

**Intervening Wrongdoing in Tort:  
The Third Restatement's Unfortunate Embrace of Negligent Enabling**

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Since even before *Scott v. Shepherd*,<sup>1</sup> judges have struggled with the special problems posed by tort suits in which the plaintiff seeks to hold a 'remote' wrongdoer liable notwithstanding that his injury was immediately inflicted by an intervening actor. The "Physical Harm" provisions of the Third Restatement adopt an aggressive strategy for dealing with these problems – they deny their existence. Torts involving intervening wrongdoing, they suggest, require no different treatment than torts that take the form of direct injurings. However well-intentioned, this strategy is doctrinally and analytically unsound. Courts should not embrace it.

**I. 19 + 34 + 37**

Section 19 of the Restatement's "Physical Harm" provisions is so understated as to seem undeserving of being a numbered section. It says: "The conduct of a defendant *can lack reasonable care* insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party." Does anyone dissent? Owen hands his car keys to Duncan, whom he knows to be heavily intoxicated; Duncan drunkenly runs down Petra. How many courts would hold that Owen has not acted carelessly toward Petra just

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<sup>††</sup> Visiting Professor Harvard Law School, James H. Quinn Chair in Legal Ethics, Fordham University School of Law. Thanks to the organizers for inviting us to re-engage with the Third Restatement. Although our writings on its "Physical Harm" provisions have been critical – constructively so, we hope – we are pleased to have another opportunity to acknowledge the fine and important work of Reporters Mike Green, Gary Schwartz, Harvey Perlman and Bill Powers.

<sup>1</sup> 96 E.R. 525 (C. P. 1773) (upholding a trespass action against a defendant who tossed a squib into a market, which was in turn picked up and thrown by two intervening actors before exploding near plaintiff).

because his conduct combined with and permitted Duncan's? The Reporters tell us that Section 19 exists to highlight "a special case" of the more general concept of ordinary care.<sup>2</sup> But even this description seems overstated. Like a hedge trimmer that warns it should not be used to trim one's eyebrows, the provision seems designed to fend off an idea that no one is ready to entertain.

And yet Section 19 is neither banal nor innocent. To see why requires that it be read in light of two other sections of the Restatement's "Physical Harm" component – Sections 34 and 37 – and in light of modern principles of apportionment.

Section 34 reads: "[w]hen a force of nature or an independent act is also a factual cause of physical harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." Like Section 19, it states a particular application of a general proposition. The general proposition is contained in the "scope of liability" (i.e., proximate cause) provisions of Section 29, which provides that a careless act that causes physical harm to another will subject the actor to liability only if the risk of that harm is one of the risks that rendered the act careless.<sup>3</sup> So again we confront the question of why the Reporters have bothered to set out in a separate section an idea already articulated elsewhere.

For Section 34, the explanation is this. Although it is presented as a *limit* on liability, the section's primary aim is to *create space for* liability by replacing a narrower limitation left over from a time when judges were in the grips of formalist nonsense. Specifically (we are told) pre-modern judges falsely imagined that each injury-producing

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<sup>2</sup> Restatement (Third) of Torts: Liability for Physical Harm § 19, comment d.

<sup>3</sup> *Id.* §34, comment a.

event had a “final” cause, and that liability could attach only to a wrongdoer whose wrong operated as such as cause.<sup>4</sup>

Suppose a train being driven by engineer *E* approaches a point at which the tracks are traversed by a road, and that *E* neglects his obligation to sound the train’s horn. Now imagine two scenarios following from *E*’s misconduct. In Scenario 1, driver *P*, who is not paying attention, carelessly drives his car onto the tracks just as the train is approaching, leaving *E* with no chance to stop before running *P* down. Under the old final-cause framework, even if reasonable care required *E* to blow the horn, and even if the noise would have induced *P* to stay off of the tracks, *P*’s estate would not be able to recover from *E* (or his employer), because *P* would be deemed “the” cause of his own death – an idea given expression through the doctrine of *contributory negligence*.

In Scenario 2, *P* does not carelessly drive onto the tracks. Instead, his stopped car is pushed into the path of the train by a second car driven by careless intervening actor *I*. Even if *P* can prove that he would have escaped injury had *E* sounded the whistle before *I*’s careless act,<sup>5</sup> *E* would, according to the Reporters, again be spared liability. Of course this conclusion would not be expressed in terms of contributory negligence. Rather, the claim against *E* would fail because *I*’s carelessness would be deemed a *superseding cause* in relation to *E*’s carelessness.

Section 34 stands first and foremost for the rejection of the final-cause framework and, with it, the doctrines of contributory negligence and superseding cause. Its aim is to make room for the imposition of liability by rejecting the idea that the intervening

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<sup>4</sup> *Id.*

<sup>5</sup> For example, the sounding of the horn might have made *P* especially attentive to the risk of collision, which in turn would have induced him to set his emergency brake, which in turn would have prevented him from being forced onto the tracks when bumped by *I*.

infliction of injury by an autonomous responsible agent – whether the victim or a third party – provides a sufficient ground to spare from liability an actor whose more remote wrongful acts also contributed to that injury. By identifying Section 29’s ‘scope of the risk’ test as the relevant limit in cases of intervening wrongdoing, Section 34 thus supplants a relatively narrow liability rule with one under which *E* would be subject to liability in both Scenarios 1 and 2 as one of two careless causers of a foreseeable, injury-producing accident.

Note that, in authorizing *P*’s estate to look past intervening wrongdoers to remote actor *E*, Section 34 does *not* contemplate their exoneration. In most jurisdictions, damages are *apportioned* on a percentage basis among at-fault actors whose faulty conduct contributes to an injury. Thus, in Scenario 1 the factfinder will be instructed to assign a percentage of fault to *P*, while in Scenario 2 it will be told to apportion liability as between defendants *E* and *I*. In this way, the legal-fictional bludgeon of final-cause analysis – one which armed judges with a relatively broad power to throw out tort cases – has been replaced by the finely wrought scalpel of apportionment, an instrument ordinarily to be wielded by jurors.

Still, it would no be quite right to say that Section 34 simply collapses the issue of intervening wrongdoing into the question of apportionment. After all, the section allows that the intervening wrongdoing of an independent actor can entirely defeat the imposition of liability on a more remote actor if the wrongdoing falls outside the ‘scope of the risk.’ (Here again, one of the Reporters’ primary goals is to ensure that questions as to the significance of intervening misconduct are addressed by jurors, not judges.) But notice that, even when an intervening wrong does function to block the imposition of

liability on a remote actor such as *E*, it does *not* do so by attributing significance to the fact of another autonomous actor's intervening wrongful act: there is no sense that the injuring of the victim was exclusively the intervener's doing, and not the doing of the defendant. Instead, the intervention defeats liability only by virtue of a rule stating that careless actors cannot be liable if they cause injuries in particularly *serendipitous* ways.

Consider in this regard a variation of the *E* and *P* situation. It introduces a new defendant *M*, and will also generate two distinct scenarios. *P*'s car has been carelessly manufactured by *M*, such that it can stall without warning. Because of the defect, *P*'s car for the first time stalls on the train tracks. In Scenario 3, *E* has plenty of time to stop his train before it hits *P*, but because *E* is in a monstrous mood, he not only refrains from sounding the train's horn, but deliberately runs over *P*'s car, killing *P*. In Scenario 4, *P*'s car, while stalled on the tracks because of the manufacturing defect, is swallowed by a sinkhole that opens up without warning, killing *P*. According to Section 34, on the issue of *M*'s liability to *P*, Scenarios 3 and 4 are identical, and not merely in result. The feature of *E*'s malicious intervening wrongdoing that renders it a reason to spare *M* from liability in Scenario 3 is exactly its quality of being *as odd or unpredictable* as the opening of the sinkhole in Scenario 4. That Scenario 3's intervening act took the form of another's heinous wrong is irrelevant. What matters is that (because it was not reasonably foreseeable) it cannot be deemed to have been a risk that rendered *M*'s conduct careless.

We are almost to the point of fully appreciating Section 19's significance. But first we must briefly attend to Section 37. It is concerned to draw the line between misfeasance and nonfeasance – i.e., between those situations governed by Section 7's default duty to exercise reasonable care, and those governed by the opposite default rule

of no duty to rescue. That line is defined purely in terms of risk-creation. If an actor is being sued for an injury that consists of the realization of a risk that was generated at least in part by an act of the actor, we are in the domain of Section 7. If an actor is being sued for an injury that consists of the realization of risks generated only by the acts of others, we are in the domain of the no-duty-to-rescue rule.

Section 37's expansive<sup>6</sup> definition of misfeasance is critical because it allows the Reporters to evade a basic black-letter principle of which Sections 19 and 34 would otherwise blatantly run afoul. This is the principle that "[g]enerally a person has no duty to prevent a third person from causing harm to another."<sup>7</sup> Rather than denying this principle's validity, the Reporters limit it. They concede that is true as far it goes, but then insist that it does not go very far at all. Specifically, it applies only in the realm of 'nonfeasance,' defined narrowly as the realm in which an actor plays no role whatsoever in creating the risk of another acting wrongfully.

