligent wrongdoing. That is, whatever may be the case for intentional wrongdoing (which Cardozo puts aside), in the case of negligence, the wrong is not the causing of harm, but, rather, the risking of harm. Our duties are not with regard to harms caused, but with regard to harms risked.

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<sup>56</sup> Palsgraf v. Long Island R.R., 162 N.E. 99, 101 (1928).



Cardozo completes his chain of inferences with what we call the relational strand of the argument. The relational strand asserts that wrongs are always wrongs to somebody, that duties are always duties to some particular person(s), that duties and wrongs (duty-violations) are owed or done only to those who hold the correlative rights — in a phrase, that "negligence in the air, so to speak, will not do."

The two strands together produce Cardozo's intended conclusion: if duties are owed to particular people and if those people are those risked harm rather than those caused harm, then only those who are within the orbit of unreasonably imposed risk can sue for negligently imposed injury. We shall examine these two strands separately.

### 1. *The Object of Duty Argument*

Andrews, in dissent, disputes the object-of-the-duty strand of Cardozo's argument. Conceding (at least *arguendo*) the second point we shall discuss shortly — that negligence "does involve a relationship between man and his fellows"<sup>57</sup> — Andrews argues that the relevant relationship is "not merely a relationship between man and those whom he might reasonably expect his act would injure."<sup>58</sup> Rather, Andrews plumps for the first view: rights, duties, and wrongs presuppose rather "a relationship between him and those whom he does in fact injure."<sup>59</sup>

It is doubtful that either Cardozo or Andrews were aware of the long-standing debate in moral philosophy on precisely this question.<sup>60</sup> About the categorical duties of morality, there is a long-standing debate concerning their proper objects: Are we categorically obligated not to *kill* (i.e., cause death)? Or are we categorically obligated not to intend to kill or to risk killing? More generally, are our moral duties not to cause harm of certain kinds (described by causally complex action verbs like "killing")? Or are we obligated not to intend or risk such harms? Are our moral wrongs complete only when we cause harm, because that is when we violate our moral duties? Or are our moral wrongs complete when we form intentions to harm others or when we do actions intending or risking such harms?

One of us has argued at length that the objects of our moral duties are causings and not either intendings or riskings.<sup>61</sup> This conclusion is

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57 *Id.* at 102.

58 *Id.*

59 *Id.*

60 See the full treatment of this debate in Heidi Hurd, *What In the World Is Wrong?*, 5 *J. Contemp. Legal Issues* 157 (1994).

61 *Id.*

largely supported by showing how the categorical force of moral duties cannot plausibly be accommodated by the alternative views. The way to test whether we regard a norm as having categorical force is to see whether it is plausible that good enough consequences can justify a violation of the norm. Consequential justifications seem very plausible for intending and for risking in a way that they do not for actual causings of harm. We can justify risking another's death (by building high-rise buildings or setting higher speed limits, for example) in a way that we cannot justify intentionally causing it. Therefore, it seems implausible that the categorical norm against killing prohibits risking death instead of causing death.

To the extent that *legal* rights, duties, and wrongs are simply moral rights, duties, and wrongs written down in appropriate legal texts, legal duties will share the categorical force of moral duties. Leo Katz has argued persuasively that the prohibitions of the criminal law (at least for *malum in se crimes*) track the categorical obligations of morality in this way.<sup>62</sup> But, of course, the criminal law by and large deals with intentional wrongdoing. The central concept of torts, by contrast, is negligent wrongdoing. Cardozo's insight was that the wrongs that are merely negligent do not correspond with the categorical obligations of morality. Actions like that of the defendant's servant in *Palsgraf* — helping a passenger with a package board a moving train — are not wrong in themselves in the way that killing, maiming, hitting, etc., are wrong. Such actions are wrong, Cardozo seems to say, only because, and only when, they *risk* injury to others.

Yet even if Cardozo were right about this difference between negligent wrongdoing and intentional wrongdoing, we still should not concede his conclusion. It is plausible that legal duties like that of the defendant in *Palsgraf* do not correspond with *categorical* moral duties (although they may well correspond to non-categorical, or "consequentialist," moral duties). Even so, such duties concern themselves with harms caused, not harms risked.

One can grasp this by seeing how Cardozo's views of legal duties, legal rights, and legal wrongdoing have played out in two more recent proposals. One is George Fletcher's view that the legal wrongdoing targeted by tort law is asymmetrical risk-imposition; on such a view, one actor legally wrongs another (violates the victim's rights and his own duties) when he risks that other in a way that the other does not risk him.<sup>63</sup> Our rights, according to Fletcher, are rights not to be risked harms (in excess of the risks

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62 Leo Katz, *Ill-Gotten Gains* (1996).

63 George Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972).

we impose on others), and those rights are violated by excessive risking, not by the causing, of harms. The second proposal is that of David Lewis in criminal law.<sup>64</sup> On Lewis' view, we should punish criminals by "penal lottery," i.e., a device that matches the risk of harm they impose on their victims with an equal risk of punishment. Because the risking of harm to others is the wrong, defendants deserve punishment (on Lewis' view) because of, and in proportion to, such risking; because getting hit with a risk of painful consequences is itself a harm, such criminals are appropriately punished by being forced to participate in a penal lottery, a lottery in which they are exposed to a risk of painful consequences. To Lewis, such criminals are appropriately punished by being exposed to such a risk, irrespective of whether such criminals actually suffer real punishment or not (and irrespective of whether their "victims" ever suffered any real losses).

Simply to state these proposals is pretty much to refute them. As Charles Fried once confessed, he had not seen the incoherence of his own, once-held, similar views (about risk-pooling) until Fletcher drove it home by making it so concrete.<sup>65</sup> The problem is this: it makes no sense to speak of risks as wrongs, of getting "hit" with a risk as being a harm or a punishment, of risks being reciprocal or non-reciprocal, or of risks being equal or proportional. These locutions make no sense because there is no sense we can make of an objective notion of risk.<sup>66</sup> Risks are epistemic notions, wholly dependant on some particular person's epistemic location. Put another way, what is risky is wholly dependant on what the person making the assessment knows. In a deterministic world, nothing is really risky. Thus, whether one "non-reciprocally risks" another, or whether one's risk of punishment "is equal to" the risk of harm one imposed on another, wholly depends on specifying the epistemic vantage points from which the respective risks are assessed.

Two points follow from this. One is that there is no epistemic vantage point that can make sense of reciprocity or equality of risk. It makes no sense to assess the plaintiff-victim's risk-impositions from the defendant's epistemic situation, but neither does it make sense to assess the defendant's risk-imposition from the plaintiff-victim's epistemic situation. We could assess each from their respective epistemic situations, but then we would be comparing apples to oranges when assessing reciprocity/equality of risk

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64 David Lewis, *The Punishment That Leaves Something to Chance*, 18 Phil. & Pub. Aff. 53 (1989).

65 Charles Fried, *Right and Wrong — Preliminary Considerations*, 5 J. Legal Stud. 165, 177 n.31 (1976). Fried's similar idea of "risk-pooling" may be found in Charles Fried, *An Anatomy of Value* at ch. 11 (1970).

66 See generally Hurd, *supra* note 60.

imposition. Finally, we could posit an idealized epistemic situation from which to measure both risk-impositions, but what would be the normative relevance of that if such situations were not that of either victim or injurer?

Secondly, and more fundamentally, to see that risk is an epistemic notion is to see its ineligibility to serve as the touchstone of wrongdoing, duty-violation, or rights-violation. Epistemic failure by persons is the locus of their culpability, not of their wrongdoing. Since to "hit another with a risk" is literally to hit the other with nothing at all, we cannot regard risks as harms or risking as wrongdoing. There is blame to unreasonable risk-taking, but it is the blame of being culpable, not the blame of rights-violation or wrongdoing.

The result is that the law cannot make risking into a violation of some "victim's" rights. Our legal rights are not rights against being hit by some risk; they are rights against actually being caused harm. They are rights only against risks that materialize, in other words. It is true that criminal law could punish risk-taking alone (although it typically does not). If it were to do so, it would not be punishing a moral wrong — i.e., a violation of the defendant's duty or a violation of some victim's rights. Rather, such "*inchoate*" liability (i.e., liability in the absence of actual wrongdoing) would be punishing culpability alone. It is also true that we do both punish and impose duties of compensation for *apprehended* risk, such as assault. But a risk that is apprehended by its victim is itself a kind of harm (for fear and apprehension impede upon life projects). To say this, however, is not to treat the risk itself as a harm or its imposition as a wrong.

The upshot is that there is no sustainable notion of objective risks as wrongs, not in morality and not in law, even if law were to diverge from its moral base. Perhaps, however, we can reconstruct the Bingham-Cardozo argument so as to wean it of any dependence on an objective notion of risk. Perhaps the argument can be made using an avowedly epistemic notion of risk. Such an argument starts with Bingham's thought that legal "rights and duties are always concrete."<sup>67</sup> Bingham was here echoing the view of Holmes<sup>68</sup> and John Chipman Gray,<sup>69</sup> to the effect that law properly so called consists of those singular propositions that decide concrete cases. Singular propositions of law are those that assign legal relations to particular people in particular situations. "The Long Island Railroad owed Mrs. Palsgraf a duty not to assist another passenger onto a moving train" and "The Long

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67 Bingham, *Suggestions* (Pt. 1), *supra* note 23, at 17.

68 Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 418 (1897).

69 John Chipman Gray, *The Nature and Sources of Law* (1909).

Island Railroad owed Mrs. Palsgraf no duty not to assist another passenger onto a moving train" would both be examples of singular propositions of law, propositions decisive of *Palsgraf* one way or the other.

One way that Bingham and Cardozo could have argued from here — although we find no evidence that they did — was to assume: (1) that all concrete legal duties must exist at the time that the actor whose duties they are committed the act that violated (or conformed to) those duties; and (2) that such concrete legal duties must not only have existed, but must also have been knowable by the actor as he acted, otherwise he cannot fairly be held liable for violating them. With these assumptions, Bingham and Cardozo could then have argued that only risk-based abstract legal duties could have existed or could have been knowable by the Long Island Railroad's employee when he assisted the fireworks-carrying passenger onto the moving train. Because the action of assisting such a passenger is not wrong in itself, the action could only be wrong, and the defendant could only have known that the action is wrong, if there existed a general risk-oriented duty, *viz* a duty not to unreasonably *risk* harm.

The duty not to *cause* Mrs. Palsgraf injury by assisting another passenger, by contrast, either did not exist at all at the time the Railroad's servant acted or, if such a duty existed, the Railroad's servant could not have known he had violated that duty until he had actually caused Mrs. Palsgraf injury. On Andrews' view that our duties are not to cause injuries to others, it is a future fact that either brings the concrete duty into existence or at least makes the concrete duty knowable; and this cannot be squared with assumptions (1) and (2) above. Therefore, the abstract legal duty cannot be cause-based, but, rather, must be risk-based.

The problem for this reconstructed argument does not lie in its assumptions, but, instead, in their supposed implications. We can assume with Bingham that *singular* legal propositions (about *concrete* legal duties) are needed to decide particular cases. We can further assume that such duties must exist at the time the actor acted, so that new law is not being retroactively applied to actors.<sup>70</sup> Such assumptions do not rule out Andrews' view of legal duty. Even though it is a future effect (Mrs. Palsgraf's injury) that makes the Railroad's action wrong, that such an effect would be caused by the Railroad's action was a present fact at the time the Railroad acted. It was wrong — a violation of existing legal duty — for the Railroad's servant

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<sup>70</sup> The existence of legal duties and legal rights at the time an actor acts is a formal postulate of our practice of law. See Ronald Dworkin, *Taking Rights Seriously* at chs. 2-4 (1978).

to assist the passenger, even though the event that made it wrong did not occur until some time after the servant's action. Unless one adopts Aristotle's peculiar view that facts about future events like sea fights are not real facts,<sup>71</sup> there is no problem in conceiving of legal duties in these terms. Indeed, the very view of legal duty that Bingham adopts — that of Holmes — presupposes that Aristotle was wrong about the reality of future facts.<sup>72</sup>

We can also assume (at least for negligence cases)<sup>73</sup> that concrete legal duties must not only exist but be knowable to those whose duties they are when they act. An abstract legal duty not to cause harm can generate notice of the concrete legal duty not to assist the other passenger as easily as can an abstract legal duty not to risk harm; this, because the calculation (from abstract to concrete duty) is the same. It is of course the risk that gives the notice, but it is a risk of *causing harm*. If the abstract legal duty is framed in terms of causing harm, one who is applying that abstract duty to a concrete action like assisting a passenger of course has to assess the likelihood that his act will, in the future, cause harm. But so does one applying an abstract legal duty not to risk the causing of harm. The calculations required of the non-negligent actor are identical, and the supposed advantages in knowability of the risk-based view are illusory.

## 2. *The Relational Argument*

Let us now turn to the other strand of Cardozo's argument, what we earlier called the relational strand. This is the aspect of the argument where Cardozo seeks to show that the objects of legal duties are not just risks as such, but risks of certain sorts of harms to particular classes of people. This strand, too, Andrews denies in his dissent in *Palsgraf*: "Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."<sup>74</sup> Since, on Andrews' view, a duty is owed to every other person in the world, when one such person is injured, "her claim is for a breach of duty to herself."<sup>75</sup>

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71 Aristotle, *On Interpretation*, in *Aristotle's Categories and De Interpretatione*, Translated with Notes 43 (John Lloyd Ackrill trans., 1962).

72 As is well known, Holmes sought to reduce legal duty to predictions of judicial behavior. Such predictive theory of law would make the present existence of all legal duties depend on future facts.

73 The parenthetical restriction to negligence cases, because in other cases one might well think that legal duties exist even though only superhuman judges could know that they exist. These are "hard cases" of complex law. See Dworkin, *supra* note 70.

74 *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 103 (1928).

75 *Id.*

Cardozo's argument against Andrews here seems wholly dependent on the first strand of argument rejected above. Namely, because Cardozo thought that the object of the duty is risking, not causing, he also thought that the duty has to be relational: risks are risks *of* certain types of harm *to* certain people. This corollary he derived because risk is an object-taking concept. Risk as such is incomplete, just as intention by itself is incomplete. It makes no sense to say "I intend" or "I risk." Intentions and risks both take objects in the sense that one intends *that* a certain harm be caused to someone and one risks *that* a certain harm will befall someone. In Cardozo's abbreviated epigram, "Risk imports relation."<sup>76</sup>

If we reject the first strand of Cardozo's argument, as we did above, that will be to reject his basis for sustaining the relational strand. But perhaps we can find another basis for the relational strand of the argument, one that does not depend on the view that risks are wrongs. If we repair to Cardozo's intellectual antecedent here — Joseph Bingham's article that preceded *Palsgraf* by over twenty years<sup>77</sup> — we can discern a seemingly independent basis for the relational view.

Bingham prefaced his detailed exposition of a fully relational HWR test with this discursus on legal rights and duties generally:

Rights and duties are always concrete. A right presupposes possible opposition. A duty is owed to some person or persons. Therefore, before one or the other is defined completely, we must know against whom the right exists or to whom the duty is owed, and what concrete 'thing' is demanded. These are elementary facts of the greatest importance to a proper comprehension of our common law system of jurisprudence.<sup>78</sup>

Notice that Bingham is not discussing legal rights and duties in negligence, nor does he restrict his thesis even to tort law more generally. Rather, he makes a set of perfectly general points about all legal rights and duties. It is this very general relational view of rights and duties that allows him to slip so easily to the more particularly relational view of the duties of negligence.

It is a curious bit of intellectual history why Bingham did not acknowledge the influence of his colleague on the Stanford faculty of 1909, Wesley Hohfeld, for Hohfeld's then-developing views are unmistakable in Bingham's views about legal duties just quoted. Hohfeld believed: that the

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<sup>76</sup> *Id.* at 100.

<sup>77</sup> Bingham, *Suggestions* (Pt. 1), *supra* note 23.

<sup>78</sup> *Id.* at 17.

content of legal rights proper (what he came to call "claim-rights") are never actions of the right-holder, but, rather, the actions of others; that rights proper are fully correlative with duties on the part of others, and vice versa; that legal relations such as rights and duties are always two-person affairs, so that a complete description of a right requires one to specify not only the action one has a right to and who holds the right, but also against whom one holds the right; that a complete description of a duty requires one to specify not only the action there is a duty to do and who holds the duty, but also to whom the duty is owed; that any so called "right against the world," like a right *in rem*, is in reality a collection of discrete rights against discrete people of similar content; that more complex legal relations like the rights of ownership are in reality bundles of more discrete rights.<sup>79</sup>

Hohfeld's reasons for adopting the two-person view of legal duties are complex; they have to do with the elegant system of inferences made possible if we conceptualize legal relations in this way. It is tied up with: Hohfeld's insights about the content of claim-rights (which are always the actions of others) versus the content of liberty-rights (which are always actions of the right-holder); the correlativity of claim-rights and duties and the correlativity of liberty-rights and the absence of claim-rights; and the need always to be able to translate abstract legal rights and duties into the concrete legal rights and duties that decide actual cases.

