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ARTICLES

PROXIMATE CAUSE AND THE AMERICAN LAW INSTITUTE: THE FALSE CHOICE BETWEEN THE "DIRECT-CONSEQUENCES" TEST AND THE "RISK STANDARD"

Michael L. Wells *

I. INTRODUCTION

This article takes a new look at an old problem that lies at the heart of tort law: How does one define the scope of liability when a negligent actor causes unforeseeable harm? This topic once drew the attention of such legal giants as Benjamin Cardozo,¹ Robert Keeton,² and William Prosser.³ Today it seems largely forgotten, except for a class or two in first year torts courses.

The occasion for examining the unforeseeable harm issue is the proposed revision of the *Restatement (Third) of Torts* by the American Law Institute ("ALI").⁴ In a tentative draft of portions

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1. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99-100 (N.Y. 1928) (Cardozo, J., writing for majority).

2. See ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 18-19 (1963).

3. See William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 16-19 (1953). The issue is also addressed, along with many other causation issues, in an important book by two esteemed English scholars. See H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 254-90 (2d ed. 1985).

4. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29 (Tentative Draft No. 2, 2002) [hereinafter Tentative Draft No. 2] (to be considered at the annual meeting in May 2003).

of the *Restatement (Third)*, Professor Michael Green and Dean William Powers ("the reporters") have included a section that adopts what they call the "risk standard" as the general test in unforeseeable harm cases.⁵ Section 29 of the draft provides that "[a]n actor is not liable for harm different from the harms whose risks made the actor's conduct tortious."⁶ As applied to negligence cases, "the risks that make an actor negligent are limited to foreseeable ones, and the factfinder must determine whether the harm that occurred is among those reasonably foreseeable potential harms that made the actor's conduct negligent."⁷ To illustrate this principle, consider the following example: the defendant puts unlabeled rat poison beside a can of flour on a shelf near a stove in a kitchen.⁸ This handling of the poison is negligent because of the risk that someone would be poisoned.⁹ In fact, the heat from the stove unexpectedly causes the poison to explode.¹⁰ On the premise that the explosion is not a reasonably foreseeable risk of putting the poison near the fire, the defendant would not be liable for harm caused by the explosion.¹¹ The actor is not liable for the harm because it was not within the scope of the risks that made the conduct negligent.¹²

From the beginning of modern tort law, the main competitor to the risk standard has been a rule that renders the actor liable for all of the "direct consequences" of actionable negligence, whether foreseeable or not.¹³ In the rat poison case, for example, the plaintiff would recover for harm from the unforeseeable explosion.¹⁴ In justifying the risk standard, the reporters contrast it to the direct-consequences approach and conclude that "[t]he risk standard is the best of the available alternatives."¹⁵ This article does not take issue with the rejection of the direct-consequences test.

5. See generally *id.* § 29 cmts. f-o (defining and discussing the "risk standard").

6. *Id.* § 29.

7. *Id.* § 29 cmt. k.

8. See KEETON, *supra* note 2, at 3. The example is based on the facts of *Larrimore v. American National Insurance Co.*, 89 P.2d 340, 342 (Okla. 1939).

9. KEETON, *supra* note 2, at 3.

10. *Id.*

11. *Id.* at 5-6.

12. See Tentative Draft No. 2, *supra* note 4, § 29 cmt. j.

13. *Id.*

14. See *id.*

15. *Id.*

Rather, it argues that the reporters ought to have considered another alternative that has advantages over both the risk standard and the direct-consequences test. I call it the "magnitude-of-harm" rule.

My argument for the magnitude-of-harm test relies on the proposition that the point of limiting the scope of liability for negligence is to save the defendant from the unfairness of paying huge damages for a small departure from due care.¹⁶ The main problem with the direct-consequences test is that it ignores this aim.¹⁷ Suppose a particular kind of rat poison foreseeably causes an upset stomach in humans, yet the explosion maims or kills the plaintiff. Under direct-consequences the defendant is liable for far greater harm than he could have expected.¹⁸ Like the risk standard, a magnitude-of-harm approach stresses the reasonable foreseeability of the injury that occurred. The weakness of the risk standard is that it puts too much emphasis on distinctions among risks, assigning liability for some but not others. As noted above, the point of limiting liability lies elsewhere: it is to shield the defendant from paying damages for more harm than he could reasonably foresee.¹⁹ Making distinctions among risks will sometimes achieve this aim, but sometimes it will not. Instead of distinguishing among risks, the magnitude-of-harm approach focuses directly on the aim of avoiding defendants' exposure to unfair burdens. In this way, the magnitude-of-harm rule provides the most elegant and just solution to the "unforeseeable harm" problem.

II. LIABILITY FOR UNFORESEEABLE HARM

Proximate cause, or "scope of liability," as the reporters call it,²⁰

16. The reporters also allude to this concern in their discussion of the risk standard. *See id.*

17. *See id.*

18. *See id.*

19. *Id.*

20. The reporters make persuasive arguments that "the term 'proximate cause' is a poor one to describe limits on the scope of liability." *Id.* § 29 cmt. b; *see also id.* § 29 cmt. b, reporters' note at 224–29 (discussing criticisms of the use of "proximate cause" in jury instructions). *But see id.*, special note on proximate cause at 191 (acknowledging the term's communicative functionality).

is a sprawling and unruly topic. The discussion here deals solely with unforeseeable harm resulting from a defendant's negligence. In order to avoid confusion, four distinctions need to be made at the outset.

First, many of the cases concerning the scope of liability for unforeseeable harm feature an "intervening cause."²¹ Suppose, for example, that a railroad negligently spills gasoline, and then someone sets it afire, causing harm to persons and property.²² Under traditional analysis, the railroad may, depending on the circumstances, avoid liability for these injuries.²³ Section 29 does not deal with intervening causes, but a later provision draws on the reasoning behind section 29 in defining the contours of this doctrine.²⁴ I too separate the intervening cause issue from the general problem of unforeseeable harm, taking it up at the end of Part II.

Second, the scope of liability issue may come up not only in negligence cases, but also in "strict liability" cases, in which the plaintiff is not required to establish negligence to prevail on the claim.²⁵ Section 29 does address proximate causation in strict liability cases.²⁶ Yet, it is not clear that the Restatement should lump these matters together, given the different substantive elements of fault-based and non-fault-based claims. For the sake of dealing with one problem at a time, I defer discussion of strict liability to Part VI.

Third, the scope of this portion of the Restatement is limited to liability for physical harm.²⁷ Absent physical harm, courts have placed stringent limits on the availability of damages for economic loss or for emotional distress.²⁸ The distinctive issues raised by those cases—which have much to do with the basic aims of tort law and little to do with proximate cause—are not considered here.

21. For examples, see *id.* § 33 cmt. e, reporters' note at 310–13.

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

23. See *id.* at 150–51.

24. See Tentative Draft No. 2, *supra* note 4, § 33.

25. See *id.* § 29 cmts. k–l.

26. *Id.*

27. *Id.* § 29 cmt. c.

28. *Id.*

Fourth, the reporters recognize that there may be limits on liability *in addition to* the basic limit imposed by the risk standard.²⁹ They note that “there are cases in which the scope of liability would be too vast in light of the circumstances of the tortious conduct if a risk standard governed liability.”³⁰ I do not address those exceptional cases, however, because my thesis is limited to advocating rejection of the risk standard in favor of a magnitude-of-harm approach.

A. *The “Direct-Consequences” Test and the “Risk Standard”*

Perhaps the best known case favoring a direct-consequences test is *In re Polemis*.³¹ In *Polemis*, the defendant’s employee, engaged in the task of unloading a ship, negligently dropped a plank into the hold.³² When the plank hit something in the hold, the friction made a spark.³³ The spark ignited gasoline vapors, setting fire to and destroying the ship.³⁴ According to the findings of fact, which were unchallenged by the appellate court, it was unforeseeable that the plank would cause a spark when it fell.³⁵ Because this event was unforeseeable, the resulting fire and the damage it produced was also unforeseeable. Nonetheless, the plaintiff recovered.³⁶ The court ruled that an actor is liable for all the *direct* consequences of his negligence.³⁷

The *Polemis* court, however, gave no explanation of why the judges preferred the direct-consequences test. Others have justified the test by stressing that, in the absence of intervening causes, the defendant is plainly responsible for the harm.³⁸ The question in cases like *Polemis*, then, is whether the loss should

29. *Id.* § 29 cmt. m.

30. *Id.*

31. [1921] 3 K.B. 560 (Eng. C.A.).

32. *Id.* at 562–63.

33. *Id.* at 563.

34. *Id.*

35. *Id.*

36. *Id.* at 578.

37. *Id.* at 577. The point of stressing “direct” is that liability would not be so broad were there an intervening cause. See *supra* text accompanying notes 9–11.

38. See discussion of the direct-consequences test, *supra* text accompanying notes 13–14.

fall on the blameworthy defendant, or instead on an injured plaintiff who is either wholly innocent or whose fault, if any, already has been taken into account under the principles of comparative negligence. One plausibly can maintain that, in these circumstances, the argument for liability is strong, because a failure to impose liability is grossly unfair to the injured party.³⁹ Responsibility, rather than foreseeability, therefore justifies the award of damages.

