3-31 Draft

FIGURING FORESEEABILITY

David G. Owen*

The universe, cosmology suggests, is comprised largely of "dark matter," invisible stuff ubiquitously binding all things together.[1] Lurking deep inside the law of tort, permeating and connecting its various components, a vital ingredient defines and gives moral content to the law of negligence, controlling how each element fits together, and, ultimately, whether one person is bound to pay another for harm. Foreseeability is the dark matter of tort.

I. THE FORESEEABILITY PARADOX

Foreseeability is the great paradox of tort: one of its most vital moral tethers, yet irretrievably its most elusive. Long recognized as providing tort law with principle and boundaries, foreseeability crucially defines the nature and scope of responsibility in tort—its internal meaning and proper limits—especially in negligence.[2] Even harmful action cannot meaningfully be viewed as "wrong" if the actor could not possibly have contemplated that the action might produce the harm. Moreover, because the effects of all behavior extend forever,[3] "no coherent conception of responsibility can suppose that a person is responsible for everything that could be called a consequence of [his or] her actions."[4] If roughly stated, it is largely true that "a defendant is responsible for and only for such harm as he could reasonably have

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*Carolina Distinguished Professor of Law, University of South Carolina. Thanks to Matthew Anderson, William Mills, and Karen Miller for research and editorial assistance.

[1] *See, e.g.*, Dark Matter, http://imagine.gsfc.nasa.gov/docs/science /know_11/ dark_matter.html (last visited Mar. 30, 2009).

[2] In 1850, for example, Baron Pollock opined that "no defendant should be held liable for consequences which no reasonable man would expect to follow from his conduct." WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 342 (1941) (citing Greenland v. Chaplin, 155 Eng. Rep. 104 (Exch. Div. 1850)). *See generally* FREDERICK POLLOCK, THE LAW OF TORTS 21–45 (1887); Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH. U. L.Q. 49 (1991) (tracing history of foreseeability in proximate cause).

[3] "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. 'The fatal trespass done by Eve was the cause of all our woe.'" WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 236 (4th ed. 1971) (adapted from JOHN MILTON, PARADISE LOST, Book IX).

[4] Arthur Ripstein, *Justice and Responsibility*, 17 CAN. J. OF L. & JURISPRUDENCE 361, 374 (2004).

foreseen and prevented."[5] And so foreseeability—of the kind of harm, from the kind of hazard, to the kind of person an actor fairly ought to contemplate when deciding whether and how to act—is the seamless, moral thread that helps define interpersonal obligations, personal wrongdoing, the extent of responsibility therefor, and it is the "stuff" that binds them all together.

Yet, while foreseeability may be the fundamental moral glue of tort, it provides so little decisional guidance that scholars often revile it for being vague, vacuous, and indeterminate: "in one sense, everything is foreseeable, in another nothing."[6] The slipperiness of foreseeability is evident from the myriad cases turning on its meaning and application. In evaluating conduct, should a person be held "reasonably" to foresee that knocking a plank into the hold of a ship carrying benzene will generate a spark that ignites petrol vapor in the hold, causing an explosion and fire that destroys the ship?[7] That clumsily helping a man to board a moving train will dislodge a package he is carrying, that fireworks hidden in the package will fall upon the rails and explode, and that the explosion will topple scales upon a passenger standing at the other end of the platform "many feet away"?[8] That oil discharged by a ship onto water will spread some distance and become ignited when cotton floating on the oil is set on fire by molten metal dropped by workers on a wharf, destroying the wharf?[9] That a young man will tilt and shake a soft drink vending machine, causing it to fall upon and kill him, in an effort to steal a Coke?[10] That an assailant might use the four walls of an unlocked building to conceal an assault?[11] That a person will attempt suicide by closing herself in a car trunk without an inside release latch, change her mind, and be trapped inside for nine days?[12] Or that terrorists will use

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[5]H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 231 (2d ed. 1985).

[6]*Id.* at 232 (citing WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 259 (2d ed. 1955)).

[7]In re Arbitration between Polemis & Furness, Withy & Co., Ltd., [1921] 3 K.B. 560 (Ct. App.) (holding that the unforeseeability of the risk did not bar recovery).

[8]Palsgraf v. Long Island R. Co., 162 N.E. 99, 101 (1928) (holding, 5–4, that the unforeseeability of the risk barred recovery).

[9]Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co., Ltd., [1961] A.C. 388 (Privy Council) [hereinafter *Wagon Mound*] (holding that the unforeseeability of the risk barred recovery).

[10]Moran v. Cavalier Acquisition Corp., 432 S.E.2d 915 (N.C. Ct. App. 1993) (holding that there was sufficient evidence that risk was actually foreseen).

[11]*Compare* Sanford v. City of Detroit, 371 N.W.2d 904 (Mich. Ct. App. 1985) (holding that owner of vacant building should have known that criminals might put building to harmful use), *with* Roberts v. Pinkins, 430 N.W.2d 808 (Mich. Ct. App. 1988) (holding that use of vacant building for criminal assault was unforeseeable).

[12]Daniell v. Ford Motor Co., 581 F. Supp. 728 (D.N.M. 1984) (holding that

fertilizer[13] or an airplane[14] to blow up the World Trade Center? As a test of responsibility for consequences in cases such as these, foreseeability may seem almost empty of content, so devoid of substantive meaning as to mock the concept of a rule, principle, or standard for evaluating conduct or its consequences to determine responsibility in tort. "Law" must be grounded in concepts on firmer footings than foreseeability, some argue,[15] or vanish in a vapor like Hamlet's father when the morning cock doth crow.[16]

Yet, there is no denying that foreseeability properly permeates tort, especially negligence, and that it cannot and should not be excised. Tort law broadly concerns personal responsibility for wrongfully causing harm to others. For a person's actions to be wrongful, the person must have had a choice between alternative courses of action, and also must have chosen, by some standard, incorrectly. If an actor chooses to act in a manner that violates some community norm of proper behavior, tort law holds the actor accountable for harmful consequences that result from that choice. Thus, tort responsibility normally implies that the actor ought to have considered and chosen to avoid the kind of harm he caused, that he or she wrongfully failed to avoid the harm. So, ascribing moral character (blame or praise) to a choice to risk or avoid the risk of harm implies the actor's ability to conceive ("foresee") its consequences. Foreseeability thus is bound up, inextricably, in both notions of wrongfulness and how far responsibility for wrongfulness should extend.

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the unforeseeability of the risk barred recovery).

[13]Port Auth. of N.Y. & N.J. v. Arcadian Corp., 189 F.3d 305 (3d Cir. 1999) (N.J. law) (holding that manufacturers of fertilizer products could not reasonably foresee that their products would be used in 1993 World Trade Center terrorist attack).

[14]In re Sept. 11 Litig., 280 F. Supp. 2d 279, 307 (S.D.N.Y. 2003) (Va. law) (holding that manufacturer of airliner might reasonably foresee that failure to design secure cockpit could facilitate hijacking that would increase risk to persons and property on the ground in the September 11, 2001 terrorist attacks).

[15]"With affection and respect" does not describe how most scholars view foreseeability. For a small sampling of criticisms, see, e.g., Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1523 (1993) (decrying judicial use of words like "foreseeable, unforeseeable, . . . and whatever other magic mumbo jumbo courts could use to obfuscate the policies that were really at the heart of their decisions"); Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1046 (2001) (foreseeability is "so open-ended that [it] can be used to explain any decision, even decisions directly opposed to each other"); Benjamin C. Zipursky, *The Many Faces of Foreseeability*, 10 KAN. J.L. & PUB. POL'Y 156, 156 (2000) ("Foreseeability is undoubtedly a muddle in the law of negligence.").

[16]*See* WILLIAM SHAKESPEARE, HAMLET, Act 1 Scene II.

Between the two views of foreseeability—as essential moral glue or indeterminate nuisance—the draft *Restatement (Third) of Torts*[17] leans uncomfortably toward the latter, indeterminate-nuisance point of view. While the draft *Restatement* forthrightly embraces foreseeability in its definition of negligence, it seeks to reduce the role of foreseeability in proximate cause, renamed "scope of risk." In addition, the draft *Restatement* unblushingly ousts foreseeability from its prominent role in duty, boldly casting it out from its vital gate-keeping role at the front of negligence law into the capricious wilderness of the other elements.

How foreseeability should be figured in tort, and whether the *Third Restatement* has refigured it properly, is the subject of this essay. The inquiry first examines why, conceptually, foreseeability reaches so deeply into tort, and it then explores, doctrinally, where foreseeability fits in the elements of the law of negligence. The overarching question here is whether the role foreseeability plays in negligence is correct as presently conceived, or whether instead foreseeability's role in negligence should be refigured, as the *Third Restatement* draft wants to do. In contrast to the *Restatement*'s view of foreseeability as a nuisance concept that should be marginalized, I conclude that foreseeability's intrinsic moral power accords it a more prominent place in the pantheon of tort—indeed, on the lofty perch where it presently resides. Unlike the *Third Restatement*, I come to praise foreseeability, not to bury it.

II. FORESEEABILITY AND RESPONSIBILITY

Tort law, including negligence, concerns the law of "wrongs."[18]

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[17] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005) [hereinafter RESTATEMENT (THIRD)].