Take together, then, Sections 19, 34, and 37 – as read against the backdrop of apportionment principles – assert a proposition that is quite a bit more substantial than any one of them might seem to be. It can be stated as follows:

*An actor (A) is under a general duty to take reasonable care against increasing the risk that an independent actor (IA) foreseeably will cause physical harm to another (V). If D creates such a risk and if that risk is realized, A is subject to liability to V, with the factfinder to apportion damages between or among A, IA, and/or V.*

Perhaps this proposition seems no more striking than any of the sections out of which it is constructed. Some examples may alter that impression. A person co-signs a friend's application for a car loan knowing that the friend has been cited for moving violations.

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<sup>6</sup> We argue in a separate paper that the core of the tort concept of misfeasance is closer to the idea of 'doing onto another' than it is to the idea of mere risk-creation.

<sup>7</sup> *Fiala v. Rains*, 519 N.W.2d 386 (Iowa 1994).

Under Sections 19, 34, and 37 he is subject to liability to anyone injured by the friend's careless driving of the car, and even anyone injured by the friend's intentional misuse of the car.<sup>8</sup> A fertilizer manufacturer is aware that its product can be converted into a powerful bomb by determined terrorists. If its failure to take steps to reduce the risk of such misuse functions as a cause of the bombing, it is subject to liability to all bombing victims.<sup>9</sup> A woman is aware of her ex-husband's violent jealousy, as well as his occasional appearances at a bar located in their small town. She nonetheless agrees to meet a date for a drink at the bar. If her ex-husband shows up and proceeds to pummel her date, she is subject to liability for her date's injuries.<sup>10</sup>

In sum, the liability regime envisioned in this part of the Third Restatement attempts to solve the problem of intervening wrongdoing by embracing what Professor Rabin memorably described as "enabling torts."<sup>11</sup> On this view, the negligent enabling of wrongdoing by another is analytically indistinct from causing harm through carelessness of one's own – it is garden-variety negligence. Finally, we have an explanation of why Section 19 is so understated. If courts in the past had not been in the grips of nonsense about final causes, there would be no point in identifying negligent enabling as a distinct form of negligence. But they were once so gripped, and therefore provisions that seem to state the obvious – that judges should not throw out claims on the basis of an imagined rule stating that an actor's conduct can *never* be careless by virtue of increasing the risk that another actor will wrongfully injure a victim – are needed.

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<sup>8</sup> Zedella v. Gibson, 650 N.E.2d 1000 (Ill. 1995) (refusing to recognize a negligent entrustment claim against loan co-signer).

<sup>9</sup> Port Authority of NY & NJ v. Arcadian Corp., 189 F.3d 305 (3d Cir. 1999) (suit against fertilizer manufacturer by owner of building that was damaged by a terrorist bombing dismissed on no-duty and proximate cause grounds).

<sup>10</sup> Fiala, 519 N.W.2d at 389.

<sup>11</sup> Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

## **II. Disconfirming Data and False Positives**

Section 19, read in conjunction with Section 34 and 37, treats negligent enabling as an unremarkable application of general principles governing liability for negligent misfeasance causing physical harm. This is unfortunate, because the “enabling torts” concept is ill-conceived. Doctrinally, it fails to account for well-established lines of decision (and statutes) that reject it. Analytically, it muddles distinct grounds for liability. Pragmatically, it makes the adjudication of cases that involve intervening wrongdoing more difficult. Theoretically, it threatens to undermine the very idea of what it means to commit a tort.<sup>12</sup>

We will focus here on doctrinal and analytic inadequacies of the negligent enabling idea. These in turn can be divided into “disconfirming data” and “false positives.” The disconfirming data consist primarily of judicial decisions that, as a matter of law, reject the imposition of liability for negligent enabling. False positives are instances in which it appears that courts are allowing for the imposition of liability on the theory of negligent enabling but in fact are not. Because “Enabling Torts” – the essay in which Professor Rabin coined the phrase – is a source of many of the arguments to which we are responding, we will make frequent reference to it as we pursue our criticisms of the Restatement.

### **A. Disconfirming Data**

The presentation of Sections 19 and 34 as restatements of current doctrine runs headlong into several prominent and related features of current tort law, including: (1)

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<sup>12</sup> Or so we argue in a forthcoming paper.

decisions refusing to expand the concept of negligent entrustment; (2) decisions rejecting social host liability; and (3) the dominance of “modified” forms of comparative fault.

1. *Holding the Line on Negligent Entrustment*

Those inclined to recognize liability for negligent enabling do so in part because they believe that the principle of liability based on *carelessly making possible a wrong by another* is imminent – already implicitly present – in decisions that impose liability for *carelessly entrusting another with a dangerous instrumentality*. Negligent enabling, they suppose, is nothing but negligent entrustment worked pure. This is why, for example, *Vince v. Wilson*<sup>13</sup> features prominently in Rabin’s “Enabling Torts” essay. In *Vince*, a great aunt provided funds to her grandnephew for the purchase of a car even though she knew him to be a substance abuser who was unlicensed and had failed several driving tests. (Apparently she also told the car dealer who sold him the car that he was unlicensed.) When the nephew drove the car recklessly and injured his passenger, the passenger sued the great aunt and the car dealer. The Vermont Supreme Court permitted the claims to go forward on the theory that the careless provision of funds for the purchase of a car, and the sale of a car, are no different from the act of carelessly handing over one’s own car to an incompetent driver.

Then and now *Vince* stands at (or outside) the fringes of negligent entrustment law. At its core, the doctrine recognizes duties that arise in connection with the possession of certain types of property. Specifically, the possessor of a dangerous instrumentality – most commonly a car or gun – is obligated to others who might foreseeably be harmed by the property’s misuse not to permit its use by someone whom

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<sup>13</sup> Rabin, *supra* note 11, at 438-39 (discussing *Vince v. Wilson*, 561 A.2d 103 (Vt. 1989)).

the possessor knows (or, in some jurisdictions, has reason to know) is incompetent to handle it.<sup>14</sup> The lynchpin is the possessor's power to "permit or prohibit" use the dangerous item.<sup>15</sup> This is why the vast majority of states to have considered the question have concluded that a genuine sale or donation of a car by the defendant cannot count as an entrustment<sup>16</sup> regardless of what the seller or donor knows about the fitness of the would-be driver.<sup>17</sup> True, a few court decisions other than *Vince* have indicated a willingness to apply the doctrine to outright sales or donations. However, two are counter-balanced by contrary decisions in the same jurisdiction,<sup>18</sup> another has been called

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<sup>14</sup> See, e.g., *Edwards v. Valentine*, 926 So.2d 315, 321 (Ala. 2005) (where defendant's brother-in-law had in the past borrowed defendant's car, and where car keys were readily available to brother-in-law, defendant can be found to have entrusted his car to brother-in-law).

<sup>15</sup> *Neary v. McDonald*, 956 P.2d 1205, 1209-10 (Alaska 1998); *Mills v. Crone*, 973 S.W.2d 828, 831-32 (Ark. App. 1998); *McCart v. Muir*, 641 P.2d 384, 388 (Kan. 1982); *Snodgrass v. Baumgart*, 974 P.2d 604, 607 (Kan. App. 1999); *Broadwater v. Dorsey*, 688 A.2d 436, 441 (Md. Ct. App. 1997); *Green v. Harris*, 70 P.3d 866, 871 (Okla. 2003).

<sup>16</sup> Of course there are sometimes disputes as to who is the "owner" of a car. See, e.g., *Watrous v. Johnson*, 2007 WL 4146289 (Tenn. Ct. App.) (unemployed adult son who lives at home with parents killed plaintiff while driving drunk; parents paid taxes, title, fees, gas, and repair costs associated with the car, the father had a security interest in car, and the father had paid off a loan that the son had secured with the car such that, had it not been paid off by the father, the car would have been repossessed.).

<sup>17</sup> *Day v. Williams*, 670 So.2d 914, 916 (Ala. 1975); *Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So.2d 560, 562 (Fla. App. 1987) (en banc); *Lopez v. Langer*, 761 P.2d 1225, 1227 (Idaho 1988); *Kirk v. Miller*, 644 P.2d 486, 490 (Kan. App. 1982); *Broadwater*, 688 A.2d at 441; *Kinder v. Caplan*, 15 Mass. L. Rep. 568 (Super. Ct. 2002); *Woods v. Alken Auto Sales, Ltd.*, 525 N.W.2d 511, 512 (Mich. App. 1994); *Sligh v. First Nat. Bank*, 735 So.2d 963, 969 (Miss. 1999); *Sansonetti v. City of St. Joseph*, 976 S.W.2d 572, 579 (Mo. Ct. App. 1998); *Sikora v. Wade*, 342 A.2d 580, 582-83 (N.J. Super. 1975); *Rush v. Smitherman*, 294 S.W.2d 873, 878 (Tex. Civ. App. 1956).