Richard Epstein asserts that "the *Polemis* rule has long been followed in most American jurisdictions."⁴⁰ Many others, including the reporters, disagree with that assessment.⁴¹ They claim that the prevailing rule is that one should be liable only for the "reasonably foreseeable" consequences of one's negligence.⁴² Among the cases adopting this test is *Overseas Tankship (U. K.) Ltd. v. Morts Dock & Engineering Co. ("Wagon Mound (No. 1)")*.⁴³ In *Wagon Mound (No. 1)*, the defendants owned a ship that discharged oil into a harbor.⁴⁴ This action was negligent because of the pollution that foreseeably would result, but the actual harm was far greater.⁴⁵ A welder on a wharf in the harbor allowed sparks to drop on the oil.⁴⁶ The sparks set fire to a piece of debris floating on the oil, and the oil caught fire, burning the wharf and doing other damage.⁴⁷ According to the findings of fact on which

39. See FRANCIS H. BOHLEN, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, in *STUDIES IN THE LAW OF TORTS* 1, 2 (1926):

It may be hard to mulct the wrongdoer in damages for results which the normal man would not anticipate, but it is more unjust that the person injured by the breach of a duty imposed for his protection should not recover for all the loss which has in the ordinary course of nature been caused to him by the wrong, because the wrongdoer could not foresee the full effect of his act.

Id. Bohlen was the reporter for the first Restatement, *RESTATEMENT OF TORTS* (1934). The Restatement itself contains provisions that point in opposite directions. Compare *id.* § 281 cmt. e, illus. 2 (no liability when the loaded gun falls on plaintiff's foot), with *id.* § 435 ("[T]he fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.").

40. RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 500 (7th ed. 2000).

41. See Tentative Draft No. 2, *supra* note 4, § 29 cmt. f, reporters' note at 241-44 (collecting authorities).

42. *Id.*

43. [1961] A.C. 388 (P.C.) (appeal taken from Austl.).

44. *Id.* at 390-91.

45. *Id.* at 391.

46. *Id.*

47. *Id.*

the court relied, there were no relevant intervening causes, and the danger that oil would ignite in these circumstances was not a reasonably foreseeable consequence of the discharge of the oil.⁴⁸

The Privy Council refused to hold the defendants liable, explicitly rejecting *Polemis* and adopting the so-called "Risk Rule."⁴⁹ In explaining its result, the Privy Council embraced a conception of fairness far removed from the responsibility-based reasoning that underlies the direct-consequences approach.⁵⁰ As stated by the court:

[I]t does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be "direct." . . . [A] man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour.⁵¹

Professor (now Judge) Robert Keeton offered a more general justification for the risk-based rule, asserting that "[t]he factors determining that the actor is liable for unintended harm caused by his conduct should also determine the scope of his liability."⁵² In other words, if it makes sense to impose liability only for foreseeability-based fault, it logically makes sense to measure the *extent* of liability based on foreseeability-based fault as well.

The reporters have endorsed this approach, calling it the "risk standard."⁵³ They find that "[c]urrently, virtually all jurisdictions employ the risk standard, or its equivalent in negligence cases, foreseeability, for some range of proximate-cause issues."⁵⁴ In

48. *Id.*

49. *Id.* at 422–23; see also KEETON, *supra* note 2, at 4, 9–10 (explaining three formulations of the "Risk Rule").

50. *Wagon Mound (No. 1)* [1961] A.C. at 422–24.

51. *Id.* at 422–23.

52. KEETON, *supra* note 2, at 18–19.

53. Tentative Draft No. 2, *supra* note 4, § 29 cmt. f.

54. *Id.* § 29 cmt. j. Ironically, the reasoning of *Wagon Mound (No. 1)* seems to have had less influence in the land of its origin. According to a British treatise on tort law, the case has seen "a steady decline in its influence over the past thirty years." B.S. MARKESINIS & S.F. DEAKIN, *TORT LAW* 197 (4th ed. 1999). The authors note that "the courts have reached a position where, as long as some kind of [physical] injury or harm to

their view, it "has the virtue of relative simplicity."⁵⁵ In addition, it "provides a more refined analytical standard than . . . an amorphous direct-consequences test."⁵⁶ In this regard, they seem especially concerned about the difficulty of determining when a consequence is direct, though their discussion of the point is cursory.⁵⁷ Echoing *Wagon Mound (No. 1)*, they reason that "[t]he risk standard appeals to intuitive notions of fairness and proportionality by imposing liability for the harms resulting from risks created by the actor's wrongful conduct, but no further."⁵⁸ Implicit in this appeal to fairness is a judgment that the direct-consequences test goes too far in extending liability for such unforeseeable consequences as the destruction of the ship in *Polemis*.⁵⁹

B. *An Alternative to the Risk Standard*

Ranking the risk standard ahead of the direct-consequences test does not settle the question of what the scope of liability for unforeseeable consequences ought to be. That choice merely eliminates one alternative, allowing us to direct our attention to the possibilities that remain. Some will quarrel with the reporters' assessment that the direct-consequences test results in too much liability in some cases and too little in others.⁶⁰ There is also room to challenge the reporters' assertion that the direct-consequences approach "provides an even vaguer and more amorphous limit on liability than the risk standard."⁶¹ For present purposes, however, these matters are beside the point. I accept the rejection of the direct-consequences standard. Rejecting this approach, however, focuses attention on another question that has received too little attention in discussions surrounding proposed section 29—whether there is an alternative to the risk

the person was foreseeable, its extent does not matter." *Id.* Furthermore, "if the type of damage suffered was foreseeable, the precise sequence of events by which the injury was brought about need not have been." *Id.* at 199. For a similar view on foreseeability, see HART & HONORÉ, *supra* note 3, at 273-75.

55. Tentative Draft No. 2, *supra* note 4, § 29 cmt. j.

56. *Id.*

57. *See id.*

58. *Id.*

59. *See* [1921] 3 K.B. 560, 563 (Eng. C.A.).

60. *See* Tentative Draft No. 2, *supra* note 4, § 29 cmt. j.

61. *Id.*

standard that more appropriately deals with the vexing problem of proximate cause.

The difficulty with the risk standard is that the limits it places on scope of liability are too severe. The persuasive force of arguments for the risk standard derives largely from the unfairness of imposing liability on someone who risked a small harm and produced a big one. As the reporters note, "[t]he risk standard appeals to intuitive notions of fairness and proportionality. . . ."⁶² Yet this test limits liability without making any comparison between the harm risked and the harm produced. Consider, for example, the reporters' illustration number two.⁶³ In this illustration, a hunter on his way home stops at a friend's house.⁶⁴ His gun is still loaded, and he hands it to a child, who drops it on her foot.⁶⁵ Handing the gun to the child was negligent because the hunter could reasonably foresee that the gun may go off.⁶⁶ It would not have been negligent to hand an equally heavy object (a board, perhaps) to the child, as the danger she may drop it on her foot is too slight to justify finding a breach of the duty of reasonable care. The reporters conclude that liability is inappropriate under section 29, because the injury to the foot is not within the risk that justifies finding the hunter negligent.⁶⁷

A better alternative is not to ask whether the injury is itself reasonably foreseeable, but whether it is greater than the reasonably foreseeable harm. Under this magnitude-of-harm modification of the risk standard, a court would reach a different result in illustration number two. The reasonably foreseeable harm is serious wounding or death from accidental discharge of the gun.⁶⁸ The harm suffered is no more than a broken foot.⁶⁹ The plaintiff would win the case even though the harm incurred is not a reasonably foreseeable consequence of negligently handing a loaded

62. *Id.* § 29 cmt. j; *see also supra* text accompanying note 58.

63. *See* Tentative Draft No. 2, *supra* note 4, § 29 cmt. f, illus. 2.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* Illustration number two is not just a product of the reporters' imaginations. It has a long history in debates about proximate cause. *See id.* § 29 cmt. f, reporters' note at 244.

68. *See id.* § 29 cmt. f, illus. 2.

69. *See id.*

gun to a child. Thus, one way to gain the benefits of the risk standard, while curbing its excessive limitations, would be to keep the current language of section 29,⁷⁰ label it subsection "(a)", and then add a proviso: "(b) Notwithstanding [subsection (a)], an actor is liable for any harm of a magnitude not greater than the harms whose risks made the actor's conduct tortious."

Illustration number two is an especially good one for my purposes, because there is a gap between the large consequence that the hunter risked and the comparatively small harm that occurs.⁷¹ But my proposal covers a wider range of cases. The defendant should be liable not only when the harm suffered is less than what was reasonably foreseeable, but also when the harm suffered is roughly the same amount as what was reasonably foreseeable. In *Doughty v. Turner Manufacturing Co.*,⁷² for example, the defendant's employee knocked an asbestos cement cover into a vat of hot chemicals.⁷³ This action was negligent because of the risk that, when the cover fell in, some of the chemicals in the vat would splash on someone nearby.⁷⁴ This did not happen.⁷⁵ A short while later, however, the interaction between the cover and the chemicals in the vat produced an explosion in the vat.⁷⁶ Although this explosion was not a reasonably foreseeable consequence of knocking the lid into the vat,⁷⁷ some of the chemicals escaped, injuring the plaintiff.⁷⁸ The court ruled for the defendant, reasoning that the harm was not within the risk that made the employee's conduct negligent.⁷⁹ Under the alternative I propose, however, the defendant would be liable even if the explosion was not within the risk that made the employee's conduct negligent, assuming the harm suffered by the plaintiff was about the same as splashing would have caused.