[18] "Tort," from the French for injury or wrong, derives from the Latin *tortus*, meaning twisted or crooked. *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 2 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS]; *see also* Peter Birks, *The Concept of a Civil Wrong*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 39 (David G. Owen ed., 1995) [hereinafter PHILOSOPHICAL FOUNDATIONS] ("'Wrong' and 'tort', like 'crook' and 'bent', play on the same metaphor which contrasts to 'right' and 'straight'. Wrong conduct, or, using the French word, 'tort', is twisted, a metaphor for condemned or disapproved.") (citing THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (Charles T. Onions ed., 1966)); *see generally* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007) (explaining why tort is properly recognized as a law of "wrongs").

By providing a broad, formal, concrete, legal frame of responsibility for harm in an unruly world,[19] tort law rests on and reflects moral standards of interpersonal behavior and responsibility for causing harm to others.[20] And the root concept of tort, of course, is that actors are held to account for harm, and only such harm, as results from their wrongful conduct.[21]

A. Capacity and Choice

In distinguishing wrongful conduct from conduct that is not, it is helpful first to focus on an agent's ability or "capacity" to avoid causing harm,[22] since one cannot ordinarily be blamed for failing to do what one is incapable of doing. This follows from Immanuel Kant's proposition that human dignity is grounded in autonomy, or self-control, premised on freedom of will as distinguished from determinism.[23] Because humans are autonomous beings, able to make choices concerning alternative goals, values, and modes of behavior, and capable of contemplating the "causal regularities" of that behavior,[24] society fairly may judge the quality of a person's choices that result in harm (or benefit) to other persons. Thus, law and morals normally figure responsibility for causing harm to another by evaluating the actor's choices to act in a harmful way rather than in another, harmless way in view of the intended, likely, and foreseeable consequences of those actions to other persons.[25] Aptly, an actor whose choices were meaningfully wrongful in relation to the victim might be said to "own" the harmful consequences of that wrongdoing.[26]

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[19]*See* Bernard Williams, *Afterword: What Has Philosophy to Learn From Tort Law?*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 18, at 487.

[20]In this essay, I postulate that tort law is grounded in principles of moral responsibility, though, like Tony Honoré, I have no interest here in engaging "the largely sterile controversy between positivism and natural law." *See* TONY HONORÉ, RESPONSIBILITY AND FAULT 8 (1999) [hereinafter HONORÉ, RESPONSIBILITY AND FAULT].

[21]Many others agree, but Ernest Weinrib has explained this point with singular clarity and force. *See generally* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

[22]*See* David G. Owen, *Figuring Responsibility and Fault*, 13 Kings College (Univ. of London) L.J. 227 (2002) [hereinafter Owen, *Figuring Responsibility and Fault*], from which this discussion draws.

[23]*See* David G. Owen, *Philosophical Foundations of Fault in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 18, at 201 [hereinafter Owen, *Philosophical Foundations of Fault*].

[24]*See infra* note 57.

[25]This might be seen as a Kantian, "reciprocity" conception of responsibility that links doers and sufferers of harm. *See* Ripstein, *supra* note 4, at 362 ("The reciprocity conception views responsibility as a relation between persons with respect to expected consequences.").

[26]*See, e.g.*, *id*. at 372 (explaining that the reciprocity conception of responsibility holds that "a consequence belongs to a particular person as against

For responsibility and blame appropriately to attach to a person for a harmful action (or credit for a beneficial action), therefore, a free-will perspective suggests that we first must determine the actor's ability to understand that the action might be harmful, that an alternative action would likely be less harmful, and that the less-harmful alternative was more consistent with the actor's obligations to other persons in the community. Responsibility for one's actions, and fault, thus depend upon an actor's capacity to understand, at the time of contemplated action, his or her relevant options for action (and inaction), the causal possibilities of those actions, and reasons why the various actions might be right or wrong. Capacity, therefore, lexically precedes choice, and choice between actions with differing outcomes—intended, expected, and foreseeable—prefigures the idea of fault.

Once an actor's capacity is established, the next step in determining moral responsibility is to evaluate the propriety of the actor's *choice*—the decision to act one way (involving a risk that eventuates into the plaintiff's harm) rather than another way (without this risk). Choices are fundamental to personhood: in combination, as the expression of a person's will, they *are* that person.[27] People's choices define who they are in relation to others in a world crowded with people of equal abstract worth chasing limited resources, including time and space. How choices should be evaluated as right or wrong is crucially important,[28] yet it suffices here to observe that a person's choice to act in a manner that results in harm cannot meaningfully be blamed unless the person prior to acting understood, or had at least an abstract capacity to understand, the consequences of the contemplated action—the possibility that it might cause the kind of harm that actually results. This is why foreseeability is a key ingredient in responsibility.

B. Responsibility for Consequences

If choice is so important, one might ask, then why not ground responsibility simply on the choice to *act*—knowing, as we all do, that unexpected and even unforeseeable results, if uncommon, not infrequently do occur. The argument here might be that *un*foreseeable consequences, those types of consequences that people comprehend as

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some other because of the norms governing the interaction of separate persons pursuing their distinct ends"). Though an "ownership" label by nature is conclusory, it helpfully conveys the conclusion in a powerfully intuitive fashion.

[27]*See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 337–41 (1980) (examining views of Thomas Aquinas and others on the relation of decisions to act and human will).

[28]Many have offered thoughts on this important topic. Mine are set forth in Owen, *Philosophical Foundations of Fault*, *supra* note 23, at 201–28.

lying outside the realm of normal expectation but that sometimes do occur, are then actually *themselves* foreseeable, at least in a sense. And, since actors contemplate (at some level of abstract understanding) the possibility of such unexpected results, may not such consequences fairly be viewed as a product of the actor's will? One may reach this kind of broader view of responsibility more directly, however, by simply broadening the notion of responsibility to include unforeseeable results. Why not, in other words, simply reject fault as the organizing principle of tort responsibility and substitute instead some notion of "strict" liability?

While most sentient beings on the planet today properly insist on keeping tort law grounded significantly in fault, a number of commentators have propounded various theories of "strict" liability from time to time.[29] One of the most intriguing strict liability theories in the last few decades is the idea of "outcome responsibility," championed most prominently by Professor Tony Honoré.[30] This broad theory of responsibility argues that persons are responsible for all outcomes of their conduct because their identity as persons "autobiographically" embraces all outcomes of their actions (and interactions) in the world. Since its initial promulgation by H.L.A. Hart and Professor Honoré in 1985,[31] and fuller explication by Honoré in his Blackstone lecture in 1988,[32] the outcome responsibility conception of personal responsibility has beguiled tort theorists around the globe.[33]

In the theory's initial iteration, outcome responsibility was

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[29]An early, prominent strict liability conception in modern tort theory was offered by Richard A. Epstein. *See* Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); *see also* Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974). For critiques of Epstein's strict liability theory, see e.g., WEINRIB, *supra* note 21; Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J. OF L. & JURISPRUDENCE 147 (1988).

[30]The following discussion draws from Owen, *Figuring Responsibility and Fault*, *supra* note 22, at 230–34.

[31]In the preface to H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW lxxx–lxxxi (2d ed. 1985) (preface dated 1983). It should be noted that the statement of outcome responsibility in the preface to the revision of this extraordinary work appears to stand independently of the extended and sensitive treatments of foreseeability and remoteness in the volume.

[32]Published as Tony Honoré, *Responsibility and Luck—The Moral Basis of Strict Liability*, 104 L. Q. REV. 530 (1988) [hereinafter *Responsibility and Luck*], reprinted in HONORÉ, RESPONSIBILITY AND FAULT, supra note 20, ch. 2, at 14.

[33]Among considerable other commentary, see, e.g., Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 514 n.207 (1992); Ripstein, *supra* note 4, at 376; W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 941–45 (2005).

sketched out as a theory of strict responsibility for harm—by merely causing harm to another, an actor becomes fundamentally linked to the victim's misfortune and so is "responsible" for the harm:

> The idea that individuals are primarily responsible for the harm which their actions [cause] is important . . . to . . . . the individual's sense of himself as a separate person whose character is manifested in such actions. Individuals come to understand themselves as distinct persons, to whatever extent they do, and to acquire a sense of self-respect largely by reflection on those changes in the world about them which their actions . . . bring about . . . .[34]

This is the essential, existential conception of outcome responsibility as later and more fully propounded by Honoré: people are responsible for the effects their actions have on others because their identity is shaped by how their conduct alters the world. This is true, he argues, regardless of whether such changes are good or bad, or whether they are intended, unintended, or even unforeseeable. Not only does outcome responsibility help define the "character" of individual persons, but it provides a connective thread between autonomous beings in the community in which they live. At a minimum, therefore, outcome responsibility is an important theory about the nature of human identity and relationships. The important question to tort is whether it is anything more.[35]

One scholar especially sympathetic to Honoré's broad vision of

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[34]HART & HONORÉ, *supra* note 31, at lxxx.

[35]Honoré, himself, queries whether outcome responsibility by itself contains sufficient normative power to support tort responsibility for causing harm:

> Yet outcome-responsibility for harm to another does not by itself create a duty to *compensate*. The form that our responsibility for an outcome should take remains an open question. An apology or telephone call will often be enough. But outcome-responsibility is a basis on which the law can erect a duty to compensate if there is reason to do so.

