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Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility, in Symposium, The John W. Wade Conference on the Third Restatement of Torts

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# Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility†

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## I. INTRODUCTION

Few issues in tort law are more in need of clarification than those encompassed by the concepts of legal cause and duty, which are not only the subject of "opaque, confused and contradictory" treatments in the American Law Institute's Restatement of the Law of Torts,<sup>1</sup> relied upon by many American courts, but also the subject of even more opaque and confused treatment in many foreign jurisdictions.<sup>2</sup> The focus of this conference is on tort law in the United States, and my assigned task is to comment on the issues encompassed by the concept of legal cause, especially as they are or should be treated in the Restatement. As anyone who is familiar with the concept of legal cause will be aware, and as Jane Stapleton's article makes clear, an adequate discussion of the concept must encompass not only the empirical issue of causal contribution and the normative issue of the extent of legal responsibility for tortiously caused consequences, but also the related concept of duty. Thus, the assigned task covers an area that is broad and complex, and it is made more difficult by the general failure, in the Restatement and elsewhere, to properly distinguish and clarify the various analytical, empirical, and normative issues that are confusingly and even contradictorily lumped together in one or the other or all of these legal concepts.

In her article, Stapleton comments on some of my prior articles, in which I undertook a detailed analysis of the empirical issue of causal contribution and emphasized the importance of (1) distinguishing that issue from the prior issue of identifying tortious conduct and the subsequent issue of the extent of legal responsibility for tortiously caused consequences; and (2) focusing the causal-contribution inquiry on the tortious aspect of the defendant's conduct.<sup>3</sup> While Stapleton and I agree on many basic points, we also

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1. See Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 943 (2001).

2. See, e.g., *March v. E. & M.H. Stramare Pty. Ltd.*, (1991) 99 A.L.R. 423; *Sew Hoy & Sons Ltd. v. Coopers & Lybrand*, [1996] 1 N.Z.L.R. 392; Stapleton, *supra* note 1, at 949 n.21, 955 n.35; Jane Stapleton, *Perspectives on Causation*, in OXFORD ESSAYS IN JURISPRUDENCE, FOURTH SERIES 61, 72, 75-76, 77-78 (Jeremy Horder ed., Oxford Univ. Press, 2000) [hereinafter Stapleton, *Perspectives*]; Jane Stapleton, *Unpacking "Causation,"* in RELATING TO RESPONSIBILITY (Peter Cane & John Gardner eds., forthcoming 2001).

3. See Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985) [hereinafter Wright, *Causation*]; Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435 (1985) [hereinafter Wright, *Economic Analysis*]; Richard W. Wright, *The Efficiency Theory of Causation and Responsibility: Unscientific Formalism and False Semantics*, 63 CHI.-KENT L. REV. 553 (1987) [hereinafter Wright, *Efficiency Theory*];

disagree on some significant ones, as Stapleton herself notes. In the following parts of this Article, I will quickly note the points of agreement and spend more time on the points of disagreement, in the hope of further narrowing our disagreements or at least clarifying the underlying issues. I will concentrate, once again, primarily on the empirical issue of causal contribution and the importance of distinguishing it from the normative issues of tortious conduct, legal injury, and the extent of legal responsibility for tortiously caused injuries. However, I will focus more than I have in the past on the (mis)handling of these issues in the Restatement, while also making a few comments about the Restatement's (mis)handling of the issues of duty and the extent of legal responsibility for tortiously caused consequences.

## II. GENERAL CONCEPTS AND STRUCTURE

The Restatement's treatment of legal cause suffers from serious conceptual and structural flaws. First, the concepts employed by the Restatement fail to distinguish the empirical issue of causal contribution from the normative issue of the proper extent of legal responsibility for tortiously caused consequences.<sup>4</sup> Second, the Restatement does not properly link the causal-contribution issue to the prior tortious-conduct issue. Third, the Restatement's treatments are insufficiently general, being elaborated only for the tort of negligence. These problems will be discussed, in order, in the following sections.

### *A. Distinguishing the Empirical Issue of Causal Contribution from the Normative Issue of the Extent of Legal Responsibility for Tortiously Caused Consequences*

As Stapleton thoroughly documents,<sup>5</sup> the Restatement fails to distinguish the empirical issue of causal contribution from the

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Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 IOWA L. REV. 1001 (1988) [hereinafter Wright, *Bramble Bush*]. See also Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45 (1992).

4. The causal-contribution and extent-of-responsibility issues arise not only in the prima facie case against the defendant, but also in the defense of plaintiff's contributory negligence. To avoid repeated awkward phrasings (e.g., "tortiously or negligently caused consequences"), I will generally discuss these issues in the context of the prima facie case against the defendant. The analyses are the same in the defense of plaintiff's contributory negligence.

5. Stapleton, *supra* note 1, at 969-81.

normative issue of the proper extent of legal responsibility for tortiously caused consequences. The Restatement's failure to properly distinguish these two issues is foreordained by its failure to employ any concepts or phrases that distinguish them. The phrases that it does employ, "legal cause" and "substantial factor," deliberately merge the two issues.

### 1. "Legal Cause" and "Proximate Cause"

The Restatement employs the phrase "legal cause" as a substitute for the phrase "proximate cause," which traditionally has been used by the courts. The word "cause" in each phrase is meant (or should be meant) to refer to the empirical issue of causal contribution, which is often called "actual causation" or "cause-in-fact," while the words "legal" and "proximate" in the two phrases are meant to refer to the normative issue of the extent of legal responsibility for tortiously caused consequences. However, none of these embedded words is adequate for its intended purpose.

Even the word "cause" is too ambiguous to be used to distinguish the empirical issue of causal contribution from the normative issue of the extent of legal responsibility for tortiously caused consequences. As the Restatement itself recognizes,<sup>6</sup> in ordinary use the words "cause" and "responsibility" have ambiguous and overlapping meanings, sometimes referring merely to the empirical fact of having contributed to a certain result, but at other times referring only to those contributing factors which are deemed to be most significant given the context and purpose of the particular inquiry. This is especially true for the phrase "the cause," but it also is true for the phrase "a cause."<sup>7</sup>

There are even greater problems with the words "legal" or "proximate" as qualifiers to the word "cause." On the one hand, the word "proximate" erroneously implies that a "proximate cause" of some harm must be a cause that is spatially and temporally near, or even nearest, to the harm.<sup>8</sup> On the other hand, an empirical

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6. See RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965), *quoted infra* in text accompanying note 29.