Hohfeld's scheme is as well known in moral philosophy as in law, for the scheme seems as accurate of moral rights and duties as of their legal analogues. This should not be surprising for those of us who view legal rights and duties to be kinds of moral rights and duties. Indeed, one of us has argued that there are substantively moral reasons to adopt Hohfeld's two-person view of moral rights and duties.<sup>80</sup>

Bingham was thus on quite defensible ground in thinking that *all* legal duties are relational in Hohfeld's sense: a duty is always a duty to some particular person, the one who holds the correlative right. Yet this Hohfeldian view of legal duties generally is insufficient to generate Bingham's (and Cardozo's) conclusion that the content of our duties to others is not to *risk*

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79 Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913); Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917). These essays were collected in Wesley Hohfeld, *Fundamental Legal Conceptions* (1919).

80 In Michael S. Moore, *Act and Crime* 356-65 (1993), one of us argues that the counting-of-moral-wrongs problem (involved in double jeopardy determinations in criminal law) is solved by the Hohfeldian view of duties as two-person relational.



them. As Andrews saw clearly in dissent in *Palsgraf*,<sup>81</sup> one can fully adopt Hohfeld's view that all duties are owed to particular people and still conclude that the Long Island Railroad owed just such a duty to Mrs. Palsgraf, i.e., a duty not to cause harm to her. It was a "multital duty" (Hohfeld's term) in that a duty of similar content was owed by the Railroad to every person in the world; but such a duty was also owed to Mrs. Palsgraf personally. It is a mistake to equate the HWR approach with a relational view of negligence. HWR is one way negligence may be relational, but it is not the only way. Andrews' cause-based view of duty is as relational to persons and to harms as Cardozo's risk-based view of duty.

What this shows is that it was a misnomer to label HWR the relational view of negligence. One can appreciate the rhetorical gains to proponents of HWR by this labeling — for negligence *is* necessarily relational, and it then can seem that HWR is also conceptually necessary to negligence. Once this mislabeling is eliminated, one can see that HWR has to be argued for on normative grounds. That sort of argument we shall examine in Part III. For now, it is worth emphasizing our final preliminary clarification of HWR: it is not *the* relational view of negligence, it is only one relational view among others, the one relating the defendant's negligent act to the plaintiff's harm by relations of risk rather than by relations of cause.

## II. CONCEPTUAL PROBLEMS FOR ALL VERSIONS OF HARM WITHIN THE RISK ANALYSIS

### A. Negligence as Unreasonable Risk Imposition

Because a HWR analysis presents itself as part and parcel of the concept of negligence, we will here first examine the notion of negligence in general. We will then ask more particularly about the viability of a HWR test as part of the negligence analysis.

Anglo-American torts casebooks and treatises, and the law professors who teach from them, regularly give not one but two definitions of negligence.<sup>82</sup> One is in terms of a "calculus of risk," by which negligent actions are defined as those whose justifications are outweighed by the harms that they risk. The other is in terms of an epistemic idealization, by which negligent actions are defined as those that would not be done by a "reasonable person." A rational

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81 *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 102-03 (1928).

82 *See, e.g.*, *Cases and Materials on Torts* at ch. 3 (Richard Epstein ed., 6th ed. 1995).

legal system, of course, would not simultaneously embrace two different notions of negligence capable of generating two different results in any given case, so the assumption is made that these two definitions are synonymous (or at least extensionally equivalent in the cases they decide).

Although the calculus of risk formulation is our principal focus in this Part, it is worth pausing to ask why tort law contains the alternative conceptualization of negligence in terms of a hypothetical reasonable person. One possibility is that the reasonable person test is merely a heuristic that helps some fact-finders do better in their calculations of risk than they would otherwise do. Some people claim to be helped in their ability to reach justified conclusions by asking what some epistemically idealized person would do or think. Adam Smith imagined an "ideal observer" to be consulted for truth in ethical matters,<sup>83</sup> and John Rawls in our own times imagines a rational contractor in an "original position" for the same purpose.<sup>84</sup> Similarly, Plowden recommended to judges that they imagine themselves in the shoes of an ideal legislator when interpreting statutes,<sup>85</sup> and Richard Posner has recently echoed Plowden in this regard.<sup>86</sup> Tort law's reasonable person, on this view, joins these other heuristic devices. Viewed as a mere heuristic, the reasonable person test does not deviate from the calculus of risk test at all,<sup>87</sup> but rather, it supposedly makes the calculus more tractable by allowing thought experiments about what the fact-finder (who no doubt regards himself as reasonable) would have done had he been in the defendant's situation.

A second explanation for tort law's reasonable person conceptualization stems from the fact that risk is an essentially epistemic notion.<sup>88</sup> For God, there are no risks; there are only certainties — that is, "risks" with a probability of 0 or 1. Indeterministic microphysics to the side, there is no such thing as an objective risk; there are only risks to be perceived from certain epistemic vantage points. A risk-based legal standard thus must specify the epistemic

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83 Adam Smith, *A Theory of Moral Sentiments* (Edinburgh 1759).

84 John Rawls, *A Theory of Justice* (1971).

85 *Eyston v. Studd*, 75 Eng. Rep. 688 (1574); *Heydon's Case*, 76 Eng. Rep. 637 (Exch. 1584). See generally Warren Lehman, *How to Interpret a Difficult Statute*, 1979 Wis. L. Rev. 489.

86 Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800 (1983).

87 This is the view taken in the current draft of Restatement (Third) of Torts: General Principles (Discussion Draft, Apr. 5, 1999).

88 See generally Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 Notre Dame L. Rev. 73 (1991). Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. Rev. 249 (1996) [hereinafter Hurd, *Deontology*]; Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 Mich. L. Rev. 2203 (1992).

vantage point from which a risk is to be assessed. Arguably, the reasonable person test is tort law's way of specifying this epistemic vantage point. A fact-finder starts with his own information base and inferential abilities to ask what he would have done in a defendant's situation; he then uses the reasonable person standard to assess just how accurate the defendant's calculus of the risk had to be to be non-negligent. In emergencies, for example, it is often held under Anglo-American law that a defendant is allowed greater leeway in misjudging whether a risk is justified.<sup>89</sup> Likewise for certain characteristics of a defendant that make it more difficult for him to calculate risks (such as youth).<sup>90</sup> Sometimes we use the reasonable person formulation to adjust the acceptable accuracy of the calculus of risk upwards rather than downwards. One who enters a profession, for example, is held to the higher standard of a reasonable professional. This means that a medical doctor must do *better* in calculating the benefits and risks of various procedures than legal fact-finders could do, even with the benefit of hindsight.<sup>91</sup>

A third explanation for the reasonable person test of negligence is that it allows for true divergence from the demands of the calculus of risk.<sup>92</sup> On this view, the calculus of risk is too utilitarian (or at least too consequentialist) to be of universal application. On a deontological view of morality, our moral duties and permissions are not measured exclusively by whether they produce cost-justified risks. The reasonable person test may exist, on this view, to deviate from the strictly consequentialist calculus of risk in two ways: (1) actors may be permitted to do some activities that are not cost-justified under the calculus of risk; and (2) actors may be obligated to refrain from some activities that are cost-justified under the calculus of risk. On this view, the reasonable person may be the (deontologically) moral person, not the one who correctly sums the consequentialist balance of benefits versus risks.

Whatever view one takes of the reasonable person test of negligence, we intend in this article to put it aside. We shall assume, for purposes of this discussion, that the idea of negligence is captured by the calculus of risk, and thus, it shall be on that conceptualization that we shall focus.

## **B. The Hand Formula for Measuring Unreasonable Risk**

For reasons having little to do with the historical importance of the

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89 Restatement (Second) of the Law of Torts § 296 (1965).

90 *Id.* § 283A.

91 *Id.* § 299A.

92 See Hurd, *Deontology*, *supra* note 88, at 254-55.

case or the originality of its insight<sup>93</sup> and more to do with the accidents of converging academic attention, Learned Hand's opinion in *United States v. Carroll Towing*<sup>94</sup> has become the *locus classicus* of the calculus of risk conceptualization of negligence. We shall also defer to academic convention and begin with *Carroll Towing*.

The question Hand addressed in *Carroll Towing* was whether the plaintiff barge owner had been (contributorily) negligent in not having a bargee aboard his barge. This barge had broken away from the line of barges that the defendant's tug had been towing, had struck a tanker's propeller, and had sunk. Had a bargee been aboard, he probably could have saved the barge. Hand held that the barge owner's duty not to be negligent was

a function of three variables: (1) the probability that she will break away; (2) the gravity of the resulting injury, if she does; and (3) the burden of adequate precautions ... to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B [is less than P x L].<sup>95</sup>

This deceptively simple formula is surely incomplete as a risk-based conception of negligence. The easiest way to see this is to do an eight-fold expansion of the Hand formula into what we shall call the "expanded Hand formula for negligence."

### 1. The Burden of Adequate Precautions

When assessing the burden of having a bargee aboard, Hand seemingly focused only on the out-of-pocket cost to the employer-plaintiff and the cost in liberty to the employee of remaining on a barge. Yet surely the burden of taking that precaution includes as well the benefits of not having a bargee aboard the barge, for those benefits would be lost if the precaution were taken. Those benefits prominently include the absence of harms bargees can cause — sabotage, accidental death or injury to bargees, injury to rescuers of bargees in trouble, accidental injury to barges because of drunken or careless bargees, etc. Not suffering these harms is surely a benefit to be taken into account in assessing how "burdensome" — i.e., desirable — it is

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93 More original was Henry Terry's five-factored calculus of risk laid out in Henry Terry, *Negligence*, 29 Harv. L. Rev. 40, 42-43 (1915).

94 159 F.2d 169 (2d Cir. 1947).

95 *Id.* at 173.

to have a bargee aboard.<sup>96</sup> These benefits can also include all the beneficial things a barge owner can do with the wages he would otherwise pay a bargee and all the beneficial things a bargee could do with his time if he were not stuck on a barge all day. The burden of this precaution, in other words, includes its opportunity costs and not just its out-of-pocket costs.

### *2. The Probabilities Involved in Assessing the Burdens of Adequate Precautions*

Focusing on out-of-pocket costs hides a risk calculation inherent in Hand's formula, for the probability of incurring such out-of-pocket costs, such as the labor costs by having a bargee aboard, approaches 1, and this makes it easy to ignore any probabilistic calculation. Yet this is not true of the other items making up the "burden of adequate precautions." It is far from certain that a bargee will turn out to be a saboteur, will get killed or injured, will need rescue, will get drunk and himself damage the barge, etc. It is far from certain that a bargee would, in fact, find better employment than as a bargee. These benefits and opportunity costs must surely be discounted by the improbability of their occurrence.<sup>97</sup>

The result is thus doubly a calculus of risk. On the downside, one discounts the gravity of the harm if no bargee is aboard by the improbability that that harm will occur, and on the upside, one discounts the value of the benefits obtained if no bargee is aboard by the improbability of those benefits being achieved. A precaution is negligently foregone only if the discounted value of the harm risked exceeds the discounted value of the justification for taking the risk, *viz.*, all the benefits obtainable if the precaution is not taken.

### *3. All Harms Risked*

Once we expand the upside benefit calculation if a bargee is not aboard, we also should expand the downside detriment calculation if a bargee is not aboard. After all, just as it is the case that many good things have some chance of occurring if a bargee is not aboard, so it is the case that there are many bad things that could occur if a bargee is not aboard. It is a mistake to focus just on the one bad thing that *did* happen in thinking about the

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96 See, e.g., *Cooley v. Pub. Serv. Co.*, 10 A.2d 673 (N.H. 1940) (in assessing burden of precautions against risk of excessive noise transmitted by telephone lines one must weigh risk of electrocution of others if the precaution is taken). See generally the Restatement (Third) of Torts: General Principles § 4 (Discussion Draft, Apr. 5, 1999), which recognizes that the burden of adequate precautions "can take a wide variety of forms" including all the "advantages" gained if the precaution is not taken.

97 See Restatement (Second) of the Law of Torts § 292(b) (1965).

downside risks.<sup>98</sup> One risk was that the barge could have been damaged or sunk by going adrift and hitting another ship. But surely many other bad things were risked by the unattended barge: with no bargee aboard to help lookout for crossing traffic and to cut the tow line if need be, there could have been a collision with another moving ship; life could have been lost by a loose barge, or by one not loosed when it needed to be; the barge could have wedged under a wharf, flooding upstream users; etc. In assessing the reasonableness of not having a bargee aboard, one must include all downside detriments as much as all upside potentials, discounted by their respective risks.

#### 4. Levels of the Precaution

It is, of course, a mistake to think that the decision to take any given precaution is a two-valued decision, *viz*, to have a bargee or not to have a bargee.<sup>99</sup> Hand recognizes as much when he distinguishes full-time bargees, who live aboard the barge, from part-time bargees, who are aboard only during daylight working hours.<sup>100</sup> Full-time bargees doubtless give greater protection against loss of the barge than do part-time bargees; presumably two full-time bargees do even better. The dual calculus of total risks against total benefits if no given precaution is taken surely must be run for each *level* of that precaution, for that precaution is reasonable at certain levels but unreasonable at others.

#### 5. Alternative Precautions

Once one sees the *level* of precaution point, one will also see the *kind* of precaution point: surely bargees are not the only means of preventing barges from getting loose, nor are they necessarily the most effective or cheapest

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98 See, e.g., *Marshall v. Nugent*, 222 F.2d 604 (1st Cir. 1955) (In applying the HWR test, "one should contemplate a variety of risks ... [Such a] bundle of risks" is what determines negligence.). See also *Seavey, supra* note 9, at 92-93 ("[W]here one shoots a gun in a crowded thoroughfare, it is not merely the risk to the person struck by the bullet which is considered; the risk to the entire group of persons endangered is considered in determining whether the act is negligent."); *Bingham, supra* note 23, *Suggestions* (Pt. 2), at 153 ("Conduct may be wrongful in more than one aspect and as regards the rights of more than one person."); *Keeton et al., supra* note 15, at 298 ("the risk of harm itself, when the defendant is found to be negligent, is usually an aggregate risk of many possibilities"); *Restatement (Third) of Torts* § 4 cmt. g.

99 See *Epstein, supra* note 82, at 203 n.3; *Kenneth Simon, The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness as Well as Efficiency Values*, 54 *Vand. L. Rev.* 901, 904 n.12 (2001).

100 *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947).

means. Television monitors, other automatic sensing devices, more secure lines or cleats, etc., may be more effective than bargees at preventing the range of harms barges cause, or they may be as effective at lesser cost. The non-negligent barge owner thus must run the full calculus of risk not just for every level of the barge precaution, but also for every level of all other precautionary actions he might alternatively take to lessen the total risks of his activity.<sup>101</sup>

### 6. Level of Activity

Even if one correctly calculates the optimal precautions to take in operating a barge, it is still quite likely that some harm will result from the barge's operation. "Shit happens," as a popular bumper sticker of the 90s has it. A reasonable barge owner thus will assess the benefits of barging versus these costs, even when the barging is done with an optimal level of precautions against all possible harms. He will do this because at some point, it is possible that it is unreasonable to be engaged in so much barging activity.<sup>102</sup>

### 7. Kinds of Activities

The benefits of barging presumably include all the benefits that derive from local transportation of high bulk items. Potentially these benefits could be obtained, with lesser downside risks, by other kinds of activities: trucks, trains, self-propelled boats, etc. A non-negligent barge owner would also assess the possibility that barging is altogether too dangerous, given the other, less risky ways of achieving the benefits of barging that have developed.<sup>103</sup> He will calculate not just whether he would do well to reduce the level of barging activity in which he is engaged, but whether he ought to go out of the barging business altogether.

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101 Restatement (Second) of the Law of Torts § 292(c).

102 For a contrary assumption about negligence, see Steven Shavell, *Strict Liability versus Negligence*, 9 J. Legal Stud. 1 (1980). Shavell assumes without argument that "by definition" negligence does not extend to the level or kind of activity questions and thus favors strict liability for such questions. In this he appears to be joined by Richard Posner. *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174 (7th Cir. 1990). Yet one need not flee to strict liability to judge the reasonableness of either kinds or levels of given activities. For activities inherently risky to others but with little social utility, to engage in them at all may be adjudged negligent under the expanded Hand formula. See, e.g., *Bolton v. Stone*, [1951] A.C. 850 ("If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there *at all.*"); Restatement (Third) of Torts § 4 cmt. i.