Tony Honoré, *The Morality of Tort Law—Questions and Answers*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 18, at 82, reprinted in HONORÉ, RESPONSIBILITY AND FAULT, *supra* note 20, ch. 4, at 67, 77–78. Compare, however, his later, more confident assertion (harking back to the spirit of *Responsibility and Luck*, *supra* note 32) that strict legal responsibility is sometimes morally justifiable "since we are responsible for what we do, including what we do without intending to, or without foreseeing the consequences." HONORÉ, RESPONSIBILITY AND FAULT, *supra* note 20, at 9.

responsibility is John Gardner.[36] Characterizing the theory as "the most important modern attempt to rehabilitate [a] contrarian interpretation of the tort of negligence at common law,"[37] Gardner argues that "in spite of tort's misleading name, the moral essence of D's tort in a negligence case is really just that he injured P."[38] Gardner asserts that the moral (or pre-moral) grounding of outcome responsibility in human identity explains the theory's inherent power:

> A regime of strict liability represents the starkest possible *reaffirmation* of our agency and its importance in the world, because the simple idea at the heart of strict liability—the idea of outcome responsibility—is the idea that we leave traces of ourselves forever imprinted on history, in the form of the countless welcome and unwelcome events that were (as Honoré puts it elsewhere) "unequivocally our doing." . . . For first and foremost, the deeper argument goes, we are what we do—complete with results.[39]

While Gardner argues cogently for outcome responsibility as a broad form of moral accountability for harm, other scholars reason that the case for applying strict outcome responsibility to tort liability ultimately must fail. Stephen Perry has extensively examined various permutations of outcome responsibility in a corpus of important work on responsibility in tort law.[40] Perry concludes that a social conception of outcome responsibility, based on a "risk" or "benefit" principle (that it is fair to require individuals to accept the costs as well as benefits of their actions), pushes responsibility toward strict liability, the logic of which

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[36] *See* John Gardner, *Obligations and Outcomes in the Law of Torts*, *in* RELATING TO RESPONSIBILITY 111 (Peter Cane & John Gardner eds., 2001) [hereinafter RELATING TO RESPONSIBILITY].

[37] *Id*. at 126.

[38] *Id*. at 125.

[39] *Id.* at 133–34 (emphasis in original). Honoré further explains:

> [O]ur responsibility for what we do and for its outcome is inseparable from our status as persons. We are the people we are and have the character we have largely because the dealings in which our bodies and brains are involved, if in some aspect intentional, are attributed to us as the actions of persons with a continuing identity.

HONORÉ, RESPONSIBILITY AND FAULT, *supra* note 20, at 10.

[40] *See, e.g*., Stephen R. Perry, *Honoré on Responsibility for Outcomes*, *in* RELATING TO RESPONSIBILITY, *supra* note 36, at 61; Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

he powerfully refutes.[41] Arthur Ripstein observes that Honoré's conception of outcome responsibility for harm is broader and less coherent than tort liability for harm based on fault.[42] While Ripstein explains that tort law could draw upon distributive justice to corral the otherwise sweeping notion of outcome responsibility as requiring merely causation, he observes that a liability regime so constructed would look entirely different from the tort law system presently in place that grounds responsibility for harm in fault.[43] Peter Cane[44] and many other commentators agree that more than causation should be demanded to establish responsibility for harm and that accountability in tort normally and properly insists on connecting the actor's will to the victim's harm.[45]

The inability of many of the best minds to understand how strict liability, under the guise of "outcome responsibility," is morally justifiable as a theory of reparative responsibility for harm reflects the ineluctable power of tort law's grounding of liability in fault. As seen above, blame makes sense only for making wrong decisions—choices to advance one's own interests in denial of equal respect owed to the interests of others.[46] And decisions may be considered faulty, as argued earlier, only if the actor is capable of understanding the *meaning* of those choices, the possible *consequences* of contemplated actions. All decisions, that is, require choice, choice presumes capacity, and capacity includes foreseeability as a proxy for the actor's will. In short, a person

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[41]See Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J. OF L. & JURISPRUDENCE 147 (1988).

[42]Arthur Ripstein, *Private Law and Private Narratives*, *in* RELATING TO RESPONSIBILITY, *supra* note 36, at 37.

[43]*Id*.

[44]*See, e.g.*, PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 134 (2002); Peter Cane, *Responsibility and Fault: A Relational and Functional Approach to Responsibility*, *in* RELATING TO RESPONSIBILITY, *supra* note 36, at 81.

[45]*See, e.g.,* Allan Beever, *Corrective Justice and Personal Responsibility in Tort Law*, 28 J. LEGAL STUD. 475, 486 (2008) (closely examining Honoré's outcome responsibility theory and characterizing it as "odd" and "bizarre"); Owen, *Figuring Responsibility and Fault*, *supra* note 22, at 231–33 (exploring weaknesses in outcome responsibility as an independent justification for legal responsibility).

[46]*See* Richard A. Wright, *The Standards of Care in Negligence Law*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 18, at 249 (Under "the Kantian-Aristotelian theory of legal responsibility, based on the foundational norm of equal individual freedom, ... the common good to which law and politics should be directed is . . . the creation of conditions that allow each person to realize his or her humanity as a self-legislating free rational being."); Owen, *Philosophical Foundations of Fault*, *supra* note 23, at 228 ("Choosing to deny another person's equal right to freedom is the most fundamental reason [for according] blame.").

is not meaningfully "accountable" for causing harm that he or she cannot reasonably foresee and therefore in no sense wills.[47] So, if tort law properly rests on moral fault, as I believe it largely does,[48] foreseeability is a crucial moral cog for responsibility in tort.

C. Why Fores*eeable* and Not Fores*een*?

If the moral value of foreseeability to tort lies in its tying human will through choice to the consequences of behavior, then we must ask why tort law views foreseeability in terms of what an actor reasonably *should* foresee rather than what the person actually *does* foresee. One might worry, that is, that holding an actor accountable for a consequence he or she did not foresee, even though a reasonable person would have foreseen it, is to hold the actor to an unfair, strict level of accountability for which he or she is no more responsible than the victim. This is an important concern.

At bottom, why negligence law holds actors responsible for foreseeable harm, rather than limiting responsibility to those harms they actually foresaw at the time of acting, is part of the broader inquiry of why negligence is based on an objective rather than subjective footing.[49] At least a partial justification for grounding negligence responsibility in an objective standard lies in the fact that tort law, unlike moral theory, necessarily operates in an imperfect world where truth is perceived but dimly, and where proof of truth in courtrooms is even further removed from its Platonic ideal. This perspective, which we might label a real-world, "rough-justice" explanation, was applied long ago in *Vaughan v. Menlove*,[50] where the dim-witted defendant built a combustible hayrick at the boundary of his land near his neighbor's cottages that burned down when the rick ignited. Rather than allowing the defendant to be judged according to whether he "acted honestly and bona fide to the best of his own judgment," the court explained that a practicable legal rule required evaluating the conduct of all persons by a uniform standard of prudence.[51] If the law chooses to place the human will at the center of its

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[47] As Arthur Ripstein concludes, "norms link agents with consequences," and "[f]oreseeability is relevant to the possibility of norms, because no norm can require a person to take account of something unforeseeable." Ripstein, *supra* note 4, at 377.

[48] *See supra* note 20.

[49] Many commentators have addressed this important, broader topic, which is only sketched out here to provide a backdrop for examining foreseeability's proper role in negligence law.

[50] 132 Eng. Rep. 490 (C.P.D. 1837).

[51] *Id.* at 493. "Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to

theory of responsibility, in other words, the law simply has to accept the fact that the translation of moral to legal reality is somewhat rough, to say the least.[52] Yet, rough tort justice, one might well conclude, is better than none at all.[53]

To this rough-justice practicability pole, we may attach a more satisfying, moral explanation for why a person fairly may be held responsible for harmful consequences he or she does not foresee but that other, prudent people would. As previously discussed, all persons do understand, at some level, that consequences outside the realm of their expectations sometimes do occur, and so at some level of abstract understanding they "foresee" the possibility of such unexpected results. This explanation is rooted in the common security pact we all implicitly embrace and, hence, in the common will. Foreseeability's source in the contemplations of a reasonable prudent person, the objective fountainhead of responsibility, suggests that foreseeability may be morally grounded in our shared acceptance of a behavioral norm of a reflective, cautious person. Most persons acting in the crowded, hurly-burly world, if they stopped to think about it, probably would accept that responsibility for the consequences of their actions fairly might be judged according to the standards of extra care, prudence, and respect for the interests of others that they would want others to apply to them. What this kind of Kantian reciprocity means to responsibility for foreseeable, but not foreseen, harm is that we understand we all must

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the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe." *Id.* Consider also Holmes' colorful explanation:

> If . . . a man is born hasty and awkward, is always hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 (1881).

[52]*See generally* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007) (explaining that tort law, though properly viewed as a law of wrongs, need not perfectly match wrongdoing with responsibility for redress). Yet Ernest Weinrib argues, powerfully, that the connection between private law and moral theory is elegant and pure. *See* WEINRIB, *supra* note 21, at 20 ("Private law makes corrective justice and Kantian right explicit by actualizing them in doctrines, concepts, and institutions that coherently fit together.").