7. See Wright, *Causation*, *supra* note 3, at 1741-50; Wright, *Bramble Bush*, *supra* note 3, at 1012-14.

8. The same problem exists with the word "remote," the antonym of "proximate," which is applied to harms which are found to be beyond the extent of legal responsibility in the United Kingdom and the British Commonwealth countries. See Stapleton, *supra* note 1, at 949 n.21; Stapleton, *Perspectives*, *supra* note 2, at 78-79.

study found that almost one-fourth of the interviewed subjects misinterpreted the phrase "proximate cause" as meaning an "approximate cause," an "estimated cause," or some fabrication.<sup>9</sup> To avoid such common misinterpretations, the earlier Restatements and some courts have replaced "proximate cause" with "legal cause." However, the phrase "legal cause" is no more enlightening nor less confusing than the phrase "proximate cause." The same empirical study that found problems with the phrase "proximate cause" also found that one-fourth of the interviewed subjects misinterpreted "legal cause" as being the opposite of an illegal cause. The study therefore recommended "that the term 'legal cause' not be used in jury instructions; instead, the simple term 'cause' should be used, with the explanation that the law defines 'cause' in its own particular way."<sup>10</sup> The phrases "responsible cause" or "legally responsible cause" might be less misleading, but they are no more helpful in specifying the relevant notion of responsibility and distinguishing it from the empirical issue of causal contribution.

## 2. "Substantial Factor"

The Restatement's basic section on legal cause, section 431, states:

The actor's negligent conduct is a legal cause of harm to another if

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

(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.<sup>11</sup>

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9. See Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1353 (1979).

10. *Id.* Relying in part on the cited empirical study, the California Supreme Court recently threw out California's standard jury instruction on causation which contained the phrase "proximate cause." See *Mitchell v. Gonzales*, 819 P.2d 872, 876-79 (Cal. 1991). However, despite also noting (i) the problems the study found with the phrase "legal cause" and (ii) the importance of distinguishing the empirical issue of causal contribution ("cause-in-fact") from the normative issue of the proper extent of responsibility for tortiously caused consequences, the court retained, as an instruction supposedly limited to the issue of cause-in-fact, the standard jury instruction on causation which included, *inter alia*, the phrase "legal cause." See *id.* For further discussion of *Mitchell*, see *infra* note 12.

11. RESTATEMENT OF TORTS § 431 (1934); RESTATEMENT (SECOND) OF TORTS § 431 (1965). The general definitional section on "legal cause" seems to focus only on the issue addressed in clause (b) of section 431:

The words "legal cause" are used . . . to denote the fact that the causal sequence by which the actor's tortious conduct has resulted in [a legally recognized injury] is such that the law holds the actor responsible for such harm . . . .

At first glance, one might think that section 431 distinguishes the empirical issue of causal contribution, in clause (a), from the normative issue of the extent of legal responsibility for negligently caused harm, in clause (b). A number of courts seem to think that it does.<sup>12</sup> So did William Prosser, who was the Reporter for the relevant portions of the Second Restatement. While he acknowledged that the "substantial factor" formulation was initially adopted as a test of both cause-in-fact and the appropriate extent of legal responsibility for tortiously caused consequences, Prosser asserted in the first edition of his influential treatise that the "substantial factor" formulation could and should be used solely as a means of posing the empirical issue of causal contribution.<sup>13</sup> In the subse-

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RESTATEMENT (SECOND) OF TORTS § 9 (1965). Slightly different wording appeared in the First Restatement:

The words "legal cause" are used . . . to denote the fact that the manner in which the actor's tortious conduct has resulted in [a legally recognized injury] is such that the law regards it just to hold the actor responsible for such harm.

RESTATEMENT OF TORTS § 9 (1934). However, in both restatements, comment b of section 9 echoes the language in section 431(b):

[To be a legal cause] the act or omission must be a substantial factor in bringing about the harm, and there must be no principle or rule of law which restricts the actor's liability because of the manner in which the act or omission operates to bring about [the harm].

*E.g.*, RESTATEMENT (SECOND) OF TORTS § 9 cmt. b (1965). Compare *id.*, with *id.* § 431(b).

12. See, e.g., *Mitchell v. Gonzales*, 819 P.2d 872 (Cal. 1991). The majority approved an instruction, supposedly limited to the issue of cause-in-fact, which included the phrases "legal cause" and "substantial factor" and made those phrases and the word "cause" the sole question-begging "tests" of cause-in-fact: "A legal cause of [injury] . . . is a cause which is a substantial factor in bringing about the [injury]." *Id.* at 873 n.2; see *id.* at 879. The majority claimed (erroneously) that the "substantial factor" formulation had been "comparatively free of criticism and has even received praise," yet thereafter noted some significant criticisms of the formulation. *Id.* at 878-79. Even the dissenting judge, despite noting additional criticisms of the "substantial factor" formulation, did not seem to find fault with the approved instruction as an instruction on cause-in-fact, but rather argued that the rejection of the former "proximate cause" instruction left California courts with no adequate approved general instruction on the extent-of-responsibility issue. See *id.* at 883-84 (Kennard, J., dissenting). Stapleton cites *Mitchell* as a case in which the "substantial factor" formulation was used "as a device to evade the normative issue presented by over-determined events." Stapleton, *supra* note 1, at 979 n.91. However, there was no over-determination in *Mitchell*. The defendants' negligent acts and omissions all were but-for causes of the child's drowning. The court turned to the "legal cause" instruction primarily because the alternative instruction had the misleading phrase "proximate cause," see *supra* note 10, but also noted that the defense attorney had twisted the "but for" language in the proximate-cause instruction into an argument that the plaintiff could not recover if his inability to swim was a but-for cause of his drowning, see *Mitchell*, 819 P.2d at 880. Nevertheless, the court assumed a proper instruction could/would include "but for" language. *Id.* at 879 n.10.

13. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 318-19, 321, 323-24 (1st ed. 1941). David Robertson, despite noting various misuses of the substantial-factor formulation, is a rare recent supporter of Prosser's assertion. He finds the formulation to be appropriate only when the but-for test fails because there were multiple forces, each of which would have been independently sufficient. He describes the Restatement's specification of such situations in section 432(2) as a "suitably tight definition," and he states that a recent decision "captures the

quent editions of his treatise, Prosser asserted that "the 1948 revision of the [First] Restatement has limited its application very definitely to the fact of causation alone."<sup>14</sup>

The 1948 revision, for which Laurence Eldredge was the Reporter, modified section 433,<sup>15</sup> which lists a number of considerations as important in determining whether a person's conduct was a substantial factor in producing the plaintiff's injury. Before the revision, section 433 listed the following considerations:

- (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
- (b) whether after the event and looking back from the harm to the actor's negligent conduct it appears highly extraordinary that it should have brought about the harm;
- (c) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
- (d) lapse of time.<sup>16</sup>

The 1948 revision deleted clause (b) and renumbered the remaining items.<sup>17</sup> The Second Restatement, for which Prosser was the Reporter, preserved the 1948 amendments.<sup>18</sup> Prosser also reproduced,

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thought perfectly." See David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1777-78 (1997). For discussion of the significant problems with section 432(2) of the Restatement, see *infra* text accompanying notes 95-107. For discussion of the significant problems with the "captured thought" in the recent decision, see *infra* note 102. Robertson does not explain why the unhelpful and misleading phrase, "substantial factor," should be used, rather than a direct reference to the independently-sufficient-condition test.

14. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 256 (2d ed. 1955); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 286-87 (3d ed. 1964); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 248 (4th ed. 1971). Each edition cited "Restatement of Torts, 1948 Supp., § 433." The editors of the posthumous edition of Prosser's treatise retained Prosser's assertion, but contradicted it with an explicit acknowledgment that "[t]he 'substantial factor' formulation is one concerning legal significance rather than factual quantum." See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 267, 278 (5th ed. 1984) [hereinafter PROSSER & KEETON]; *id.* 268-69 (suggesting an alternative to the substantial-factor formulation). But see Wright, *Causation*, *supra* note 3, at 1780-81 (criticizing the proposed alternative).

15. See RESTATEMENT OF THE LAW, 1948 SUPPLEMENT, Torts § 433 at 733 (1949).

16. RESTATEMENT OF TORTS § 433 (1934).

17. See RESTATEMENT OF THE LAW, 1948 SUPPLEMENT, Torts § 433 at 733 (1949). The language in clause (b), with the words "to the court" inserted after the word "appears," was added to section 435 as section 435(2). The reporter explained: "Clause (b) and the comments to it deleted from this section are transferred to § 435. This is done to eliminate the inconsistencies in original §§ 431, 433 and 442 and the confusion they have caused and to clarify the separate problems involved." *Id.* at 734 ("Reason for Changes").

18. RESTATEMENT (SECOND) OF TORTS §§ 433 & 435(2) (1965).



in a 1966 Appendix volume to the Second Restatement,<sup>19</sup> a note in the 1948 Supplement that explained the rationale for the deletion of clause (b):

[T]he "substantial factor" element [in § 431(1)] deals with causation in fact while the other element [in § 431(2)] deals with a legal policy relieving the actor of liability for harm he has, as a matter of fact, caused. The conclusion that it appears highly extraordinary that the conduct should have brought about the harm has nothing to do with the question whether it did actually "cause" the harm. The question of actual causation involves an application of the laws of physics to the data to determine whether there is an unbroken chain of causes and effects, starting with the negligent conduct and ending with the harm complained of. Once that question is answered "yes," the only remaining problem of actual causation is the determination of whether the negligent conduct played a "substantial" part in bringing about the harm. It seems obvious that the negligence may have been a "substantial factor" in a particular case regardless of how "highly extraordinary" the chain of events appears in retrospect. It is completely faulty analysis, in view of § 431, to list the "extraordinary" element as a part of the "substantial factor" aspect of legal cause particularly in view of § 442[(b)] which lists it as a part of the quite separate superseding cause problem. It is confusing the question of policy with the question of fact. . . .<sup>20</sup>

This transitional Reporter's note, which does not appear in any permanent section or comment in the Restatement, is clearly insufficient notice that "the Restatement has limited its application [of the 'substantial factor' formulation] very definitely to the fact of causation alone."<sup>21</sup> Moreover, as the note itself makes clear, the phrase "substantial factor" literally requires not only that a condition be a "factor" (without providing any guidance on what constitutes a "factor") but also that it be "substantial"—a qualifier that deliberately and inevitably introduces non-causal normative or policy issues.

Jeremiah Smith first proposed the "substantial factor" formulation, as a guide for resolving the extent-of-responsibility issue rather than the causal-contribution issue. He was content with the usual necessary-condition ("but for") test as a test of cause-in-fact, with an exception for simultaneous, independently sufficient tor-

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19. RESTATEMENT (SECOND) OF TORTS, APPENDIX § 433 Reporter's Notes (1966). Stapleton states that, apart from this note, the Restatement contains no reference to "factual cause," "cause-in-fact," or "actual cause" in its chapter on legal cause. Stapleton, *supra* note 1, at 972-73. But see RESTATEMENT (SECOND) OF TORTS § 431 cmt. b (1965) (declaring that "the question, whether the defendant's negligence has a substantial as distinguished from a merely negligible effect in bringing about the plaintiff's harm . . . becomes important" only when the evidence permits an affirmative answer to the prior question of "whether the actor's negligence was *in fact* the cause of the other's harm—that is, whether it had any effect in producing it") (emphasis added).

20. RESTATEMENT OF THE LAW, 1948 SUPPLEMENT, Torts § 433 at 733-34 (1949) ("Reason for Changes").

21. See *supra* text accompanying note 14.

tious conditions.<sup>22</sup> He wanted to devise a practical alternative to the "probability" or "foreseeability" tests for determining the extent of responsibility for tortiously caused harm, since he believed that those tests were unsound and inconsistent with the results in many cases.<sup>23</sup> He proposed the following formulation: "Defendant's tort must have been a substantial factor in producing the damage complained of."<sup>24</sup> The accompanying explanation and alternative formulations clearly stated that the defendant's tortious conduct could not be a substantial factor unless it not only satisfied the but-for test (with an exception for simultaneous, independently sufficient conditions), but also was an appreciable and continuously effective or efficient factor in producing the harm, up to the time of occurrence of the harm.<sup>25</sup> Thus, the substantial-factor formulation was meant to be used as the test of legal (proximate) cause, but also subsumed the but-for test (and its exception) for cause-in-fact.

Smith's approach was adopted in the First Restatement and retained in the Second Restatement, despite efforts by Prosser, Leon Green, and others to confine the term "substantial factor" to the actual-cause issue.<sup>26</sup> As Stapleton notes,<sup>27</sup> the Restatement continues to list several non-causal considerations as important in determining whether a person's conduct was a substantial factor in producing the harm,<sup>28</sup> and it explicitly states:

The word "substantial" [in the phrase "substantial factor"] is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred.<sup>29</sup>

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22. Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 108-09 & n.20 (1911) [hereinafter Smith, *Legal Cause part 1*]; Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 223, 227 (1912) [hereinafter Smith, *Legal Cause part 2*]; Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 303, 312, 314 n.36, 316-17 n.41 (1912) [hereinafter Smith, *Legal Cause part 3*].

23. Smith, *Legal Cause part 1*, *supra* note 22, at 105, 115-28; Smith, *Legal Cause part 2*, *supra* note 22, at 223-52; Smith, *Legal Cause part 3*, *supra* note 22, at 308-09.

24. Smith, *Legal Cause part 3*, *supra* note 22, at 309.

25. *Id.* at 310-12, 314 n.36.