103 See *supra* note 102.

### 8. Information/Calculation Costs

At some point, a reasonable barge owner will cease calculating items 1-7 above. That is, he will run the expanded Hand calculation on the upside and downside risks of continuing to run the expanded Hand calculation! He will only calculate as far as this second-order calculation tells him, so that if he fails to optimize somewhere in 1-7, his actions may still be reasonable (because it would have been unreasonable to calculate further in order to find the optimal action).<sup>104</sup>

The expanded Hand formula presents a very different picture of negligence than is suggested by Hand's own simplistic algebraic formula. Hand presents negligence as if it were a matter of balancing *a* risk of *a* certain kind of harm (the one that happened) against the cost of taking *a* precaution to eliminate that risk. This is understandable as a matter of litigating any single case. In a typical case, *a* harm has been suffered by *a* plaintiff. This gives the illusion of fixing *a* risk to be considered. In addition, the adversary system tends to produce one precaution upon which parties focus and to litigate whether *it* should have been taken by the defendant.<sup>105</sup>

Yet this heuristic shortcut, understandable in the actual litigation of a negligence case, should not be confused with the nature of negligence itself. On its own terms, Hand's calculus of risk demands expansion in the eight directions indicated. It requires one to weigh the total harms risked versus the total benefits risked if a given precaution is not taken, considered for each level of each kind of precautionary action possible, for all levels and kinds of activities in which the defendant might be engaged. An action is negligent, on this holistic view, "if its disadvantages exceed its advantages."<sup>106</sup> This holistic view of negligence makes it challenging to isolate *a* risk that makes a defendant negligent, a seeming prerequisite to finding a given harm to be within or outside of such *a* risk. This we explore in the succeeding section.

The HWR analysis in fact appears to invite two quite damning conceptual challenges. First, once one appreciates that *all* risks created by a defendant weigh in an assessment of his negligence, it would appear that *any* and *all* harms that materialize from the defendant's conduct are within the

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104 The law's most explicit recognition of this point is in the "emergency doctrine." See Restatement (Second) of the Law of Torts § 296. The emergency doctrine is more in the nature of an excuse, not of a justification for not calculating further. Restatement (Third) of Torts § 4 cmt. f, contains a more clearly justificatory version of such second-order calculations.

105 Mark Grady so argues in Mark Grady, *Untaken Precautions*, 18 J. Legal Stud. 139 (1989).

106 Restatement (Third) of Torts § 4 cmt. k.



category of risks that make such conduct negligent. If this is true, then of course the test fails as a test of anything; for it fails to provide any means of distinguishing harms for which the defendant ought not to be held responsible from harms for which he ought to be liable. We shall refer to this as the "all-inclusiveness problem." Second, it would appear that the test suffers from a fatal "description problem," for how one describes the risk(s) that make the defendant's conduct negligent does all the work to place the harm(s) in question either within or outside of the stated risk(s). In the succeeding sections of this Part, we shall take up these two general conceptual challenges to any attempt to insert a HWR analysis into the *prima facie* elements of a negligence cause of action (be it at the level of assessing the defendant's duty to the plaintiff, his breach of that duty, or his proximity to the harm caused to the plaintiff).

### C. The All-Inclusiveness Problem

The first problem, then, with any HWR inquiry is that it would appear that *all* harms are within the risks that make a defendant's conduct negligent. As we argued earlier in this Part, *all* risks enter into the calculus that determines the justifiability of a defendant's conduct. If a harm materializes from a defendant's conduct, then necessarily there was some risk of it so doing, and that risk was on the list of risks created by the defendant's conduct, the cumulative total of which make the defendant's conduct unjustified. While the harm in question may not have been among the most likely harms to have materialized from the defendant's conduct, our earlier discussion makes clear that the concept of negligence demands that we include *all* harms risked by the defendant's conduct in our calculus of the benefits and burdens of the defendant's conduct. But if *all* harms, discounted by their probability, are to be included in the calculus of risk, then it would appear that any harm that happens as a result of a defendant's unjustified conduct is within the risks that make the defendant's conduct unjustified. In short, once one understands the concept of negligence as we unpacked it earlier, one must conclude that a HWR test is impotent to test anything — be it duty, breach, or proximate causation. Properly applied, it yields the conclusion that all defendants are responsible for all harms that they cause to all persons. Inasmuch as its purpose is to sort between harms for which defendants should be held responsible and harms for which they should not be responsible, that purpose is thwarted by its own formulation.

In response to this *prima facie* damning indictment, defenders of HWR have to rebut the idea that *all* risks are considered when judging an action to be negligent. Needed is thus some principled distinction between the

risks that go into the calculus of risk of the expanded Hand formula and those that are excluded from that calculus. Below, we consider five possible distinctions.

*1. Risks that Are Individually Sufficient for Negligence*

Advocates of a HWR analysis might be inclined to argue as follows: the calculus of risk should include only risks that are *individually sufficient* to make a defendant's conduct negligent. That is, in assessing the gravity of the harms imposed by a defendant's conduct, discounted by their probability, we should concern ourselves only with harms that individually outweigh, by themselves, the cumulative benefits that accrue from the defendant's conduct (and, therefore, the burden of forgoing the activity or of adopting further precautions). For example, consider the earlier discussed case of *Gorris v. Scott*.<sup>107</sup> Advocates of the HWR analysis might argue that if the discounted value of the loss of livestock due to drowning was, by itself, less than the cost of the pens that would have been required to prevent such drownings, then the risk of the livestock drowning did not make it negligent on the part of the shipowner to refuse to pen the sheep. The fact that the shipowner should have penned the sheep as a means of preventing disease — because the discounted value of the loss of livestock due to disease was, by itself, *greater* than the cost of the pens — is neither here nor there on this view. The spread of disease among the sheep was a risk sufficient to declare the shipowner negligent for failing to pen the sheep; their drowning at sea was not. While the sheep would not have drowned had they been penned and while they should have been penned to prevent them from contracting diseases, the shipowner should not be held responsible for their deaths, because the risk of the sheep drowning was insufficient, by itself, to justify the precaution of penning them.

On this view, it is possible that a defendant's conduct may engender numerous risks that are individually sufficient to declare that conduct negligent; hence, there will be multiple harms that, if they materialize, will be within the risks that make it negligent for the defendant to act as he did. But the list of these individually sufficient risks will not be as long as the list of *all* risks created by the defendant's conduct — a list that will include many risks that are not, by themselves, sufficiently grave to declare the precautions taken by the defendant vis-à-vis those risks to be inadequate. On this view, a defendant can properly be held liable for all harms that materialize from risks that are individually sufficient for negligence. And

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<sup>107</sup> *Gorris v. Scott*, 9 L.R.-Ex. 125 (1874) (discussed in *supra* note 17).

when a defendant's negligence is "overdetermined" by the fact that there is more than one risk that is sufficiently grave to make the defendant's conduct unjustified, a defendant can properly be held liable for the materialization of more than one type of harm. But, on this account, the HWR analysis will not make him liable for many harms, much less all of the harms, that he causes.

As a means of assessing the plausibility of limiting the calculus of risk to risks that are individually sufficient to declare a defendant negligent, let us consider a second kind of case — a case in which a defendant creates multiple risks, no one of which is sufficient, by itself, to declare the defendant negligent. If we have good reasons to think that a defendant who creates such risks can be negligent, then we have good reasons to believe that the view advanced in this subsection on behalf of the HWR test is indefensible.

Imagine a case in which the risks created by a defendant's conduct are individually necessary and only jointly sufficient for a finding of negligence. No harm risked is, by itself, greater in discounted value than the cost of precautions that would be necessary to avert that harm. But the summed value of all harms risked, discounted by their improbability, exceeds the costs of precautions available to eliminate those risks. Under these circumstances, is it not plausible to say that the defendant is negligent in acting in a manner that imposes these risks, the cumulative value of which exceeds the benefits of his conduct?

Imagine the carpool mother who, at sixty-five miles an hour, repeatedly diverts her gaze from the highway so as to shuffle through a collection of children's cassette tapes, select one, and pop it in the tape recorder. The increased risk to the children in the backseat is relatively small; the increased risk to other drivers is relatively small; the increased risk to hitchhikers along the highway is relatively small; and the increased risk to animals who might be crossing the road is relatively small. And yet, these small risks, when cumulatively considered, appear to outweigh the burden to her of pulling over long enough to change tapes in complete safety. And had any one of these small risks in fact materialized — had she rear-ended a car that suddenly put on its brakes in front of her during the moment she was searching for the volume control — it would seem entirely plausible to conclude that she was, at the time, driving negligently, even though the particular risk of a rear-end collision was insufficiently high, by itself, to merit the precaution of stopping.

Indeed, in a great number of run-of-the-mill negligence cases, it would seem that the risk that materialized in the harm caused by the defendant was not, itself, a risk sufficient to merit precautions, but was instead a member of a set of risks only jointly sufficient to justify a charge of negligence.

*Carroll Towing*<sup>108</sup> is itself a good example. The risk that a barge would break free of a line of barges (being moved through the New York harbor by the defendant's tugboat), and thereby sustain hull damage as a result of striking a tanker's propeller, had to be of reasonably low probability; by itself, such a harm would seemingly not merit the employment of a bargee. But add to the risk of *this* harm the multitude of other risks created by not having a bargee aboard the barge (e.g., that fire would break out and destroy the barge; that rats would eat away at the cargo; that vandals would pirate the contents) and it becomes entirely plausible to conclude, as Learned Hand did, that the plaintiff was contributorily negligent for failing to have a bargee aboard, at least during daylight hours in the full tide of war activity.<sup>109</sup>

In light of the fact that many cases of negligence in fact appear to be cases in which the risks that make defendants' acts negligent are only jointly sufficient to do so, it would appear difficult for advocates of the HWR test to sustain the thesis here examined — the thesis that the calculus of risk should sum only risks that are themselves individually sufficient to make a defendant's conduct negligent. It would appear that they would have to expand their view so as to make relevant to the negligent assessment not only all risks that are *individually sufficient* for a finding of negligence, but all risks that are *individually necessary and only jointly sufficient* for a finding of negligence. They would then have to admit that any harm whose discounted value could not be subtracted from the sum of risks created by the defendant's conduct without affecting the judgment that the defendant's

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108 *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947).

109 Ken Abraham similarly argues that the only means of making sense of the court's conclusion in the textbook case of *Wagner v. International Railway Co.*, 133 N.E. 437 (1921), is to attribute to the court the view that a defendant is negligent with regard to all risks that are individually necessary and only jointly sufficient to outweigh the burden of precautions available to avert those risks. In *Wagner*, the plaintiff sought to rescue his cousin after his cousin was thrown from a train because its door had been left unfastened by negligent railroad employees. As Abraham explains, the court held that the defendant Railroad was liable for the plaintiff's injuries, because while those injuries were not *themselves* the principal harms risked by leaving a train door ajar,

one of the risks that makes it negligent to risk harm to another ... is the risk that a different individual will be injured while attempting to rescue him from the consequences of the defendant's actions. ...; therefore harm to the rescuer is within the cluster of risks that makes the defendant's actions negligent — or so a jury may find.

Abraham, *supra* note 16, at 121.

conduct was negligent is within the risks that made the defendant negligent — even if its probability and gravity were of little consequence by itself.

### *2. Risks that Are Individually Necessary for Negligence*

In light of the plausibility of liability in the many cases of risks that are individually necessary and only jointly sufficient for negligence, it might be tempting to a HWR theorist to restrict the risks eligible for the HWR test to those that are at least necessary to an actor being negligent. Yet, a moment's reflection will show that this restriction is hopeless. Consider the overdetermined risk cases mentioned before, where each of two or more risks is individually sufficient for an actor to be negligent. When one of such risks materializes into the harm risked, surely no proponent of HWR would wish to deny liability (for the overdetermined risk cases are cases of severe negligence, the actor in such cases doing an act posing a number of risks any one of which it would be negligent to take). But that is precisely the result this suggested limitation would reach; for if  $R_1$ ,  $R_2$ , and  $R_3$  are each individually sufficient for negligence, then as a matter of logic no one of them can be necessary for negligence.

### *3. Risks that Are Either Individually Necessary or Individually Sufficient for Negligence*

The obvious way to remedy the problems for the last two tests is to combine them in a disjunctive way: if a risk is either sufficient for negligence, or at least necessary for negligence, then that risk leads to liability if it materializes in the harm risked under the HWR test. To test this third suggested restriction, imagine a case in which a defendant's conduct risks numerous harms, all of which are of identical discounted value. Suppose that the sum of any two of these is sufficient to make it negligent to fail to take precautions against their realization. In such a case, the risks created by the defendant's conduct are neither individually sufficient for, nor individually necessary to, a determination of his negligence. Two risks are jointly sufficient to find the defendant negligent, but inasmuch as any two will do, none of the multiple risks created by his conduct is necessary to that finding.

In such a case it would seem that one must consider the defendant's conduct negligent, notwithstanding the fact that the risk that materialized was neither individually sufficient, nor individually necessary, for a finding of negligence. To say otherwise would invite some pretty absurd counterexamples. Suppose, for instance, that a defendant releases a slingshot

containing several stones in the direction of a crowd of persons.<sup>110</sup> The risk that any given person will be hit by a flying stone is presumably small. But the risk that *someone* will be hit is predictably large. When someone is in fact hit, one's ability to declare the defendant negligent in causing the injury turns on one's willingness to countenance findings of negligence in mixed concurrent risk cases. On pain of inviting absurdity by exonerating defendants whenever their conduct risks many people, but none in particular, it would seem that one must indeed include in the calculus of risk all risks irrespective of whether they are individually necessary or sufficient to a finding of negligence.

4. *"INUS" Risks: Risks that Are Individually Insufficient but Necessary to a Set of Risks Being Sufficient, although the Set May Be Unnecessary*

Modeled on the late John Mackie's INUS conditions as an analysis of causation,<sup>111</sup> the HWR proponent might restrict risks the way Mackie restricted putative causal factors. On this view, a risk may well be insufficient by itself for negligence, yet it may be a necessary element of a set of risks that are jointly sufficient; such a sufficient set may be itself unnecessary to the finding of negligence, because there may be more than one such sufficient set. Such a restriction seems to take care of the three kinds of counter-examples hitherto found troublesome. There would be liability in: (1) the concurrent risk cases, where no one risk is sufficient, but the risk realized is necessary to negligence; (2) the overdetermined risk cases, where two or more risks are individually sufficient for negligence, although none of such risks can be individually necessary for negligence; and (3) the mixed concurrent/overdetermined risk cases, where no one risk is either necessary or sufficient, but subsets of such risks are sufficient for negligence.

Notice how close this brings the advocate of a HWR test towards having to concede the general *reductio ad absurdum* that prompted this inquiry — the challenge that *all* risks will ultimately be within the class of risks that make a defendant's conduct negligent on any proper application of a HWR analysis. For now, all risks created by a defendant that *could* be conjoined with one another in a manner that would cumulatively dictate the taking of available precautions are properly among the risks that make the defendant negligent when he fails to take such precautions. It is not obvious that *any* risk could not be conjoined with some other risks to form a set of risks

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110 Seavey's kind of example, in his *Principles of Torts*, Seavey, *supra* note 9, at 92-93.

111 John L. Mackie, *Causes and Conditions*, 2 Am. Phil. Q. 245 (1965).

sufficient for negligence, and the risk thus conjoined could be necessary to the negligence of the set.

Advocates of a HWR analysis might respond by arguing that there remains a significant class of cases in which small risks are displaced by large ones, so that the small risks cannot be conjoined with other risks as necessary elements of a set of risks sufficient for negligence. The cases they might have in mind can be called "asymmetrical overdetermination risk cases." In such cases, the defendant creates both a singular large risk, the discounted value of which is sufficient by itself to justify a finding of negligence, and a host of small risks, the discounted values of which are either (a) jointly sufficient to justify a finding of negligence or (b) are jointly insufficient, without the addition of the discounted value of the large risk also created by the defendant's conduct, to justify a finding of negligence.

Consider Warren Seavey's famous discussion of cases that may seem to be of this sort:

[T]he owner of a dog, known to be vicious, who would be liable without fault if it should bite a person after escaping, is not ... liable to a person whom the dog clumsily knocks down, since the risk created by the dog was only that of being bit. I would assume that a court ... would not hold liable the possessor of a pile of boxed explosives if ... the boxes were to fall upon and crush the foot of a privileged visitor. ... The risk is one of explosion and not of crushing.<sup>112</sup>

As his examples illustrate, Seavey took the view that large risks altogether eliminate small ones from the calculus of risk.

We can extract at least two variants of this view. Seavey wrote as if he literally believed that in many cases, there are only large risks, i.e., that dogs pose literally no risk of harm other than by biting. Despite his language, however, it would surely be uncharitable to assign such a view to him, for he must have contemplated harms from dogs that are much less probable and much less grave. On a second interpretation, then, Seavey recognized that most conduct creates both large and small risks, but he thought that as a moral matter, the large risks swamp the small risks, rendering them irrelevant to the assessment of a defendant's culpability. That is, risks that are individually sufficient to support a finding of negligence displace small risks that, when cumulated, might otherwise themselves demand the taking of precautions. On this more plausible interpretation of Seavey's view, it remains meaningful to inquire whether the harm brought about by

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<sup>112</sup> Seavey, *supra* note 5, at 387.

a defendant was within the risk(s) that made the defendant negligent, for many risks imposed by the defendant were displaced by, rather than added to, the risk(s) that made him negligent, and if any of *those* small risks had, in fact, materialized, they would not have been risks as to which the defendant is negligent — or so would go Seavey's argument.