Decisions from two other states have merely declined to rule out the possibility that a certain kind of sale or donation might count as an entrustment. *Pugmire Lincoln Mercury, Inc. v. Sorrels*, 236 S.E.2d 113, 114 (Ga. App. 1977) (declining to hold that a sale can never be an entrustment, but ruling for the defendant-seller on the ground that, as a matter of law, it had insufficient knowledge of buyer's incompetence); *Johnson v. Johnson*, 611 N.W.2d 823, 826-27 (Minn. App. 2000) (noting decisions rejecting negligent entrustment claims against sellers, but deeming it unnecessary to adopt such a rule given that the defendant-seller had no basis for knowing of driver's incompetence).

<sup>18</sup> *Dodge Center v. Superior Court*, 199 Cal.App.3d 332, 341 (1988), ruled that the sale of a car cannot provide the basis for a negligent entrustment claim. That same year, however, *Talbott v. Csakany*, 199 Cal. App. 3d 700, 705 (1988), declined to adopt a similar blanket rule with respect to donors. Notably, *Talbott* still held for the donor as a matter of law by placing on the plaintiff a very demanding burden of proof on the issue of causation. See *id.* at 706-07 (plaintiff's claim fails for lack of evidence that donee would have been unable to secure a car from some source other than the donee).

*Tosh v. Scott*, 472 N.E.2d 591, 592 (Ill. App. 1984), held that a seller of a vehicle who does not retain control over it cannot be held liable for negligent entrustment. However, *Small v. St. Francis Hosp.*, 581 N.E.2d 154, 157 (Ill. App. 1991), ruled that negligent entrustment theory could apply to a used car dealer

into question by a later decision,<sup>19</sup> and a third has been limited in a way that suggests that it rests on an alternative theory of liability.<sup>20</sup>

Even construed broadly, the negligent entrustment doctrine neither entails nor even points toward a regime of liability for negligent enabling. There is no general duty to refrain from selling or giving goods to persons just because the seller can or should foresee that the recipient might misuse the good. The owner of a lawn-and-garden store, for example, is not required to refrain from selling a hedge trimmer or lawn mower to a person whom she happens to know is generally prone to irresponsible behavior, notwithstanding that such a person's use of that equipment may pose risks of harm to others. With respect to cars, there are clear instances of non-actionable enabling. A car manufacturer might know that a certain percentage of its cars will be sold by franchise dealers to incompetent drivers. Yet it has no duty to take care to instruct those dealers to refrain from selling to such drivers.<sup>21</sup> Insurers are not liable for issuing policies to persons with bad driving records, even if the issuance of a policy is a necessary condition

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who sold a car to a 15-year-old buyer who lacked a driver's license. In a subsequent decision barring negligent entrustment claims against defendants alleged only to have assisted the driver by helping to finance the driver's purchase of the car, the Illinois Supreme court noted this split without resolving it. *Zedella v. Gibson*, 650 N.E.2d 1000, 1004 (Ill. 1995).

<sup>19</sup> *Fliegler v. Barcia*, 674 P.2d 299, 301 (Alaska 1983), cavalierly deemed the defendant's ownership of car at time of accident "irrelevant" to the issue of liability for negligent entrustment. *Fliegler's* complete failure to explain or support this conclusion was noted in a subsequent decision from the same court, which rejected application of negligent entrustment doctrine to a mother who was at most a co-owner of a car that had been driven badly by its other owner, her adult son. *Neary v. McDonald*, 956 P.2d 1205, 1208 (Alaska 1998).

<sup>20</sup> *Kahlenberg v. Goldstein*, 431 A.2d 76, 84 (Md. 1981), held that a parent who had donated a car to his son can nonetheless be held liable for negligent entrustment. As later explained by the Maryland Court of Appeals, *Kahlenberg* turned on the fact that the son was a minor living with and under the control of his father. *Broadwater*, 688 A.2d, at 442. In this sense, *Kahlenberg* is better understood either as a case that looked behind the purported 'gift' and concluded that it really wasn't one, or treated the claim as resting on a negligent supervision rather than a negligent entrustment theory. Another decision that seems to better fit the model of negligent supervision rather than negligent entrustment is *Green v. Harris*, 70 P.3d 866, 871 (Okla. 2003) (given parents' control over son's use of what was nominally his car, parents may be subject to liability for negligent entrustment).

<sup>21</sup> *Salinas v. General Motors Corp.*, 857 S.W.2d 944, 949 (Tx. Ct. App. 1993).

of injurious careless driving.<sup>22</sup> Banks and relatives that make car loans to persons known to be bad drivers, which loans permit the purchase of vehicles that are later driven badly, are likewise not subject to liability for negligent entrustment.<sup>23</sup>

On this last point, it is worth quoting a 2004 Illinois appellate decision, which not only rejects a negligent entrustment claim against a bank for issuing a loan to a driver (Chapman) with a history of moving violations, but does so while referring to a prior Illinois Supreme Court decision that rejected a negligent entrustment claim against a parent (Robert) for having co-signed a car loan for his son (Daniel).

Just as Robert *enabled* Daniel to finance his car, the bank in this case *enabled* Chapman to finance the purchase of the Ford Escort. Robert knew that Daniel was going to use the proceeds of the loan he was cosigning to buy a car, just as the bank in this case knew that Chapman was going to buy a car. Our supreme court was not willing to hold that the cosigner who *enabled* the purchase of a dangerous article could be liable under a negligent-entrustment theory. We are similarly unwilling to apply that theory when a lending institution *enables* such a purchase.<sup>24</sup>

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<sup>22</sup> Syah v. Johnson, 247 Cal.App.2d 534, 544 (1966) (interpreting the prior decision of Vice v. Automobile Club of Southern California, 21 Cal.App.2d 759 (1966), as holding that an insurer does not entrust a vehicle to an incompetent driver simply by issuing a liability policy without which the driver would not have driven).

<sup>23</sup> Mills v. Crone, 973 S.W.2d 828, 832 (Ark. App. 1998) (that parents paid for son's car and carried the car on their auto insurance policy is insufficient as a matter of law to subject them to liability for negligent entrustment); Drake v. Morris Plan Co. of California, 53 Cal. App. 3d 208, 212-13 (1975) (mere loan of funds to enable purchase of car not sufficient to count as an entrustment of car to driver); Peterson v. Halsted, 829 P.2d 373, 378 (Col. 1992) (parent who co-signs child's application for car loan has not thereby entrusted car to child); Zedella, 650 N.E.2d at 1004 (father who co-signs loan for son's purchase of car and who provides help with payments not subject to liability for negligent entrustment); Sligh, 735 So.2d at 969 (lender not subject to liability for negligent entrustment); Connell v. Carl's Air Conditioning, 634 P.2d 673, 675 (Nev.1981) (employer who assists employee in making payments on employee's car has not entrusted car to employee); Nichols v. Atnip, 844 S.W.2d 655, 660 (Tenn. Ct. App. 1992) (parents who help adult son pay some car-related expenses not subject to liability for negligent entrustment); Mejia v. Erwin, 726 P.2d 1032, 1034 (Wash. App. 1986) (father who pays for son's rental car with his credit card has not entrusted the car to his son).

In Arkansas Bank and Trust Co. v. Erwin, 781 S.W.2d 21, 23 (Ark. 1989), the court concluded that the plaintiff crash victim could assert a negligent entrustment claim against a bank that financed the negligent driver's purchase of the car. However, the bank had been appointed the legal guardian of the driver, who had been declared legally incompetent because of a severe mental illness. Needless to say, the role of bank qua guardian is quite distinct from its role in a standard arm's-length loan transaction.

<sup>24</sup> Northcutt v. Chapman, 819 N.E.2d 1880, 1184-85 (Ill. App. 2004) (emphasis added) (referencing Zedella v. Gibson, 650 N.E.2d 1000 (Ill. 1995)).