70. *Id.* § 29.

71. *See id.* § 29 cmt. f, illus. 2.

72. [1964] 1 Q.B. 518 (Eng. C.A. 1963).

73. *Id.* at 519.

74. *Id.* at 522.

75. *Id.* at 527.

76. *Id.* at 519.

77. *Id.* at 521.

78. *Id.* at 519.

79. *Id.* at 527.

Though the magnitude-of-harm test differs from the risk standard, the tests have much in common. In particular, the magnitude-of-harm principle shares the central ethical premise underlying the risk rule.⁸⁰ Contrary to the direct-consequences test, both magnitude-of-harm and the risk standard hold that it is unfair to the defendant to impose liability for harm that goes beyond his reasonable expectations.⁸¹ Magnitude-of-harm simply focuses on the *amount* of damages, rather than the unexpectedness of how the damages came about. In deciding between the two, the key concern is whether the latter kind of unforeseeability ought to count for anything.

The two approaches are also parallel in their treatment of the distinctive and recurring role of the unforeseeable plaintiff. In *Palsgraf v. Long Island Railroad Co.*,⁸² for example, the plaintiff was standing on a railroad platform while a man carrying a package tried to board a parting train.⁸³ Two guards employed by the railroad pushed and pulled this man to help him on the train, causing his package to fall on the tracks.⁸⁴ The package contained fireworks, which exploded when the package fell.⁸⁵ The force of the explosion evidently caused scales at the other end of the platform—near Ms. Palsgraf—to fall, injuring her.⁸⁶ The court ruled, however, that she could not recover from the railroad because negligence is “relational.”⁸⁷ The harm to her was unforeseeable, so the railroad breached no duty to her, even if the guards were negligent toward the passenger carrying the package.⁸⁸

Rather than making a special rule for unforeseeable plaintiffs, the reporters choose to treat the fact pattern in *Palsgraf* as merely one aspect of the larger problem of unforeseeable harm.⁸⁹ The magnitude-of-harm test would also do the same. The policy issues in unforeseeable plaintiff cases are the same as in other

80. See *supra* text accompanying note 62.

81. See Tentative Draft No. 2, *supra* note 4, § 29 cmt. f.

82. 162 N.E. 99 (N.Y. 1928).

83. *Id.* at 99.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 101.

88. *Id.*

89. See Tentative Draft No. 2, *supra* note 4, § 29 cmt. n, illus. 11.

unforeseeable harm cases. Making a special rule for them would add needless complexity. This in turn would risk confusion and mischief, as the very existence of a such a rule would invite lawyers to look for ways to draw distinctions where there are no important differences.

This similarity does not mean, of course, that one arrives at the same *results* under the two principles. If the harm to Ms. Palsgraf is of about the same magnitude as the harm the guards should have reasonably expected the passenger to suffer, the railroad ought to be liable for her harm under the magnitude-of-harm test. By contrast, the reporters note that under section 29 there would be no liability to Ms. Palsgraf if the risk that made the guards negligent is that the departing passenger would be hurt in some way and no harm to Ms. Palsgraf could be reasonably foreseen.⁹⁰

C. *Intervening Causes*

Section 29 does not specifically address the scope of liability when some event intervenes between the actor's negligence and the injury. The main treatment of intervening causes comes in section 33, which contains two provisions that apply the section 29 risk standard to the intervening cause fact pattern.⁹¹ In negligence cases, section 33 provides that liability turns on whether the harm that occurred is among the reasonably foreseeable consequences that made the actor's conduct negligent.⁹² If the harm is within those risks, then the defendant is liable in spite of the intervening cause.⁹³ Conversely, there is no liability when an intervening cause produces an unforeseeable harm.⁹⁴ Suppose, for example, a train negligently puts a passenger off at night in a dangerous part of town and the passenger is attacked by criminals.⁹⁵ The attack is a reasonably foreseeable consequence of the

90. *See id.*

91. *Id.* § 33 cmts. e, g.

92. *Id.* § 33(a).

93. *Id.*

94. *Id.* § 33(b). Like the other provisions on scope of liability, this one is phrased in general terms to apply to both negligence and strict liability. *See id.* I have paraphrased it because I believe, for reasons discussed in Part VI, that it is useful to treat negligence separately.

95. *See Hines v. Garrett*, 108 S.E. 690, 691-92 (Va. 1921).

negligence, and the railroad should be liable for it.⁹⁶ By contrast, there is no liability on the part of the railroad when it negligently puts the passenger off at the wrong place, the passenger spends the night at a hotel, and the hotel catches fire on account of a defective lamp.⁹⁷

Adopting the magnitude-of-harm rule as a modification of section 29 would have implications for section 33 as well. Rather than asking whether the harm that occurred is within the risks that justify finding negligence, the question in intervening cause cases would be whether the harm that occurred is greater than the amount the defendant could reasonably foresee. The arguments that I set forth in the remainder of the article support modifications of both sections. Before leaving intervening causes, however, a caveat is in order. In some intervening cause cases, courts identify reasons besides the foreseeability of harm as appropriate grounds for limiting liability.⁹⁸ For example, some courts suggest that the defendant may not be liable if an intervening actor takes charge of the dangerous situation and fails to prevent injury to the plaintiff, even if the injury satisfies the risk standard.⁹⁹ The general idea behind this kind of limit on liability is that "responsibility" as well as "foreseeability" ought to count in fixing the scope of liability, and in such a case the defendant is not responsible for the harm. The merit of responsibility-based limits on liability presents a question separate from the choice between the risk standard and the magnitude-of-harm approach.

96. *Id.* at 695.

97. *Cent. of Ga. Ry. Co. v. Price*, 32 S.E. 77, 77-78 (Ga. 1898).

98. *See, e.g., McLaughlin v. Mine Safety Appliance Co.*, 181 N.E.2d 430, 435 (N.Y. 1962) (holding that heating pads for treating shock did not adequately warn of the need for insulation, but the fireman who took the pads from their package, discarding such warnings as there were, took over responsibility for the resulting injury).

99. *See Pittsburg Reduction Co. v. Horton*, 113 S.W. 647, 649 (Ark. 1908). In *Pittsburg*, the defendant negligently discarded dynamite caps in areas frequented by children. *Id.* at 647-48. However, when a child took some caps home, his parents allowed him to play with them and keep them. *Id.* Thus, the defendant was not liable for injury when a cap exploded. *Id.* at 649. *See also HART & HONORÉ, supra* note 3, at 282 (noting that "courts often adhere to the causal doctrine that a voluntary intervention, even if foreseeable, may exclude defendant's liability, but do this in a disguised form by calling such events 'unforeseeable'").

III. THE CHOICE BETWEEN RULES AND STANDARDS

One part of the case against section 29 relates to its lack of concreteness. Section 29 precludes liability "for harm different from the harms whose risks made the actor's conduct tortious."¹⁰⁰ A court that adopts this test for negligence will be obliged to identify in each case the harms which made the actor's behavior negligent. As the reporters point out, "'harm' can be described at varying levels of generality."¹⁰¹ In *Doughty*, for example, the court identified the relevant risk as the danger of splashing.¹⁰² It is a fair question why the risk should not be defined more broadly, such as the danger that some of the contents would escape from the vat when the cover fell into it. Since "harms" can be defined broadly or narrowly, courts often will be able to achieve whatever results they wish through clever exercises of characterization.¹⁰³

The problem is not just that courts have broad discretion in defining the relevant risks. There is also a danger that they will arrive at incompatible results. In another English case, *Hughes v. Lord Advocate*,¹⁰⁴ workers in the public street had opened a manhole to gain access to underground cables.¹⁰⁵ They covered the manhole with a tent and before temporarily leaving the work area, lighted four paraffin warning lamps.¹⁰⁶ With the workers gone, two young boys began to play with the equipment, and one of them tripped over a lamp.¹⁰⁷ The lamp fell into the hole, causing an explosion that injured one of the children.¹⁰⁸ The workers were negligent because they could foresee that a child might be burned by a lamp.¹⁰⁹ The defendants, however, sought to avoid liability by arguing that an explosion was not reasonably foreseeable.¹¹⁰ The House of Lords found that the distinction between

100. Tentative Draft No. 2, *supra* note 4, § 29.

101. *Id.*

102. *Doughty v. Turner Mfg. Co.*, [1964] 1 Q.B. 518, 532 (Eng. C.A. 1963).

103. The reporters acknowledge this inherently arbitrary line drawing. See Tentative Draft, *supra* note 4, § 29 cmt. i.

104. [1963] A.C. 837 (appeal taken from Scot.).

105. *Id.* at 839.

106. *Id.*

107. *Id.* at 839-40.

108. *Id.*

109. *Id.* at 840.