While many theorists who champion a HWR analysis talk as Seavey did and thus lend support to the view that at least in asymmetrical overdetermination risk cases, there is a multitude of risks that do not enter into the calculus of the defendant's negligence, they must ultimately admit that this class of cases is not special. Indeed, all of the cases in this category can ultimately be collapsed back into one of the three sorts of cases already discussed; as such, the conclusions drawn above will apply to them as well. If the cumulative value of the small risks created by a defendant in an asymmetrical overdetermination case is sufficient to justify a finding of negligence, then the defendant's case will constitute a hybrid of the first and second sorts of cases discussed above — the overdetermination risk cases and the concurrent risk cases. Inasmuch as we concluded that HWR advocates would have to admit that the risks in such cases *all* enter into the calculus of negligence, it would appear that in cases in which defendants create individually sufficient risks together with a multitude of otherwise individually necessary and only jointly sufficient risks, *all* such risks would also enter into the determination of these defendants' negligence. And were any one of these risks to materialize in harm, be it the large risk (i.e., a dog bite) or a small risk (i.e., a dog bump), such a risk would be within the class of risks that make it negligent for the defendant to act as he did (i.e., to refuse to restrain his dog).

If, on the other hand, the small risks created by the defendant are jointly *insufficient* to justify a finding of negligence absent the addition of the large risk, then the defendant's case will be, in all morally relevant respects, akin to the mixed concurrent risk cases. To appreciate this fact, juxtapose two cases. The first is a true mixed concurrent risk case: the defendant creates fifteen equally-valued small risks and one risk that is five times as great as any of the fifteen. No risk is individually sufficient to justify a finding of negligence, but the larger risk combined with any one of the smaller risks or, alternatively, any six of the smaller risks are jointly sufficient to justify a finding of negligence on the part of the defendant. In the second case, the defendant creates five small risks and one significant risk that is three times as large as the five small risks combined. In this case, the large risk is individually sufficient to declare the defendant's conduct negligent, but the small risks, even when combined, are insufficient, absent the addition of the large risk, to justify a finding of negligence.



While it might tempt HWR defenders like Seavey to declare that the small risks in the first case are relevant to the negligence determination, while the small risks in the second case are irrelevant, such a claim should be embarrassing: In both cases the total risk creation by the defendant is the same. Why should it matter how that package of risks is apportioned? What could possibly be the moral relevance of finding that one package is divided into one very large and a multitude of very small risks, while another is divided into many small risks with one slightly larger risk? Why should a defendant who creates a multitude of small risks that are only jointly sufficient to justify a finding of negligence be liable if one of those small risks materializes, while another defendant, who creates the same total level of risk and who causes the same small risk to materialize to a similarly situated plaintiff, walks away Scot-free because he had the good fortune to also create a very great risk (that did not materialize), which, by itself, would have been sufficient to justify a finding of negligence had it materialized? Indeed, does not such a conclusion get the culpability judgments in these cases exactly backwards?

It thus appears that if advocates of the HWR test are prepared to grant that in mixed concurrent risk cases, *all* risks enter into the negligence calculus, then they should be prepared to grant that in the asymmetrical overdetermination cases that we have been talking about, *all* risks similarly are within the class of risks that determines the defendant's negligence. But with this admission, they have seemingly been driven to the wall; for advocates of a HWR analysis have now been forced to concede that every risk created by a defendant in every kind of case enters into the calculus that determines the justifiability of the defendant's conduct. Hence, if a defendant's conduct is deemed negligent, any harm it causes is within the set of harms the risk of which make the defendant's conduct negligent. The HWR analysis is thus impotent to sort between cases in which defendants should bear plaintiffs' losses and be criminally liable for victims' harms and cases in which plaintiffs should bear their own losses and in which defendants are not criminally liable.

##### *5. Risks Exceeding Some Threshold of De Minimus Risk Imposition*

At this point, the proponent of HWR analyses might give up specifying the role a given risk must have in justifying a finding of negligence. He might, that is, eschew all talk of risks necessary or sufficient for negligence. Instead, he might propose a kind of threshold limitation: any risk that is below a certain threshold is to be regarded as *de minimus*, so that if (miraculously) it does materialize in harm, that harm falls outside the risks considered in the HWR test.

Presumably such a threshold is to be set probabalistically. If the harm that some defendant's action caused was extremely unlikely, as judged from what a person in the defendant's situation could be expected to know, then such a harm is outside the risk and the defendant is not liable under the HWR test.

Such a proposed limitation to the risks eligible to serve in the HWR test, of course, collapses the HWR test into a simple foreseeability test. Once one eliminates the relation a risk must have to the finding of negligence and substitutes a threshold of probability below which a risk does not count for purposes of the HWR test, then one is really only asking the general foreseeability question with the HWR test: Was the harm caused in fact by the defendant's act foreseeable to him at the time that he acted?

The problem with any such absolute threshold of probability ("foreseeability") has been stated many times. To the classic HWR proponent, such a threshold test is not stringent enough: it allows liability where an isolated risk of small magnitude — one that neither by itself nor in conjunction with any other risks makes the defendant negligent — is created by the defendant's action. Equally damningly, such a threshold test is too stringent: it bars liability when a very low probability risk is created, but that risk is of harm of very great magnitude and that risk is run without any justification. The foreseeability test is also subject to the description of the risk problem, to be discussed shortly.<sup>113</sup>

We conclude that there is no way to specify a limitation on the risks eligible to be used in the HWR test. Yet without some such limitation, every harm that is in fact caused by some defendant's action had some *ex ante* risk of being caused by that action. Every harm that some defendant's act causes, then, is within the risk, and the test is without effect.

#### D. The Description Problem

There is a level-of-risk problem that is (seemingly, at least) distinct from all inclusiveness problems just discussed. To even state the problem of describing the level of risk requires that we make some assumption about how the HWR advocate solves the all-inclusiveness problem. It does not matter to the description problem *how* the HWR theorist solves the all-inclusiveness problem, but some solution must be stipulated so that we can even state

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113 This general problem has been explored before by one of us with respect to the foreseeability test. See Michael S. Moore, *Placing Blame: A General Theory of the Criminal Law* 363-99 (1997) (Chapter 8: Foreseeing Harm Opaquely).

the description-of-risk problem. In the discussion that follows let us assume the sufficiency version of HWR. That is, assume a risk must be sufficient by itself to adjudge an actor negligent for it to be *the* risk (or risks, in the risk-overdetermination kind of cases) within which the harm caused must be.

The description problem is this: how one describes the risk(s) that make the defendant negligent — in terms of types of harm and classes of persons — determines whether the harm that happened is within the risk(s) (so described). *And*, crucially, there is no right answer to the question of how one ought to describe the types of harm risked. Inasmuch as any given harm instantiates any number of types of harm, all levels of description of the harm risked can be equally accurate; it would thus appear that any choice of a description is inherently arbitrary. And this makes the HWR test inherently arbitrary.

Let us illustrate. Suppose defendant is adjudged negligent in that he winds plaintiff's antique clock too tight, and suppose that *the* risk that makes the action negligent is the risk that plaintiff's clock would be broken. What happens is that a third party drives by plaintiff's house and is so distracted by seeing (through the window) defendant winding plaintiff's clock too tight that the third party runs into plaintiff's car.

It is easy to imagine quite different descriptions of the risk sufficient to make defendant's action negligent. From most general to most particular: defendant risked harm to someone; harm to plaintiff; damage to plaintiff's property; damage to plaintiff's clock; a broken spring in plaintiff's clock. These are all equally accurate descriptions of the types of harms risked, and each seems to be a risk sufficient for negligence. Yet under the first three descriptions, the harm that happened — the damage to plaintiff's car — is within the risk, while under the latter two descriptions, such damage is not within the risk.

As a second illustration, suppose a case where the defendant is negligently speeding in an automobile, hits the pedestrian plaintiff, and injures her. If we describe the risk that makes it negligent for the defendant to act as he did as a risk "that he would bring about harm to someone," "harm to pedestrians," or "personal injury to pedestrians," then the harm is within the risk that make the defendant's conduct negligent. On the other hand, if we describe the type of harm risked by the defendant as "a perforated lung, resulting from a stake impaling the plaintiff after being catapulted through the air at 37 mph by the impact of a speeding blue Ford 1997 Taurus which had swerved to avoid a nine-year-old," then surely the risk that an instance of that type of harm would occur was so low that such risk was not sufficient to make the act negligent, so that the harm caused will not be within the

risk. Since it is equally accurate to describe the type of injury risked both as "a harm to someone" and as "an impaling by a stake launched at 37mph by a blue Ford Taurus which had swerved to avoid a nine-year-old child," the harm that happened was both within and not within the risk.

If there are no right answers as to how we ought to describe the risks that defendants impose, then it would appear that the HWR test is entirely vacuous. But perhaps we are being too hasty in assuming that we can take no lessons from human psychology, morality, or law itself. Perhaps one of these sources can provide us with salient descriptions of the types of harms risked that permit us to test their fit without begging the question that prompts us to do so.

Consider first the resources made available to us in our armchairs by plausible claims about human psychology. If persons were asked to predict the consequences, say, of leaving a dog unrestrained, it is possible they would converge upon a set of common predictions in the sense that the classes of events they would foresee would overlap. Could we not use the average response, or the response that enjoys the broadest consensus, to fix the description of the risk(s) of the defendant's conduct? Suppose such average description were "a dog bite." We would then describe the risk created by the defendant as the risk of "a dog bite," and if the harm caused by the defendant's dog were "a dog bite," we could then conclude under the HWR test that the harm caused by the defendant is within the risk that makes the defendant negligent.

There is, of course, a real doubt whether there are such average or most popular descriptions on which a populace converges. Even if there are such average descriptions, there is also the question of how a court could ever be confident about how average persons would describe the risks of a defendant's conduct. One can only imagine just how much judicial projection would occur were we to license courts to unpack the HWR test in terms of their armchair assumptions about the descriptive generalizations of ordinary folks.

But set aside the empirical problems that this solution to the description problem poses for advocates of the HWR test. Is not the real problem with this appeal to ordinary psychology the fact that it is without obvious moral motivation? Why, as a moral matter, should we fix the content of the HWR test by appealing to the descriptions of the risks and harms generated by a defendant that would predictably be provided by ordinary persons? One answer might come from those who hold a "majoritarian theory" of

negligence.<sup>114</sup> This was the understanding of negligence that was at work in *Osborne v. Montgomery*,<sup>115</sup> when the Wisconsin Supreme Court declared,

We apply the standards which guide the great mass of mankind in determining what is proper conduct of an individual. ... Such a standard is usually spoken of as 'ordinary care,' being that degree of care which under the same or similar circumstances the great mass of mankind would ordinarily exercise.

As Robert Rabin argues, it is this majoritarian view of negligence that best captures early torts theorists' conception of negligence, for they conceived of reasonableness as conformity with statistically prevalent norms of conduct, rather than as the exercise of rationality.<sup>116</sup>

Yet on most contemporary accounts, what is reasonable and what is ordinary are two quite different things. As Learned Hand famously wrote: "[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. ... [T]here are precautions so imperative that even their universal disregard will not excuse their omission."<sup>117</sup> If what ordinary persons ordinarily *do* may still be negligent (e.g., smoking, speeding, failing to use seatbelts), then what ordinary persons *say* about what other ordinary persons do is of questionable moral consequence. Inasmuch as we think that such persons can be wrong about what is reasonable, we can hardly regard their descriptions of the risks attendant upon a defendant's conduct as *constitutive* of the risks to be compared by a HWR analysis. But if the average is not constitutive of the ideal, what can justify employing it to fix the content of the HWR test?

Putting aside popular descriptions, consider, second, whether morality might provide us with salient descriptions of the risks to be used within a HWR analysis. Such a proposal is tempting, given that the negligence law we have presupposes a morality that enables us to judge the ordinary acts of average persons to be wrongful. Perhaps such a morality has the resources

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114 For an extended discussion of majoritarian theories of negligence, see Hurd, *Deontology*, *supra* note 88, at 269-70.

115 234 N.W. 372 (Wis. 1931).

116 Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925, 931 n.25 (1981).

117 *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932). As Clarence Morris put it, "Those who follow bad examples may still be at fault even though their models are respectable and numerous." Clarence Morris, *Custom and Negligence*, 42 Colum. L. Rev. 114, 1149 (1942).

to fix the relevant descriptions of the risks created by a defendant's conduct so as to permit the comparison demanded by HWR advocates. Yet what would it mean to say that morality itself can provide us with the relevant descriptions of the risks in question? It surely could not mean that we should first decide whether the defendant should bear responsibility for the victim's loss and then characterize that loss, and the risk that attended the defendant's conduct, in ways that place the loss inside or outside that risk (depending upon our overall moral assessment of the defendant's responsibility for that loss). For that would put the proverbial cart before the horse. After all, if we were confident of our all-things-considered moral judgments concerning defendants' responsibility for victims' harms, we would hardly need to engage in the more fine-grained inquiries mandated by the elements of the *prima facie* case for negligence. We would simply "know" that the defendant owed the plaintiff a duty, breached that duty, and proximately caused the harm in question so as properly to be held responsible for the plaintiff's loss.

The point is, however, that all of the *prima facie* elements within a cause of action for negligence articulate morally relevant criteria by which to reach a morally legitimate conclusion about whether to require the defendant to compensate another for an injury. As propounded by its supporters, the HWR test is supposed to enable us to reach a morally grounded conclusion about a defendant's obligations of corrective justice; if, in fact, the HWR test depends upon such a conclusion, then it is wholly useless. But indeed, whenever proponents of the HWR test claim that a particular harm was within a particular risk, they appear to be implicitly employing an all-things-considered judgment concerning the justness of imposing liability on a defendant to fix their descriptions of the risk. Thus, when Seavey said that the risk that makes a defendant liable for failing to restrain his dog is a "dog bite" not a "dog knocking over,"<sup>118</sup> he was clearly adjusting his descriptions of the relevant risk so as to exonerate the defendant from liability for injuries sustained as a result of his dog knocking another over. Such descriptive manipulations might render the right result, but they surely do not do so *as a result of* a genuine HWR analysis.

It might be proposed, third, that the law itself could solve the description problem that plagues a general HWR inquiry. And surely it could. For if courts and legislatures were to determinatively specify the types of harms that, as a matter of law, it is negligent to risk, then we could meaningfully ask of any harm materializing from a defendant's conduct whether it constitutes

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118 Seavey, *supra* note 5, at 387.

a token of the type of harm described by the legislature. If the legislature declared it negligent, as a matter of law, to risk "dog bites" (but remained otherwise silent concerning all other types of harm potentially caused by unrestrained dogs), then we could ask whether the harm that resulted from the failure of the defendant to restrain his dog constitutes a token of this type of harm.

Those who would supplement their defense of a HWR analysis with the thesis that the law itself must specify the risks that it is negligent to impose are not without famous company. Both Jeremy Bentham and Oliver Wendell Holmes famously complained about the refusal to "codify," either legislatively or via judicial declaration, the lessons that have been, and will be, learned over time by applying a general negligence standard. As Holmes argued, once standards of reasonable behavior become clear, judges should lay them down "once and for all" as *per se* rules of conduct.<sup>119</sup>

If, now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances.<sup>120</sup>

The trouble with Holmes' vision is that, in J.L. Austin's words, "fact is richer than diction."<sup>121</sup> Any attempt to translate a general reasonableness standard into a list of specific types of harms that one may not risk, as a matter of law, would necessarily yield morally untenable results, for the list of risky behaviors specified would inevitably be grossly over- and under-inclusive. Courts and legislatures simply cannot come close to imagining and crafting rules to cover the myriad ways in which a person may be culpably careless or the myriad circumstances in which it is justified, notwithstanding the risks imposed, for persons to act in ways that may harm others. As Cardozo wrote in response to one of the famous *per se* rules that Holmes himself crafted,

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119 *Baltimore & O.R.R. v. Goodman*, 275 U.S. 66, 70 (1927).

120 Oliver Wendell Holmes, *The Common Law* 111 (Boston: Little, Brown & Co. 1881).

121 John L. Austin, *A Plea for Excuses*, 56 *Proc. Aristotelian Soc'y* 1 (1956).

which required all automobile drivers to "stop, look, and listen" for trains when approaching railroad crossings:

To get out of a vehicle ... is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him.<sup>122</sup>

For all its vagueness, we do better with a general rule that simply prohibits negligence than we would with thousands of rules prohibiting particular acts or the creation of particular risks. For the costs of more specific rules regulating acts or describing unacceptable risks are too great: we would hold liable defendants who were, in fact, justified in acting as they did or who were, in fact, imposing risks that were significantly outweighed by the benefits of their activities; and we would be forced to exonerate defendants who, in novel ways, culpably failed to give due weight to the harms that they would cause others.