26. See RESTATEMENT OF TORTS §§ 432-33 (1934); LEON GREEN, RATIONALE OF PROXIMATE CAUSE 137, 140, 180-85 (1927); LEON GREEN, JUDGE AND JURY 190-95 (1930); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 557-59 (1962); Wright, *Causation*, *supra* note 3, at 1781-84 (from which the sentence in the text and the prior paragraph were taken); *supra* text accompanying notes 11-20; *infra* text accompanying note 95.

27. Stapleton, *supra* note 1, at 975-76.

28. See *supra* text accompanying notes 15-18.

29. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965). David Fischer purports to find the substantial-factor formulation useful for "resolving difficult cause-in-fact problems in [the

As a test for determining either causal contribution or the extent of legal responsibility for tortiously caused injury, the substantial-factor formulation is completely useless. Hopefully, Dan Dobbs' telling description of the test will become its epitaph: "The substantial factor test is not so much a test as an incantation. It points neither to any reasoning nor to any facts that will assist courts or lawyers in resolving the question of causation."<sup>30</sup>

### 3. Stapleton's Proposed Non-Causal Terminology

I strongly support Stapleton's insistence on the critical importance of (1) clearly distinguishing for separate analysis the empirical issue of causal contribution and the normative issue of the extent of legal responsibility for tortiously caused consequences; and (2) using phrases other than "legal cause," "proximate cause," "substantial factor," or perhaps even "actual cause" or "cause-in-fact" to refer to these two distinct issues.<sup>31</sup> I have emphasized these same points in my earlier articles.<sup>32</sup> However, I disagree with Stapleton's proposed terminology. She uses the phrases "historical involvement" or "played a role in the history of the outcome [or transition]" to refer to the empirical issue of causal contribution. She employs the phrase "scope of liability for consequences" to refer to the issue of the extent of legal responsibility for tortiously caused consequences.<sup>33</sup> I believe that these phrases are also potentially

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over-determined multiple] omission cases" precisely because it merges the empirical issue of causal contribution and the normative issue of legal responsibility. David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1348; see *infra* text accompanying notes 191-197. However, the substantial-factor formulation does not "resolve" anything, but rather merely restates, confuses, and begs both the empirical issue of causal contribution and the normative issue of legal responsibility.

30. DAN B. DOBBS, *THE LAW OF TORTS* 416 (2000).

31. See Stapleton, *supra* note 1, at 958-59, 966-81, 1004-09. Although Stapleton continues to use the phrase "cause-in-fact," see *id.* at 945, 967, 978, 1004-05, she notes its possible misinterpretation and places primary emphasis on the phrases "historical involvement" or "historical role" as replacements for, or at least elaborations of, the phrase "cause-in-fact." See *id.* at 945, 958-62, 965-69, 1007-09; *infra* text accompanying notes 33-35.

32. See Wright, *Causation*, *supra* note 3, at 1737-58, 1764 n.121, 1781-83, 1791-92; Wright, *Bramble Bush*, *supra* note 3, at 1004-18. There is also the need to distinguish the empirical issue of causal contribution from the normative issues of specifying the required tortious conduct and the required legal injury for a particular tort cause of action. Although these normative issues definitely shape the framing of the causal-contribution inquiry, they are distinct from and prior to the causal-contribution inquiry, which itself is an entirely empirical inquiry. See Wright, *Causation*, *supra* note 3, at 1741-59; Wright, *Bramble Bush*, *supra* note 3, at 1004, 1011-18; Robertson, *supra* note 13, at 1769-71. In the end, Stapleton herself fails to distinguish these normative issues from the causal-contribution issue. See *infra* text accompanying notes 157-180.

33. *E.g.*, Stapleton, *supra* note 1, at 845, 951, 956-67, 974, 980.

misleading, especially the "historical involvement" and "played a role in the history" phrases.

As others have pointed out,<sup>34</sup> assessments of historical involvement or historical role usually turn on non-empirical assessments of historical significance. Inquiries about historical involvement or historical role focus on those causally relevant factors that seem most significant in explaining the event that transpired, and they depend on the particular context and purpose of the historical inquiry and the viewpoint of the inquirer. Such inquiries thus involve normative or policy judgments in addition to the purely empirical issue of causal contribution. Moreover, accounts of "historical involvement" or being "part of the history" may well encompass historical details that bear no causal relevance to the outcome in question. Although, as was noted above,<sup>35</sup> causal language itself is often used to convey non-empirical assessments of significance in addition to the empirical assessment of causal contribution, it almost always includes the empirical assessment of causal contribution. Thus, I think it is a mistake, when focusing on the empirical issue of causal contribution, to entirely abandon causal language as Stapleton proposes. Instead, the causal language chosen must, to the maximum extent possible, exclude consideration of significance. Phrases such as "the cause" or even "a cause" should not be used. I prefer phrases such as "empirical causal contribution," "causal contribution," or even merely "contribution"—as in, "Did it contribute, in even the slightest way, to the result?"

I agree with Stapleton that a (primarily) non-causal, normative phrase such as the one she suggests, "scope of liability for the consequences of tortious conduct,"<sup>36</sup> should be used to clearly distinguish the normative issue of the appropriate extent of legal responsibility for tortiously caused injury from the empirical issue of whether the defendant's tortious conduct contributed to the plaintiff's injury. However, the phrase can and should be sharpened a bit more. First, the word "liability" should be changed to "responsibility," since the issue arises not only in the *prima facie* case against the defendant, but also in the defense of plaintiff's contributory negligence. A plaintiff cannot be held *liable* for her own injury, but if she was contributorily negligent she can be deemed *responsible*

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34. See, e.g., H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 9-13, 35-37, 60, 63 (2d ed. 1985); W.H. Dray, *Causal Judgment in Attributive and Explanatory Contexts*, 49 *LAW & CONTEMP. PROBS.*, Summer 1986, at 13, *passim*; Michael Scriven, *The Structure of Science*, 17 *REV. METAPHYSICS* 403, 407-10 (1964).

35. See *supra* text accompanying notes 6-7.

36. E.g., Stapleton, *supra* note 1, at 945, 951, 980, 984.

(along with others) for its occurrence, and her responsibility can and should be compared with the defendant's responsibility in order to determine the defendant's ultimate liability. Second, the word "scope" should be changed to "extent." The phrases "scope of liability" or "scope of responsibility" can easily be interpreted as encompassing not only the "Adam and Eve" issue of the extent of legal responsibility for tortiously caused injury, but also the prior issue of the existence of an obligation to conduct oneself in a certain way in light of the foreseeable risks. I believe the phrase "extent of legal responsibility for tortiously caused injury" better conveys the nature of the issue involved.