110. *Id.* at 842-43.

burning and explosion was "too fine to warrant acceptance."¹¹¹ *Doughty* and *Hughes*, decided a year apart, make an odd pair. If burning cannot be distinguished from an explosion, then "why is the distinction between splashing and [an] explosion acceptable?"¹¹² Adopting the risk standard routinely will produce such discordant outcomes because courts and juries dealing with similar fact patterns surely will diverge in their judgments as to how broadly to define the risk. The reporters acknowledge as much.¹¹³ They admit that "[n]o specific rule can be provided about the appropriate level of generality or specificity to employ in characterizing the harm for purposes of [section 29]"¹¹⁴ and that "the risks that are encompassed within the actor's tortious conduct may not be readily apparent."¹¹⁵

As the reporters see it, the need to identify the risk that makes the conduct negligent, and to do so on a case-by-case basis, is actually an advantage.¹¹⁶ Because of its "flexibility,"¹¹⁷ the "risk standard can be employed to do justice in a wide range of cases in which the particular facts require careful consideration and thereby resist any rule-like formulation."¹¹⁸ Perhaps courts and juries will use the risk standard in just this way. Flexibility, however, is not necessarily a virtue. Its cost is that decision makers will have wide discretion to do as they please on a case-by-case basis. They may favor one side or the other for reasons that have nothing to do with the merits. Even if they scrupulously try to decide in conformity with legal principles, the lack of guidance provided by a flexible standard probably will produce a pattern of inconsistent outcomes among the cases.¹¹⁹ One of the main reasons

111. *Id.* at 850.

112. EPSTEIN, *supra* note 40, at 522; *see also* MARKESINIS & DEAKIN, *supra* note 54, at 199 (noting that *Doughty* "is hard to reconcile with *Hughes*").

113. *See* Tentative Draft No. 2, *supra* note 4, § 29 cmt. i (noting that in some cases "there will be contending plausible characterizations that lead to different outcomes and require the drawing of an evaluative and somewhat arbitrary line").

114. *Id.*

115. *Id.*

116. *Id.* § 29 cmt. j.

117. *Id.*

118. *Id.*

119. Some courts have used the flexibility of "foreseeability" to narrow liability considerably. In *Mauney v. Gulf Refining Co.*, 9 So. 2d 780 (Miss. 1942), for example, the defendant oil company negligently maintained its delivery truck, causing it to catch fire. *Id.* at 780. Since the truck contained gasoline, this in turn risked an explosion. *Id.* The plaintiff

for undertaking a restatement is to minimize this kind of confusion.¹²⁰

The reporters recognize the problem and plead impossibility as their defense: "[t]he appropriate scope of liability and responsibility is inherently a subject resistant to any rigorous formulation, and it is a mistake to expect any more precision than a subject will bear."¹²¹ The plea is unconvincing, for the magnitude-of-harm test offers more guidance than the risk standard of section 29. The magnitude-of-harm approach would substantially diminish the problem of the courts' broad discretion because, unlike the proposed section 29, this alternative would not inquire into "whether the harm that occurred is among the harms that made the actor's conduct" negligent.¹²² Rather, the jury is told to take into account the magnitude of the harm that was reasonably foreseeable and compare that harm to the amount of harm that actually occurred. No doubt there remains room for judgment as to what amount of harm was reasonably foreseeable. Even so, concentrating strictly on the amount of harm, to the exclusion of other factors, would produce fewer occasions for argument than the section 29 inquiry into what particular risks are reasonably foreseeable and which are not.¹²³

was in a café nearby when she heard about the explosion. *Id.* In hurriedly trying to escape, she tripped over a chair. *Id.* The court denied recovery on the ground that if the plaintiff didn't see a chair in her way in her own place of business, it would impose an inadmissible burden upon [the defendants] to say that they should have foreseen from across the street and through the walls of a building on another corner what appellant didn't see right at her feet.

Id. at 782; see also *Di Ponzio v. Riordan*, 670 N.E.2d 616, 620 (N.Y. 1997) (finding that the risk that a car would roll backwards after parking gear failed was not among the hazards associated with leaving the engine running while refueling); *Holloway v. Martin Oil Serv., Inc.*, 262 N.W.2d 858, 861 (Mich. Ct. App. 1977) (denying fire victims recovery against a gasoline station that sold gasoline to a group of apparently intoxicated young men, who used it to set fire to a nearby dance hall and holding that arson was not a foreseeable risk of selling the gasoline); Tentative Draft No. 2, *supra* note 4 § 29 cmt. i, reporters' note, at 250 (citing *First Springfield Bank & Trust v. Galman*, 720 N.E.2d 1068, 1073 (Ill. 1999)).

120. See William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law: "How We Did It,"* in *RESTATEMENT IN THE COURTS* 1, 3 (1945) (stating that ALI's aims include "clarification and simplification of the law"); John P. Frank, *The American Law Institute, 1923-1998*, 26 *HOFSTRA L. REV.* 615, 617 (1998) (noting that, from the beginning of the ALI, a primary object of the Restatements was to reduce uncertainty in the law).

121. Tentative Draft No. 2, *supra* note 4, § 29 cmt. j, reporters' note, at 251.

122. *Id.* § 29 cmt. g.

123. See *supra* note 119 and accompanying text.

The reporters hope that courts and juries will employ the risk standard "to do justice."¹²⁴ Rather than hoping for the best, a better approach is to identify the central factor bearing on the justice of liability—the size of the reasonably foreseeable harm—and direct courts and juries to give decisive weight to that factor. Under a magnitude-of-harm regime, results in tort cases would be more predictable, so that more cases probably would be settled without trial and the tort system probably would incur lower administrative costs as well.¹²⁵ We could confidently tell the litigants in cases like *Palsgraf*,¹²⁶ *Doughty*,¹²⁷ and *Hughes*¹²⁸ that no "scope of liability" principle would interfere with the plaintiff's recovery. Conversely, liability for the fire plainly would not be available in *Wagon Mound (No. 1)*,¹²⁹ nor in *Polemis*.¹³⁰ All of these advantages commend the magnitude-of-harm rule over section 29.

Lawmakers often face a dilemma when constructing legal doctrine. They can adopt flexible standards that allow judges and juries to take into account all relevant considerations, at the cost of predictability and consistency in the results reached. Alternatively, they can settle on a rule that identifies one or a few factors that determine case outcomes, thereby purchasing consistency and predictability at the price of achieving the best outcome in any given case.¹³¹ The choice between section 29 and the magnitude-of-harm alternative does not demand that either value be sacrificed. Magnitude-of-harm is superior on *both* counts; it avoids the uncertainty and potential for abuse that can result from giving too much discretion to judges and juries, while at the same time, it better serves the substantive goal of shielding the

124. Tentative Draft No. 2, *supra* note 4, § 29 cmt. j.

125. See discussion *infra* Part IV.B.

126. 162 N.E. 99 (N.Y. 1928).

127. [1964] 1 Q.B. 518 (Eng. C.A. 1963).

128. [1963] A.C. 837 (appeal taken from Scot.).

129. [1961] A.C. 388 (P.C.) (appeal taken from Austl.).

130. [1921] 3 K.B. 560 (Eng. C.A.). Again, this reasoning takes as a given the finding of fact in *Wagon Mound (No. 1)* that the fire was an unforeseeable consequence of discharging the oil. See [1961] A.C. at 391. As for *Polemis*, I assume that no one was in the hold of the ship, so that dropping the plank generated no risk of personal injury, only harm to property. See [1921] 3 K.B. at 563.

131. See H.L.A. HART, *THE CONCEPT OF LAW* 126–32 (1961); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–59, 62–69 (1992); Michael Wells, *Positivism and Antipositivism in Federal Courts Law*, 29 GA. L. REV. 655, 681–82 (1995).

defendant from unfairly expansive liability. Part IV explains what I mean by fairness and why the magnitude-of-harm rule realizes the fairness goal better than the risk standard.

IV. THE GOALS OF TORT LAW AND THE SCOPE OF LIABILITY FOR NEGLIGENCE

This part of the article argues that the risk standard of section 29 does not serve the substantive aims of tort law as well as the magnitude-of-harm test. Limits on the scope of liability for injuries caused by an actor's negligence are appropriate if, and only if, some worthy substantive goal is served by the limit. Some theorists argue that the role of tort law is to achieve corrective justice between the parties, while others stress the utilitarian aim of using liability rules to deter unduly dangerous activity.¹³² But we need not choose between these two broad purposes. As Gary Schwartz pointed out, "the combination of deterrence and justice can provide a better or fuller explanation for [tort] doctrines than can either theory standing on its own."¹³³ My argument is that, as a matter of corrective justice, strong "fairness" reasons favor the magnitude-of-harm rule. With regard to deterrence, there are ar-

132. To be clear about the arguments I wish to make, and those I put aside, several definitions and distinctions should be noted. First, "corrective justice" is the aspect of justice that deals with situations in which one person is obliged to make another whole for a loss. See, e.g., Jules L. Coleman, *The Practice of Corrective Justice*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 53, 56 (David G. Owen ed., 1995); James Gordley, *Tort Law in the Aristotelian Tradition*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 131, 132, 137-39 (David G. Owen ed., 1995). Corrective justice must be distinguished from "distributive justice," which addresses the "fair apportionment of the burdens and benefits of risky activities," rather than the "questions of wrongdoing and rectification" associated with corrective justice. See Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 194-95 (2000).