If it is too expensive to purchase the determinate descriptions of the risks required by the HWR test through legislation or judicially crafted *per se* rules, then it appears that those who advocate HWR inquiries are without a means of answering the description problem, which otherwise renders their inquiries vacuous. Absent a source of determinate answers concerning how the risks generated by a defendant's conduct ought to be described, the question of whether the harm caused by a defendant is within the risk(s) that make(s) the defendant negligent is an empty one.

Each of the conceptual problems that we have now discussed is individually sufficient to declare any general HWR analysis quite literally incoherent. Indeed, after one fully appreciates each of them, it is extremely hard to continue talking about a HWR test as if it were capturing a meaningful question — even when one wants to do so in order to exhaust the difficulties that separately confront such a test. This difficulty presumably became apparent simply in the transition from the discussion of the first conceptual problem (the all-inclusiveness problem) to the discussion of the second conceptual problem (the description problem); and it would surely confront one if one were to review these problems in reverse. Having demonstrated in the first section that as a conceptual matter, *all* harms must be thought to be within the risks that make a defendant's conduct negligent, it is then hard to get a grip on the question posed by the description problem of how

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122 *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104 (1934).



one could and should describe *a risk* so as to determine whether the harm that the defendant caused is within *the* risk, as required by a HWR test. Conversely, once one appreciates the fact that how one describes the risks generated by a defendant determines whether the harms that occurred are within the risks that make the defendant negligent, it is hard to get a grip on how one would individuate risks so as to even make meaningful the question that the all-inclusiveness problem addresses — namely, whether there is some subset of risks that alone make a defendant negligent.

One might think, then, that we have said enough to demonstrate the indefensibility of a HWR test as an element within a negligence cause of action. And, indeed, if the above conceptual claims are right, we surely have. But there remains the question of whether there are important normative considerations that have motivated theorists to advocate a HWR analysis — normative considerations that cannot be dismissed even after we discover good grounds to suspect that a HWR test cannot be coherently defended. If so, we must then either continue to seek solutions to the seemingly insoluble conceptual problems that confront a HWR test or else seek alternative means of unpacking negligence concepts in ways that will satisfy these normative considerations.

### III. NORMATIVE PROBLEMS WITH ALL VERSIONS OF HARM WITHIN THE RISK ANALYSES

#### A. Generally

As was mentioned in the historical treatment of the HWR test, early advocates of a HWR analysis defended the test on normative as well as on conceptual grounds. It is now time to address that normative argument. What motivated early proponents of a HWR analysis to limit defendants' obligations of corrective justice to harms that materialize from the big or obvious risks attendant upon defendants' actions?

The answer to this question must be this: Inasmuch as negligence is a doctrine of culpability, the risks that go into its assessment should include only those that it was culpable for a defendant to ignore. While there might be an infinitesimal chance that by sitting in a chair, one will put enough pressure on the floor below to cause it to give way, so as to drop through the floor onto a person standing in the room below, no one should be required to imagine, deliberate about, or guard against such an infinitesimal risk; hence, such a risk should not be added to the calculus that measures a defendant's culpability. Rather, the negligence calculus

should be limited to those risks that reasonable persons, subject to common cognitive constraints and limited research possibilities, would anticipate and deliberate about in the time available to them. Inasmuch as persons typically find themselves in circumstances that permit the contemplation of only a handful of possible harms prior to action — most naturally, the two or three of greatest discounted value — the calculus that determines the justifiability of persons' conduct should be limited to the risks of these harms alone. In short, the calculus should include only those risks that would have been *subjectively* appreciated by reasonable persons at the time of a defendant's action; it should not measure all risks that *ex post facto* are believed to have been attendant upon the defendant's conduct, most of which would only have been subjectively appreciated at the time by God. When a risk materializes from a defendant's conduct in a manner that would surprise a reasonable person, it is flatly unfair to exact compensation for it from the defendant.

This argument on behalf of an HWR analysis is least persuasive in overdetermination and asymmetrical overdetermination cases. Recall that in these sorts of cases, defendants' conduct imposes at least one risk that is, by itself, sufficient to justify a finding of negligence: its discounted cost, by itself, exceeds the burden of precautions required for its elimination. In such cases, defendants patently know or should know that they have no business doing what they are doing. They are on moral notice, if you will, that their conduct is unjustified. When different, less significant risks in fact materialize from their conduct, they can hardly claim that it is unfair to impose upon them the costs of those harms. On the contrary, the fact that their conduct could also cause other harms beyond those that were obvious and sufficient for finding them negligent is grounds for thinking them all the more blameworthy. Thus, for example, while the fact that an unrestrained dog might bury a neighbor's Ming vase is not something a defendant might spend time contemplating, it can hardly be unfair to hold the defendant liable for the loss of the vase, since the significant possibility that his dog would cause *other* harms (by biting, digging, trampling, etc.) put him on moral notice that his dog should be restrained. As Judge Friendly wrote when deciding *Petition of Kinsman Transit Co.*<sup>123</sup> (arguably an asymmetrical overdetermination case in which a poorly tied ship was knocked loose of its dock by cakes of ice, dislodging another ship downstream and, with that other ship, jamming a drawbridge, in a manner that caused flooding for miles):

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123 *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964).

We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated *should inculcate him further* rather than limit his liability.<sup>124</sup>

A slightly different way of making essentially the same point is to deny that there ever really are asymmetrical overdetermination negligence cases. For notice that in a case like *Kinsman Transit*, the untaken precaution (securing the ship properly) would have prevented both the large ("sufficient") risk and the smaller risk; since the very same conduct was required to eliminate both risks and since the larger risk already outweighed the burden of taking the adequate precaution, *there was no justification (or "burden") whatsoever for taking the smaller risk* — in which event, even a very, very slight risk is sufficient for negligence itself. Really, therefore, supposed asymmetrical overdetermination cases are a kind of overdetermination case where the tiny risk that materializes is sufficient for negligence because the larger risk (that does not materialize) is by itself sufficient for negligence.

The normative argument for limiting the negligence calculus to those risks that would be appreciated by reasonable persons is perhaps more compelling in pure or mixed cases of concurrent risks in which all of the risks that attach to the defendants' actions are individually trivial, but in which all of them together (the pure case), or some subset of them together (the mixed case), are sufficient to make the defendants' conduct negligent. In a case of this sort, advocates of the HWR test might insist that it would be grossly unfair to hold a defendant responsible for the materialization of one of these trivial risks *just because* a multitude of other trivial risks that *did not* materialize might otherwise have done so. Imagine, for example, that all of the risks associated with a defendant's driving are small — but that there are a great many such risks attendant upon this activity: a tire might blow out and cause the defendant to lose control of the vehicle; a seagull might bounce off the car's roof and hit an old lady; a sudden bee sting might cause

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124 *Id.* at 724-25.

the defendant to go into anaphylactic shock and careen off the road; a sonic boom might frighten the defendant into swerving toward oncoming traffic; the defendant, while in no way predisposed to a heart-attack or a stroke, might have one; etc. If the benefits of driving are, ultimately, outweighed by the sum of the discounted harms risked by that activity, then on the earlier analysis, the defendant would properly be held liable for the materialization of any of these risks. But advocates of a HWR analysis are likely to declare such a result positively crazy. Why should the defendant pay for the injuries sustained by an old lady who is hit by a seagull that ricocheted off his car roof *because* while driving, he might have experienced a bee sting, or a heart attack, or a stroke, or a tire blow out, or a distracting sonic boom — all of which are wildly improbable happenings to which no reasonable person would give a thought? Inasmuch as the defendant had no *single* good reason, and even no obvious *set* of reasons, to fear that he would cause any harm at all, given the individually trivial nature of all of the harms associated with his activity, how can he fairly be held liable when a harm of enormously low probability materializes, just because other, equally low-probability harms might have occurred?

While this argument has superficial bite, it is crucial to remember just what it means to say that a defendant's conduct risked harms. It is to say that from the epistemic situation of the defendant, it was possible to predict, with a certain degree of confidence, that the conduct would cause a harm. We have not suggested that risks are anything other than epistemic constructs that help us to compensate for our inability to know whether particular harms resulting from particular conduct have an objective probability of one or zero. We have also not suggested that it is morally appropriate to Monday-morning-quarterback. When applying the negligence calculus, the risks ascribed to a defendant's Saturday conduct must be those that could have been assessed on Saturday, not those only knowable on Monday. Inasmuch as we share with proponents of a HWR analysis the view that the negligence calculus must accurately measure a defendant's culpability for a harm, we certainly subscribe to the conventional view that risks that are only made apparent as a result of, or after, the defendant's conduct do not belong in the calculus.

But once these reminders are issued, it should be clear that there are only two possible things to say in a case in which a defendant creates thousands of small risks, no one of which, and even no subset of which, is sufficient to make him negligent: either the total sum of those risks never exceeds the total sum of the benefits associated with the defendant's activity — in which case the defendant is not negligent for behaving in a way that imposes thousands of risks — or else those risks indeed cumulatively outstrip the

benefits of his conduct — in which case, *because they are knowable to him* (given the meaning of a risk), it is fully appropriate for them to weigh in an assessment of his conduct and fully appropriate for us to hold him liable for the materialization of any one of them.

Those who would persist in arguing otherwise must either themselves be assuming one of two things or must be assuming that we believe one of two things: namely, that there are risks that are not knowable to reasonable persons at the time of a defendant's actions; or that risks that can be appreciated by reasonable persons only after a defendant's actions can properly be included in the calculus that determines the defendant's negligence. But as we have just said, we certainly do not subscribe to either of these claims, nor should others. To believe that there can be risks independent of a reasonable person's ability to know them is to believe that risks possess the ontological status of tables, chairs, and protons. On pain of being committed to a bizarre metaphysics, we eschew such a view in favor of the claim that risks constitute probabilistic calculations about future events derived inductively from past experience. On this view, if a defendant risks a harm, it is knowable that he does so; for what it means to risk a harm is simply to have access to evidence acquired from past experience (one's own and others') from which it is possible to predict a causal connection between one's own act and a future harm.

Similarly, nothing tempts us, and nothing should tempt others, to judge the defendant's decision to act based on evidence that only became available after the defendant's action. Culpability is a function of a defendant's epistemic state at the time of action. A defendant is culpable for an unjustified harm if he positively intended to cause the harm, knew that it would happen, was consciously aware of a risk that it would happen, or should have been consciously aware of a risk that it would happen. On the "ought implies can" principle, inasmuch as no one can know the future, no one should be held responsible for failing to do so. Hence, as a moral matter, to say that a defendant risked a harm, one must mean, and we always have meant, that evidence was available to the defendant at the time of action from which he could have inferred that he would cause a harm.

In the end, then, there can be no normative objection to holding a defendant liable for all risks apparent at the time of action that materialize in harm and that were individually sufficient, individually necessary, or members of sets that were sufficient to justify a finding of negligence on the part of the defendant. *Ex hypothesi*, all such risks were knowable to the defendant, and *ex hypothesi*, all such risks could be summed by the defendant so as to determine their collective justifiability, relative to the anticipated benefits of acting. That people often do not consciously calculate the myriad risks

created by their conduct is no argument that they should not or could not calculate such risks.

Indeed, it is precisely because people appreciate that they could and should calculate many more risks than they generally do that they adopt heuristics or proxies in concurrent and mixed concurrent risk cases. For example, when one is driving on the freeway during rush-hour traffic and one's cellular telephone rings, one only needs to conjure up an image of rear-ending the car in front of one's own in order to generate an effective proxy for all of the risks that one knows are attendant upon the act of answering the phone while driving. While the risk of a rear-end collision is probably insufficient by itself, and even in tandem with other such risks, to make answering the cell-phone negligent, one appreciates the fact that rear-ending someone is but one example of the many sorts of risks one could avert, and as such, its prospect puts one on moral notice of the riskiness of driving one-handed while trying to concentrate on sustaining an unbroken conversation with another person. That we use such proxies regularly as a means of overcoming the difficulty of assessing risks in concurrent and mixed concurrent risk cases suggests not that such risks are irrelevant to the justifiability of our actions, but, rather, that they are constitutive of it. By arguing that only some risks — i.e., the most easily knowable — enter into the negligence calculus, proponents of an HWR analysis are likely confusing obvious proxies for the lengthy list of risks to which they are proxies. In the end, however, inasmuch as all risks are knowable and inasmuch as many risks serve as useful proxies for others, defendants cannot complain of unfairness when they are held liable for harms that are not among the risks to which a reasonable person would consciously avert; and adjudicators should not be misled into thinking that it is unfair to hold defendants liable for anything other than harms that materialize from the most obvious risks associated with their activities.

## B. The Alleged Analogy to Transferred Intent

There is a particular normative argument made on behalf of a HWR test that merits separate treatment. This is an argument by analogy to the doctrine of transferred intent in torts and in criminal law. As made by *opponents* of a HWR analysis,<sup>125</sup> the argument is that we do "transfer intent" — in the sense that we hold a defendant liable for intending a type of harm *H* to a person *x* even though that defendant intended a type of harm *J* to person *y* — so

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125 See Keeton et al., *supra* note 15, at 284.

that equality demands that we similarly transfer negligence. As made by *proponents* of a HWR analysis,<sup>126</sup> the argument is that we by and large do *not* transfer intent, so equality demands that we likewise should not transfer negligence, i.e., that we should adopt a HWR test of negligence. Obviously, the first question to be settled here is just what is the doctrine of transferred intent; then we will assess how compelling is the analogy to it by the critics and proponents of a HWR analysis.

Transferred intent began as a criminal law doctrine.<sup>127</sup> Very generally speaking, the doctrine is that intent is to be transferred across persons, but not across harms. Let us consider persons first. If *x* intended to hit *y*, but hit *z* instead, *x* is guilty of criminal battery; his intent to hit *y* is treated as an intent to hit *z*, so his battery of *z* is deemed intentional and not merely negligent. With regard to harms, suppose again that *x* intended to hit *y* with a rock; instead, *x* missed *y*, but hit and broke *z*'s shop window. In such a case, *x*'s intent to hit *y* is not transferred to *z*'s window, because the crime of malicious destruction of property involves a different harm than does the crime of assault intended by *x*.<sup>128</sup> Each crime must "rest on its own bottom" (in the metaphor of the courts), in the sense that the *mens rea* sufficient for one crime (that the defendant did not do) will not be treated as *mens rea* sufficient for the crime the defendant did do.

The latter branch of the doctrine is limited in criminal law by two other doctrines. One is the doctrine of felony-murder. Under this doctrine an intent to do one criminal act, such as theft, is treated as an intent to do another, murder, so long as a killing takes place during the theft.<sup>129</sup> The second is the legal wrong doctrine, according to which types of harm will be substituted so long as the substitution is merely between harms that mark different grades of the same offense.<sup>130</sup> Thus, if *x* intends to break and enter a building that he believes to be unoccupied, but in fact he breaks into a dwelling house, *x* will be held for first-degree burglary and not some lesser degree of burglary, because his intent to break into an unoccupied building

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126 Glanville Williams treats transferred intent as a doctrine so limited that one could admit an analogous doctrine of transferred negligence that "would operate as a strictly limited exception to the risk principle ... used only in a comparatively narrow class of cases to prevent the risk theory giving results some might regard as absurd." Williams, *supra* note 4, at 187.

127 *Regina v. Salisbury*, 75 Eng. Rep. 158 (1553); *Queen v. Saunders & Archer*, 75 Eng. Rep. 706 (1576).

128 *Regina v. Pembliton*, 12 Cox Crim. Cas. 607 (Ct. Crim. App. 1874).

129 See generally Joshua Dressler, *Understanding Criminal Law* (2d ed. 1995).

130 See, e.g., *Regina v. Prince*, 2 C.C.R. 154 (1875) (Judge Brett).

(second- or third-degree burglary, typically) is treated as an intent to break into a dwelling house (first-degree burglary).<sup>131</sup>

Transferred intent was extended to torts when the writ of trespass still was used to invoke the intentional torts<sup>132</sup> (whereas the writ of trespass on the case was later used to invoke the tort of negligence). Transferred intent in torts is still influenced by this history in that the doctrine is limited to those intentional torts bringable under the old writ of trespass.<sup>133</sup> These included assault, battery, trespass, trespass to chattels, conversion, false imprisonment, but not newer intentional torts such as the intentional infliction of emotional distress.<sup>134</sup>

The classic application of transferred intent in torts is the same as in criminal law; it transfers across persons but not across harms. If *x* intends to hit *y* by throwing a glass ashtray but hits *z* instead, the intent is "transferred" so that *x* is guilty of the intentional tort of battery to *z*. On the other hand, intent does not usually transfer between types of harm. If *x* intends to hit *y* but instead destroys *z*'s property, one does not transfer *x*'s intention to make him guilty of the intentional tort of conversion.<sup>135</sup> As in criminal law, tort law has some exceptions to this latter doctrine: for example, between the closely related torts of assault and battery, we do transfer intentions between the different types of harm (contact versus apprehension of contact).<sup>136</sup> If *x* intends to scare *y*, but hits her, he is guilty of battery; if *x* intends to hit *y*, but in missing *y* scares her, *x* is guilty of assault.