[53]For an early inquiry into "rough justice" at work in tort, see Clarence Morris, *Rough Justice and Some Utopian Ideals*, 24 ILL. L. REV. 730 (1929–1930). *Compare* Bernard Williams, *supra* note 19.

surrender a bit of personal will-to-consequence equivalence if we choose on any particular occasion not to act with the utmost care, prudence, and deliberation upon the variety of harmful consequences our contemplated action might produce. On the many occasions when the exigencies of practicable decisionmaking and action in a busy world lead us to put aside robustly prudent deliberation and behavior, we opt, as in a lottery,[54] to take our chances on and accept the consequences of such shortcuts, unforeseen though they may be. In such situations, where we act according to our own practicable moral compass yet contrary to higher moral norms, we might well be fairly deemed to consent to take responsibility for the harmful consequences we "negligently" cause – those that lie outside the scope of risks we actually contemplate but that remain inside the realm of risks we should have contemplated had we acted with the full prudence and solicitude toward others demanded by their equal worth. Grounded in the common will, and in the correlative relationship between doers and sufferers of harm under corrective justice,[55] this kind of reciprocal-waiver explanation may help justify an objective standard of responsibility in tort that stretches beyond foreseen consequences to include as well those that merely are foreseeable. If indirectly and unconsciously, members of a community thus may be seen to accept responsibility for unforeseen risks that remain inside the broader reasonable foreseeability bubble that we understand fairly

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[54]*See* Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 18, at 39 (justifying liability for unexpected consequences in tort in terms of a lottery). The lottery concept invites comparison with Tony Honoré's characterization of choice as a kind of bet. *See Responsibility and* Luck, *supra* note 32, at 539 (In choosing to do *X* rather than *Y*, "we are choosing to put our money on *X* and its outcome rather than *Y* and its outcome."). See also the tangle of related problems surrounding "moral luck," which has captured the minds of academics at least since Bernard Williams, *Moral Luck*, *in* MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980, at 20 (Bernard Williams ed., 1981), and Thomas Nagel, *Moral Luck*, *in* MORTAL QUESTIONS 24 (Thomas Nagel ed., 1979). More recently, see, e.g., Symposium, *Moral and Legal Luck*, 9 THEORETICAL INQUIRIES L. 1 (2008) (articles by Elizabeth Anderson, Tom Baker, Meir Dan-Cohen, David Enoch, Richard A. Epstein, Daniel Markovits, Menachem Mautner, Arthur Ripstein, Yoram Shachar, Jeremy Waldron, and Benjamin C. Zipursky); Gregory C. Keating, *Strict Liability and the Mitigation of Moral Luck*, 2 J. ETHICS & SOC. PHIL. 1 (2006); Goldberg & Zipursky, *supra* note 52.

[55]*See, e.g.*, WEINRIB, *supra* note 21, at 145 (positing that "negligence law unifies doing and suffering"); *id.* at 203 (stating that "the theoretical case for basing tort liability on the causation of harm without fault is inconsistent with the equality and correlativity of corrective justice and with the concept of agency that underlies Kantian right"); Allan Beever, *Corrective Justice and Personal Responsibility in Tort Law*, 28 J. LEGAL STUD. 475, 491–92 (2008). While this essay rests on principles of corrective justice, the many dimensions of that important concept extend far beyond this essay's scope. *See generally* JULES L. COLEMAN, RISKS AND WRONGS (1992).

circumscribes the consequences of our actions. So, when such risks do eventuate into harm, an actor fairly, morally, may be held accountable in tort.

However imperfectly,[56] then, tort law translates the moral predicate of responsibility grounded in the human will and human choice into a legal one through the concept of foreseeability—the capacity of a reasonable prudent person to contemplate that acting in a certain way may produce the type of hazard that actually does result.[57] While translating an actor's actual, subjective capacity into the objective capacity of a reasonable person requires pounding out some

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[56]While one might argue that this discrepancy between legal and moral theory proves the lack of cohesion between torts and morals, I believe instead that this minor discrepancy merely reflects the administrative frailties of a real-world tort law system that tries its best to mirror the ideals of moral responsibility. *See supra* notes 50–51 and accompanying text.

[57]*See, e.g.*, WEINRIB, *supra* note 21; Owen, *Philosophical Foundations of Fault*, *supra* note 23; Ripstein, *supra* note 4. Perry may explain it best:

> Negligence law has dealt with the proximity that limits outcome-responsibility under the doctrinal heads of duty of care and proximate cause (remoteness, as it is sometimes called). In both areas a test of foreseeability has eventually won out . . . . [T]he law has correctly sensed that it is proximity-as-foreseeability that is particularly relevant to reparation. The reason is that the existence of fault depends itself on epistemic considerations, in the form of belief in or actual or constructive knowledge of causal regularities, and this gives rise to a natural continuity between fault and proximity-as-foreseeability. Both the basis of and the limitations on outcome-responsibility are determined by the sense of having made a difference, and this is a complex phenomenon. But there is no doubt that it is present where our actions set in motion a foreseeable train of events that conforms to known or partially known causal regularities, since this increases our sense that we could have had a measure of *control* over the situation, or at least that some agent, perhaps an idealized one, could have had some control. If action generally produced outcomes that conformed to no specifiable regularities, so that we could never or almost never predict what the result of an action would be, then we would have no sense that agency was in any way meaningful, either for ourselves or with respect to its "effects" on others; there would be no sense of making a difference. It is the possibility of control, which depends in turn on the existence of knowable regularities, that creates meaning of both kinds.

Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 505 (1992).

imperfections in the alignment of tort and moral notions of responsibility, the fit is usually close enough to accomplish rough justice in an imperfect world.

III. FORESEEABILITY AND NEGLIGENCE

Now that we have examined why negligence law is properly bounded by the concept of foreseeable risk, we may turn to a consideration of where in negligence, in which elements, foreseeability properly belongs. Among the five elements of which negligence is comprised,[58] most agree that foreseeability is implicated significantly in three: duty, breach, and proximate cause.[59] Breach and proximate cause may be the most important, and, because the role of foreseeability in them is least controversial, how foreseeability fits in breach and proximate cause is first addressed, followed by an examination of foreseeability's duty role.

A. Breach

For all of the reasons previously discussed, there is little dispute that the foundational element of negligence—wrongdoing, breach of duty, falling below a community behavioral norm—necessarily rests first upon an actor's ability to contemplate, at least abstractly, the possibility that his or her contemplated behavior may cause the type of hazard to the type of person that actually does result. This is foreseeability, nothing more, nothing less.

The *Restatement (Second) of Torts* defines negligent conduct as "an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another."[60] This standard is explained as whether "a reasonable man

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[58] *See* David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671 (2007) (cogently explaining how splitting factual and proximate causation in two yields five negligence elements).

[59] *See, e.g.*, Cardi, *supra* note 33; Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, ___ WAKE FOREST L. REV. ___ (20__). Indirectly, foreseeability is also implicated in factual causation and damages—in causation, which is tied to foreseeability through negligence (where it resides), see, e.g., Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1082–84 (2001); and in damages, which are the consequences that normally must be foreseen.

[60] RESTATEMENT (SECOND) OF TORTS § 284(a). The *First Restatement*'s language was identical except that it variously substituted "should realize" for "should recognize." RESTATEMENT (FIRST) OF TORTS § 284(a) (1934). Comment a to the *First Restatement*'s version of this section explains that a reasonable man would realize such a risk if he, "knowing so much of the

should have expected that" his conduct "might cause harm to persons" like the plaintiff.[61] The *Second Restatement* further provides: "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done."[62] While this standard of *what a reasonable man should expect or recognize* embraces the idea of foreseeable risk, the *Restatement (Third) of Torts* locates foreseeability more prominently at the heart of negligence, defining negligence in section 3 explicitly in terms of foreseeable risk:

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.[63]

By defining both components of risk in terms of foreseeability,[64] the

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circumstances surrounding the actor at the time of his act as the actor knows or should know, would realize the existence of the risk and its unreasonable character." An actor "should recognize that his conduct involves a risk of causing an invasion of another's interest" if an actor, having the perception, knowledge, intelligence, and judgment of a reasonable man, or the higher perception and knowledge actually possessed by the actor, "would infer that the act creates an appreciable chance of causing such invasion." RESTATEMENT (FIRST) OF TORTS § 289. *See also* RESTATEMENT (SECOND) OF TORTS § 289, Recognizing Existence of Risk (rephrasing these same principles); *id.* at § 290, What Actor is Required to Know (listing such items as the normal characteristics of humans, animals, and things, commonly understood forces of nature, and relevant laws and customs).

[61]This statement of responsibility for negligence from the *First* and *Second Restatements*, section 281, illustration 1, restates the hypothetical Judge Andrews used in *Palsgraf v. Long Island Railroad Co*., that considers the responsibility of a driver ("chauffeur") who injures various people in an explosion when he carelessly collides with another car that contains dynamite, which nothing in the car's appearance would suggest. Contrary to Judge Andrews, who would extend at least the possibility of liability for the chauffeur to all the victims, with only a passing nod to foreseeability, the *First* and *Second Restatements* conclude that responsibility depends on whether a reasonable person in the defendant's position "should have expected" the particular risk.

[62]RESTATEMENT (SECOND) OF TORTS § 291.

[63]RESTATEMENT (THIRD), *supra* note 17, § 3.