It is difficult to imagine a more forthright rejection of the idea that negligent entrustment naturally leads to the endorsement of liability for mere negligent enabling.<sup>25</sup>

Perhaps the most prominent contemporary refusal to endorse the slide from negligent entrustment to negligent enabling is the rejection by courts of “negligent marketing” claims by shooting victims against gun manufacturers. At the time “Enabling Torts” was published, Professor Rabin could point to Judge Weinstein’s characteristically aggressive recognition of negligent marketing claims in *Hamilton v. Accu-Tek*.<sup>26</sup> But that decision proved to be a false portent – the New York Court of Appeals promptly rejected its reading of the state’s tort law.<sup>27</sup> Another leading decision, *Young v. Bryco Arms*, issued by the Illinois Supreme Court in 2004, similarly rejected shooting victims’ claims against manufacturers, there raised in the form of a “public nuisance” suit asserting that

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<sup>25</sup> Another category of cases said to illustrate the movement of doctrine toward the enabling torts view are those in which a person injured by a car thief’s bad driving is permitted to sue the owner of the car for carelessly leaving her keys in the ignition, thereby enabling the theft and the bad driving. Yet even the Reporters acknowledges that the jurisdictions that bar such claims outright outnumber jurisdictions that permit them by roughly 2 to 1, and that many that do allow claims only do so upon a showing that the defendant ignored an identifiable and heightened risk of theft such that his conduct involved gross negligence or recklessness. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §19, at 270 (Reporters’ Notes to comment c) (P.F.D. No. 1 2005); *see also* William H. Danne, Jr., *Liability Of Motorist Who Left Key In Ignition For Damage Or Injury Caused By Stranger Operating The Vehicle*, 45 A.L.R.3d 787 §2(a) (2007) (originally published in 1972).

Given that, on the enabling torts view, the basis for holding a remote actor liable is that the latter acted carelessly so as to help cause a foreseeable harm to the plaintiff, it is difficult to see why one would even bother to distinguish categorically between claims for negligent entrustment and claims resting on carelessly-leaving-of-keys-in-the-car. Yet courts do. *See, e.g.,* Mackey v. Dorsey, 655 A.2d 1333, 1338 (Md. App. 1995) (owner who momentarily exits car with keys still in ignition, thus enabling passenger to take car without permission, cannot be held liable on a negligent entrustment theory). Whatever disputes there may be as to what constitutes “entrustment,” the concept quite clearly refers to something more robust than a careless act that makes possible another’s foreseeable misuse of personal property.

<sup>26</sup> 62 F. Supp. 2d 802 (E.D.N.Y. 1999), *vacated* 264 F.3d 21 (2d Cir. 2001). Our criticism of this aspect of Rabin’s analysis is of course made with the benefit of hindsight, but not entirely. Anyone who would hitch an exercise in doctrinal prognostication to an as-yet unratified decision from the fantastically thoughtful and innovative Judge Weinstein is assuming a significant risk.

<sup>27</sup> *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001) (reasoning that “[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control.”) (quoted authority omitted); *see also* *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1215 (D. Tex. 1985) (noting that, under Texas law, a manufacturer of a handgun is deemed not to have proximately caused injuries stemming from criminal misuse of the gun).

manufacturers' marketing of guns had rendered the Chicago streets so unsafe as to interfere unreasonably with the victims' right to use public spaces.<sup>28</sup> *Young* rejected the nuisance theory on several grounds, including that the intervening criminal acts between the initial sale of the gun and the shooting rendered the former not a proximate cause of the latter.<sup>29</sup> Further judicial development in this area was forestalled by Congress's passage in 2005 of the Protection of Lawful Commerce in Arms Act.<sup>30</sup> Yet a significant criticism of this statutory intervention was its superfluosity, given that no state high court had yet shown interest in endorsing the application of a negligent marketing or public nuisance theory to claims by shooting victims against gun manufacturers.<sup>31</sup>

In sum, courts continue to resist the dilution of the circumscribed concept of negligent entrustment into the much broader concept of negligent enabling. That they have done so even in the face of substantial pressure from the plaintiff's bar, even in cases brought by sympathetic claimants, and even where policy goals such as compensation and deterrence might well be advanced, demonstrates that they reject the composite assertion of Sections 19, 34 and 37 that carelessness increasing the risk of misconduct by another calls for the application of generic negligence principles.

## 2. *The Widespread Rejection of Social Host Liability*

The scourge of drunk driving has given rise to understandable efforts by plaintiffs to extend liability beyond drunk drivers to others who have enabled drunk driving. One source of liability is Dram Shop Acts, which allows suit by a victim of drunk driving

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<sup>28</sup> *Young v. Bryco Arms*, 821 N.E.2d 1078 (Ill. 2004).

<sup>29</sup> *Id.* at 1090-91; *see also id.* at 1088 (citing similar rulings issued by other courts).

<sup>30</sup> 15 U.S.C. §7901 *et seq.* (2005).

<sup>31</sup> Anthony J. Sebok, *The New Bill to Protect the Gun Industry From Lawsuits: How It Strikes at the Heart of Age-Old Tort Law Principles*, [http://writ.news.findlaw.com/commentary/20040223\\_lytton.html](http://writ.news.findlaw.com/commentary/20040223_lytton.html).

against the commercial establishment that over-served the driver. Tempting as it might be to cite these statutes as evidence of the embrace of negligent enabling, they are of no help. In fact, they mark self-conscious departures from, rather than applications of, common law tort principles.<sup>32</sup>

When first enacted, they were conceived not as tort statutes, but as sin taxes and poor-relief laws designed primarily to discourage the sale of alcohol, and to shift to purveyors the cost of supporting families placed in a state of economic dependency by ‘drunkards’ whose ‘enslavement’ to alcohol had rendered them less than fully competent adults.<sup>33</sup> This is why many initially contained no requirement of fault or wrongdoing and took pains to emphasize that family members of the drunkard were entitled to recover for loss of support.<sup>34</sup> Later these statutes came to be conceived in a more regulatory spirit, focusing particularly on traffic safety.<sup>35</sup> In these incarnations, they have tended to require as a condition of liability that the commercial establishment serve alcohol to a minor or a visibly intoxicated customer who proceeds to injure a third party.<sup>36</sup> Regardless, Dram Shop Laws have formed part of longstanding schemes by which states have heavily regulated the commercial sale of alcohol. Their terms represent conditions historically and legitimately placed by governments on the doing of a particularly dangerous form of

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<sup>32</sup> 1 JAMES F. MOSHER, *LIQUOR LIABILITY LAW* §2.01[2], at 2-4 - 2-5 (2002) (noting that Dram Shop acts “worked a drastic change from the common law” by treating intoxicated adults as incompetents and thereby enabling victims of their actions to sue other persons).

<sup>33</sup> ELAINE FRANTZ PARSONS, *MANHOOD LOST: FALLEN DRUNKARDS AND REDEEMING WOMEN IN THE NINETEENTH-CENTURY UNITED STATES* 36-37 (2003) (noting that, by 1890, 21 states had adopted “civil damages” laws – another name for Dram Shop Acts) – and that their enactment was tied to the temperance movement’s efforts to ban alcohol, as well as concern for the dependents of inveterate drunks).

<sup>34</sup> *See, e.g.*, Harry C. Burgess, *Liability Under the New York Dram Shop Act*, 8 SYRACUSE L. REV. 252, 253 & n. 6 (1956) (noting that New York’s initial 1873 act specifically empowered, among others, a “husband, wife, child, [or] parent” to recover for loss of “means of support,” and that the statute extended not merely to sellers of alcohol but even to landlords who leased their properties to sellers of alcohol).

<sup>35</sup> MOSHER, *supra* note 32, § 2.01[2], at 2-6.

<sup>36</sup> *Id.* at 2-3 - 2-4.

business, one for which an official license has always been required, and which the government retains the power to ban outright.<sup>37</sup>

Seemingly more promising for the cause of the Reporters are judicial decisions recognizing so-called social host liability. The wrong alleged in this sort of case is that the host of an ordinary social event failed adequately to monitor his or her guests' intake of alcohol (or to take steps to determine if a departing guest was competent to drive, or to try to dissuade or prevent a mildly intoxicated guest from driving), and that a guest drove away from the party intoxicated and thereby injured the victim. In light of the heightened and salutary attention to drunk driving generated by groups such as Mothers Against Drunk Driving, there was a time at which social host liability looked as if it would become a prominent new frontier of negligence law: decisions from the California and New Jersey Supreme Courts certainly seemed to suggest as much.<sup>38</sup> And yet common law courts have overwhelmingly rejected claims against social hosts for drunk-driving by adult guests.

Representative of the ongoing resistance is *Childs v. Desormeaux*.<sup>39</sup> Desmond Desormeaux, an adult, drank beer at a BYOB New Year's party hosted by Dwight Courier and Julie Zimmerman. The hosts were aware that he was prone to drink to excess, and one of them asked Desormeaux as he was leaving whether he was fit to drive. Desormeaux said that he was. In fact, his blood alcohol level at the time was probably three times the legal limit. While driving home drunk, Desormeaux collided with another

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<sup>37</sup> *Id.* §5.01, at 5-2 - 5-3.

<sup>38</sup> *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984); *Coulter v. Superior Court*, 577 P.2d 669 (Cal. 1978).