I am concerned with corrective justice in this article and use "fairness" as a synonym for corrective justice. I do not think that leaving distributive justice aside risks tilting the odds against the risk standard. On the contrary, since distributive justice tends to favor broader liability, it would seem to favor more rather than less expansive rules on scope of liability. See Keating, *supra*, at 219-21.

While corrective justice rectifies past wrongdoing, the point of deterrence is to influence behavior in the future, by imposing liability on actors who do not behave as they should. See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1828-29 (1997) (discussing free market and government-centered "varieties of deterrence"). Though deterrence takes many forms, for my purposes it does not seem necessary to distinguish among them.

133. Schwartz, *supra* note 132, at 1801.

guments on both sides and no clear answer. Even if the risk standard would be chosen in a liability system based solely on deterrence, the magnitude-of-harm test serves the utilitarian aim well enough. Taking both goals into account, the magnitude-of-harm approach seems superior to the risk standard of section 29.

The arguments put forward in this part of the article draw heavily on tort theory, and hardly at all on the case law. There are two reasons for this emphasis. First, regardless of what courts have said and done in the past, the path of the law as we go forward ought to take account of modern understandings of the ethical and utilitarian goals of tort law. Second, courts to date have given virtually no explicit consideration to the relation between scope of liability problems and the broad goals of tort law. In choosing between the direct-consequences test and the risk standard, for example, judges have offered little more than conclusory assertions about whether unforeseeable harm should fall on the plaintiff or the defendant.¹³⁴ Greater care in linking the aims of tort law to "scope of liability" issues is long overdue. Judicial indifference to tort theory hardly furnishes a reason for the drafters of the *Restatement (Third)* to ignore it as well.

A. Negligence, Freedom of Action, and Unforeseeable Consequences

In some kinds of tort cases, "strict liability" reigns, and plaintiffs can win without showing fault. Negligence is thus a *limit* on liability. The basic point of a regime of liability based on negligence is that the defendant is not liable for every single harm the defendant causes, but only for harms produced by negligent acts.¹³⁵ One of the reasons for restricting liability in this way is that it is unfair to hold the actor liable unless the actor is at fault.¹³⁶ Though some take issue with this fault-centered vision of tort law,¹³⁷ it remains the dominant view of most courts in most

134. See discussion *supra* Part II.A.

135. See *infra* notes 140–46 and accompanying text.

136. See *infra* notes 140–46 and accompanying text.

137. See generally RICHARD A. EPSTEIN, A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW 5–14 (1980) (critiquing negligence and advocating strict liability).

areas of liability for unintentional harm. According to the reporters, the fairness rationale for the negligence limit on liability carries over to the risk standard's limit on the scope of liability.¹³⁸ The risk standard "appeal[s] to the intuition that it is fair for an actor's liability to be limited to those risks that constituted the basis for the wrongful conduct."¹³⁹

This "intuition" deserves more scrutiny than the reporters give it. In order to resolve the scope of liability issue, we need to look more closely at the fairness rationale for negligence liability. Precisely *why* is it unfair to impose liability in the absence of negligence? Answering this question will give us guidance as to whether the current section 29 or the magnitude-of-harm variant is more compatible with the fairness goal of tort law.

The best answer to the question of why fairness requires a negligence analysis is the one given by Holmes in *The Common Law*.¹⁴⁰ He began from the widely shared ethical proposition that it is unfair to make a person liable in the absence of a voluntary act on his part.¹⁴¹ Suppose, for example, *B* throws *A* onto *C*'s property. *A* should not be liable to *C* for trespass, because his presence on *C*'s land is not the result of his voluntary act. For the same reason, *A* should not be liable if he hits *C* while tossing and turning in his sleep. On these matters, the law has not changed since 1881, when Holmes made his argument.¹⁴²

Given the unfairness of imposing liability without a voluntary act, Holmes went on to reason that the same conclusion followed when the defendant was not at fault.¹⁴³ Suppose a fully conscious and unfettered *A* faces a choice between two courses of conduct, *X*

138. See Tentative Draft No. 2, *supra* note 4, § 29 cmt. k.

139. *Id.*

140. OLIVER WENDELL HOLMES, *THE COMMON LAW* 76-78 (Belknap Press 1963) (1881).

141. *Id.* at 76.

142. *Id.* at 3.

143. See *id.* at 75. Holmes was neither the first nor the last thinker to recommend the negligence rule over strict liability as the better way to respect the value of personal autonomy. James Gordley shows that Aristotle and Thomas Aquinas justified negligence law in similar terms. See Gordley, *supra* note 132, at 140-41. Contemporary tort theorists make similar arguments in explaining and justifying the negligence principle. See David G. Owen, *Philosophical Foundations of Fault in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 201, 226 (David G. Owen ed., 1995); Stephen R. Perry, *Risk, Harm, and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS IN TORT LAW* 321, 341-42 (David G. Owen ed., 1995).

and Y. He cannot reasonably foresee harm from either of them and chooses X rather than Y for reasons of his own. As it happens, X results in injury to someone, while Y would not have done so. Holmes argued that holding A liable for the harm would violate the ethical principle that precludes liability in the absence of a voluntary act.¹⁴⁴ He maintained that "[a] choice which entails a concealed consequence is as to that consequence no choice."¹⁴⁵ If the actor has no reason to think a given course of conduct poses unreasonable risks, he cannot make a choice not to take those risks, any more than A could make a choice not to land on C's property or to hit C while tossing in his sleep.¹⁴⁶

A central premise of my argument is that this reasoning bears not only on the *justification* for the negligence regime, but also on the *scope of liability* for an act of negligence. In particular, it furnishes a powerful argument for preferring the magnitude-of-harm approach over the risk standard. The facts of *Wagon Mound (No. 1)*¹⁴⁷ illustrate why. The argument for the risk standard is that, given a blameworthy actor, it is fair to make that actor liable only for the small harm of polluting the harbor, not the big harm of starting a fire.¹⁴⁸ The defendant could reasonably foresee the small harm of the pollution, and therefore chose to risk it when he discharged the oil.¹⁴⁹ But he could not reasonably foresee the big harm from the fire, made no choice to risk that consequence, and in fairness should not be held liable for it.¹⁵⁰

Notice that the unfairness of liability for the fire depends critically on the fact that the small harm was reasonably foreseeable while the big harm was not.¹⁵¹ The fairness of making the defen-

144. Holmes, *supra* note 140, at 76.

145. *Id.*

146. One need not agree with Holmes about what fairness requires. One critic of the negligence regime has argued that, when the defendant is a business enterprise, the loss ought, as a matter of fairness, to fall on the business, especially if we set aside "corrective justice" and instead give a primary role to considerations of "distributive justice" in choosing liability rules. See Keating, *supra* note 132, at 194-95, 219-21. But that debate is beside the point. Given the negligence rule and its corrective justice underpinnings, my concern is with the scope of liability for negligence.

147. [1961] A.C. 388 (P.C.) (appeal taken from Austl.).

148. See *id.* at 391.

149. See *id.* at 390-91.

150. See *id.* at 423.

151. It is noteworthy in this regard that Judge Keeton relies on the unfairness of dis-

dant pay turns on whether he would be surprised by liability, not whether the particular harm that occurred is a reasonably foreseeable one.¹⁵² In this regard, there is a big difference between *Wagon Mound (No. 1)* and the reporters' illustration number two, concerning the loaded gun that breaks the child's foot.¹⁵³ In the loaded gun case, the magnitude of the harm that occurred is surely no greater than the magnitude of the harm that was reasonably foreseeable. The defendant cannot be surprised by the sum he is asked to hand over to the plaintiff in the event he is found liable. In fact, the consequences of the thing that occurred is *less* burdensome to him than what he risked. At the same time, there is a strong fairness argument in favor of liability, simply because the defendant is blameworthy and has caused harm. The loss must fall somewhere. As between the blameworthy defendant and the injured person, it is more fair that the defendant bear it than that it be left on the plaintiff.¹⁵⁴

This conclusion holds even if the plaintiff is also blameworthy. In a few jurisdictions, the plaintiff's fault will foreclose any recovery.¹⁵⁵ In the vast majority of states, however, the plaintiff's fault will be taken into account under principles of comparative negligence and will reduce the recovery accordingly.¹⁵⁶ It seems fair,

proportion between what was risked and what was lost in stating the rationale for the risk rule. See KEETON, *supra* note 2, at 20–21.

The policy argument underlying use of the Risk Rule in negligence cases is a corollary of the foundation of tort law on fault. Generally one is not liable for an unintended harm caused by his non-negligent conduct. If negligence in one respect were to make the actor liable for all unintended harms to follow, the legal consequences would be disproportionate to the fault.

Id. The problem is that the risk rule is too blunt an instrument to combat disproportion, whereas magnitude-of-harm is a more refined tool. See Tony Honoré, *The Morality of Tort Law—Questions and Answers*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 73, 92 (David G. Owen ed., 1995).

152. See Honoré, *supra* note 151, at 91–92 (arguing against the view that “[t]he unforeseeability of the harm for which compensation is claimed is . . . an independent ground for limiting the extent of the defendant’s liability,” while affirming that “the retributive principle does require a rough proportion to be preserved between the degree of fault and the burden of the sanction”).