Notice that within types of harm, there is sometimes no need for a doctrine of transferred intent in either criminal law or torts. For example, suppose that defendant intends to put out *an eye* of *v*'s with a blow to *v*'s head. If the blow was headed for *v*'s left eye, but *v* moved her head at the last moment so that it was her right eye that was damaged, defendant will be held liable for intentionally disfiguring *v* (mayhem), but this will not be because of any

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131 The American Law Institute's Model Penal Code § 2.04(2) (Proposed Official Draft 1962), modifies the common law legal wrong doctrine by convicting the mistaken defendant of the less serious grade of crime he thought he was doing rather than on the more serious grade of crime he was in fact doing.

132 Prosser's thesis. William L. Prosser, *Transferred Intent*, 45 Tex. L. Rev. 650 (1967).

133 *Id.*

134 *Id.*

135 In the property-protecting torts of trespass, trespass to chattels, and conversion, the non-transfer of intention is easily missed because the question of whose property it is is held not to be material for purposes of these intentional torts. Thus, I am liable if I intend to enter land I believe belongs to you but in fact belongs to Jones; such liability does not depend on any transfer of intention.

136 *See, e.g.*, Restatement (Second) of the Law of Torts §§ 16, 20 (1965).



"transfer" of intention. Defendant intended to put out some eye, the putting out of *v*'s right eye is an instance of this type of harm, so that no transfer of intent is needed to match the harm caused to the type of harm intended.

The same is true within classes of persons in the comparatively rare cases where defendant intends to harm "someone," not in the sense of some particular person, but in the sense of anyone. In what English criminal lawyers called the "implied malice" cases, defendant shoots into a crowd or bombs a building full of people; in doing so, defendant intends to kill someone, but not anyone in particular. If defendant succeeds in killing someone, *v*, then the harm he has caused is an instance of the harm he intended. Defendant is thus appropriately held for intentionally killing someone, and this result obtains with no need to "transfer" any intentions.<sup>137</sup> The cause of this mistake is to confuse two different questions. One is the question of match or "concurrence" on which we have been focusing: Is the harm caused an instance of the type of harm intended? Different is the question asked by those making this mistake: Was the intent of the defendant (say, to hit *y*) an instance of the type of intention (to hit someone) the law requires for conviction of intentional battery? In the classic transferred intent cases, the answer to the second question is plainly yes, for defendant's intention to hit *y* is an instance of the type of intention required; yet the answer to the first question is plainly no, for the hitting of *z* is not an instance of the type of act intended, a hitting of *y*. The doctrine of transferred intent thus cannot be dispensed with if there is to be liability for intentional wrongdoing in the classic transferred intent cases.<sup>138</sup>

In light of the complexities in the doctrines of transferred intent in both criminal law and torts, it is easy to see why legal scholars have drawn analogies both ways with respect to negligence. On the one hand, opponents of a HWR analysis can certainly argue that *prima facie*, the *Palsgraf* holding is inconsistent with transferred intent — for if we transfer intentions across persons, as we do, then why not similarly transfer negligence across persons? On the other hand, proponents of a HWR an analysis can certainly argue

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<sup>137</sup> It is common to think that one can dispense altogether with the doctrine of transferred intent on this basis and yet still hold defendants liable for intentional wrongdoing in the classic "transferred intent" cases. See, e.g., Joshua Dressler, *Understanding Criminal Law* 109 (2d ed. 1995). Yet when *x* intends to hit *y*, but hits *z* instead, what *x* has done in fact does not match what he intended to do. The hit on *z* is not an instance of the type of wrong intended, a hitting of *y*, whereas in the cases supposed in the text, the harm done is literally an instance of the type of harm intended.

<sup>138</sup> See generally Moore, *supra* note 6, at 268-69.

that, *prima facie*, the *Palsgraf dicta* is consistent with transferred intent — for if we do not transfer intentions across types of harms, as by and large we do not, neither should we transfer negligence from harms risked to harms caused.

In fact, the analogy is unpersuasive in both directions. This is partly because the transferred intent doctrine is fractured in an irrational way: Why should there be transfers across persons when there are such limited transfers across types of harms? This makes as little sense as the Restatement (Second) of Torts' fracturing of *Palsgraf*,<sup>139</sup> so as to allow negligence to be transferred across types of harms but not across persons. Both of these doctrines ought to go one way or the other rather than residing in these untenable halfway houses.

Moreover, the direction to go from the halfway house of current transferred intent doctrine is towards abolition of transferred intent, not towards expansion. Transferred intent may well have made good sense when the doctrine originated in the sixteenth century, for there were then no crimes or torts of negligence. The choice was thus to transfer defendants' intention in the cases put above or to exonerate defendants entirely. Now, however, we distinguish intentional torts and crimes from negligent torts and crimes, attaching more severe sanctions to the former vis-à-vis the latter. Now we can afford to be more discriminating as to when a defendant should be held to the more serious sanctions attached to intentional torts and intentional crimes. Where *x* throws an ashtray at *y* but hits *z*, we should hold *x* liable for his negligence in hitting *z*. We might also hold *x* for both criminal assault (attempted battery) of *y* and tortious assault (causing apprehension of contact) on *y*. We have no reason to get sloppy in our culpability judgments by pretending that *x* is guilty of the one thing he is not guilty of, an intentional battery on *z*.

The best thing to do with the doctrine of transferred intent is thus to get rid of it entirely.<sup>140</sup> However, abolition of transferred intent across persons suffering intended harms does not need to eliminate a kind of transferred intent across harms that has always gone on in both torts and criminal law. Suppose defendant strikes *v* intending specifically to put out *v*'s left eye, but *v* turns

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139 See text in *supra* notes 26-37.

140 In recommending the abolition of the doctrine of transferred intent, we do not, of course, recommend results different from those obtaining in implied malice and like cases discussed earlier in the text. If a defendant intends some disfigurement to some person (but he does not care what kind of disfigurement or which person), then when he causes the loss of Jones' right eye, he is guilty of intentional disfigurement (mayhem). Such results, as we noted earlier, in no way depend on some doctrine of "transferred intent."

her head and the blow puts out *v*'s right eye. Defendant's intent is clearly an instance of the type of intention the law requires for conviction of mayhem, for the intent to put out *v*'s left eye is of the type — an intent to disfigure a human being.<sup>141</sup> Yet the harm defendant caused — putting out *v*'s right eye — is not literally an instance of the type of harm defendant intended — a putting out of *v*'s left eye. In such a case, we nonetheless would hold defendant liable for mayhem, as does present law. This, in effect, is a limited transfer of intention, one that operates *within* the type of harm the law prohibits (disfigurement in mayhem, for example). The defendant in the case imagined is close enough to success in achieving what he set out to do that he should be held liable for an intentional crime and not merely some lesser crime of recklessness or negligence. Lest this seems to leave open the door for the proponent of a HWR analysis, let us be explicit about why this is not so.

Negligence now occupies the lowest rung on the ladder by which we grade culpability. If there were any cases in which the harm that was caused by a defendant's action lies outside the risk that makes that action negligent — a point that our conceptual arguments above deny — then such cases would present us with the "transfer-culpability-or-exonerate entirely" choice that was faced by the originators of the transferred intent doctrines in the sixteenth century. In the situation imagined, our choice would be the same as theirs: a culpable defendant who causes harm to an innocent victim should both pay for doing so and be punished, rather than be exonerated entirely, which is the only other alternative. The normative argument made above as to why negligent riskers should pay for harms caused that were not among the obvious risks created by the action have no application to higher forms of culpability, where the whole idea is to be more discriminating in our culpability assessments.

### C. Reduction to Absurdity?

One way to argue against a position is to demonstrate that it proves too much. Proponents of a HWR analysis of negligence may insist that the conceptual and normative arguments that we have directed against their project ultimately generate *reductio ad absurdum*s that prove we have proved too much. In particular, it may seem that these same arguments are of equal force against two legal tests that are similar to general HWR tests: (1) the requirement that harm caused be an instance of the type of harm

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141 See *supra* note 137.

intended, foreseen, or knowingly risked for that harm to be intentionally, knowingly, or recklessly caused; and (2) the requirement that a harm be an instance of the type of harm that motivated the legislature to pass a criminal statute before that statute may set the standard of care in torts. The thought is that if our arguments condemn these very well-established doctrines in the same breath as they condemn HWR tests, then there must be something wrong with our arguments. We examine each of these challenges in the subsections that follow.

### *1. Intent, Foresight, and Recklessness*

As we stated in the Introduction, it is well established in the law of torts and crimes that we must match harms caused to harms intended, foreseen, or consciously risked before we can hold the defendant to the culpabilities of intent, knowledge, or recklessness. Moreover, as a matter of morality, such matchings seem essential if we are to grade culpabilities by the mental states of intent and belief. Thus, it would be troublesome indeed if our arguments were to challenge these matching tests.

Fortunately they do not. For in these cases of more serious culpability, there is a canonical description of some type of harm intended, foreseen, or consciously risked. This is the description that the actor had in his head at the time that he acted.<sup>142</sup> If the defendant intended to start a *fire*, or predicted that his act would cause a *fire*, or knew that his act might start a *fire*, then fire is the type of harm an instance of which the defendant must cause in order to be an intentional, knowing, or reckless arsonist. There thus seems to be no description problem for these true mental states, for unlike negligence (which is not a state of mind), the type of harm is fixed by the defendant's state of mind.

It is true that there are approaches to cognitive psychology and the philosophy of mind that would deny that the objects of intentions or beliefs are canonical descriptions of certain types of events. These are holistic, pragmatic, or hermeneutic approaches to the question of the content of propositional attitudes like intentions or beliefs.<sup>143</sup> These are

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142 The relevant description does *not* come from the law, such as a criminal statute prohibiting an act if done with a certain intention. As we set forth earlier, *supra* note 137, the matching or concurrence question is to be distinguished from the question of whether the intention of a particular defendant is an instance of the type of intention prohibited by some statute. To answer this latter question of classification, one would use the statutory description. To answer the matching question, however, one uses the type of action defendant intended to see if the act done is an instance of this type or not.

143 On belief-holism, see Donald Davidson, *Actions and Events* (1980). On pragmatic

not approaches to which we subscribe. On our view, intentions and beliefs are aptly named by Russell's label — "propositional attitudes" — because they are attitudes necessarily representing the world under certain descriptions. Such fixed descriptions of the objects of intentions and beliefs means there is no "description of the risk" problem as there is for negligence.

Given that there is a type of harm intended, foreseen, or consciously risked, there also does not seem to be an "all-inclusiveness problem." That is, one cannot reduce intent, foresight, and recklessness to absurdity by showing that all harms caused were necessarily intended, foreseen, or consciously risked, as we did for negligence. This is because legal fact-finders privilege the type of harm intended, foreseen, or consciously risked and ask whether the harm caused is or is not an instance of this type of harm only.

It is not that other risks of other harms do not enter into the culpability judgments of intent, foresight, and recklessness. Such other risks are part of these culpability judgments because of their relevance to the justification considerations that are built into these culpability judgments. That is, to judge whether an actor has recklessly caused a harm, it is not enough to find that he was consciously aware of the risk of some type of harm occurring of which this harm is an instance; in addition, the risk must be unjustified in the sense of the expanded Hand formula — all the benefits of taking this risk need to be factored in, balanced against the detriments of taking this risk (which includes all other harms risked in addition to the one that was caused).<sup>144</sup> Similarly, to hold an actor for intentionally or knowingly causing a certain harm, it is not enough to find that he intended or foresaw some type of harm of which the harm caused was an instance; in addition, one must find the causing of such a harm to be unjustified in the sense of the expanded Hand formula: all the benefits likely to be brought about by causing this harm need to be factored in, balanced against *all* the detriments risked by the action (not just the detriment that is this harm).<sup>145</sup>

Thus the question of a defendant's justification imports holistic risk

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attribution of beliefs and intentions, see Daniel Dennett, *The Intentional Stance* 117-212 (1987) (Chapter 5: Beyond Belief). On hermeneutic approaches, see Michael S. Moore, *The Interpretive Turn: A Turn for the Worse?*, 41 *Stan. L. Rev.* 871 (1989). Compare each of these skeptical views to Jerry Fodor, *The Language of Thought* (1975); Jerry Fodor, *Psychosemantics* (1987).

144 See, e.g., Model Penal Code § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk ..." (emphasis added)).

145 We ignore the fact that in both torts and criminal law, lack of justification is separated out from intent and knowledge, so that general justification (or "necessity") becomes a defense and not part of the *mens rea*.

questions into the culpability determinations for intentional, knowing, and reckless wrongdoing, just as for negligence. Still, there is no problem analogous to the all-inclusiveness problem for negligence. This, for the obvious reasons that *a* type of harm is risked, foreseen, or intended, even though other types of harm also are risked and even though these other risks must also be considered. There are thus many cases where a harm that is caused is outside the risk(s) of which the actor was aware or outside the type(s) of harm that he foresaw or intended, even though such harms are within *some* risk that entered into the calculation of whether his action was unjustified.

There are thus no conceptual obstacles to doing the matching between mental states and harms required for the more serious culpability determinations that are at all analogous to the conceptual problems we raised for negligence. Nor are there analogous normative problems. As we alluded to when discussing transferred intent, negligence is the lowest rung on the culpability ladder. We do not try to distinguish negligence from some other state of even lesser culpability. Thus, a defendant who causes a harm outside the risk(s) that make(s) him negligent must be either exonerated or held liable. As argued earlier, we would opt for liability. But that is not the choice in cases that involve intention, foresight, or recklessness. For these higher forms of culpability, the whole idea is to match the harm caused to the type of harm intended, foreseen, or risked so that one can distinguish the intentional wrongdoer from the merely reckless wrongdoer and both from the merely negligent wrongdoer.

## 2. *Negligence Per Se*

The second *reductio* with which we must deal in defending our non-relational view of negligence is this: if one rejects the view, as we do, that negligence is relational by relations of risk — if one denies, as we do, that negligence is properly applied by a HWR analysis — then one cannot make sense of tort law's traditional negligence *per se* doctrine. For the two-pronged doctrinal test of negligence *per se* is a special sort of HWR test; so if HWR tests are both conceptually and morally indefensible, then the doctrine of negligence *per se* must be both conceptually and morally indefensible as well. Since this is absurd, goes the argument, the non-relational theory of negligence that yields such a conclusion must be false.

In tort law, a defendant is deemed negligent *per se* when his conduct violates a criminal statute and both (1) harms a person sought to be protected by that statute and (2) does so in a manner sought to be prevented by that

statute. Consider, for example, the textbook case of *Martin v. Herzog*,<sup>146</sup> in which the plaintiff's husband, who was killed when his buggy was struck by the defendant's car, was deemed to be contributorily negligent *per se* in driving the buggy at night without lights, in violation of a statute. Cardozo held that inasmuch as the statute that required buggies to have lights was "intended for the protection of travelers on the highway" (a class of persons within which both the defendant and the decedent were members) and inasmuch as the collision that occurred and the harm that ensued from that collision were instances of the types of harms intended to be prevented by the statute, the plaintiff's omission constituted "negligence in itself."<sup>147</sup>

In describing the plaintiff's omission in this way, Cardozo is often thought to have articulated the majority rule concerning the legal relevance of a statutory violation that satisfies the two-pronged test articulated above. On this dominant view, such a statutory violation is *conclusive* evidence of a defendant's negligence (or a plaintiff's contributory negligence). To establish the violation is to exhaust the inquiry into the reasonableness of the defendant's conduct. As Cardozo maintained,

By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform."<sup>148</sup>

The rule that statutory violations constitute, by themselves, conclusive evidence of negligence can usefully be juxtaposed to four other, progressively less stringent, rules concerning the possible relevance of a statutory violation to the question of a defendant's negligence.

The first alternative rule would be that a statutory violation constitutes *practically conclusive* evidence of negligence — evidence sufficient to obtain a summary judgment or a directed verdict for the plaintiff unless rebutted by the defendant. The second alternative rule would be that a statutory violation constitutes *prima facie* evidence of negligence — evidence sufficient to withstand a motion for summary judgment, or a motion for a directed verdict, by the defendant. On an alternative interpretation of *Martin v. Herzog*, Cardozo was articulating this second rule, for after describing the plaintiff's conduct as "negligence in itself," he went on to state that "[t]he jury should have been

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146 126 N.E. 814 (N.Y. 1920).