<sup>39</sup> [2006] 1 S.C.R. 643.

car, killing one person and severely injuring three others, including Zoe Childs.<sup>40</sup> Childs brought negligence claims against Desormeaux and the hosts. A unanimous Supreme Court rejected the claim against the hosts on the ground that they owed no duty to Childs.<sup>41</sup> This was so, the Court reasoned, even if the hosts were in a position to foresee that one of their guests might drive poorly because of intoxication and thus injure a person such as Childs.<sup>42</sup>

According to the Court, Childs' claim faced a dilemma that could not be overcome: it worked neither as a claim for misfeasance nor nonfeasance. Her lawyers had argued that the hosts should be held liable for negligent misfeasance because they “*facilitated* [Desormeaux's] consumption of alcohol by organizing a social event where alcohol was consumed on their premises.”<sup>43</sup> The Court nonetheless insisted that this was an inapt description of the alleged wrong. Of course it could not deny that the hosts had entirely failed to act (clearly they had acted). Rather it insisted that, insofar as her claim alleged careless *conduct* on the part of the hosts, Childs was required to demonstrate why the seemingly “autonom[ous]” wrong of Desormeaux (the intervening injurer) could be attributed to them – why what happened to Childs was properly described as something that the hosts (as well as Desormeaux) *had done to her*. In fact, there was no basis for treating the hosts as having carelessly injured her: because Desormeaux's drunk driving was not attributable to them, his injuring of Childs was not *their doing*. It followed that

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<sup>40</sup> The facts recited in this paragraph are taken from ¶¶ 2- 4 of the Court's opinion. Desormeaux later pleaded guilty to criminal charges and was sentenced to 10 years in prison. *Id.* ¶ 3.

<sup>41</sup> The opinion indicates that its rule is meant to apply not only to hosts of BYOB parties, but to hosts of any standard social occasion at which alcohol is consumed or served. *Id.* ¶ 44.

<sup>42</sup> As a separate ground for its holding, the Court also maintained that, absent any evidence indicating that hosts such as Courier and Zimmerman knew or should have known that their guest was driving away from the party in an impaired condition, they could not be expected to foresee dangerous drunk driving by a guest. *Id.* ¶¶ 28-30.

<sup>43</sup> *Id.* ¶ 33 (emphasis in original).

Childs' complaint had to be understood as arguing for liability on the basis of "an ... alleged failure to act"<sup>44</sup> – "the case put against [the hosts] is that they should have interfered with the autonomy of Mr. Desormeaux by preventing him from drinking and driving," yet did not do so.<sup>45</sup> But then there would have to be grounds for recognizing an exception to the default rule of no affirmative duty.<sup>46</sup> The Court concluded that extant doctrine afforded no such grounds. In particular, it insisted that the relationship of host to adult guest is not the sort of asymmetric relationship in which the former is expected to look after or control the latter: "A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct."<sup>47</sup>

*Childs*, like many of the other decisions described above and below, is not the progeny of a rabidly pro-defendant court. Nor is its holding an outlier. Like the Canadian Supreme Court, U.S. courts have tended to identify the guest's role as explaining why the social host ought not to be held even partly responsible.<sup>48</sup> Here again we see courts declining to recognize negligent enabling claims even when brought by sympathetic plaintiffs, even where the intervening wrongdoing is foreseeable, even when there is a plausible argument that liability-imposition will advance a desirable policy goal (the deterrence of drunk driving), and even where there is broad political support for

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<sup>44</sup> *Id.* ¶ 32 (emphasis added).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* ¶ 36.

<sup>47</sup> *Id.* ¶45.

<sup>48</sup> *Graff v. Beard*, 858 S.W.2d 918, 919 (Tex. 1993) (noting that the high courts of only four states had to that time indicated a willingness to impose social host liability, and that in two of these states legislation overturned or modified those decisions); *MOSHER*, *supra* note 32 § 12.06[2], at 12-72.6 ("Most courts are unwilling to impose liability on social hosts for injuries caused by intoxicated adult guests.").

In "Enabling Torts," Professor Rabin suggested that social host liability has been accepted by courts "with less than a consensus." Rabin, *supra* note 11, at 441. This is akin to asserting that American courts have accepted market share liability with "less than a consensus." As noted below, there are importantly distinct variants on the standard social host allegation that might well warrant the imposition of liability on a host for injuries caused most immediately by the drunk driving of a guest.

other efforts to change the law to ‘crack down’ on the problem at hand (e.g., by increasing criminal penalties for drunk driving).

### 3. *The Significance of Modified Comparative Fault*

There are other lines of cases to which one might point for evidence of the courts’ continued commitment to the idea that even foreseeable intervening injurious wrongdoing will ‘cut off’ the imposition of liability on a remote actor whose carelessness also contributes to the injuring of the victim.<sup>49</sup> Rather than focus on these, however, we wish to note briefly a different sort of disconfirming datum.

Recall from Part I that the Reporters hold out as a central instance of old-hat, “final cause” thinking judicial reliance on contributory negligence. Conversely, they see in the adoption of comparative fault a compelling piece of evidence that tort has left this nonsense behind as it has worked itself toward “the fault principle,” i.e., a default rule of liability for any careless risk-creation that is realized in physical harm, with the jury left largely free to assess the key issues of fault, actual cause, scope of liability, damages, and apportionment.

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<sup>49</sup> See, e.g., *Port Authority of NY & NJ v. Arcadian Corp.*, 189 F.3d 305 (3d Cir. 1999) (owner of a building damaged by terrorist bombing sued manufacturer of fertilizer that was used to make the bomb; suit dismissed on no-duty and proximate cause grounds); *Wade v. City of Chicago*, 847 N.E.2d 631 (Ill. App. 2006) (patrol car pursued at low speeds along busy city streets a car driven by a person suspected of having committed a minor offense; to escape the driver drove on to the sidewalk and struck the plaintiff; the driver’s role blocks the attribution of responsibility to police even granting that they acted wantonly in instigating a needless chase); *Kohn v. Laidlaw Transit, Inc.*, 808 N.E.2d 564 (Ill. App. 2004) (defendant school bus operator was alleged to have carelessly failed to indicate that the bus was letting off some of its passengers; plaintiff, who drove around the bus from behind, struck a small child who had exited the bus and was crossing the street; the child was unharmed, but several adults who witnessed the incident attacked the plaintiff, beating him severely; even assuming that the bus operator’s carelessness was a necessary condition of the plaintiff’s injuries, there was no basis for holding the operator liable to the plaintiff); *Fast Eddie’s v. Hall*, 688 N.E.2d 1270 (Ind. App. 1997), *transf. den.*, 726 N.E.2d 303 (Ind. 1999) (bar served alcohol to two visibly intoxicated patrons, one of whom later tracked the other down at another location and there sexually assaulted and killed her; murderer deemed solely responsible) [other cites to be provided].

One puzzling and unsatisfactory feature of this narrative is its failure to mention that, in roughly two-thirds of the states, the rejection of contributory negligence has gone hand-in-hand with the adoption of a particular form of comparative fault – namely, “modified” comparative fault. Regimes of modified comparative fault leave plenty of room for no-liability rulings based on the plaintiff’s fault being the dominant contributor to the plaintiff’s injury. In this sense, a form of final cause analysis is alive and well, resting not on dubious metaphysics but normative judgments about appropriate allocations of responsibility. Its being alive and well in the domain of plaintiff fault weakens the case for the recognition of negligent enabling in cases of intervening wrongdoing.

Suppose ski resort operator *O* carelessly marks an expert-level ski run as suitable for beginners. Now suppose that two adult novice skiers *S* and *T* follow the signage but quickly discover that the run promises to exceed their basic skills. Fortunately, *T* spots a very manageable trail that will take *S* and *T* back to safe terrain. *T* points it out and makes her way to safety. However, *S* does not follow. Instead, he shouts out to *T*: “Life is too short not to take chances. I know this is the wrong trail for me, and I’ll probably hurt myself, but I’m going for it!” *S* breaks his legs on the expert slope, and sues *O* for negligence in mislabeling the trail.

Presumably in most courts *S*’s negligence claim against *O* would fail. Following traditional tort parlance some judges would invoke (or instruct jurors to consider invoking) the doctrine of implied assumption of risk. Under it, a plaintiff who knowingly and voluntarily choosing to expose himself to a clear and present danger associated with a defendant’s carelessness forfeits what would ordinarily be his entitlement to insist that

the defendant heed the duty of care owed to him. Today, however, many courts treat plaintiff-assumed risks as just a particular instantiation of comparative fault. In a modified comparative fault jurisdiction, they would either grant judgment for the defendant as a matter of law on a finding that *S*'s fault exceeded *O*'s, or instruct the jury to reject plaintiff's claim if it were to so find.

Framed either way, *S*'s intervening conduct probably will (and probably should) provide a reason for blocking entirely the imposition of liability on *O* notwithstanding that *O*'s carelessness was a cause of *S*'s injury. And it would do so not because the plaintiff's foolhardy conduct was unforeseeable, but because the plaintiff's contribution to his injury – much like the drunk-driving guest's contribution in *Childs* – so overshadows the defendant's as to render the injury not the defendant's 'doing.' Perhaps the Reporters would be tempted to treat this as a case in which the plaintiff's injury falls outside the scope of the risks that rendered the defendant's conduct careless. But this response is question-begging. If *S*'s injury does fall outside the scope, it is precisely because it involves the intervention of the plaintiff's decision to take the chance of injury.