[64]The burden of precautions properly should be modified with "expected," rather than "foreseeable." Though section 3 leaves this concept unmodified, "expected" may be implied.

Third Restatement's definition of negligence improves upon the *Second Restatement*'s less explicit inclusion of foreseeability in terms of what a reasonable man should recognize.

An important aspect of foreseeability's role in breach is how widely foreseeability should be conceived. Focusing on the actor's choice to act in a certain way that foreseeably produces a panoply of risks to various persons, the *Third Restatement* properly evaluates the broad bundle of hazards foreseeably flowing from an actor's conduct: "all the risks foreseeably resulting from the actor's conduct are considered in ascertaining whether the actor has exercised reasonable care."[65] As noted earlier, foreseeability includes risks that an actor may not know but reasonably should, commonly explained in constructive knowledge terms as risks the actor "should have known," meaning that prudence sometimes requires actors to investigate and evaluate possibilities of hidden or inchoate risk. Often, as a comment to section 3 observes, "the actor's alleged negligence consists of an inattentive failure to perceive or appreciate the risk involved in the actor's conduct."[66] In such cases, "the relevant burden of precautions is the burden the actor would have borne by paying more attention in the course of his ordinary affairs."[67] Most agree that negligence should be formulated in objective terms of constructive knowledge,[68] and the foreseeability perplexities lurking in breach are more directly bound up in proximate cause, where the inquiry now will turn.

B. Proximate Cause

Proximate cause addresses the question of whether in fairness and policy an actor should be held accountable in tort for a person's harm that in some manner is "remote" from the actor's breach of duty.[69] This doctrine serves to limit a tortfeasor's responsibility to the consequences of risks viewed fairly as arising from the wrong. Because "[i]t is always to be determined on the facts of each case upon mixed

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[65] RESTATEMENT (THIRD), *supra* note 17, § 3 cmt. b.

[66] *Id.* cmt. k; *see also id.* cmt. g.

[67] *Id.* cmt. k.

[68] *See, e.g.*, Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 506 n.207 (1992) ("Blame is assignable not just where the agent acts with knowledge of fairly specific facts, say that a certain action will or might cause a certain harm. It is also assignable where the agent knows that he ought not to act without first obtaining knowledge of the specific facts (knows that he ought to know, for short).").

[69] "It takes, perhaps, a degree of temerity to approach the subject of Proximate Causation about which much has been written with apparently increasing divergence of views." James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 149 (1925–1926). *See generally* JOSEPH A. PAGE, TORTS: PROXIMATE CAUSE (2003).

considerations of logic, common sense, justice, policy and precedent,"[70] proximate cause is an "elusive butterfly"[71] that e'er evades a net of rules.[72]

Because proximate cause in truth is little more than a swirling maelstrom of policy, practicality, and case-specific fairness considerations—rather than a meaningful set of rules or even principles—it would seem incapable of being subjected to rational "testing." Yet, lawyers, courts, and juries continue to search for guidance in unraveling the mysteries of this perplexing doctrine, which has led courts and commentators on an eternal search for a proper "test" for deciding whether a plaintiff's injury in any particular case was a proximate result of the defendant's wrong. Over time, courts have applied a number of tests that still sometimes inform judicial decisions, at least to some extent. Today, as has been true for many years,[73] the concept of "foreseeability," in one formulation or another, is the "touchstone"[74] or "cornerstone"[75] of proximate cause.[76] Under this "test," the responsibility of an actor for the consequences of wrongful action is limited by principles of reasonable "foreseeability." This outer boundary of tortious responsibility protects actors from liability for consequences that fall outside the scope of their wrongdoing, beyond their moral accountability. As previously discussed, responsibility for consequences should be based on the quality of an actor's choices, and the moral fiber of those decisions is gauged by the consequences the actor should contemplate as causal possibilities at the time the choice is made. If some other, "unforeseeable," consequence eventuates from an action, the fact that it lies outside the bundle of consequences the actor reasonably should have contemplated means that it probably did not

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[70] THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY 110 (1906).

[71] Accordini v. Security Cent., Inc., 320 S.E.2d 713, 714 (S.C. Ct. App. 1984) (Sanders, C.J.).

[72] "Proximate cause cannot be reduced to absolute rules." PROSSER AND KEETON ON TORTS, *supra* note 18, § 39, at 279. My discussion here draws from David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1681–83 (2007).

[73] "Except only the defendant's intention to produce a given result, no other consideration affects our feeling that it is or is not just to hold him for the result as its foreseeability; and no other consideration so largely influences the courts." Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 343, 352 (1923–1924) (pt. 2); *see also* HART & HONORÉ, *supra* note 31, at 254.

[74] *See, e.g.*, Jamison v. Ford Motor Co., 644 S.E.2d 755, 765 (S.C. Ct. App. 2007) ("The touchstone of proximate cause . . . is foreseeability."); Walcott v. Total Petrol., Inc., 964 P.2d 609, 611 (Colo. Ct. App. 1998) (same).

[75] *See* Morguson v. 3M Co., 857 So. 2d 796, 800 (Ala. 2003).

[76] The classic "modern" cases highlighting the role of foreseeability in duty and proximate cause, of course, are *Palsgraf* and *Wagon Mound*, *supra* notes 8 and 9.

inform the actor's deliberations and choice, and thus did not reflect his will. Under this view of human agency, there is no moral connection between a person's actions and the unforeseeable consequences of those actions. This suggests, as concluded earlier, that only the foreseeable consequences of an actor's choices may fairly be considered in evaluating the moral quality of a choice, which is why negligence determinations are bounded by the foreseeable scope of risk.[77]

Foreseeability may be even more important to proximate cause, where it provides the central limiting consideration, than it is to breach, where a number of important notions combine importantly within the calculus. As a matter of corrective justice, tort law appropriately holds blameworthy actors accountable only for harms they reasonably should contemplate as possible consequences of the wrongful aspect of their conduct. Put otherwise, wrongdoers are properly held liable only for harm foreseeably caused by their *wrongdoing*, not for all the harms their actions may cause. A careful driver, for example, who runs over a pedestrian, even if the driver is in the process of kidnapping a child, is not subject to tort liability for the pedestrian's harm.[78] The *Third Restatement* captures this simple, powerful idea in its principal section on proximate cause, section 29, Limitations on Liability for Tortious Conduct:

> An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious.[79]

The Reporters explain that this limitation, often called the "scope of risk" approach, which they call the "risk standard,"[80] is based on "the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor's conduct tortious."[81]

Several aspects of this definition of "proximate cause" pertain to

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[77] *See Wagon Mound*, *supra* note 9, at 422–23 (Viscount Simonds) (observing that "current ideas of justice or morality" argue for defining the scope of liability for the consequences of a person's negligent actions in terms of the foreseeability of those consequences: "To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behaviour."); *see also* Owen, *Philosophical Foundations of Fault*, *supra* note 23, at 226–27.

[78] *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 88, 117 (1997); Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 386 (1938–1939).

[79] RESTATEMENT (THIRD), *supra* note 17, § 29.

[80] *Id.* § 29 cmt. d.

[81] *Id.*

the foreseeability inquiry here. Plainly, the definition contains no explicit mention of "foreseeability" or "foreseeable risk" and, indeed, seems designed to shift attention away from the concept of foreseeability to the broader concept of scope of risk. Foreseeability, of course, is embedded in section 29's tortious risk idea, since negligence in section 3 is based on "the foreseeable likelihood that the person's conduct will result in harm [and] the foreseeable severity of any harm that may ensue."[82] In fact, foreseeability logically remains the *primary* consideration in scope of risk, and the Reporters note an increasing movement toward foreseeability as the "test for scope of liability in negligence cases."[83] What "scope of risk" thus appears to mean, essentially, is scope of *foreseeable* risk.[84] Yet this equivalence (or near equivalence) of the concepts lies muted in the comments and Reporters' Notes. So, while foreseeability contributes the most vital content to section 29's scope-of-risk concept, it nevertheless remains hidden from open, black-letter view.

Foreseeability's burial deep inside the draft *Restatement*'s formulation of proximate cause (itself buried under the label "Scope of Liability")[85] was no mistake. The Reporters, while acknowledging that the two concepts are largely co-extensive and suffer from the same frailties of over-breadth, under-breadth, and indeterminacy, nevertheless conclude that the risk theory's "simplicity," "more refined analytical" basis, and flexibility[86] justify substituting it for simple foreseeability.

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[82] *Id.* § 3. *See supra* note 63 and accompanying text.

[83] *Id.* § 29 cmt. e; *see also* cmt. j.

[84] DAN G. DOBBS, THE LAW OF TORTS (2000) (observing that "foreseeability is a short-hand expression intended to say that the scope of the defendant's liability is determined by the scope of the risk he negligently created"); *see also* PROSSER AND KEETON ON TORTS, *supra* note 18, § 43, at 297 (noting that "the 'scope of foreseeable risk' is on its way to ultimate victory as the criterion of what is 'proximate,' if it has not already achieved it"); *id.* at 281 (tracing the idea that foreseeability and scope of risk are equivalent, in limiting responsibility, to two opinions written by Baron Pollock in 1850); *supra* note 2.