*B. Focusing the Causal-Contribution Inquiry on the Tortious Aspect of the Defendant's Conduct*

Although it is rarely noticed, Restatement section 431(a) does not require (as it should) that the defendant's *negligence* (e.g., excess speed) contributed to the plaintiff's injury, but rather only that the defendant's *conduct* (e.g., driving a car) was a "substantial factor" in producing the harm.<sup>37</sup> Section 431 thus seems to adopt the analytic approach favored most prominently by Robert Keeton and Leon Green, by making the causal-contribution inquiry almost trivial and putting all the weight on a harm-matches-the-risk analysis under clause (b).<sup>38</sup>

Keeton and Green's overall-conduct approach is correctly avoided in negligence actions by the subsequent phrasing of section 432.<sup>39</sup> However, section 519 of the Second Restatement explicitly adopted the overall-conduct approach in the context of strict liability actions for "abnormally dangerous" activities, after John Wade had succeeded Prosser as the Reporter. In the First Restatement, section 519 correctly required the plaintiff to prove that the ultrahazardous aspect of the defendant's activity caused her harm:

[O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm *resulting thereto from that which makes the activity ultrahazardous* . . . .<sup>40</sup>

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37. See *supra* text accompanying note 11.

38. See ROBERT KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* viii-ix, 10-16 (1963); Green, *supra* note 26. Keeton's and Green's analyses are criticized in Wright, *Causation*, *supra* note 3, at 1761-66.

39. See *infra* text accompanying note 95.

40. RESTATEMENT OF TORTS § 519 (1938) (emphasis added).

However, in the Second Restatement, for which Keeton and other prominent supporters of the harm-matches-the-risk rule were advisers,<sup>41</sup> section 519 was modified to conform to Keeton's overall-conduct approach:

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another *resulting from the activity* . . .
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.<sup>42</sup>

As I have demonstrated in a prior article, the overall-conduct approach can lead to absurd results, and the courts have clearly rejected it.<sup>43</sup> The courts require instead that the plaintiff prove that the tortious aspect of the defendant's conduct contributed to the plaintiff's injury.<sup>44</sup> The Third Restatement should correct the ear-

41. The following advisers, at least, were prominent proponents of the "harm within the risk" rule: Laurence H. Eldredge, Fleming James, Jr., Robert E. Keeton, W. Page Keeton, Wex S. Malone, and Warren A. Seavey. See RESTATEMENT (SECOND) OF TORTS, §§ 504-707A, at v (1977); Wright, *Causation*, *supra* note 3, at 1759-60 & n.105, 1771 nn.146-49.

42. RESTATEMENT (SECOND) OF TORTS § 519 (1977) (emphasis added). The Second Restatement omitted the prior language limiting liability to those whom the actor "should recognize as likely to be harmed" by the miscarriage of the activity. However, it seems to have been assumed that this limitation was encompassed by section 519(2). See *id.* § 519(2) cmt. c (discussing risks and harms to those "in the vicinity"). The Reporter's Note to section 519 of the Second Restatement merely noted, "This section has been changed by the substitution of 'abnormally dangerous' for 'ultrahazardous,' and by the addition of Subsection (2)." RESTATEMENT (SECOND) OF TORTS, APPENDIX § 519, Reporter's Note (1981).

43. See Wright, *Causation*, *supra* note 3, at 1759-74; accord, Robertson, *supra* note 13, at 1770 & n.19 (stating that the overall-conduct approach "is a decidedly eccentric view of cause in fact, shared by only a few analysts and having no appreciable judicial influence"). David Fischer cites a couple of idiosyncratic product-liability failure-to-warn cases as having adopted the overall-conduct approach. See Fischer, *supra* note 29, at 1355 & n.83 (citing Frankel v. Lull Eng'g Co., 334 F. Supp. 913, 925-26 (E.D. Pa. 1971); Muncy v. Magnolia Chem. Co., 437 S.W.2d 15, 19 (Tex. Civ. App. 1968)).

44. In their latest attempt to bolster the controversial "feasible alternative design" requirement in the Restatement Third of Torts on Products Liability, James Henderson and Aaron Twerski really mix things up. First, they claim that the only actual-causation requirement is that the defendant's overall conduct, "quite apart from its wrongful nature," was either a necessary condition or an independently sufficient condition for the occurrence of the harm. James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 GEO. L.J. 659, 663-64 & n.23 (2000) (citing Smith v. Rapid Transit, Inc., 58 N.E.2d 754, 755 (Mass. 1945)). The *Smith* case does not support the overall-conduct approach. The bus at issue allegedly negligently forced the plaintiff to turn into a parked car. The issue in the case was whether the plaintiff could prevail, in the absence of any concrete evidence regarding who owned the bus, based merely on an abstract statistical probability that it was the defendant's bus. The court correctly concluded that such evidence is insufficient to establish actual causation. See *Smith*, 58 N.E.2d at 754-55; Wright, *Bramble Bush*, *supra* note 3, at 1049-67. Similarly, contrary to what Henderson and Twerski state, see Henderson & Twerski, *supra*, at 665 & nn.32 & 33, the difficult causation issues in many of the toxic tort cases (the "generic causation" issue of whether the substance is even capable of causing the harm at issue, and the "specific causation" issue of whether, assuming such general

lier Restatements' erroneous unfocusing of the causal-contribution inquiry, by clearly stating that the causal-contribution inquiry must be narrowly focused on the tortious aspect of the defendant's conduct.<sup>45</sup>

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causal capacity, it can be proven that exposure to the substance actually contributed to the plaintiff's injury) have nothing to do with the supposed overall-conduct approach to actual causation. In each of those cases, it is assumed or alleged that the plaintiff's exposure to the substance was caused by the tortious aspect of the defendant's conduct; the contested causal issue is whether such exposure is capable of causing, and in the particular case actually contributed to, the plaintiff's injury.

Second, although Henderson and Twerski recognize and indeed insist upon the tortious-aspect causation requirement, they incorrectly treat it as an issue of proximate causation rather than actual causation, and they incorrectly require, contrary to the courts and the Restatement, that the tortious aspect must have been a necessary (but-for) condition, with no exception for independently sufficient or otherwise contributing conditions. See *id.* at 664; *infra* text accompanying notes 95-107. They also assert that a third essential "causation" requirement is a harm-matches-the-risk rule. This supposed rule is not followed by most courts. Instead, the courts follow, sometimes explicitly but more often implicitly, a harm-results-from-the-risk rule, which is the rule that is explicitly stated in the case which they cite. See Henderson & Twerski, *supra*, at 664 (quoting *Marshall v. Nugent*, 222 F.2d 604, 610 (1st Cir. 1955), as stating that "the effort of the courts has been, in the development of this doctrine of proximate causation, to confine the liability of a negligent actor to those harmful consequences which *result from* the operation of the risk . . . the foreseeability of which rendered the defendant's conduct negligent") (emphasis added).