As the Reporters would have it, the adoption of comparative fault signals that modern tort law is never willing to give dispositive legal effect to the intervention of plaintiff carelessness, as such. But if that were so, then comparative fault ought to be pure, not modified. That it usually is not tells us that modern tort law still gives effect to the idea that certain kinds of intervening actions undermine attributions of responsibility to more remote actors. And this is not because the only instances in which plaintiff fault exceeds defendant's fault are those in which the plaintiff's fault is unforeseeable.

## B. False Positives

A comprehensive canvas of decisions that block the imposition of liability that should attach under a regime in which negligent enabling is treated as plain-vanilla negligence would capture only half of what is wrong with Sections 19 and 34. This is because decisions that *permit* the imposition of liability on remote defendants overwhelmingly do so on grounds other than negligent enabling. Indeed, in these cases, liability is typically imposed on one of three grounds: (1) attribution; (2) parallel (concurrent) negligence; or (3) affirmative duty.

### 1. Attribution

A premise for the application of the negligent enabling concept is that the intervening wrongdoer has acted independently of the “enabler.” Yet in many instances in which a remote actor is subject to liability notwithstanding the intervention of another’s wrongful act, it is because there are grounds for *attributing* the intervener’s wrong to the careless actor. In these instances, tort law is not imposing liability simply because one person acted so as to increase the risk that another would wrongfully injure someone. It is instead permitting the victim to treat two actors as a *single, fused agent*.

The civil corollaries to crimes such as solicitation and abetting are familiar examples of this sort of rule. If *X* hires *Y* to attack *Z*, *Y*’s attack on *Z* is as much *X*’s battery as it is *Y*’s.<sup>50</sup> Even granted that *X* and *Y* are autonomous agents, the arrangement between them justifies regarding them as a single agent for purposes of determining who injured *Z*. Likewise, if *X* knowingly and substantially assists *Y*’s commission of a crime

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<sup>50</sup> DAN B. DOBBS, THE LAW OF TORTS § 31, at 62 (2000) (noting that a person who procures or aids an attack by another can be held liable to the victim for battery).

that involves an attack on *Z*, *X* is treated as a principle wrongdoer by virtue of aiding and abetting *Y*'s attack.<sup>51</sup>

Another attribution doctrine (or set of doctrines) covers certain kinds of well-coordinated activity. Consider a scenario involving *D1* and *D2*, two drug manufacturers who collaborate on research to save costs. They determine on the basis of internal studies that a new drug is inefficacious in treating the illness it is meant to treat and will pose a risk of liver damage to users. Nonetheless, they suppress the studies and bring the drug to market. *P* uses a version of the drug manufactured by *D1*, suffers liver damage, and sues *D1*. When the fact of the suppressed studies is later revealed, *P* adds a claim against *D2*. *P* might well have a viable claim against both defendants. If so, it will be because the latter's collaboration with the former renders the former's wrongful injuring of the victim attributable to the latter. The two are treated as a single actor because of the 'civil conspiracy' or 'joint enterprise' of which they are both a part. The same holds in the textbook example of a drag-race, in which only one of the two drivers drives badly and hurts a third-party.<sup>52</sup> Both drivers are subject to liability even if only one's car hits and hurts the victim because the two were engaged in the same enterprise – they coordinated their activities in a way and to an extent that warrants deeming each driver's act as an expression of the agency of the other.

Another recognized instance of joint agency in tort occurs by virtue of the doctrine of vicarious liability, the most significant instantiation of which is, of course, the

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<sup>51</sup> Halberstam v. Welch, 705 F.2d 472, 477-78 (D.C. Cir. 1983).

<sup>52</sup> Bierczynski v. Rogers, 239 A.2d 218, 221 (Del. 1968).

rule of *respondeat superior*.<sup>53</sup> If a doctor employed by a practice group commits malpractice in the course of his employment, the group will be liable *qua* employer. The practice group constitutes a separate ‘person’ in the eyes of the law, and we may assume that its managers did not command, plan, or abet the doctor’s malpractice. So in what sense, if any, is the doctor’s malpractice a ‘doing’ of *the practice group*? The answer is that, so long as the doctor was acting within the scope of her employment, then her act is not only her own but also an act of the group. In the eyes of the law, entities such as practice groups, partnerships, and corporations count as persons: they can be located in space,<sup>54</sup> they enjoy the benefits of rights and powers and bear the burdens of duties,<sup>55</sup> and they act. Yet they act in the world only by virtue of the acts of natural persons. Thus, when natural persons’ acts are undertaken as part of the business of the entity, those acts are acts of the entity, as well as the natural person.<sup>56</sup>

Rules and principles of attribution surely admit of difficult boundary cases. The most remarkable feature of the California Supreme Court’s famous decision in *Ybarra v. Spangard* is not its application of *res ipsa loquitur* to an injury resulting from a surgical procedure, but its willingness to treat a cluster of medical personnel who were formally

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<sup>53</sup> J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 410 (4<sup>th</sup> ed. 2002) (dating the emergence of the doctrine in English law to the late 1600s, though noting that before then a master could be held liable for a careless act by a servant that he had commanded).

<sup>54</sup> *But see* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935) (ridiculing the idea that one can determine where a corporation is located). Perhaps Cohen is best read as properly (if hyperbolically) cautioning against treating the normative inquiry into entity-location as if it could be answered simply by observing the location in physical space of objects such as desks and chairs.

<sup>55</sup> For example, corporate speech enjoys First Amendment protection, *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Corporations also possess the power to sue in their own right. *See, e.g.*, 8 Del. C. § 122 (granting power to sue and be sued).

<sup>56</sup> *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (Friendly, J.) (“a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities”).

independent as a single agent.<sup>57</sup> And although market-share liability, at least in the forms recognized in the *Sindell* and *Hymowitz* decisions,<sup>58</sup> does not involve the sort of attribution under discussion here, judges have toyed with treating, or have in fact treated, entire industries – including manufacturers of explosives and lead paint – as a single agent responsible for the injuries inflicted by the products of other manufacturers within the industry.<sup>59</sup>

Still, there is no reason to infer from these difficult cases that one's acts can always be attributed to another. Whatever one might think of the plausibility of holding a gun manufacturer liable for carelessly allowing its gun to be put to an illegal use by another so as to injure a victim, it would be erroneous to suppose that the manufacturer solicited or abetted the shooting, or that the shooter and manufacturer were engaged in a joint enterprise, or that the shooter was acting on behalf of the manufacturer such that vicarious liability should apply. The sale of the gun through a chain of one or more dealers and buyers is an arm's-length transaction. Unless the law is prepared to treat every such transaction as a conspiracy or joint enterprise, there is no basis for treating the shooter's shooting of the victim as the manufacturer's 'doing'.

The same goes for a standard claim of social host liability, in which the victim of an adult drunk driver seeks redress against the host on the basis of the host's holding of an event at which alcohol was available to the driver. Indeed, as the Canadian Supreme Court emphasized in *Childs*, it is precisely the independence of the adult guest from the host that takes this scenario outside the realm of fusion of agency. The guest's drunk

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<sup>57</sup> 154 P.2d 687, 690 (Cal. 1945).

<sup>58</sup> *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1077-78 (N.Y. 1989); *Sindell v. Abbott Labs.*, 607 P.2d 924, 936-37 (Cal. 1980).

<sup>59</sup> *See, e.g., Hall v. E.I. DuPont de Nemours & Co., Inc.*, 345 F. Supp. 353, 373-74 (E.D.N.Y. 1972).

driving, in the standard scenario, is not solicited by the host, part of a cooperative undertaking or enterprise, or an instance of actual or apparent agency. Rather, the host has at best furnished the conditions that permit the guest to drink to excess then drive. And so the fusion-of-agency idea cannot explain why the host ought to be held liable for the wrong of the adult drunk driver, a conclusion that is typically expressed by courts in terms of a holding that the defendant owed no duty of care to the victim of the drunk driver.

At the same time, attention to fusion of agency could explain how certain variants on standard social host claims might warrant a finding of liability. Imagine a situation in which *L*, a soon-to-be law graduate, invites his drinking-age classmates to his cabin in the woods to attend a graduation-eve “beer blast,” for which *L* provides the beer kegs, and the express point of which is to “get ourselves so wasted that the Dean will smell the alcohol on our breath when he hands us our diplomas.” Given the stated purpose of the enterprise, its location, and *L*’s knowledge that his guests will have to drive considerable distances to get to and from it, a judge and jury would perhaps be entitled to treat *L*’s agency as fused with that of a guest who drives away from the party drunk and injures someone.