"Risk" and the risk theory can be (and frequently are) viewed narrowly as including only risks that made the conduct negligent. In addition to section 29 of the *Third Restatement*, many commentators have long espoused this view. *See infra* notes 86–87. Yet the notion may be defined far more broadly and inclusively. "In its looser form it invites the judge to consider, when responsibility for harm is in dispute, on which of the parties the risk of that harm should fall." HART & HONORÉ, *supra* note 31, at 285 (explaining that such a conception can embrace whatever principles a decisionmaker might wish, such as economic efficiency).

[85] *See* Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 981 (2001) (recommending this usage).

[86] RESTATEMENT (THIRD), *supra* note 17, § 29 Reporters' Note to cmt. j.

They are not alone. Warren Seavey and many others have also seen great power, understandably, in the risk approach popularized by Judge Cardozo in *Palsgraf*.[87] The *Second Restatement*, in a comment entitled "Flexibility of risk," adopts the risk standard for the purpose of capturing within the scope of risk all hazards and consequences that might be seen as "normal and ordinary," though not "which a reasonable man would have in contemplation and take into account in planning his conduct"—such as the risk that negligent driving will endanger the rescuer of a child endangered by the driving; or that a victim of the negligent driving may "suffer further injury from negligent medical treatment, or from a fall while attempting to walk on crutches; or that the injured man may be left lying in the highway, where a second car will run over him."[88] To this list, one might add the risk that the victim will suffer unexpectedly severe injuries due to a particularly thin skull.[89] Although these hazards are not the types of hazards upon which actors normally dwell while acting,[90] the *Second Restatement* reasons, they all are a "normal" consequence of negligent driving and so fairly are included "within its scope."[91]

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[87]*See, e.g.*, Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 391 (1938–1939) (praising "the simplicity, logic, and justice" of Cardozo's risk approach in *Palsgraf*); Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 90–93 (1942–1943); ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 99–100 (1963) (explaining that the risk rule had become the prevalent approach and was preferable to the direct-consequences test). Viscount Simonds, in *Wagon Mound, see supra* note 9, emphasized that notions of "justice or morality" argue for defining the scope of consequences for negligence liability in terms of foreseeable risk; s*ee also supra* note 77.

[88]RESTATEMENT (SECOND) OF TORTS § 281 cmt. g; *see also id*. cmts. e, f.

[89]*See* RESTATEMENT (THIRD), *supra* note 17, § 31. The *Third Restatement* addresses responsibility for injuries to rescuers in section 32 and for enhanced harm from efforts to render medical aid in section 35.

[90]*See* Francis Bohlen, *Book Review*, 47 HARV. L. REV. 556, 557–58 (1933–1934) (arguing that applying foreseeability to such risks "strain[s] the idea of foreseeability past the breaking point").

[91]*See* RESTATEMENT (SECOND) OF TORTS § 281 cmt. g:

> None of these possibilities is in itself sufficient to make the driver negligent, and none of them is sufficiently probable to influence the conduct of a reasonable man in his position, which will be determined without regard to them. Nevertheless, each of them is a normal, not unusual consequence of the hazardous situation risked by the driver's conduct, and each is justly attachable to the risk created, and so within its scope.
>
> In determining whether such events are within the risk, the courts have been compelled of necessity to resort to hindsight rather than foresight. If an event appears to have

Risk theory, perhaps, is amenable to being stretched to capture "ulterior risks" like these.[92] But to argue that the concept of scope of risk is flexible enough to capture ulterior risks, those that extend beyond the kinds of risks people actually might think about at the time of acting, while foreseeability is not, is to attribute too much power to the risk standard and too little to foreseeability. First, we should not forget that the risks rendering the conduct wrongful are the bundle of hazards that foreseeably might result from the conduct.[93] So, the flexibility of risk or foreseeable risk would seem identical under either standard, rendering either standard equally capable (or incapable) of capturing whatever risks are subject to capture. Moreover, the *Second Restatement*'s narrow formulation of foreseeability in terms of what a reasonable person truly might contemplate in planning conduct ignores the broader kind of *reflective* foreseeability that many courts apply in widening the scope of consequences under the "reasonably foreseeable" umbrella. While this broader, more abstract form of "foreseeability" may be criticized for being outside the range of what ordinary people actually think about when acting,[94] it reflects the kind of objective fairness perspective that embraces the reciprocal nature of a tortious wrong, as previously discussed.[95] These points reveal the largely (if not precisely) equivalent work done by risk and foreseeability in proximate cause, as judicial decisions increasingly appear to recognize,[96] and argues not for finely spun dissertations on why one is preferable to the other but for recognition that the two approaches are better collapsed into a single standard of reasonably foreseeable scope of risk.[97]

The discussion so far has concerned foreseeable *risk*, and scope of *risk*, although the question of foreseeability often is put in terms of the

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> been normal, not unusual, and closely related to the danger created by the actor's original conduct, it is regarded as within the scope of the risk even though, strictly speaking, it would not have been expected by a reasonable man in the actor's place.

[92] *See* HART & HONORÉ, *supra* note 31, at 263–65 (characterizing as "ulterior" that "harm the risk of which was not a reason for calling defendant's act negligent," including harm to rescuers and negligent medical treatment after an accident, and observing that neither the foreseeability doctrine *nor* the risk doctrine plausibly includes such risks of harm).

[93] *See* Marshall v. Nugent, 222 F.2d 604, 611 (1st Cir. 1955) (Magruder, J.) (examining proximate cause problem in terms of the "bundle of risks" one should contemplate from a particular type of accident).

[94] *See* HART & HONORÉ, *supra* note 31, at 263 ("Reasonable foresight, in relation to culpability, is therefore a practical notion . . . .").

[95] *See supra* notes 25–26, 53–55 and accompanying text.

[96] *See* RESTATEMENT (THIRD), *supra* note 17, § 29 cmt. e.

[97] *See supra* notes 81–83 and accompanying text.

foreseeability of the *consequences*. It commonly is said that responsibility requires only that an actor foresee the *type* of harm,[98] not the *manner* of harm[99] nor the *extent* of harm.[100] Of interest here is the infelicitous convention in the first usage—type of *harm*—of characterizing as "harm" what usually is meant as "hazard" (or "risk"),[101] an unhappy misnomer that also recurs too frequently in connection with statutory violations and negligence per se.[102] That is, the usage problem with the "risk of harm" expression concerns how broadly or narrowly "harm" is characterized[103]—since "type of harm" is really shorthand for "type of *risk* of harm," meaning type of *hazard*. Yet, mischievously, the "type of harm" phraseology is too easily (and hence too often) misinterpreted broadly to mean the type of *damage* to person or property. So, if an actor negligently hands a loaded shotgun to his friend's 9-year-old daughter who drops it on her toe, which is broken by the falling gun, the broken toe fairly lies outside the scope of foreseeable risk of handing a loaded shotgun to a child.[104] Yet the broader type of "harm" risked by the negligence was personal injury, the type of harm that actually occurred. The *Third Restatement* draft sensitively examines this problem of how narrowly or widely to characterize the type of "harm,"[105] but it ultimately leaves the resolution of this linguistically seductive, interpretative problem to courts and juries without much guidance.[106]

One final concern about the *Third Restatement*'s decision to define proximate cause in terms of scope of risk lies, ironically, in the conceptual purity of that concept.[107] Scope of (foreseeable) risk is a simple, powerful theory, eloquently expounded by Judge Cardozo in *Palsgraf*, that well resolves many remoteness issues.[108] Yet, its simplicity suggests that this theory may circle back upon itself, resulting in a kind of singularity that leaves little real power for deciding cases.[109]

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[98]*See* RESTATEMENT (THIRD), *supra* note 17, § 29 cmt. i (addressing levels of generality in conceiving "type of harm").

[99]*See id*. cmt. o (addressing "manner of harm").

[100]*See id*. cmt. p (addressing "extent of harm").

[101]*See id.* cmt. i (addressing "type of harm").

[102]*See id.* cmt. k.

[103]*See id.* cmt. i; *see also id*. cmt. h.

[104]*See id.* cmt. d, illus. 3.

[105]*See id*. cmts. h, i.

[106]*See id*. cmts. i, j. Juries (and sometimes courts) often will need specific guidance that type of *harm* usually really means type of *hazard*.

[107]*See* PROSSER AND KEETON ON TORTS, *supra* note 18, § 43, at 282 (referring to the "pristine purity" of the risk rule).

[108]Whether through the rubric of duty, per Cardozo's opinion in *Palsgraf*, or through the rubric of proximate cause, per the *Third Restatement*.

[109]*See* Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 995 (2001) (arguing that the risk rule "is an incoherent, or even circular, idea" that would "lose the advantages of our

Even if the risk theory is as powerful as it often is thought to be, this single concept may simply be inadequate to the messy task assigned to proximate cause. As Judge Andrews explained in his *Palsgraf* dissent, proximate cause might be seen as embracing a less arid, more complex set of diverse considerations than foreseeable risk—including such open-ended concepts as fairness, justice, policy, practical politics, and common sense—that cannot be corralled under any single conceptual umbrella, no matter how pure or elegant it may be. Because the vast calculi of these vague factors provide such an open-ended amalgam of considerations, they are best applied to real-world disputes by juries armed with an armada of fairness views, based on personal experience and guided by flexible legal principles on how responsibility boundaries fairly should be drawn on the unique facts of every case. Foreseeability alone does no better in offering the kind of rich reservoir of justice principles juries need to apply, and no single concept can be offered as more than a useful, initial guide for proximate cause decisions. If Holmes was right that the life of the law is not logic, but experience,[110] then we should place our trust in jurors to put their combined experience to work in deciding the fairness of connecting a particular defendant's wrongdoing to a particular plaintiff's harm that somehow is remote.[111] As exquisite as may be the logical nexus between wrongdoing and scope of risk, a conceptual equivalence that may dazzle scholars with its elegant simplicity, we should not want our street-level dispensers of justice chained like Prometheus to scope of risk, foreseeability, or any other logical rock. Such lustrous theories of proximate cause often help to point the way, but individualized justice, much richer and more complex than any logical theory, should be our goal. So, we should ask that jurors be guided first and foremost by foreseeability and the scope of (foreseeable) risk, but that they be instructed, in working out problems of

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separate analytical elements").