147 *Id.* at 815.

148 *Id.*

told that the omission of the lights was *prima facie* evidence of contributory negligence, i.e., that it was sufficient in itself unless its probative force was overcome."<sup>149</sup> Inasmuch as he maintained that the plaintiff's "omission of these lights was a wrong, and being wholly unexcused was also a negligent wrong,"<sup>150</sup> Cardozo seemingly contemplated the possibility that a party might be able to defend against a charge of negligence by advancing some excuse for his statutory violation — in which case, his violation would not constitute *conclusive* evidence of negligence.

The third alternative rule governing the relevance of statutory violations to negligence determinations constitutes the clear minority rule in American jurisdictions — the rule that such violations are simply *some* evidence of negligence. This was the view adopted by the trial court in *Martin v. Herzog*, which instructed members of the jury that they could "consider the default as lightly or gravely" as they chose.<sup>151</sup> Under this rule, the fact that the defendant violated the criminal law is probative of the question of whether he breached his duty of reasonableness in tort law, but it does not exhaust the question, nor does it even provide sufficient evidence of negligence to withstand a defendant's motion for summary judgment. One is hard pressed to describe this as a "negligence *per se*" rule, since it does not take statutory violations to be proxies for findings of negligence under either the Reasonable Person Test or Learned Hand's more exacting calculus of risk. For our purposes, however, we shall proceed by treating any and all rules that require at least some deference to legislative judgments when setting the standard of care in tort law to be negligence *per se* doctrines, recognizing that in most instances, true negligence *per se* is typically thought to be captured only by the first, and maybe the second, view articulated above.

The fourth alternative rule would be that a statutory violation constitutes no evidence of negligence at all. To hold this view, one would have to believe that the unjustified and unexcused commission of a crime can be, and often is, wholly reasonable and that it is thus of no probative value at all in assessing a defendant's negligence. Inasmuch as American courts have consistently eschewed this view in favor of one of the previous four rules, they have demonstrated a faith in legislative judgments concerning the reasonableness of particular forms of conduct — a faith that we shall now examine.

As we articulated at the start, before courts can assign weight to statutory

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149 *Id.* at 816.

150 *Id.* at 815.

151 *Id.*



violations, be it some weight or conclusive weight, they are bound to find first that the harm caused by the defendant's statutory violation is within the class of harms sought to be prevented by the legislature and that the person who was so harmed is within the class of persons sought to be protected by the legislature. Each of these doctrinal requirements patently demand an analysis that bears a disturbing similarity to a HWR test. A court must satisfy itself that the harm caused by the defendant is within the risk that made the legislature criminally prohibit the defendant's conduct to begin with; and it must establish that the plaintiff is within the class of persons to whom the legislature found a duty, the breach of which it deemed serious enough to merit criminal penalties. Inasmuch as these doctrinal hurdles demand analyses that are just the strong version of a fully relational HWR analysis, it would seem that they must stand or fall together with the general HWR tests. If a general HWR analysis invites fatal conceptual problems and is otherwise morally unmotivated, then it would seem that the requirements for finding a defendant to be negligent *per se* would suffer similar fatal difficulties.

Can negligence *per se*, in any of its variations, be saved from the difficulties that we have articulated for HWR inquiries? Consider, first, whether the description problem bedevils the doctrine of negligence *per se*. One might plausibly deny that it does, for one might argue that the risk within which the harm caused by the defendant must fall is given a determinate description by the legislation (as is the class of persons sought to be protected). But of course, that description nowhere figures in the legislature's enacted language. In order to determine whom the legislature sought to protect and what harms the legislature sought to prevent by enacting a statute that requires buggies to travel by night with lights, one cannot merely read the statute — for its language simply requires the use of lights at night, on pain of criminal penalty. One must, instead, look to the legislature's intent, as reflected, presumably most reliably, in legislative history. If one can extract from that history an unconflicted intent to prevent one or more discrete types of harm to a determinate class of persons, then one can presumably solve the description problem. If, for example, expressions of legislative intent reveal that by requiring lights on buggies at night, the legislature sought only to prevent "highway collisions" (but not "espionage by foreign spies" or "an overpopulation of flying insects"), then among the many true descriptions of the harm caused by the defendant must be a description of it as "a highway collision." If it cannot be so described, then it cannot be thought to be within the harm sought to be prevented by the legislature — a harm not susceptible to re-description without offending determinately fixed intentions on the part of the legislature.

If the description problem can be solved, then one might think that so too can the all-inclusiveness problem. For once one can identify a determinate class of harms sought to be prevented by the legislature and a determinate set of persons sought to be protected by the legislature, not all harms to all persons will be among those targeted by the statute. The two-pronged test of when a statutory violation makes a defendant negligent *per se* thus would have real bite. It would clearly sort, in a non-arbitrary, non-question-begging fashion, those whose allegedly tortious behavior is, in fact, also criminal from those whose allegedly tortious behavior is not. If we have sound reasons to think that criminal conduct is very often (and perhaps always) tortious conduct when the two-pronged test is satisfied, it would appear that we can continue to infer the one from the other without fear that the problems that beset a general HWR analysis make such an inference arbitrary.

There are, however, two very significant reasons why we cannot, as yet, declare negligence *per se* doctrines to be free of the conceptual challenges that confront HWR analyses generally. The first is that by appealing to legislative intent in order to solve the description problem, one assumes the burden of having to solve the conceptual and moral problems that beset any attempt to determine and give weight to a legislature's authorial intentions. The second is that once one appreciates the true demands of the concept of negligence, as they were spelled out in Part II above, it is not clear how the doctrine of negligence *per se*, in any but its weakest of forms, can be morally motivated. In the remainder of this section, let us take each of these issues up in turn.

The situation proposed above for the description and all-inclusiveness problems depends on treating the intention of the legislature like the intention of one, unitary, real person. Then one can solve these problems in this context as we solved them in the context of the culpability assessments of defendants accused of intended, knowing, or reckless crimes or torts. The obvious problem for this solution is that legislatures are not like real people in that they do not literally have intentions or predictive beliefs about the consequences of the criminal legislation they pass. Individual legislators may have such intentions or beliefs, but the trick is to construct a model of a legislature's intentions from the intentions of its individual legislators.

We have separately discussed elsewhere the myriad difficulties that attend any attempt to construct a model of a legislature's intentions,<sup>152</sup> and those difficulties will surely confront anyone who seeks to extract from legislative

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152 See Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277 (1985); Michael S. Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151 (1981) [hereinafter Moore, *Semantics*]; Heidi M. Hurd, *Moral Combat*

history a determinate description of the harms sought to be prevented and the persons sought to be protected by a criminal prohibition. First, each legislator may fail to settle on any single description of the persons he or she individually seeks to protect and the harms he or she individually seeks to prevent when voting on proposed legislation. In such a case, it may be equally true to say of each legislator that he or she intends to "prevent harm to people," to prevent "vehicular collisions," and to prevent "the Amish from becoming victims of advanced technology." Inasmuch as we are returned to the description problem as soon as the intentions of individual legislators can be equally truly described in a variety of ways — from the very general to the very particular — an appeal to legislative intent will clearly not guarantee the conceptual integrity of a negligence *per se* analysis.

Second, even if we were to suppose, for purposes of further discussion, that in at least some cases some legislators in fact individually settle upon fixed descriptions of the persons with whose protection they are concerned and the harms from which they seek to protect such persons, there will remain well-worn difficulties with extracting a single "legislative intention" from the many individual intentions possessed by legislators. These difficulties are several in number. First, whose intentions should count? Are only the intentions of those who voted *for* the statute to be counted? Or should the intentions of those who voted against the enactment be counted as a means of determining the possible limits of the intent with which the statute was passed? What should be done in the face of multiple intentions, none of which commands a majority? And what of those legislators who had no intention one way or another concerning the enactment of a statute?<sup>153</sup> Second, notice that only when the objects of legislator's intentions contradict one another can it make sense to speak of a majority intention, gained by tallying individual intentions. Much more often one will have intentions whose objects are not contradictory propositions, so that the whole idea of counting intentions to make a majority makes no sense.<sup>154</sup> Where one legislator's intent in enacting a criminal statute is different from, but may be thought to be encompassed by, another legislator's intent, should it be counted as identical to the more general intent, or does it function to identify a category of intentions of its own?

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140-46 (1999); Heidi M. Hurd, *Sovereignty in Silence*, 99 Yale L.J. 945, 968-76 (1990).

153 For further discussion of these sorts of counting problems, see Ronald Dworkin, *A Matter of Principle* 38-55 (1985); Joseph Raz, *Dworkin: A New Link in the Chain*, 74 Cal. L. Rev. 1103, 1113 (1986) (book review).

154 See Moore, *Semantics*, *supra* note 150, at 267.

In addition to the description and combination problems, those who would seek legislative intentions must cope also with problems that stem from the nature of the mental states accompanying legislators' intentions. Suppose some legislator,  $L_1$ , believes that "vehicular lights" as used in ordinary discourse has in its extension, candles. Assume further that candles are not within the extension of "vehicular lights," as ordinarily used. Contrast  $L_1$  with  $L_2$ .  $L_2$  does not know whether candles are usually classified as vehicular lights, but since he believes that the Amish to whom this statute will apply would likely construe vehicular lights to mean candles, he *intends* that they be so classified in this statute. Should one allow mistaken beliefs about what words ordinarily mean to be sufficient ( $L_1$ ), or should one require, in addition, that the legislator intend that any mistakes he makes of this sort be corrected to conform what he said to what he should have said ( $L_2$ )?

In the face of these seemingly insurmountable difficulties, it must be admitted that in many, and probably in most, circumstances, it is quite impossible to detect whether legislators shared a single, identical description of the harms and persons with which each was concerned when enacting a criminal prohibition. One strongly suspects that when courts and commentators make reference to legislative intentions concerning particular statutory enactments, they are not discovering facts of shared psychology, but, rather, moral facts about the good. That is, they are articulating a purpose (what Aquinas called "the spirit of the law"<sup>155</sup>) that makes the best moral sense of the particular statute within the larger corpus of statutory and common law rules, and they are then asking whether application of the statute to the facts of a given case well serves that good. But, of course, how one describes the purpose of a statute, once one no longer means by "purpose" a fixed intention singularly shared by a legislature, is open to multiple levels of abstraction. And hence, whether a defendant's conduct offends that purpose will be a function of its description and the description of that purpose. A leash law can be equally described as serving the purpose of "preventing harms to others" and "preventing persons from being bitten." If a person's Ming vase is buried by her neighbor's rottweiler, the neighbor's conduct in failing to leash his dog will be negligent *per se* under the first description, and not under the second. Inasmuch as we can expect that courts will craft their descriptions of the purposes of criminal statutes in accordance with their antecedently-formed judgments about whether a defendant should be held to be negligent *per se*, we can expect that their negligence *per se* analyses will be as vacuous as are general HWR analyses.

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155 St. Thomas Aquinas, *Summa Theologica*. pt. II (first part), qu. 96, art. 6.

In addition to these conceptual problems with using legislative intention to solve the same description problem that renders incoherent any general HWR test, there is a second, normative obstacle in the way of such a solution. In order to appreciate this obstacle, consider again the case of *Gorris v. Scott*,<sup>156</sup> in which the plaintiff's sheep were washed overboard in a storm after the defendant shipowner failed to pen them as required by the Contagious Disease (Animals) Act of 1869. As the Court held,

[I]f we could see that it was the object, or among the objects of this Act, that the owners of sheep and cattle coming from a foreign port should be protected by the means described against the danger of their property being washing overboard, or lost by the perils of the sea, the present action would be within the principle.

But looking at the Act, it is perfectly clear that its provisions were all enacted with a totally different view; there was no purpose, direct or indirect, to protect against such damage; but, as is recited in the preamble, the Act is directed against the possibility of sheep or cattle being exposed to disease on their way to this country. ... [T]he damage complained of here is something totally apart from the object of the Act of Parliament, and it is in accordance with all the authorities to say that the action is not maintainable.<sup>157</sup>

Why have courts like this one consistently refused to declare a defendant negligent *per se* when that defendant's criminal violation has brought about a harm outside of the class of harms sought to be prevented by the legislature or when the harm has befallen someone outside the class of persons sought to be protected by the legislature? The answer must be that with regard to such harms and such persons, criminal legislation is poor evidence of negligence. That is, criminal prohibitions are assumed to be a product of extensive legislative fact-finding and deliberation concerning how to prevent efficiently particular harms to particular persons. They thus provide good evidence — perhaps the best evidence possible — of the conclusions generated by Learned Hand's calculus of risk if that calculus is limited to the harms, persons, and precautions contemplated by the legislature. As the *Gorris* court assumed, in enacting the Contagious Disease (Animals) Act, Parliament had clearly researched the probability and gravity of harm resulting from the arrival in England of diseased livestock and had concluded that penning animals during trans-oceanic shipments

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<sup>156</sup> 9 L.R.-Ex. 125 (1874).

<sup>157</sup> *Id.* at 129.

constitutes a cost-efficient means of eliminating that risk. But, as the Court further assumed, that legislative conclusion is no evidence that the risk of drowning is cost-efficiently eliminated by penning animals, because the legislature was not gathering facts and deliberating about the probability and gravity of losing animals to drowning.

Yet once one appreciates that an assessment of a defendant's negligence requires one to consider *all* of the risks attendant on his conduct (as we argued in Part II) and once one accepts that a defendant can fairly be held liable for *any* risk that materializes from negligent conduct (as we argued also in Part II) — even when that risk is not, by itself, sufficient to make the defendant's conduct negligent (as is true in concurrent risk cases), and even when it might not have been strictly necessary to finding the defendant's negligent (as is true in mixed concurrent risk cases) — then one of two conclusions must follow. Either statutory violations are not good heuristics by which to assess the reasonableness of a defendant's conduct, because in crafting them, the legislature did not comply with the full demands of the calculus of negligence by considering *all* of the risks, *all* of the benefits, and *all* of the precautions that might maximize benefits and minimize risks. (If this is the case, then statutory violations should hardly be accorded conclusive, practically conclusive, or even *prima facie* weight.) Or statutory violations are good evidence that the defendant created certain risks that were individually or jointly sufficient to make his conduct negligent (e.g., the risk of contagious disease). On this second alternative, the two limitations on finding a defendant negligent *per se* are themselves confused because, as we argued in Part III, the fact that a defendant realizes a risk different from those that are themselves sufficient to make his conduct negligent is morally irrelevant.

It follows from this analysis that even if negligence *per se* can escape the description problem that threatens to render it as incoherent as the more general HWR analyses to which it is akin, it cannot be preserved intact. Either courts must refuse to treat statutory violations as anything more than *some* evidence that a defendant created sufficient risks to be found negligent — evidence that jurors may weight "as lightly or as gravely" as they see fit — or they must lift the limitations on the negligence *per se* doctrine so as to permit defendants who, by virtue of their criminal violations, are found (with conclusive, or practically conclusive, or *prima facie* certainty) to have created risks individually or jointly sufficient to make their conduct negligent (even when risks other than those in fact materialize from their conduct).

Our thesis thus does not entail that the concept of negligence *per se* be altogether abandoned, but it certainly reveals both that a negligence *per*

*se* analysis very often asks unanswerable questions (in the same way that general HWR analyses ask unanswerable questions) and that even when its questions are answerable, they are not questions that yield morally relevant, or morally consistent, answers. If a defendant's criminal violation, by itself, entails that the defendant has generated a risk to someone sufficient to make him negligent, it matters not that some other risk to some other person materializes. And if a defendant's criminal violation does not, by itself, entail such a conclusion, then it should not be treated as most jurisdictions currently treat it — namely, as conclusive proof that the defendant acted unreasonably.

#### IV. THE DESCRIPTIVE INACCURACY OF A STRONG VERSION OF A HARM WITHIN THE RISK ANALYSIS AS MEASURING PROXIMATE CAUSATION

Assume now, contrary to the previous Parts, that a HWR test is both a conceptually coherent and normatively desirable criterion of liability in torts and criminal law. Assume, that is, that making a HWR inquiry is a proper part of the culpability determination for civil liability and criminal liability. The question remains whether a HWR analysis can supplant entirely the need for any proximate cause requirement. Proponents of a strong version of HWR analysis assert that it can, and it is this assertion that we wish here to examine.

Sometimes the fully relational HWR analysis is said to be compatible with the decisions courts have made on proximate cause grounds, in the sense that a HWR analysis decides those cases the same way as they were decided under proximate cause tests. At other times, a HWR analysis is presented as working a change in the proximate cause decisions. Under the latter scenario, proponents of a HWR analysis are advancing a normative proposition: the law of proximate causation should be changed to conform to a HWR test because such a test is so normatively attractive. In the former scenario, proponents of a HWR analysis are advancing a descriptive proposition: the law that we have is really an expression of a HWR test, although the courts and some commentators have mistakenly thought that the grounds for their decisions lie elsewhere. We shall thus want to probe the strong version of a HWR analysis both for its descriptive accuracy with respect to proximate cause decisions and for its normative superiority over proximate cause rationales for those decisions.