## 2. *Parallel Negligence*

We began Part I with consideration of a hypothetical in which engineer *E* carelessly neglected to sound his train’s horn shortly before car driver *P* carelessly crossed in front of the train. Now imagine a case in which sequential careless acts by two careless actors function as actual causes of an innocent victim’s injury. For example,

negligent driver *NI* speeds, loses control of her car, and crashes into a telephone pole, such that the car is mostly on the sidewalk, but extends a few feet out into the road. A minute later, driver *N2*, who could quite easily have navigated around *NI*'s car, carelessly fails to notice the wreck, such that he crashes into the stopped car and deflects off of it into innocent bystander *B*. *B* stands to recover from *NI and N2*: *NI* will not be able to point to *N2*'s subsequent carelessness as a reason for blocking the imposition of liability on *NI*.<sup>60</sup>

The Reporters seem to suppose that these sorts of standard negligence cases attest to the propriety of treating negligent enabling as a generic form of negligence. After all, in each an actor (*E* or *NI*) is subject to liability on the ground that his or her conduct has created a risk of wrongful conduct by another, which risk is later realized in an injury. Yet this inference is mistaken. For in *neither* of these cases is liability predicated on the theory that a more remote actor acted carelessly *by virtue of creating a risk of wrongful conduct by another*. Rather, the remote actor's conduct acted carelessly by posing unacceptable risks to the victim *quite apart from the prospect of any wrongful conduct by another*. Driving a train toward an intersection without sounding its horn is wrong because it can cause a collision with a car regardless of whether anyone drives carelessly. Driving a car carelessly is wrong because it unduly risks injury to other users of the road irrespective of carelessness on the part of anyone else. When harm occurs in these cases, the harm is a realization of aspects of the defendant's conduct that render it already wrongful toward the victim; there is no need to make reference to a subsequent wrong to capture its wrongfulness. In short, these are cases of 'parallel' (or concurrent)

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<sup>60</sup> See, e.g., *G. & R. Waterproofing Co. v. Brogdon*, 121 S.E.2d 77, 79-80 (Ga. App. 1961); *McDonald v. Robinson*, 224 N.W 820 (Iowa 1929).

negligence. In them, the fact that another's wrongful conduct intervenes between the remote actor's carelessness and the plaintiff's injury does not undermine the case for treating the injury as a realization of the risk that the careless defendant created. The accident was instead produced by a synergistic reaction between two independent risks.<sup>61</sup>

Just to be clear, our claim with respect to cases of parallel wrongdoing is that the intervention of another actor's wrongful conduct is *normatively* irrelevant, *not* causally irrelevant. The intervener's misconduct is presumed to function as a necessary condition of the victim's injury. The point is that the risks wrongfully posed to the victim by the remote actor's conduct can be fully described without reference to any such intervention. The parallel risk concept is also distinct from the 'scope of the risk' idea. The gist of the latter is that a careless actor will not be held liable for an injury caused by his carelessness if the injury is not the realization of one of the risks that rendered the defendant's conduct careless. Parallelism of risk-creation also concerns the quality or nature of the connection between the creation of a risk and its ultimate realization in an injury to another. And one could even describe the idea of parallel risk as a special application of the scope-of-the-risk idea. Yet doing so would not somehow collapse the former into the latter. Instead it would merely identify parallel risk as a member of a family of concepts housed within the umbrella category of proximate cause. In parallel risk cases, a careless actor is deemed to have committed negligence against a victim if the risk that is realized in the plaintiff's injury is among the risks that rendered his

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<sup>61</sup> Suppose a latter-day Shepherd – see *Scott v. Shepherd*, 96 E.R. 525 (C. P. 1773) – were carelessly to send a lit firecracker into a crowd. (Perhaps he meant to throw it away from the crowd but lost his grip, or slipped in the act of throwing). If another member of the crowd sees the lit firecracker and carelessly flings it toward another patron, rather than take what she knows to be an easy and safe opportunity to dispose of it, and if it explodes near and injures a third person, that person will have claims against both the second and the initial thrower. The claim against the latter will rest on the idea that the firecracker's mischief-making power was already present once it left the thrower's possession – it was fully ready to do mischief, even though that mischief was not realized until the immediate injurer's carelessness intervened.

conduct careless *and* if that risk can be characterized without reference to intervening wrongdoing by another actor.

We can now see why negligent enabling claims of the sort made by plaintiffs pressing social host and negligent marketing claims are fundamentally different from claims based on parallel negligence. The risk that renders the conduct of a careless marketer of guns careless is *by definition* the risk that an injury will result when an intervening actor acts tortiously or wrongfully: there can be no actualization of the risk except through the wrongful conduct of another. To the extent a manufacturer's selling of guns is careless it is because of the risk that others will wrongfully sell or procure a gun and misuse it. Likewise, the wrongfulness of careless social hosting resides in the risk that it will allow a guest to act negligently and criminally by driving drunk. Neither of these cases involves a synergy between independent risks. They involve the realization of a risk that was all along the risk that another would behave badly.

### 3. *Affirmative Duties.*

In "Enabling Torts," Rabin cited *Hines v. Garrett*, a 1921 Virginia decision, as an early instance of liability for negligent enabling. It held that the operator of a train was subject to liability to a female passenger who was discharged by a conductor at an unsafe location between stops, then raped by third-parties as she made walked to a station. According to Rabin, the following passage from *Hines* – offered by the court as an explanation of why the assailants' wrongdoing did not undermine the victim's claim against the railroad – stands as a prescient early endorsement of negligent enabling:

"We do not wish to be understood as questioning the general proposition that no responsibility for a wrong attaches whenever an independent act of

a third person intervenes between the negligence complained of and the injury. But ... this proposition does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury.”<sup>62</sup>

The first sentence of the passage already ought to make a reader wary of Rabin’s reading of *Hines*. Confirmation for this concern can be found by adding to this passage the very next sentence of the opinion, omitted in Rabin’s presentation of it:

But ... this proposition does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury. *It is perfectly well-settled ... that, wherever a carrier has reason to anticipate the danger of an assault upon one of its passengers, it rests under the duty of protecting passenger against the same.*<sup>63</sup>

Rabin treats the underlined word “negligence” as meaning carelessness in the abstract or anti-social conduct. Only then can the sentence in which it appears be understood to suggest that an actor can be subject to liability whenever its conduct is careless in creating a risk of misconduct by another. However, it is clear from the italicized sentence that the court is using the term “negligence” to refer to carelessness in the more precise tort sense of conduct that is a breach of a duty of reasonable care owed to a person such as the victim – i.e., not carelessness in the abstract, but carelessness where there is a duty of care owed to the victim. The railroad in *Hines* was not held liable because its employee acted so as to increase the risk of attack by others. It was held liable because it acted in breach of an affirmative duty to protect the plaintiff, qua passenger, from dangers that might be encountered in transit. Had the plaintiff not been a passenger there would have been no liability even if there had been careless enabling.<sup>64</sup>

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<sup>62</sup> Rabin, *supra* note 11, at 439 (quoting *Hines*, 108 S.E. at 695).

<sup>63</sup> *Hines*, 108 S.E. at 695 (emphasis added).

<sup>64</sup> That *Hines* is rightly read not as an enabling torts decision but as a breach-of-an-affirmative-duty-to-protect decision is readily confirmed by several subsequent Virginia Supreme Court decisions that portray

Much the same can be said of another line of decisions invoked by Rabin, namely those that permit victims of attacks occurring in unguarded, poorly-lit structures to hold liable the owner of the structure for carelessness in failing to prevent the attack. Typically, when owners are held liable it is not on the ground that they have risked wrongful conduct by another, but because, as in *Hines*, they have breached an affirmative duty to protect certain potential victims from harm at the hands of third parties. This is why courts usually require a pre-existing relationship between victim and owner: overwhelmingly, successful claimants are customers and other invitees.<sup>65</sup> It is also why the trigger for the duty – when a duty is recognized – is the sort of ‘heightened foreseeability’ that puts or should put the owner on alert that its enclosed space ‘invites’ physical attacks on persons who occupy the space with permission.<sup>66</sup>

To be sure, tort law sometimes recognizes affirmative duties owed to strangers.<sup>67</sup> While such cases might seem to lay the groundwork for recognition of negligent enabling as a generic ground of liability, they fall well short of doing so. For the most part, affirmative duties of this sort rest on the existence of a custodial or quasi-custodial role being played by the remote actor in relation to the more immediate injurer. A familiar example is the obligation that law enforcement officers, prisons, and parole boards owe to members of the public to take care to ensure that the latter are not harmed by violent prisoners inappropriately released from custody or confinement.<sup>68</sup> A modern and more

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it in these terms. *Taboada v. Daly Seven, Inc.* 626 S.E.2d 428, 435 (Va. 2006); *Wright v. Webb*, 362 S.E.2d 919, 922 (Va. 1987); *Gulf Reston, Inc. v. Rogers*, 207 S.E.2d 841, 844 (Va. 1974).