Third, Henderson and Twerski incorrectly identify or merge the *risk-reduction* requirement for a feasible alternative design—the requirement that the alleged alternative design must reduce the *ex ante* risks of injury—with the *ex post* causal-contribution issue of whether the negligent failure to adopt such a safer alternative design contributed to the injury. They would require, contrary to the case law in over-determined-causation cases such as the multiple-fires cases, multiple-sources-of-pollution cases, and multiple-exposures-to-asbestos cases, that the failure to adopt the (safer) alternative design must have been a necessary (but-for) cause of the injury. See Henderson & Twerski, *supra*, at 661, 666-67. They state that the supposed identity of the *ex ante* risk-reduction requirement and the but-for test of *ex post* causal contribution is an "insight" which they and other academics have previously failed to see, an "insight" which allegedly strengthens the argument for their controversial feasible-alternative-design requirement. See *id.* at 661. To the contrary, it is a serious conceptual confusion which they, as reporters, previously inserted in a draft of the Restatement of Products Liability, but which was removed (with their acquiescence) at the 1996 annual meeting of the American Law Institute. See PROCEEDINGS OF THE 73RD ANNUAL MEETING OF THE AMERICAN LAW INSTITUTE 136-38 (1996). An attempt to eliminate this conceptual confusion failed the prior year, when the reporters, especially Twerski, defended the relevant language as being "an important teaching tool," even though it was pointed out that the language confused the *ex ante* risk-reduction requirement for a defective design with the inadequate but-for test of *ex post* causal contribution to the injury. See PROCEEDINGS OF THE 72ND ANNUAL MEETING OF THE AMERICAN LAW INSTITUTE 226-28 (1995).

45. Accord Stapleton, *supra* note 1, at 945, 964-65 & n.58, 978 n.90. However, Stapleton does not state this principle precisely enough. The causal-contribution inquiry must be focused on the *tortious aspect* of the defendant's tortious conduct (or the negligent aspect of the plaintiff's negligent conduct) rather than on the person's tortious (or negligent) conduct described merely as an act or omission. The description of the tortious (or negligent) conduct must include those aspects of the conduct which made it tortious (or negligent)—e.g., leaving a *loaded* gun lying around, sitting on an *unstable* wall, or standing on the *unrailed* portion of a platform—and those existing conditions, as well as the act or omission per se, must have causally contributed to the

### C. Lack of Generality

Although the "legal cause" element is a required element of every tort (as well as every contributory negligence defense), there is no section in the Restatement that states this general requirement; instead, it appears only in a few comments.<sup>46</sup> The Restatement's chapter on legal cause, chapter 16, deals solely with the tort of negligence, except for a few scattered, vague sections and comments.<sup>47</sup> I agree with Stapleton that the Third Restatement should (1) clearly state in relevant generally applicable sections that the empirical and normative issues that are currently confusingly encompassed by the "legal cause" requirement arise in every tort action; and (2) provide more guidance on whether the same or different rules or principles govern the resolution of these issues in the different types of tort actions.<sup>48</sup>

Paradoxically, the lack of general principles is a serious problem in the so-called General Principles project and in the Third Restatement as a (jumbled) "whole." The "General Principles" project is currently limited to physical injuries, and it excludes all no-duty (e.g., nonfeasance) or limited duty (e.g., risks to entrants on one's land) situations.<sup>49</sup> Nonetheless, the title, "General Principles,"

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plaintiff's injury. See Wright, *Causation*, *supra* note 3, at 1766-74; Tony Honoré, *Necessary and Sufficient Conditions in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 363, 368 (David G. Owen ed., 1995). For suggested language for stating this requirement, see *infra* text accompanying note 129.

Stapleton claims that both the tortious-conduct inquiry and the subsequent causal-contribution inquiry are rendered highly subjective and manipulable by the need to select the "comparator class" for her "made a difference" analysis of individual responsibility. Stapleton, *supra* note 1, at 964 n.58; Stapleton, *Perspectives*, *supra* note 2, at 66-70. Neither process is nearly as open-ended and subjective as she claims. The standard for assessing tortious conduct is generally fixed as the "ordinary prudent person" with normal physical and mental abilities and skills, but also includes any above-normal knowledge, abilities, or skills that the defendant actually possesses or should possess given the occupation or activity in which he or she is engaged. See RESTATEMENT (SECOND) OF TORTS §§ 283, 289, 299 & cmts. c & f, 299A (1965). Similarly, the causal-contribution analysis, properly done, does not involve mental explorations of hypothetical or imaginary "alternative universes," see Stapleton, *supra* note 1, at 961 n.46, 963, but rather the matching of existing conditions against the required elements of causal generalizations that are believed to apply in our world. See Wright, *Causation*, *supra* note 3, at 1803-13; Wright, *Bramble Bush*, *supra* note 3, at 1039-42; cf. Robertson, *supra* note 13, at 1770-71.

46. See, e.g., RESTATEMENT (SECOND) OF TORTS §§ 9 cmt. a, 430 cmt. e (1965).

47. *Id.* § 430 cmt. e (intentional torts and strict liability); *id.* § 435A & cmt. a (intentional torts); *id.* § 435B & cmt. a (intentional torts); *id.* § 501 & cmt. a (recklessness); cf. RESTATEMENT (SECOND) OF TORTS § 519 (1977) (strict liability for abnormally dangerous activities); RESTATEMENT (SECOND) OF TORTS § 870 cmt. l (1979) (the "innominate" or "prima facie" intentional tort); *id.* § 917 (extent of liability for damages).

48. See Stapleton, *supra* note 1, at 951 n.26, 971-72.

49. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES at xxi (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft]; cf. *id.* § 14 scope note.



implies general rather than limited applicability, and the sections and comments are usually worded in general terms with no indication of limited applicability, yet are not valid if applied generally. Citations to supporting cases for some sections, for example, section 4 and its comment *d* on the supposed risk-utility definition of negligence, consist almost entirely of citations to cases involving risks to entrants on land and other situations supposedly excluded from the scope of the draft.<sup>50</sup> The failure to express clearly and adhere to scope limits throughout the draft can only lead to serious confusion by those attempting to use the Restatement. More significantly, although it seems too late to do much about this problem, the breaking up of the Third Restatement into numerous limited and mutually incoherent projects seems almost guaranteed to make it even more confusing, contradictory, and misleading than the first two restatements, which themselves were hardly models of clear and orderly exposition.