[110]OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881); *see also* John Dickinson, *Speech at the Constitutional Convention, Aug. 13, 1787*, *in* AMERICA'S FORGOTTEN FOUNDERS 90 (Gary L. Gregg II & David Hall eds., 2008) ("Experience must be our only guide. Reason may mislead us."); Patrick Henry, *"Liberty or Death" Speech, 1775*, *id*. at 118 ("I have but one lamp by which my feet are guided, and that is the lamp of experience. I know of no way of judging of the future but by the past.").

[111]Professor Cardi explains this well:

> The genius of the jury is that it brings to each case multiple perspectives, both shared and diverse experiences, and . . . a legal *tabula rasa*. To put it simply—especially when considering a question like foreseeability that is part-analysis, part-community experience, and part-gestalt—perhaps twelve heads are better than one.

W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 800 (2005).

proximate causation, also to bring to bear their personal toolboxes of factors comprising fairness, justice, practicality, and common sense.[112]

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[112]This was also the view of Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 343, 373 (1923-1924) (pt. 2), who recommended that juries be instructed that a "legal" or proximate cause "is a justly-attachable cause. A legal consequence of an act is an event which is justly attributable to the act." Further:

> "Just" means, not merely fair as between the parties, but socially advantageous, as serving, directly and indirectly, the most important of the competing individual and social interests involved. In deciding whether it is just to attribute an unintended harmful event to a particular act without which the harm would not have happened, you may consider any circumstances which you think pertinent, but you should not neglect [such considerations as] (a) The character of the act. . . . (b) The risk of the harm. . . . (c) Logical directness and intervening forces. . . . (d) Directness in time and space.

Id. at 373–75. Judge Andrews must have read Professor Edgerton's article. Dean Prosser observed that "[t]he sole function of a rule of limitation in these cases is to tell the court that it must not let the case go to the jury. Yet we are in a realm where reasonable men do not agree." William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 31 (1953–1954). Concluding that we have at best an "approach to the problem," Prosser doubted "that all the manifold theories of the professors really have improved at all upon the old words 'proximate' and 'remote,' with the idea they convey of some reasonable connection between the original negligence and its consequences, between the harm threatened and the harm done." *Id*. at 32.

> It has been, I think, always the formula, the generalization which has been at fault, in a field where it seems impossible to generalize at all. "The mule don't kick according to no rule." Direct causation, the scope of the risk, the unforeseeable plaintiff, the last wrongdoer, the distinction between cause and condition, limitations of time and space, substantial factors, natural and probable consequences, mechanical systems of multiple rules, and all the rest of the rigmarole of "proximate cause," all have been tried and found wanting in situations that inevitably arise to which they do not and cannot provide a satisfactory solution. There is no substitute for dealing with the particular facts, and considering all the factors that bear on them, interlocked as they must be.

Id.; *see also* PROSSER AND KEETON ON TORTS, *supra* note 18, § 43, at 300. With such skeptical ruminations, of course, intelligent observers may disagree. *See, e.g.*, ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 24–26, 48 (1963) (characterizing such skeptical attitudes as "non-rules," and arguing that "the leap from insufficiency to futility is unjustified. Good legal rules are extremely useful if depended upon to resolve those aspects of a legal problem to which

C. Duty

Duty, obligation of one person to another, is the thread that binds humans to one another in community. Because negligence law deems choices improper only if they breach a preexisting obligation of repair for carelessly inflicted physical harm to another, duty gives definitional coherence to the negligence inquiry. Serving in this manner as the foundational element of a negligence claim, duty provides the front door to recovery for the principal cause of action in the law of torts: Every negligence claim must pass through the "duty portal" that bounds the scope of tort recovery for accidental harm.[113]

In defining the maximum extent to which people are held accountable for their damaging misdeeds in differing contexts, duty balances the interests of certain classes of potential victims in security from certain types of hazards and harm, on the one hand, against the interests of certain classes of actors in freedom of action, on the other. This balance of interests controls the extent to which courts close the door on categories of problems at the edge of tort law or, instead, pass such "border problems" through to juries for determination. How strongly duty rules are framed controls the extent to which negligence lawsuits of various types are approved for full adjudication or are instead summarily ejected from the judicial system. Weaker no-duty rules funnel more disputes at the margin of negligence law into local courtrooms for possible redress, while stronger no-duty rules force the victims of such disputes to absorb their injuries themselves or seek relief from insurance providers and other institutions beyond the courts.

Thus, the duty/no-duty element provides an important screening function for excluding types of cases that are inappropriate for negligence adjudication. Recurring categories of cases where negligent conduct does not always give rise to liability, where negligence claims may be barred or limited, include those involving harm to third parties caused by certain types of actors, such as manufacturers, professionals, employers, social hosts, and probation officers; harm to unborn children; harm to trespassers and others who enter another's property; harm from "nonfeasance," from failing to provide affirmative help to others in need; and damage to nonphysical interests, especially emotional harm and pure economic loss. In contexts such as these, while such harm may result from an actor's negligence, determining whether recovery should be allowed under normal principles of negligence law involves policy choices of the highest order for deliberation by the courts, gatekeepers of the common-law negligence system, as a threshold matter before

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they are directed, and not more.").

[113]This discussion draws from David G. Owen, *Duty Rules*, 54 VAND. L. REV. 767, 767–79 (2001).

appropriate disputes are funneled into courtrooms for jury resolution.

Depending on the issue, duty determinations may call upon every possible reason of fairness, justice, and social policy. In assembling major considerations to be "balanced" in determining duty or no duty, the California Supreme Court's list mirrors the lists of many other courts:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[114]

"Foreseeability," we see, conspicuously leads California's list, just as it figures prominently among the duty factors drawn upon by most other courts.[115] As Arthur Ripstein cogently declares, "Other factors may be relevant to the existence of a duty, but foreseeability provides an outer bound beyond which there can be no liability because there can be no duty."[116] In the words of the New Jersey Supreme Court: "Foreseeability of the risk of harm is the foundational element in the determination of whether a duty exists."[117] But the *Third Restatement*, drawing upon the

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[114]Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968); *see generally* Dilan A. Esper & Gregory C. Keating, *Abusing Duty*, 79 SO. CAL. L. REV. 265 (2006) (arguing that the proliferation of no-duty rulings in California in recent years reflects an abuse of the duty concept).

[115]*See generally* Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1524 (1997) (conducting 50 state survey of duty and concluding in part that, "[f]oreseeability, as Cardozo, Prosser (Green) and the California courts agree, has become prominent in questions of duty (and other questions of liability)—however, foreseeability is not the only determinant of liability"); Zipursky, *supra* note 59, at ___ (concluding from survey of states that "almost every jurisdiction does treat foreseeability as a significant factor (and frequently *the most significant factor*) in analyzing whether the duty element is met in a negligence claim").

[116]Ripstein, *supra* note 4, at 374. Professor Ripstein may have been speaking loosely, in terms that some might characterize as addressing breach rather than duty, yet his assertion appears more powerfully fundamental, in a Cardozian kind of way.

[117]J.S. v. R.T.H, 714 A.2d 924, 928 (N.J. 1998).

important scholarship of Jonathan Cardi,[118] has decided to rip foreseeability, root and stock, from duty:

> Despite frequent use of foreseeability in no-duty determinations, this Restatement disapproves that practice and limits no-duty rulings to articulated policy or principle in order to facilitate more transparent explanations of the reasons for a no-duty ruling and to protect the traditional function of the jury as factfinder.[119]

This move, contrary to how most courts view duty, might be seen as passing strange. By positing that foreseeability is relevant to whether a defendant *breached* its duty of care,[120] and (at least indirectly) to the *scope* of that duty under proximate cause,[121] but *not* to whether the defendant had a duty of care in the first place, might be seen as putting the proverbial horse before the cart.[122] But the Reporters appear to have thought about this issue long and hard, and they have reasons for this move.

Some arguments for kicking foreseeability out of duty are tied to the Reporters' vision of the proper allocation of issues among the elements of negligence. Foreseeability is a fact-specific concept, it is argued, that properly is pertinent only to breach and proximate cause, determinations grounded fundamentally in the facts of particular cases.[123] Hence, the reasoning seems to go, fact-intensive considerations are incompatible with the work of duty, which is to render policy decisions that span entire categories of types of defendants, types of plaintiffs, types of hazards, and types of harms. A related argument is that courts should make no-liability decisions, in cases where the facts so demand, only by ruling on other elements as a matter of law, specifically on breach and proximate cause. While it certainly is true that courts should not hide liability or proximate cause decisions under a duty mantle, this is a weak argument for ejecting foreseeability from duty. As broad-based

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[118] *See* W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 (2005); *see also* Cardi, *supra* note 33; W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 SO. CAL. L. REV. 671 (2008).