<sup>65</sup> *See, e.g.*, *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654 (Tex. 1999) (denying liability of garage owner to victim who was brought onto premises against her will, and without permission of owner).

<sup>66</sup> *See, e.g.*, *Sharon P. v. Arman Ltd*, 989 P.2d 121 (1999).

<sup>67</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §§ 37-44 (P.F.D. No. 1, 2005) (articulating affirmative duty rules).

<sup>68</sup> DOBBS, *supra* note 50, §331, at 894.

controversial application of this same idea is found in the famous *Tarasoff* decision,<sup>69</sup> in which the California Supreme Court held that a psychotherapist owes a duty to take steps to warn a person targeted by his patient for attack of the risk of attack.

An extension of the duty-to-control idea arises with respect to claims by the victims of car accidents against the physicians of adult patients whose poor driving precipitates a crash. Perhaps the most common allegation of this sort is that the physician failed to inform a patient that her medication might cause her to fall asleep while driving.<sup>70</sup> Some state courts have deemed allegations such as these as insufficient as a matter of law, while others have allowed them to go to the jury on the issues of breach and cause. In the latter group, the theory of breach is almost always an unreasonable *failure to warn* the patient of a risk of unexpected, uncontrollable somnolence. That is, few if any courts suppose that a treating physician is under an obligation to attempt to control the comings and goings of a mentally competent adult patient (e.g., by physically detaining him, or taking his car keys). Instead, the theory is that the doctor is in a position to inform the patient as to possible side-effects of medication of which the patient might well be unaware. The doctor's affirmative duty is predicated on her greater expertise and the corresponding reliance of the patient on that expertise.<sup>71</sup>

In providing rules that allow for liability only on particular terms, affirmative-duty doctrines necessarily set liability limitations. To see this, we can again return to claims against gun manufacturers for negligent marketing by victims of criminal

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<sup>69</sup> *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976).

<sup>70</sup> *See, e.g., Coombes v. Florio*, 877 N.E.2d 567, 572 (Mass. 2007) (adopting this rule and citing other cases that have done the same). In these cases, courts have routinely declined invitations to invoke the idea that a doctor has a duty physically to control her patients. *See, e.g., id.* at 575.

<sup>71</sup> Thus where the enhanced danger of bad driving does not arise from the administration of medication, but instead from a pre-existing medical condition of which the patient is aware such as epilepsy, the physician often is not held liable. *See, e.g., Praesel v. Johnson*, 967 S.W.2d 391 (Tex. 1998).

shootings. It is quite apparent that, in the standard case, the requisite special relationship between manufacturer and victim, or between manufacturer and shooter, is missing. The manufacturer has not undertaken to provide protective services to the victim, and exercises nothing like the sort of control that a jailer has over a prisoner or a therapist has over his patient.

Likewise, the relationship of social host to adult guest is not custodial in the requisite sense. *Tarasoff*, which was already pushing the edge of the envelope, turned on the authority and responsibility of a treating psychiatrist to control the comings and goings of a potentially dangerous psychotic patient. No comparable expertise or relationship exists between social host and competent adult guest. A host is no more expert than the mildly inebriated guest, or other guests, in assessing whether the inebriated guest presents a heightened risk of injury to other users of the roads, and a host has no legal authority to detain a mildly impaired guest against the guest's will. And the typical guest of course bears no resemblance to a mentally ill patient who confesses to his psychiatrist an intent to murder or harm an identifiable third party.

Nor is the social host properly equated with the doctor who fails to inform her patient of possible soporific side-effects of medication. The doctor's affirmative duty is predicated on her greater expertise and the corresponding reliance of the patient on the doctor. In the standard case, the social host does not stand in this sort of position relative to her inebriated guest. While it is certainly possible that inebriation might render the guest's self-control or judgment less acute, such that he is less risk-averse than he might otherwise be, he will not have become somehow unaware of the obvious risks that attend

driving while intoxicated, such that it would be enlightening to him to learn from the host about the dangers of drunk driving.

It is also significant that any duty owed by a physician to users of the road is parasitic on – indeed inseparable from – the doctor’s core duty to treat her patients competently. If in the failure-to-warn cases discussed above the doctor has fallen down on the job with respect to users of the public roads, it is only because she has at the same time failed in her duty to provide appropriate medical care to her patient. The patient is owed a warning about the side-effects of her medication as part of her treatment. In this sense, the doctor’s duty to warn is part of a broader affirmative duty to look out for the patient’s health as she treats her. Perhaps the word “host” in the phrase “social host” connotes a similarly paternalistic role for the host and his guests. If so, it is misleading. A social host is entitled and expected to treat his adult guests as ... *adults*. Indeed, we would expect that many guests would find it insulting or offensive to have the host treat them as if they were in need of a chaperone, or a warning about the perils of drunk driving. Our point is *not* that the interest of the host in avoiding potential awkwardness in dealing with guests, or hurt feelings on their part, is an interest that outweighs the imposition of a duty to monitor. Nor is it to suggest that hosts who aggressively monitor guest’s alcohol consumption are doing something wrong – they may be doing the right thing, morally. It is rather that the potential for awkwardness and hurt feelings provides evidence that, in ordinary social life, a host does not interact with guests as if they were patrons or patients dependent on the host for certain kinds of supervision. Accordingly, the law recognizes that a social host is not *obligated* to treat his or her adult guests as in

need of protection, as incompetent, or as irresponsible: he is entitled to treat them as responsible agents.

By appreciating what's missing from ordinary social host cases, one can in turn identify scenarios involving the provision of alcohol that depart from the ordinary, and thus might actually warrant the imposition of liability on a host for nonfeasance. Most obviously, if the host is presiding over an event at which alcohol is being made available to minors, the host is much more appropriately cast in the role of guardian. It is a crime to serve alcohol to minors. Presumably, this conduct has been criminalized in large part out of a concern that minors, as a class, are less able to handle alcohol consumption responsibly. This is why parents of teenage children who are invited to parties are likely to ask the parents of the child throwing the party whether they or someone else will be chaperoning at the event. The expectation, in this situation, is that a responsible adult must be present to guard against and deal with irresponsible behavior by teenage guests. In this setting, it makes some sense to suppose that the host owes an affirmative, custodial duty to monitor her guests' behavior for the benefit of third parties who might be injured by them.<sup>72</sup> The host is quite literally expected to interact with the minor partygoers as a chaperone and supervisor, a notion that is out of place when one describes the hosting of an ordinary social event for adult guests.<sup>73</sup>

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<sup>72</sup> *Biscan v. Brown*, 160 S.W.2d 462 (Tenn. 2005).

<sup>73</sup> A closer case might be one in which the host serves alcohol to a visibly intoxicated adult guest whom the host knows will be driving away from the event. *See McGuiggan v. New England Tel. & Tel. Co.*, 496 N.E.2d 141, 146 (Mass. 1986) (dictum) (host can be held liable for guest's drunk driving if host served guest when guest was visibly intoxicated); *Langle v. Kurkul*, 510 A.2d 1301, 1306 (Vt. 1986) (same). Our inclination is to treat these as a special kind of breach-of-affirmative-duty case.

Space limitations prevent us from addressing Section 39 of the Physical Harm provisions, which asserts that an actor whose conduct has generated a risk of physical harm to another owes a duty to take steps to prevent that harm. Suffice it to say we believe this Section significantly overextends the sources from which it derives, including Sections 321 and 322 of the Second Restatement.

## Conclusion

One of the Reporters' animating concerns is to restate tort law so that it has fewer moving parts. The hope is that by simplifying they will minimize error, particularly error in the form of judges improvidently granting matter-of-law judgments for defendants. But simplification that runs roughshod over real distinctions – reductionism – is neither appropriate nor helpful. Unfortunately, the effort to treat careless injurings that feature intervening wrongdoing as indistinct from careless injurings that do not feature intervening wrongdoing is an exercise in reductionism. Sections 19, 34 and 37 do not restate the law accurately and promise to sow confusion. By running roughshod over standard intuitions about responsibility, they even threaten to discredit tort's claim to be law that permits victims to redress wrongs others have visited upon them.

A court faced with a tort claim against a remote actor for an injury (also) inflicted by an intervening actor's wrong should first determine if it is dealing with a case of *parallel risks* or a case of genuine *negligent entrustment*. If so (and assuming the standard negligence elements are satisfied), the remote actor and the immediate injurer are subject to liability. If the situation is not one of parallel risks or entrustment, the court must next determine if there is any basis for *attributing* the wrong of the intervener to the remote actor (as in the case of a battery abetted by another). Where attribution is appropriate, both defendants are subject to liability. Finally, if there is no basis for attribution, it will ordinarily be incumbent on the plaintiff to establish that the remote actor owed her a genuine *affirmative duty* to protect her against the intervener's wrong, either because of a special relationship between remote actor and victim or a custodial or quasi-custodial relationship between remote actor and intervener.