### III. DUTY

Stapleton expresses grave concern over what she sees as a failure of the existing Restatement, and of United States tort scholars and lawyers in general, to pay sufficient attention to the need to place explicit limits and controls on the duty of care in negligence law. She claims that the Second Restatement, "reflect[ing] the dominant academic fashions of the time," was motivated by a "skepticism about the role of the duty concept and a preference for jury judgment."<sup>51</sup> Therefore, she states, it "embrace[d] a general duty owed 'to the whole world' [which] left most issues to be dealt with under the rubric of the other recognized elements of the tort, including 'legal cause,' "<sup>52</sup> which she assumes is generally treated as an issue of fact for the jury.<sup>53</sup> One senses a strong undercurrent of

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50. See *id.* § 4 cmt. c, Reporter's Note.

51. Stapleton, *supra* note 1, at 945 (footnotes omitted); see *id.* at 944.

52. *Id.* at (footnotes omitted).

53. See *id.* at 955. However, legal-cause issues as well as duty issues are often decided by judges in the United States. See RESTATEMENT (SECOND) OF TORTS § 328B(b) & (e) (1965). It is often assumed that Judge Cardozo's opinion in *Palsgraf*, which adopted the narrow relational approach to duty, was motivated by a desire to shift power from juries to judges by making the issue an issue of law for the judge. See, e.g., Stapleton, *supra* note 1, at 954 n.33. However, Cardozo treated the duty issue in *Palsgraf* as an issue of fact to be left to the jury if reasonable minds could differ, as with any other issue of fact. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928). According to Cardozo, "[t]he range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury.

belief that tort liability in the United States has gone awry in the direction of unbounded liability as a result of contingency fees,<sup>54</sup> the (optional) use of civil juries,<sup>55</sup> and "[t]he emergence of a large, nation-wide, entrepreneurial and intellectually inventive plaintiffs' bar" which has "hastened the exposure of the intrinsically voracious nature of the negligence principle, putting pressure on court dock-

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Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station." *Id.*

54. See Stapleton, *supra* note 1, at 946.

55. See *id.* at 946, 954-55; *cf. id.* at 956 ("There is no convincing evidence that American juries in general are running wild, or that they are impervious to reasoned argument."). Actually, there is quite strong evidence to the contrary, from the past to the present. See, e.g., Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964) (finding that in 79% of cases judges and juries agreed on liability, in 10% of cases judges would have found liability where juries did not, in 11% of cases juries found liability where the judges would not have; and that judges would have found liability in 54% of total cases, whereas the juries actually held the defendants liable in 55% of total cases); R. Perry Sentel, Jr., *The Georgia Jury and Negligence: The View from the Bench*, 26 GA. L. REV. 85 (1991) (similar results). Several empirical studies have reported higher plaintiff success rates with judges than juries. See, e.g., CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEPT OF JUSTICE, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, at 6 (1999) (NCJ-173426) (finding that plaintiffs won 48% of state tort trials overall: 48% of jury trials and 57% of bench trials), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf>; Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992) (product liability cases); Neil Vidmar, *The Unfair Criticism of Medical Malpractice Juries*, 76 JUDICATURE 118 (1992) (medical malpractice cases); see also VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).

Studies have uniformly found that, while juries find in favor of plaintiffs in around 50% of all tort cases (compared to around 60% of contract cases), they are much more likely to find in favor of defendants in the two most controversial and publicized areas of tort liability: medical malpractice and product liability. See, e.g., DEFRANCES & LITRAS, *supra*, at 6 (finding that plaintiffs won 48% of all tort jury verdicts in 1996, but only 23% in medical malpractice cases and 31% in product liability cases, except for asbestos-related claims, of which plaintiffs won 55%); CAROL J. DEFRANCES ET AL., U.S. DEPT OF JUSTICE, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES, at 4 (1995) (NCJ-154346) (finding that plaintiffs won half of total jury tort verdicts in 1992, but only 30% in medical malpractice cases and 40% in product liability cases), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cjcavilc.pdf>; CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEPT OF JUSTICE, FEDERAL TORT TRIALS AND VERDICTS, 1996-97, at 5 (1999) (NCJ-172855) (finding that plaintiffs won 45% of all trials, 75% of which were decided by juries: 34% in medical malpractice cases and 29% in product liability cases), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fttv97.pdf>; ANDREW H. PRESS & CAROL J. DEFRANCES, U.S. DEPT OF JUSTICE, FEDERAL TORT TRIALS AND VERDICTS, 1994-95, at 4 (1997) (NCJ-165810) (finding that plaintiffs won 43% of all trials, 72% of which were decided by juries: 32% in medical malpractice cases and 27% in product liability cases), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fttv95.pdf>; see also John A. Goerdt et al., *Special Issue: Litigation Dimensions - Torts and Contracts in Large Urban Courts*, 19(1) STATE CT. J. 1, 24, 32 (1995). Doctors reportedly are winning a higher and higher percentage of verdicts, approaching 90% in some of the largest urban jurisdictions. See ERIK MOLLER, *TRENDS IN CIVIL JURY VERDICTS SINCE 1985*, at 15-19 (RAND, Document No. MR-694-ICJ, 1996).

ets,"<sup>56</sup> and "constrain[ed] American courts' adoption of the no-duty strategy"<sup>57</sup> as a means of controlling this voraciousness.

Believing that the prior restatements contain "dogmas such as the general duty owed to the whole world and the implicit assumption that a defendant will be liable for a consequence of tortious conduct unless, exceptionally, a rule restricting liability operates,"<sup>58</sup> Stapleton argues that the Third Restatement should follow the lead of foreign common law jurisdictions by resisting the "emotional allure" of this general duty for "non-traditional" types of cases.<sup>59</sup> She supports the general-duty principle for "traditional" cases involving physical injuries that result from a person's positive acts—a principle which she says is recognized outside the United States and which she describes as "the continent of obligation in the traditional running down-type case."<sup>60</sup> However, she asserts that the Restatement and tort scholars in the United States have failed to recognize, as foreign courts have, the need for a "vast ocean of freedom from liability . . . dotted with much smaller carefully charted islands of non-traditional [limited relational] duties."<sup>61</sup> She urges that the restricted-duty approach be applied to "[m]odern

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56. See Stapleton, *supra* note 1, at 946 (footnote omitted).

57. *Id.* at 955.

58. *Id.* at 944.