There are three sorts of proximate cause cases and doctrines that are *prima facie* incompatible with a HWR analysis. These are the intervening

cause cases, the take-your-victim-as-you-find-her cases, and the remoteness cases. We shall consider each in turn.

### A. Harm within the Risk and Intervening Causation

As one of us has explored in detail,<sup>158</sup> standard intervening cause doctrines in American tort law and criminal law hold that the intervention of a subsequent, independent event, when that event is either a preemptive cause, an extraordinary ("abnormal") event, or a third party's action intentionally exploiting the situation created by the defendant, "breaks the causal chain" between a defendant's act and his victim's harm. Thus, if a defendant poisons *v*'s water when *v* is headed into the desert, but another drains the water in an attempt to kill *v*, the second party's preemptive intervention relieves the first defendant of causal responsibility for *v*'s death in the desert.<sup>159</sup> If a defendant's negligence causes a fire to ignite, but an unprecedented gale happens along so as to fan the fire and spread it to *v*'s house miles away, the intervention of the extraordinary storm relieves the defendant of causal responsibility for the loss of *v*'s house.<sup>160</sup> If a defendant negligently derails a tanker car and spills its gasoline throughout the streets of a town, but a third party intentionally ignites the gasoline that destroys the town, the arsonist's intervention relieves the defendant of causal responsibility for the town's destruction.<sup>161</sup>

Descriptively, a HWR analysis has a difficult time accommodating these cases. A HWR test, in its pure form, only asks after a logical relation between a type of harm (the one the risk of which made the defendant negligent) and a token of harm (the harm that actually happened). If the token is an instance of the type, then the harm was "within the risk." This logical relation takes no notice of the freakishness of the route by which the defendant's act caused the harm. It makes no difference what the means, instrumentality, or causal route may have been; if death was the type of harm risked by the defendant and a death occurred, the harm was within the risk that made the defendant negligent.

Some proponents of a HWR test embrace this conclusion. Glanville Williams celebrates that with a HWR analysis "we shall be spared ...

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158 Michael Moore, *The Metaphysics of Causal Intervention*, 88 Cal. L. Rev. 827 (2000).

159 James McLaughlin's famous hypothetical, in James McLaughlin, *Proximate Cause*, 39 Harv. L. Rev. 149, 155 n.25 (1925).

160 *Kimble v. Mackintosh Hemphill Co.*, 59 A.2d 68 (1948).

161 *Watson v. Ky. & Ind. Bridge Co.*, 126 S.W. 146 (1910).



'the never-ending and insoluble problems of causation,' together with the subtleties of *novus actus interveniens*.<sup>162</sup> Williams is right about a HWR analysis in its pure form. The question remains whether this fact about HWR is something to be celebrated or regretted. And that depends on what one thinks of the intervening cause cases and their doctrines.

As Herbert Hart and Tony Honore charted in great detail,<sup>163</sup> the intervening cause distinctions are supported by many common intuitions about both causation and responsibility. Williams responds that "no satisfactory reason is suggested for drawing [the distinctions of intervening causation]" and that the intervening cause cases "must often have the most arbitrary results."<sup>164</sup> As a matter of the metaphysics of causation, some of the intervening cause cases are difficult to justify. Particularly puzzling is the intentional intervening wrongdoers doctrine, which makes the question of whether an action is an intervening cause turn on the mental state of the intervener.<sup>165</sup> Other intervening cause doctrines, such as the preemptive cause and extraordinary natural events doctrines, are more easily explained on causal grounds.<sup>166</sup>

Yet justifying the intervening cause doctrines on causal grounds is only one possibility. As the old "last wrongdoer" rule recognized explicitly,<sup>167</sup> one might justify the *novus actus interveniens* doctrine on normative grounds rather than on the metaphysics of causation. This is particularly easy to do in criminal law, where one who culpably sets the stage for the intervention of a third party is not himself guilty of a crime (at least not as a principal and possibly not even as an accomplice). One who persuades, suggests, makes easy, locates the victim, etc., for a rapist is not himself guilty of rape. This is because the ordinary meaning of the word "rape" has built into it a kind of non-proxyable feature,<sup>168</sup> and in criminal law (because of the

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162 Williams, *supra* note 4, at 179.

163 H.L.A. Hart & Tony Honore, *Causation in the Law* (2d ed. 1985).

164 Williams, *supra* note 4, at 181. For Williams' extended disenchantment with intervening cause doctrines, see his review of the first edition of Hart and Honore's book, Glanville Williams, *Causation in the Law*, 1961 Cambridge L.J. 62. But see Glanville Williams, *Finis for Novus Actus?*, 1989 Cambridge L.J. 391, where Williams expresses apparent agreement with intervening cause doctrines so long as they are clothed as moral (not causal) limits on responsibility.

165 See Moore, *supra* note 156, at 839-44, 877.

166 *Id.* at 876.

167 *Id.* at 828.

168 Sandy Kadish's terminology, in Sandy Kadish, *Cause, Complicity, and Blame*, 73 Cal. L. Rev. 323 (1985), reprinted in Sandy Kadish, *Blame and Punishment* 172 (1987). Kadish's thesis is discussed in Moore, *supra* note 80, at 227-28.

great concern for notice), we care very much about the ordinary meaning of statutorily chosen terms.

The more typical response to the intervening cause cases by proponents of a strong HWR analysis is to modify that HWR analysis. One way to do this is to go the route of the first Restatement of Torts, which abandoned a strong version of an HWR test for a weak version. Rather inelegantly, Bohlen's first Restatement let the HWR analysis do the work of proximate causation until an intervening cause problem was encountered; then the prolix rules of intervening causation took over.<sup>169</sup>

The American Law Institute's much later Model Penal Code follows the lead of the first Restatement of Torts in this regard. Section 2.03 qualifies its HWR test by denying liability for a harm within the risk that made an actor negligent if that harm is "too ... accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."<sup>170</sup> This is an open-ended invitation to judges to allow traditional intervening cause doctrines to decide cases without regard to the results of a HWR analysis. Unlike the first Restatement, however, the Code does not spell out what those intervening cause doctrines might be.

A second, seemingly less ad hoc way of modifying a HWR analysis so as to accommodate the intervening cause cases is to exploit the vagaries in the description of the risk, adverted to in Part II. Here, the game is to build into the description of the risk that makes a defendant negligent not only a type of harm, but also a type of means by which such a type of harm comes about. As Warren Seavey baldly stated this strategy, "The fact that the harm is directly caused by an intervening act of a stranger induced by the defendant's negligent conduct prevents the supposition of liability upon the first wrongdoer only if the type of intervention was not within the risk."<sup>171</sup> For example, where a defendant negligently leaves an unprotected bulkhead next to a slippery sidewalk, he is liable to the plaintiff when the plaintiff slips and falls into the bulkhead and when the plaintiff is negligently jostled towards the bulkhead by a crowd of rowdies; but the defendant is not liable when the plaintiff is pushed towards the bulkhead by an old enemy. "The risk was that a traveler might slip or be inadvertently pushed in, and not that he might be thrown in."<sup>172</sup>

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169 Warren Seavey's analysis. Seavey, *supra* note 5, at 390-91.

170 Model Penal Code § 2.03 (Proposed Official Draft 1962). The Code Commentary makes clear that this language is an invitation to courts and juries "to deal with intervening or concurrent causes, natural or human ... ." *Id.* at 133.

171 Seavey, *supra* note 5, at 387.

172 *Id.* at 387-88.

Well ... does anyone really believe this? The slipperiness of a sidewalk next to an unprotected bulkhead risks just the *kind of injury* the victim suffers under any of the three scenarios Seavey imagined. The type of injury risked is identical no matter how the victim is propelled — by her own motion, the inadvertent jostling of rowdies, or the intentional shove of an enemy. What Seavey's unprincipled willingness to alter the risk-description reveals is that he too wished to supplement his HWR analysis with intervening cause doctrines. The only difference between Seavey's arguments and the rule articulated by Bohlen's Restatement is the honesty with which each abandons a strong version of a HWR analysis. What the Restatement did openly, Seavey did with smoke and mirrors.

The honest response of the HWR proponent is the earlier one. One should keep the HWR analysis pure, so that the relevant risks are of types of harms, not including the routes or instrumentalities by which such harms are produced. Such purity does not accommodate the intervening cause cases, but admitting this then allows issue to be joined as to whether those cases are rightly decided.

### **B. Harm within the Risk and the Take-Your-Victim-as-You-Find-Her Maxim**

One of the essential prerequisites for an intervening cause is that it *intervenes* between the defendant's culpable act and the victim's harm.<sup>173</sup> Preexisting conditions, no matter how extraordinary or abnormal, do not occur subsequent to a defendant's act and so are ineligible to serve as breakers of causal chains. There is thus liability in such cases, no matter how extraordinary or unforeseeable may have been the harm. This legal result is encapsulated most famously in the common law maxim that a defendant must "take his victim as he finds her." If the victim is particularly susceptible to injury because she has a proverbially thin skull (hemophilia, a psychiatric condition, religious scruples against transfusions, etc.), the defendant is liable for the full extent of the victim's harm, no matter how unforeseeable.

This maxim, embraced by both tort law and criminal law, is not easy to square with a HWR analysis. Again, there are two basic stances a HWR theorist might take when faced with these cases. The first is to deny that these cases are correctly decided. As Glanville Williams concluded, "It seems obvious that, if the risk principle is not to be seriously undermined,

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173 See Moore, *supra* note 156, at 832-34.

the thin-skull rule must either be denied or carefully restricted."<sup>174</sup> Yet this again frames a difficult normative issue for the HWR theorist. Is not the common law of torts compelling? After all, defendants in these cases have culpably caused (in often the most direct of ways) serious injury to their victims. Such culpability exists even though the kind of injuries caused may have seemed freakishly impossible to defendants who were ignorant of their victim's peculiar susceptibilities. Why should an innocent victim, whose susceptibilities to injury are not her fault, bear such an uncompensated loss when harmed by a culpable harm-causer? Consider, for example, the facts of *Koehler v. Waukesha Milk Co.*,<sup>175</sup> where a defendant milk vendor negligently left a chipped milk bottle on a victim's stoop. The victim cut her hand on the bottle and, because of a rare blood condition, contracted blood poisoning and died. In torts, the defendant is liable not only for the cut but also for the death. And is this not the right result?<sup>176</sup>

If the thin-skulled victim rule is properly retained, the other response of the HWR theorist is to attempt to accommodate thin-skulled victims within the risk analysis. Consider again Warren Seavey on this solution. Seavey illustrates both of the variations of this kind of response that we saw before with respect to intervening causes. He at one point appears to abandon the strong version of a HWR analysis for the weak version. This is where Seavey concedes, with respect to the take-your-victim-as-you-find-her maxim, that

[t]he theory of risk is only partially invoked in determining the extent of liability for an admittedly negligent completed tort. There may be liability for consequences which were not within the risks as they existed immediately before the impact.<sup>177</sup>

Yet this again seems an *ad hoc* concession for a true believer in the power of an HWR analysis.

At another point, Seavey appears to try the other tack. He excludes from the risk that makes one negligent the extent of the harm, including in the harm's description only the type of the harm.<sup>178</sup> Yet this type-of-injury versus extent-of-injury distinction, familiar from Pollock's writings,<sup>179</sup> is seemingly

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<sup>174</sup> Williams, *supra* note 4, at 195.

<sup>175</sup> 208 N.W. 901 (1926).

<sup>176</sup> Admittedly, criminal law differs, for the defendant must have culpable *mens rea* with respect to every material element of homicide, including death, and the defendant seems not even negligent with respect to that element.

<sup>177</sup> Seavey, *supra* note 9, at 91.

<sup>178</sup> Seavey, *supra* note 5, at 385.

<sup>179</sup> Frederick Pollock, *Liability for Consequences*, 38 Law Q. Rev. 165, 167 (1922).

unprincipled. If, as Seavey said, the basic idea behind a HWR analysis is that "the reasons for creating liability should limit it,"<sup>180</sup> *prima facie* liability for death should follow only on a risk of death sufficiently serious that it makes leaving a chipped milk bottle negligent. Yet in cases of abnormally susceptible victims, liability is imposed for serious injuries even though the basis for that liability — an unreasonable risk of serious injury — was not present.

Because the type/extent distinction is unprincipled, it is also hard to draw. Was the victim's death by blood poisoning the same type of injury as the cutting of her finger, only to a greater extent? Or was the death a different type of injury from the cutting?

Again, the honest response of the HWR proponent is to concede that a HWR analysis does not decide the thin-skulled cases consistent with current law, but to dispute the correctness of the thin-skulled victim rule. This, of course, concedes that a HWR analysis does not absorb all of the proximate cause doctrines. It also commits proponents to the uphill normative argument mentioned earlier.

### C. Harm within the Risk and the Remoteness Rules

As is suggested by Sir Francis Bacon's phrase "*causa proxima*," an act is not the proximate cause of some harm if that harm is too remote from that act. Remoteness is not a product of intervening causes; those, as we have discussed, merit separate doctrines. Rather, remoteness is simply a matter of spatio-temporal remove that need not involve the intervention of extraordinary natural events or deliberate third-party actions. These simplest of proximate cause cases are also difficult to square with a HWR analysis. For again, in its pure form, a finding that a harm is within the risk that made a defendant negligent is a logical relation between a type of harm risked and a token of harm caused. Such a logical relation is blind to spatio-temporal location of events, and it is blind to the length of the causal route between events, be it short or long.

Again, the HWR theorist can have one of two responses to these remoteness doctrines of proximate causation. The first is to deny that they are correct. As Seavey wrote, "The fact that there is a long space of time or series of events intervening between the negligent act and the harm does not prevent liability."<sup>181</sup> This seems to be an assertion by Seavey that

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180 Seavey, *supra* note 5, at 386.

181 Seavey, *supra* note 9, at 91-92.

our present law does not contain simple remoteness doctrines. Yet Seavey's much admired Cardozo thought differently: "There is no use in arguing that distance ought not to count, if life and experience tell us that it does."<sup>182</sup>

So proponents of a strong HWR analysis are forced to deny the correctness of remoteness doctrines on normative grounds. They are forced to argue that spatio-temporal remove ought not to make a difference for responsibility. Yet as Cardozo noted, this is not only contrary to the decided cases and the common sense on which the law is built, it is also contrary to a plausible metaphysics of causation. On a plausible theory of causation, causal relations peter out gradually by transmission through events. This is because causation is a scalar relation (a more-or-less affair) and because the degree of causal contribution by some act to some harm becomes less and less as successively larger groups of other events join the act in causing the harm. Spatio-temporal proximity, on this view, is a rough but good proxy for this progressive diminishment in causal contribution.<sup>183</sup>

The second response available to proponents of a strong HWR analysis is to concede the correctness of the remoteness cases, but to modify their HWR analysis to accommodate those cases. There are, again, two varieties of this response, just as there are in intervening cause and thin-skulled victim cases. The first is to abandon the strong version of a HWR test for a weak version. This is the Model Penal Code's tack, for the Code makes an exception for any harm that is "too remote ... to have a [just] bearing on the actor's liability or on the gravity of his offence," even if that harm is fully within the risk that makes the actor negligent.<sup>184</sup> This is yet another *ad hoc* concession that any true believer in a HWR analysis should be loath to make.

Alternatively, the HWR theorist might further gerrymander her description of the risks that make the actor negligent so as to include not just types of harms but also the causal routes by which those harms occur. Thus a death brought about by a remote act of a defendant would not be within the risk that makes defendant negligent, because that risk was only of a death brought about by a *short* causal route. The arbitrariness of this tack should by now be apparent.

The upshot is that a HWR analysis cannot fully replace proximate causation doctrines. An ungerrymandered HWR test decides the intervening

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182 Bird v. St. Paul F. & Minn. Ins. Co., 120 N.E. 86 (1918).

183 Michael S. Moore, *Causation and Responsibility*, 16 Soc. Phil. & Pol'y 1, 15-17 (1999); Moore, *supra* note 156, at 874-75.

184 Model Penal Code § 2.03.

cause cases, thin-skulled cases, and remoteness cases both differently than do existing proximate cause doctrines and wrongly. A gerrymandered HWR test arrives at the results of the proximate cause tests only because it in fact employs, rather than replaces, those tests.

### CONCLUSION

It is time to abandon the harm-within-the-risk analysis, root and branch. Introduced over a century ago as the enlightened alternative to the hoary doctrines of proximate causation, it turns out on careful inspection to be no real alternative at all. The analysis is conceptually incoherent, normatively undesirable, and it gives an inaccurate description of the decided cases. Each of these is reason enough to abandon the analysis, despite its distinguished lineage. Taken together, we think the case for such abandonment to be conclusive.