153. See Tentative Draft No. 2, *supra* note 4, § 29 cmt. f, illus. 2.

154. See *supra* note 39 and accompanying text.

155. Alabama, Maryland, North Carolina, and Virginia are the only states still using the contributory negligence approach. See DAN DOBBS, *THE LAW OF TORTS* 504 (2001).

156. See *id.* (“The overwhelming majority of American states thus now follow the general system adopted in other common law and in the major civil law countries.”).

therefore, to speak of the plaintiff as "innocent" with regard to the share of the causal fault that the jury assigns to the defendant.

Although the Restatement reporters do not squarely address the argument advanced here, they may take issue with this account of the role of fairness in determining the scope of liability. Following Judge Keeton's reasoning, they separate the negligent "aspect" of the defendant's conduct from the rest of it, declaring that "[f]rom a corrective-justice perspective, a merely serendipitous causal connection between the tortious aspect of the actor's conduct and the other's harm provides little reason for requiring the defendant to correct for that which has been wrongfully taken from the plaintiff."¹⁵⁷ Since the connection between the hunter's faulty conduct in not unloading the gun and the harm to the child's foot is fortuitous, there should be no liability for it.¹⁵⁸

This reasoning begs the question of what worthy aim is served by dividing the defendant's conduct into a negligent aspect and a non-negligent aspect. In making scope of liability rules, courts ought to concentrate on the point of the exercise, which (putting deterrence aside for the moment) is to decide where the loss should fall as a matter of fairness between the parties.¹⁵⁹ With this aim in mind, the persuasive force of separating the tortious conduct into parts that are and are not faulty depends on the reason for which it is done. For Judge Keeton, the point was to contest the fairness of the direct-consequences test, which would hold the defendant liable for losses of a magnitude far beyond what he could have reasonably foreseen.¹⁶⁰ Employed for that purpose, the distinction between faulty and non-faulty aspects carries considerable weight. But that battle is behind us now. When the inquiry turns to whether a defendant, who can reasonably foresee loss of a given magnitude, ought to be liable when loss of a similar or

157. Tentative Draft No. 2, *supra* note 4, § 29 cmt. j.

158. See *id.* § 29 cmt. f, illus. 2.

159. One may argue that the risk rule is a corollary of the "reasonable foreseeability" principle and must be enforced for that reason alone, whether or not it helps to realize any important goals of tort law. For reasons discussed in Part V.B, *infra*, I find this argument unconvincing.

160. See KEETON, *supra* note 2, at 91. In Judge Keeton's analysis of the risk rule, he identifies the direct-consequences test and its variants as the principal alternative and offers arguments favoring the risk rule over that alternative. See *id.* at 28-36, 44-45, 90-97.

smaller magnitude occurs, the distinction between various aspects of the defendant's conduct has far less force. What is missing from the reporters' rationale for section 29, and for that matter from the rest of the literature favoring the risk standard, is an explanation of why it is unfair to hold the defendant liable *just* because the harm is not within the risk that makes his conduct negligent.

In this regard, the reporters' appeal to the "mere serendipitous causal connection" between fault and harm is particularly unsatisfying.¹⁶¹ Indeed, to return to the dropped-gun hypothetical,¹⁶² one might ask why the concededly negligent adult should escape liability altogether solely because of the luck that his culpable behavior broke a foot rather than blew off a head. It is true that "moral luck" plays a role in tort law.¹⁶³ In this context, however, the case for allowing it to determine liability seems weak. If fairness is our guide, it seems odd, to say the least, that such fortuities should separate those who do and do not have to pay for harms they have imposed on innocent victims.

B. *The Deterrence Goal*

Besides corrective justice, another aim of tort liability is to deter conduct that produces a greater risk of accidents than it is worth.¹⁶⁴ This goal is expressed in the definition of negligence, set forth in section 3 of the *Restatement (Third)*, which states that

[p]rimary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that it will result in harm, the foreseeable severity of the harm that may ensue, and the burden that would be borne by the person and others if the person takes precautions that eliminate or reduce the possibility of harm.¹⁶⁵

161. See Tentative Draft No. 2, *supra* note 4, § 29 cmt. j.

162. *Id.* § 29 cmt. f, illus. 2.

163. See Basil A. Umari, Note, *Is Tort Law Indifferent to Moral Luck?*, 78 TEX. L. REV. 467, 468 (1999) (arguing that, as a descriptive matter, tort law is comfortable with allowing liability to be determined by moral luck).

164. See Schwartz, *supra* note 132, at 1828–33 (discussing various forms of deterrence in tort law).

165. Tentative Draft No. 2, *supra* note 4, app. § 3.

The reporters are somewhat equivocal regarding the relation between the risk standard and the deterrence goal. In their comment on the rationale for section 29, the reporters state that “[l]imiting liability to instances in which the tortious conduct increased the risk of harm is essential for appropriate incentives in a tort system that retains a factual-cause requirement.”¹⁶⁶ But they do not explain why this should be so, and in the reporters’ note they acknowledge that: “[f]or negligence-based torts, proximate cause limitations are difficult to justify from a pure deterrence standpoint. Once a determination of negligence is made, the defendant’s behavior has already been found to pose excessive risks and imposing liability, regardless of the connection to the harm, can only improve deterrence.”¹⁶⁷

The reporters then warn that “a pure law and economics rationale might well divorce causing harm from socially inappropriate behavior, which would take the tort system a far piece from where it is and move it much closer to a penal or regulatory system.”¹⁶⁸ Finally, they fall back on Professor Landes’s and Judge Posner’s argument that “the explanation for proximate-cause limits in a negligence regime is the administrative costs in cases involving unforeseeable harm or unusual chains of events.”¹⁶⁹ In other words, litigation always generates costs in terms of the time and effort put in by lawyers, judges, jurors, witnesses and others. The benefit of tort litigation lies in giving people information about what precautions they should take. Situations where the harm is unforeseeable or the chain of events is unusual do not arise often, and their resolution will provide little useful information to people. In these circumstances, the administrative costs may outweigh the benefits of litigation. If this is true, proximate cause limits on liability will serve a good purpose, for they will discourage plaintiffs from bringing suits in the first place.

Several observations are in order. First, the proximate cause context is one in which a purely economic analysis of torts may produce a radically broader scope of liability rule than either sec-

166. *Id.* § 29 cmt. j.

167. *Id.* § 29 cmt. j, reporters’ note, at 253 (citing STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 113 (1987)).

168. *Id.*

169. *Id.* (citing WILLIAM A. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 246–48 (1987)).

tion 29 or a magnitude-of-harm approach. Between the two, deterrence seems to favor the latter. Second, assuming the Landes and Posner argument¹⁷⁰ based on administrative costs is right, it seems not to take sides between the risk standard and my alternative, or even to speak to the issue I raise. In fact, the magnitude-of-harm alternative has much to commend it if administrative costs are of central importance. As explained in Part III, its more rule-like and predictable test contrasts with the fuzziness and manipulability of the risk standard.¹⁷¹ Potential litigants will have a better sense of their chances for success, and the costs of litigation likely will be lower under the magnitude-of-harm test than under the risk standard.

In the end, it is fair to conclude that there is much uncertainty as to the appropriate scope of liability rule in a system based solely on deterrence and efficiency. Yet our system is based at least as much on corrective justice as it is on deterrence.¹⁷² Because there is a strong corrective justice argument in favor of the magnitude-of-harm rule—and no compelling efficiency-based argument against it—that rule, on balance, best comports with the underlying purposes of tort law.

V. TORT DOCTRINE AND “MAGNITUDE-OF-HARM”

In the case law and the scholarly literature, the debate over the scope of liability for negligence has centered on the choice between the “direct-consequences” and “scope-of-the-risk” approaches to limiting liability for negligence. As far as I can tell, no one has recommended, attacked, or even identified the “magnitude-of-harm” principle. Does its evident novelty foreclose adopting it in the *Restatement (Third)*? The problem is that a primary aim of the Restatement is to distill black letter rules from a welter of cases from fifty jurisdictions.¹⁷³ This task, according to some

170. *Id.* (citing LANDES & POSNER, *supra* note 169, at 246–48).

171. *See supra* Part III.

172. *See* Schwartz, *supra* note 132, at 1834 (pointing out that “[a]s tort objectives . . . corrective justice and deterrence can be recognized as collaborators rather than competitors”).

173. *See Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing an American Law Institute*, 1 A.L.I. PROC. 1, 4–5, 15 (1923).

observers, is already enough of a challenge for the ALI.¹⁷⁴ Law reform, except on technical matters, is best left to other institutions.¹⁷⁵

The proper place to begin in answering this contention is to put the Restatement to one side. Whatever one thinks about the proper role of the Restatement, defining proximate cause is a matter of great and continuing importance. Whatever words might ultimately appear in the *Restatement (Third)*, it is crucial that *courts* consider and evaluate the magnitude-of-harm approach. If arguments for the magnitude-of-harm rule have merit, then it may not matter in the long run whether the current state of the doctrine will support incorporating it into the Restatement.