[119] RESTATEMENT (THIRD), *supra* note 17, § 7 cmt. j.

[120] *Id.* § 3.

[121] *Id.* § 29 cmt. j.

[122] For a cart-before-the-horse case, see Illidge v. Goodwin, 172 Eng. Rep. 934, 935 (C.P. 1831) (Tindal, C.J.) (defendant's cart and horse backed into plaintiff's shop window) (remote or not, "[i]f a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done").

[123] *See* Cardi, *Purging Foreseeability*, *supra* note 118, at 794–804.

rules of law, duty (and no-duty) rulings by courts contain much more intrinsic power than do breach and proximate-cause rulings, for duty rulings far more prominently telegraph rules across the legal landscape that help lawyers and their clients understand the law.[124] Since pure duty rulings are exceptional, they deserve the widespread dissemination they receive, and converting important rulings of this type to case-specific breach and proximate cause decisions drains them of their power effectively to communicate important information on the scope of law throughout the legal world. Thus, an initial response to the wrong-element argument is that we might be better served by *more* duty/no-duty rulings, not less.

The improper-element argument for booting foreseeability from duty suffers from a false premise: that foreseeability inherently is so fact-specific that it cannot operate at a categorical level. When courts address foreseeability in duty determinations, they are using a different, broader type of foreseeability than that employed in breach and proximate cause determinations made on facts of particular cases.[125] In the duty context, courts draw lines between types of parties and types of wrongful conduct threatening types of hazards and types of harm. For a court to imagine how the scope of liability for negligence might look under one type of duty rule contrasted to how it might look under a duty rule of a different formulation, the court must consider the reach of negligence under both formulations of the rule. Yet, as previously discussed, the reach of negligence is foreseeable risk. It seems artificial, sterile, unrealistic, illogical, and bizarre to argue that judges should be deprived of a conceptual tool that lies at the center of moral and legal responsibility—of negligence—the reach of which judges must define. At the root of all duty issues is the question of whether, as a general principle, certain types of actors should or should not be subject to the law of negligence for causing certain types of hazards that threaten certain types of harm to certain types of victims. It is hard to understand why we would want to demand that judges, in the process of making these important categorical decisions on the scope of responsibility for wrongdoing, exclude from their consideration the possibility that reasonable people in these

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[124] *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1831–32 (1998).

[125] At least Professors Goldberg and Zipursky appreciate the difference between categorical and particularized foreseeability, see John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 727–28 (2001), an article elegantly addressed in David G. Owen, *Duty Rules*, 54 VAND. L. REV. 767 (2001). Professors Cardi and Green disagree. *See* W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 722 (2008) (arguing "that foreseeability is inherently unamenable to categorical decisionmaking, and that foreseeability is not in fact decided categorically by courts").

situations will (or should) contemplate the types of risk for which they may be held responsible. If using foreseeability in this categorical manner appears to offer judges, when peering down from Mount Olympus, a word or concept they should not use for resolving problems affecting only mortals in the valley below, then we might call the notion something else when put to judicial use—perhaps "categorical foreseeability" or "judicial foreseeability" would do the trick.

A related improper-element rationale for banishing foreseeability from duty lies in the age-old judge/jury debate. It is hornbook law, of course, that duty is a question of law for courts, whereas breach and proximate cause are questions of fact for juries. Including foreseeability (or foreseeable scope of risk) in duty surely does enrich this important, threshold element of negligence by offering judges an important conceptual tool they may use to keep inappropriate cases from ever reaching juries.[126] This hoary battle in American law over the proper allocation of power between judge and jury lay at the heart of the Cardozo/Andrews divide in *Palsgraf*, and it is a battle that will continue to be waged until the cows come home.[127] But the judge/jury battle is unlikely to be much affected by a *Restatement*'s exclusion of an important duty factor from a calculus of considerations where most courts believe it properly belongs.

Another argument for kicking foreseeability out of duty—the transparency or "lazy-judge" rationale—is that courts too easily hide under it to cover policy choices that should instead be forced out into the bright light of day.[128] It is no doubt true that "foreseeability" indeed is a tempting cover (we might say "tent") beneath which courts may hide their rationales. Take an example. Pup tent manufacturers, we might posit, should not be responsible for the harm caused by a scout leader who hides inside a tent to molest a scout.[129] If a court agrees with our view that tent manufacturers should not bear the burden of this type of use of their product, it might well simply declare no duty because the risk is "unforeseeable." To this, commentators might complain that such a

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[126] *See generally* ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 99–100 (1963) (concluding that judges should deliberately address "the allocation of judicial and jury responsibility" for scope of risk decisions rather than ruling rigidly that this issue is by nature one of duty or proximate cause that simply belongs in its respective domain); Patrick J. Kelley, *Restating Duty, Breach, and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law*, 54 VAND. L. REV. 1039, 1061–63 (2001) (explaining that proximate cause as well as duty issues are also, appropriately, often decided by courts).

[127] *See* Cardi, *supra* note 33, at 950–51.

[128] *See generally id.* at 983 et seq.

[129] For an analogous situation, see note 11, *supra*, and accompanying text.

judge is being lazy or otherwise irresponsible for not transparently revealing the true reasons for holding as it does.

The first response to the lazy-judge critique is that "unforeseeable" in fact probably does a pretty good job of describing an important reason why tent manufacturers fairly might be protected from this type of risk. Another response to the lazy-judge rationale is to note its arrogance in assuming that commentators know what should and should not be shielded from public view, whereas judges do not. That judges are overworked is no secret, and to provide them with a flexible concept that facilitates explanation, even if it short-circuits it somewhat, may often provide more benefit than cost. It simply is not reasonable to demand that judges always fully explain their rulings. Some duty conclusions are very difficult to explain, resting on a complex calculus of social, moral, and practical policies, a full explanation of which may extend far beyond the time constraints and expressive abilities of almost any hard-working judge. Moreover, we should not think that lazy judges are the same as stupid judges, of whom there are surely few. Any busy judge worth his or her salt, working feverishly late at night to justify a no-duty ruling, who is deprived of his or her lazy-judge foreseeability prong on which to hang a hat has only to move the hat to a "fairness" prong, or to one called "justice," or to the familiar prong called "social policy." And conclusory labels like these, one might opine, are even more opaque than foreseeability, which possesses substantive meaning, grounded ultimately in human will.

In conclusion, excluding foreseeability from duty appears to be not only contrary to the case law, but a policy mistake as well. It seems illogical, if not downright immoral, to demand that courts design and apply rules defining the scope of responsibility for human wrongdoing divorced from one of wrongdoing's most important moral tethers—foreseeability.

IV. REFIGURING FORESEEABILITY

Like celestial dark matter, foreseeability swirls throughout the law of tort, permeating, connecting, and providing moral strength to the elements of negligence. Since responsibility for harm is rooted in the human will, manifested by an actor's choices to act in ways that may cause harm to others, the ability of individuals to comprehend the possibility that their contemplated actions may be harmful is fundamental to responsibility in tort as well as morals. Just how foreseeability should figure in negligence law, how foreseeability should be distributed among the various elements of negligence, raises important questions addressed by the *Restatement (Third) of Torts*, which has been underway for a decade and is near completion. How the *Third*

Restatement refigures foreseeability for the next generation of lawyers raises important questions examined here.

No one should doubt that foreseeability is an explicit, central consideration in evaluating whether a person's conduct should be blamed, whether it is "negligent." The *Third Restatement* draft saliently makes this point, raising foreseeability to central, black-letter status in its definition of negligence. While foreseeability also plays a prominent role in proximate cause, defining the scope of a wrongdoer's responsibility for harmful consequences, the draft *Restatement* opts instead for a pristinely conceptual "scope of risk" approach that mutes foreseeability and highlights other analytics. Most courts also locate foreseeability in duty, the threshold element of negligence law, but the *Third Restatement* draft boldly banishes foreseeability from this domain. Reflecting the age-old power struggle between judge and jury, the draft *Restatement*'s ejection of foreseeability from the forum where courts make rules of law on responsibility for harm raises important questions about how we expect judges to make important decisions about the reach of tort law if they are deprived of one of tort's most important moral anchors.

Oddly narrowing the decisional power of both judge and jury in the realms where their respective expertise is needed most, the *Third Restatement* draft allocates foreseeability and scope of risk between proximate cause and duty in a fashion that seems almost backwards and contrary to some of *Palsgraf*'s most important lessons. By stripping foreseeability from duty, one of duty's key features, the *Third Restatement* discards Judge Cardozo's elemental work in *Palsgraf* so long ago. And, by harnessing juries to a sterile yoke of scope of risk for proximate cause decisionmaking, the draft *Restatement* also rejects Judge Andrew's valuable insight that juries should be offered a wide range of fairness factors, beginning with foreseeability, in figuring how far responsibility should extend. Be that as it may, foreseeability was the moral glue of negligence before tort law was first restated many years ago, and, regardless of its reconfiguration in the *Third Restatement*, foreseeability will continue, at least on earth, to ground and bind the elements of negligence law together.