Beyond this basic point, there *are* strong reasons to reject the suggestion that the magnitude-of-harm rule should not be incorporated into section 29. First, there is reason to question the premise that the Restatements aim solely at restating the law.¹⁷⁶ In the mid-1960s, for example, the ALI adopted section 402(a) of the *Restatement (Second) of Torts*, a sweeping provision that brought products liability under the umbrella of tort law.¹⁷⁷ Section 402(a) was avowedly an effort to promote law reform.¹⁷⁸ Critics of the recent products liability provision of *Restatement (Third) of Torts* claim that it, too, qualifies more as a law reform effort than a Restatement, because it takes sides on hotly disputed issues and departs from the existing case law.¹⁷⁹

174. *Id.*

175. *Id.*

176. See Frank, *supra* note 120, at 617 (quoting the ALI's original committee report to the effect that "the object of the Restatements 'should not only be to help make certain much that is now uncertain, to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the law to the needs of life'"); see also Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 604 (1995) (stating that institutions such as the ALI "do venture into areas where values conflict and traditional legal expertise is insufficient to generate effective solutions to the problems at hand").

177. RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 7, 1962).

178. Joseph W. Little, *The Place of Consumer Expectations in Product Strict Liability Actions for Defectively Designed Products*, 61 TENN. L. REV. 1189, 1189 (1994); see also George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 505-19 (1985).

179. See, e.g., Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism*, 61 TENN. L. REV. 1105, 1112 (1994); Little, *supra* note 178, at 1194; Jerry J. Phillips, *Achilles' Heel*, 61 TENN. L. REV. 1265, 1265 (1994); Frank J. Vandall, *The Re-*

Second, even if the Restatement is aimed mainly at coherent formulation of existing law, the magnitude-of-harm rule *does* belong in the Restatement despite its supposed novelty. The doctrinal case against thus "restating" the magnitude-of-harm rule has two dimensions: one stressing the holdings and reasoning of the decided cases, the other focusing more on the general foreseeability principle that runs throughout negligence law. On close examination, however, neither of these objections carries weight.

A. *Magnitude-of-Harm and Case Law*

So far as the cases are concerned, the complaint that the magnitude-of-harm approach does not figure into existing doctrine can be turned on its head. From one perspective, novelty argues in favor of the magnitude-of-harm approach rather than against it.¹⁸⁰ If courts had considered and rejected the magnitude-of-harm test, their collective judgment would be a compelling reason to omit it from the Restatement. But there is no evidence in the opinions that they have done so. At any rate, none of the cases cited by the reporters in their comprehensive treatment of the area contain such a discussion.¹⁸¹ Nor, despite an assiduous search by a research assistant who sympathizes with the reporters, have I been able to locate any cases that identify and reject the magnitude-of-harm approach. If such cases exist, they are too

statement (Third) of Torts: Products Liability Section 2(b): *The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1408 (1994). But see, e.g., David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1242 (1994) ("All in all, the new Restatement has staked out positions on the important issues of products liability doctrine near the center of where the courts and legislatures have traveled over the last three decades.").

180. Certain possible *applications* of the magnitude-of-harm principle do seem to be incompatible with general tort doctrine. Suppose, for example, an actor can foresee X amount of harm and produces triple that amount. The magnitude-of-harm rule would support holding him liable for a third of the total harm. Yet no tort doctrine I know of would support liability of this kind. Perhaps it is beyond the scope of the Restatement to put such a rule in the black letter text. That said, there seems to be neither a strong policy argument nor an insurmountable practical obstacle to allowing a partial recovery in such a case. In the cause-in-fact context, there is already authority for partial recoveries based, for example, on the defendant's market share. See Tentative Draft No. 2, *supra* note 4, § 28 cmt. o.

181. The reporters cite cases for the proposition that the risk standard is dominant in the case law, while the direct-consequences test is on the wane. See *id.* § 29 cmt. f, reporters' note, at 242-43.

few and far between to amount to a considered judgment by the courts.

Preoccupied with the choice between within-the-risk and direct-consequences, courts have not focused attention on the magnitude-of-harm variant of the within-the-risk approach. Nor have scholars identified magnitude-of-harm as a viable choice.¹⁸² This is hardly surprising. The choice between magnitude-of-harm and within-the-risk can receive sustained attention only after one has set direct-consequences aside. The reporters' decision to do just that is the threshold decision that makes it possible to look more closely at which version of reasonable foreseeability is the better one. In this context, the role of the ALI ought to be to bring its collective wisdom to bear on the matter. It should make a considered judgment on the merits between the two and not jump to the conclusion that rejecting the direct-consequences test leads ineffectually to a simple within-the-risk approach.

There is something else to be said for the magnitude-of-harm methodology. Even if most American courts now favor the risk standard, the direct-consequences test has a long and distinguished pedigree. Indeed, it was favored by the reporters of both the first and second *Restatements of Torts*,¹⁸³ and some courts may continue to apply the direct-consequences test.¹⁸⁴ In these circumstances, accurately restating the law of proximate causation poses no small measure of difficulty, and the appeal of the magnitude-of-harm approach lies in part in the fact that it steers a middle course between these competing standards.

182. Judge Keeton, in his defense of the risk rule (as he called it), identified several alternatives. These included not only "order-and-nature-of-antecedents rules," of which the direct-consequences test is one, see KEETON, *supra* note 2, at 28–36, but also the "natural-and-probable-consequences test," *id.* at 26–28, and the "non-rule of practical politics," *id.* at 25–26. He did not, however, address the magnitude-of-harm proposal I advance here. Nor do the reporters recognize magnitude-of-harm as an alternative. See Tentative Draft No. 2, *supra* note 4, § 29 cmt. j (characterizing the scope of liability issue as a matter of choosing between the risk standard and the direct-consequences test).

183. See BOLEN *supra* note 39, at 1; PROSSER *supra* note 3, at 16.

184. See DOBBS, *supra* note 155, at 459–60. Though Professor Dobbs tries to explain away many of these cases, partisans of the direct-consequences test would be within their rights to insist that the test continues to have influence. Cf. MARKESINIS & DEAKIN, *supra* note 54, at 196–99 (discussing English law).

B. *The Foreseeability Principle in Negligence Law*

Defenders of the risk standard make a more subtle argument than one based solely on a head count of recent cases. They point out that the general principle of negligence law is that liability should turn on whether an actor could reasonably foresee harm.¹⁸⁵ It seems to follow that the scope of liability should extend only to those harms that are reasonably foreseeable. As Judge Keeton put it, "[t]he factors determining that the actor is liable for unintended harm caused by his conduct should also determine the scope of his liability."¹⁸⁶ He then suggests that the Risk Rule (as he called it) logically follows from the basic negligence principle, claiming that "[t]he policy argument underlying use of the Risk Rule in negligence cases is a corollary of the foundation of tort law on fault."¹⁸⁷ Similarly, the reporters favor this test because it "imposes limits on liability by reference to the reasons for holding an actor liable for tortious conduct in the first place."¹⁸⁸

The magnitude-of-harm rule would hold defendants liable for some harms they could not reasonably foresee, such as the injury to the child's foot in illustration number two,¹⁸⁹ and for harms produced in ways that they could not reasonably foresee, as in *Doughty* (the exploding-chemicals-in-the-vat case).¹⁹⁰ Would imposing liability in these cases offend the foundational foreseeability principle of negligence law? If so, the obligation of judges to decide cases in accordance with established principles might require rejection of the magnitude-of-harm approach, even if considerations of fairness and policy otherwise supported its adoption.¹⁹¹ For a variety of reasons, however, this "deep foreseeability principle" line of analysis is unavailing.

185. See Tentative Draft No. 2, *supra* note 4, § 29 cmt. k.

186. KEETON, *supra* note 2, at 18-19.

187. *Id.* at 20.

188. Tentative Draft No. 2, *supra* note 4, § 29 cmt. j. To an extent, this is a way of expressing "fairness." See *supra* Part IV.A. Here, the focus is on the notion that the logic of negligence law is by itself a justification for the risk standard, independent of any concern for fairness.

189. Tentative Draft No. 2, *supra* note 4, § 29 cmt. f, illus. 2.

190. [1964] 1 Q.B. 518 (Eng. C.A. 1963).

191. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 112-15 (1977) (describing the "gravitational force of precedent").

The argument rests on the dubious premise that reasonable foreseeability is a powerful principle in tort law. In fact, courts often refuse to impose liability for harm that is a reasonably foreseeable consequence of the defendant's negligence.¹⁹² An injured person, for example, typically cannot recover for pure economic harm, such as lost profits, however foreseeable they may be.¹⁹³ There are significant limits on recovery for emotional distress as well.¹⁹⁴ In many jurisdictions, landowners are not liable for all the reasonably foreseeable harms suffered by entrants on the land.¹⁹⁵ Instead, liability rules depend on whether the entrant is an "invitee," a "licensee," or a "trespasser."¹⁹⁶

In other situations more directly relevant to the issue at hand, liability extends *further than* the reasonably foreseeable consequences of the defendant's negligence. Under the "rescue doctrine" courts hold that if *D* negligently puts another in peril, *D* is liable to a third person who is hurt in the course of attempting a rescue, whether or not harm to the rescuer is reasonably foreseeable.¹⁹⁷ The "thin skull rule" concerns the situation in which the plaintiff's injuries are greater than the reasonably foreseeable consequences of the defendant's negligence because of some special vulnerability of the plaintiff.¹⁹⁸ In that situation, the defendant typically is held liable for all harm caused, whether foreseeable or not.¹⁹⁹ Liability is similarly expansive when the actor commits an intentional tort.²⁰⁰

The reporters have recognized that the rescue doctrine, the thin skull rule, the intentional tort rule, and similar doctrines cannot be reconciled with section 29.²⁰¹ Yet, these doctrines are

192. See George C. Christie, *The Uneasy Place of Principle in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 113, 116–26 (David G. Owen ed., 1995).

193. See DOBBS, *supra* note 155, at 1282–85.

194. See *id.* at 835–41.

195. See *id.* at 592.

196. See *id.* at 591–92. Some states have partially abandoned this scheme. Even fewer have imposed a general duty of reasonable care on landowners toward entrants on the land. See *id.* at 616 & nn.4–5.

197. See *id.* at 456.

198. See *id.* at 464–65.

199. *Id.*

200. See *id.* at 75–76.

201. Tentative Draft No. 2, *supra* note 4, § 30 cmt. b, reporters' note, at 266, § 31 cmt. b, reporters' note, at 276–77, § 32 cmt. a.

entrenched in the case law.²⁰² The reporters have sought to solve this problem by creating a series of special exceptions to the risk standard.²⁰³ That solution renders the Restatement compatible with the case law concerning rescuers, thin-skull plaintiffs and the like, but it does so at the cost of undermining the whole notion that there is a strong reasonable foreseeability principle at work either in tort law generally or in the doctrine on scope of liability. Perhaps tort law should be more principled than it is, but that is a question for another day.²⁰⁴ The reality is that the foreseeability principle has not proven vigorous enough to fend off recognition of these exceptions. This being so, it is hard to give weight to the argument that such a principle must trump the policy considerations advanced in Parts III and IV in favor of a magnitude-of-harm approach.²⁰⁵

VI. STRICT LIABILITY AND NEGLIGENCE PER SE

Up to this point in the article, discussion has centered on the scope of liability for common law negligence. The premise of the foregoing argument has been that the defendant owes a duty of reasonable care to others, the defendant has breached that duty, and the issue for discussion is the scope of liability for unforeseeable harm caused by the breach. Now it is time to set that premise aside, for section 29 applies not only to common law negligence, but also to negligence per se²⁰⁶ and strict liability torts.²⁰⁷ I

202. See *id.* § 30 cmt. b, reporters' note, at 276-68, § 31 cmt. b, reporters' note, at 277-78, § 32 cmt. c., reporters' note, at 285-87.

203. *Id.* §§ 30-32, 34.

204. Compare RONALD DWORKIN, *LAW'S EMPIRE* 228-54 (1986) (arguing for principled adjudication of tort cases and illustrating his approach) with Christie, *supra* note 192, at 127-28 (arguing that "principles are not ends in themselves; they are merely devices by which human beings seek to achieve the good life"). Note that coming down on Dworkin's side would not decide between the magnitude-of-harm versus the risk standard. Having decided that tort law should be based on principles, the question would remain just which principles ought to govern. In such a world, a partisan of magnitude-of-harm would have a good argument that the governing principle should be the fairness-as-preserving-freedom-of-action principle. See discussion *supra* Part IV.A.

205. See discussion *supra* Parts III, IV.

206. See Tentative Draft No. 2, *supra* note 4, app. § 14. These are cases in which the actor has violated a statute, causing physical injury. If the purpose of the statute is to prevent the harm that took place, the jury is not permitted to evaluate the conduct under the "reasonable person" standard of common law negligence. Instead, the statutory violation is negligence as a matter of law, or "*per se*." See DOBBS, *supra* note 155, at 315.

have argued that a magnitude-of-harm test is the best rule for addressing the proximate cause problem in ordinary negligence causes of action. At the same time, my view is that the reporters state exactly the right rule for negligence per se and strict liability.²⁰⁸ This part of the article explains why the risk rule is correct for these torts, but not for ordinary negligence. The explanation will contribute to the larger project of persuading the reader that the magnitude-of-harm rule should be preferred for common law negligence cases.

“Strict liability” is a misleading term. It signifies merely that the plaintiff is not obliged to show negligence in order to win his case.²⁰⁹ But this just means that liability depends on some *other* element of the situation. The plaintiff must establish, for example, that the defendant has engaged in an abnormally dangerous activity like blasting, or manufactured a defective product, or harbored a dangerous animal.²¹⁰ Strict liability is shorthand for the judgment that, for moral or economic reasons, liability is appropriate in circumstances like these even if the actor was not at fault in the sense of taking an unreasonable risk.²¹¹ Now suppose that the defendant does an act that exposes him to strict liability, like the abnormally dangerous activity of hauling gasoline in a tank truck on the highway.²¹² Through no fault of the driver, the truck collides with a car. Though the truck crushes the car, no gasoline escapes from the tank. This is a case in which the abnormally dangerous nature of the activity is the justification for a strict liability rule, and yet the feature of the defendant’s conduct plays no part in the accident. Since the accident that occurred is unrelated to the justification for liability without fault, the non-negligent truck driver escapes liability.

207. See Tentative Draft No. 2, *supra* note 4, § 32. The scope of liability for intentional torts is considerably broader than liability for non-intentional torts. *Id.*

208. See *id.* app. §§ 14, 20–25.

209. See DOBBS, *supra* note 155, at 941.

210. See *id.* at 941–59, 977–81.

211. Compare George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 541–42, 547–48 (1972) (arguing that strict liability for abnormally dangerous activities is justified as a matter of fairness, as the defendant has created a “non-reciprocal” risk, exposing others to far greater dangers than people ordinarily generate), with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 175–80 (4th ed. 1992) (offering an economic rationale for strict liability for abnormally dangerous activities).

212. See *Siegler v. Kuhlman*, 502 P.2d 1181, 1182 (Wash. 1973); see also RESTATEMENT (SECOND) OF TORTS § 519(2) & cmt. e.

The structure of a negligence per se case resembles strict liability. The justification for negligence per se is that the legislature has made a judgment to forbid certain conduct on account of some harm that it may produce.²¹³ For example, it may require that ships transporting animals put fences around them, so as to prevent the spread of disease.²¹⁴ A ship captain fails to do this, a storm comes up, and the animals are washed overboard.²¹⁵ There is no liability for the loss of the animals, because the harm had nothing to do with the risk that gave rise to the rule in the first place.²¹⁶ There is no justification, therefore, for imposing liability beyond common law negligence.²¹⁷

There is a subtle but crucial difference between common law negligence, on the one hand, and strict liability and negligence per se on the other. The latter doctrines identify specific circumstances calling for duties that go *beyond* the reasonable care we ordinarily owe one another.²¹⁸ The defendant on whom this extra burden is placed has a compelling argument that fairness requires limiting liability to harms that are within the risk thus identified. The argument is so strong that virtually all courts and commentators endorse it—as do I.

Common law negligence is a different matter altogether. Apart from exceptions that are not relevant here, we each owe a duty of reasonable care to everyone else in the ordinary course of all of our activities,²¹⁹ and any breach of that duty is sufficient to justify finding the defendant blameworthy in a strong sense. It is there-

213. See DOBBS, *supra* note 155, at 315.

214. See *Gorris v. Scott*, 9 L.R.-Ex. 125 (1874).

215. *Id.* at 125–26.

216. *Id.* at 129.

217. *Id.* at 129–30. It is important to keep in mind that the failure of a negligence per se theory of recovery does not preclude the jury from finding common law negligence for failure to keep the animals secure against the reasonably foreseeable dangers of stormy weather.

218. It is possible to imagine a tort system in which strict liability was the general principle governing recovery. Such a system would look very different from what we have today. With negligence removed from the prima facie case, a whole new body of “causation” rules, quite unlike the current “cause-in-fact” doctrine, would have to be developed. For one effort to construct such a system, see EPSTEIN, *supra* note 137, at 15–50.

219. This characterization of the duty of care, though adequate for my purpose, is an oversimplification of a complex topic. For an illuminating treatment of the duty problem, see John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001).

fore entirely reasonable that the answer to the question of what is a fair scope of liability comes out differently in this context than it does when an exceptionally onerous duty is placed upon the defendant.

VII. CONCLUSION

By choosing the risk standard over the direct-consequences test, the reporters for the *Restatement (Third)* have opened the door to a more searching inquiry about how that standard should be defined. In common law negligence cases, an important aspect of that debate relates to cases in which the harm that occurs is no greater than the *amount* of harm that the negligent defendant could reasonably foresee. The question is whether courts should care that the harm resulted from a *risk* different from the reasonably foreseeable ones that justify finding the defendant negligent. Though partisans of the risk standard give an affirmative answer to that question, they have not adequately explained why this should be so. I have argued that the approach proposed by the reporters is wrong as a matter of fairness and policy.

The determinative question in these proximate cause cases ought to be whether the harm that occurred is greater than the reasonably foreseeable harm. This magnitude-of-harm approach avoids the excesses and anomalies produced by the increasingly disfavored direct-consequences test. It also establishes a more workable rule of decision than the competing risk standard, while fully addressing concerns that unfairness lurks in exposing negligent defendants to surprisingly expansive awards of damages. Most important, the magnitude-of-harm standard advances simple justice by permitting innocent victims to recover damages from concededly negligent defendants who cause a foreseeable measure of harm.