59. See *id.* at 946-47. Stapleton claims that "[a] common law judgment that recognizes a new entitlement rule, such as *MacPherson v. Buick Motor Co.*, . . . seeks to justify a shift in distribution and is therefore appropriately assessed in terms of theories of distributive justice," and she views corrective justice as simply involving applications of the distributively created rule or correcting departures from it. See *id.* at 947 n.12. Her understanding is not consistent with that of the British courts, as represented by her quotation from Lord Steyn, who declared that "tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven . . . in situations of uncertainty and difficulty a choice sometimes has to be made between the two approaches." *Id.* (quoting *McFarlane v. Tayside Health Bd.*, [1999] 4 All E.R. 961, 977-78 (Lord Steyn)). For discussions of the distinct and independent natures of distributive justice and interactive (corrective) justice, which are the positive and negative aspects of the foundational norm of equal external freedom, see Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1883-92 (2000); Richard W. Wright, *Right, Justice, and Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 159, 166-81 (David G. Owen ed. 1995); Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625, 691-710 (1992). For a few of the considerations that United States courts take into account when deciding whether to create, expand, or limit some duty, see *infra* note 73.

60. Stapleton, *supra* note 1, at 948; see *id.* at 946, 950 n.24; Stapleton, *Perspectives*, *supra* note 2, at 79 & nn.46 & 47. Although Stapleton limits the general duty to negligence involving "(positive) acts," see Stapleton, *supra* note 1, at 946, 948 n.24, the general duty in negligence law applies to omissions (e.g., failures to brake or to watch out for other traffic) as well as acts. The distinction that Stapleton seems to have in mind, or should have in mind, is the distinction between misfeasance (creating or enhancing a risk to another through one's own conduct, whether by an act or an omission) and nonfeasance (failing to warn or guard another against a risk created by a third person or a condition for which one is not responsible).

61. Stapleton, *supra* note 1, at 948.

non-traditional claims . . . rang[ing] from ones for pure nervous shock or pure economic loss to a diverse range of physical injury claims of affirmative duties (omission cases such as . . . wrongful failure to control a third party) that have proved particularly troublesome, especially when brought against deep-pocketed public authorities.”<sup>62</sup>

When one takes into account the legal environment in which Stapleton has worked—the United Kingdom and the British Commonwealth countries—one can appreciate her preoccupation with the problems posed by the “vast ocean” of “non-traditional” claims of negligence liability for pure economic loss, pure emotional distress, and the failure (particularly of “deep pocket public authorities”) to control or guard against the negligence of third parties. In *Anns v. Merton London Borough*,<sup>63</sup> the British House of Lords announced a broad general duty that (to continue Stapleton’s metaphor) British courts took up to sail boldly, like British explorers of old, into previously uncharted waters staking out new colonies of negligence liability. British academics, practicing lawyers, and courts became enmeshed in attempts to delineate and manage these new colonies. Being unable to do so, they eventually undertook a prudent retreat.<sup>64</sup>

Like many others, Stapleton assumes that the situation must be much worse in the United States:

Since the 1964 adoption and 1965 publication of the relevant sections on legal cause in the Restatement (Second), American courts have faced even greater pressures associated with non-traditional claims than courts in other jurisdictions. Relative to the rest of the common law world, the intellectual inventiveness of many American plaintiffs’ lawyers, coupled with the willingness to back it with their own financing, is remarkable. Since the negligence principle invites invention, non-traditional claims have burgeoned in the United States, especially claims in the form of complaints of failure to control a third party. Many American courts now share the view that liability for harm resulting from carelessness in non-traditional cases can and should, at most, be limited to what I have elsewhere called “pockets” or “islands” of duty: that the negligence principle requires clear and tight control. But in the United States the control of liability in non-traditional negligence claims by means of no-duty rules is significantly constrained [by the plaintiffs’ bar].<sup>65</sup>

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62. *Id.* at 946.

63. *Anns v. Merton London Borough*, [1978] A.C. 728 (H.L.).

64. See R.F.V. HEUSTON & R.A. BUCKLEY, *SALMOND & HEUSTON ON THE LAW OF TORTS* 204-07 (20th ed. 1992); W.V.H. ROGERS, *WINFIELD & JOLOWICZ ON TORT* 82-90 (14th ed. 1994); Stapleton, *supra* note 1, at 946-49.

65. Stapleton, *supra* note 1, at 953. Although Stapleton seems to imply otherwise, the sections on duty and legal cause in the Second Restatement that were approved in 1964 are essentially the same as those adopted in 1934 in the First Restatement. See *supra* text accompanying notes 11-29; *infra* text accompanying notes 79-92.

However, despite the aggressiveness,<sup>66</sup> entrepreneurial nature, and intellectual inventiveness of plaintiffs' lawyers in the United States, lawyers and courts in the United States have hardly ventured into the vast ocean of "non-traditional" claims, and the few that have almost always have been forced to turn back not far from the familiar shores. Claims against public authorities are limited by governmental immunity doctrines;<sup>67</sup> claims for negligent infliction of pure economic loss are rarely allowed;<sup>68</sup> claims for negligent infliction of pure emotional distress, if allowed at all, are kept in check by limited relational duties;<sup>69</sup> and only limited relational duties to control or guard against the negligence of third parties are recognized.<sup>70</sup> This has long been the state of tort law in the United States, as is recognized in the prior restatements.<sup>71</sup> There has not been an explosion of litigation, or at least not more so than in foreign jurisdictions.<sup>72</sup> In sum, in the United States, unlike in the United Kingdom and the British Commonwealth, the general-duty principle has never been launched into the vast ocean of "non-

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66. See *id.* at 946.

67. See DOBBS, *supra* note 30, at 693-741.

68. See *id.* at 1282-87.

69. See *id.* at 835-52.

70. See *id.* at 874-903.

71. See, e.g., RESTATEMENT OF TORTS §§ 314-324A (1934) (duty to aid or protect others); *id.* § 436 (negligent infliction of emotional distress); RESTATEMENT OF TORTS §§ 887 & 888 cmt. c (1939) (immunities); RESTATEMENT (SECOND) OF TORTS §§ 314-324A (1965) (duty to aid or protect others); *id.* §§ 436-436A (negligent infliction of emotional distress); RESTATEMENT (SECOND) OF TORTS §§ 895A-J (1979) (immunities). The lack of an action for negligent infliction of pure economic loss can be inferred from the failure of either of the prior Restatements to mention any such possibility. See, e.g., RESTATEMENT OF TORTS §§ 906, 917, 924-32 (1934); RESTATEMENT (SECOND) OF TORTS §§ 906, 917, 924-32 (1965).

72. A recent extensive survey of nonfatal traumatic personal injuries in the United States reported that only about one injury in ten results in a liability claim. Almost two-thirds of the total liability claims were associated with motor vehicle accidents; 44% of those injured in motor vehicle accidents made a liability claim. If motor vehicle accidents are excluded, only 7% of those injured at work made a liability claim, and only 3% of those suffering non-work injuries made a liability claim. A liability claim included dealing directly with the injurer or his or her insurer, regardless of whether a lawsuit was initiated. DEBORAH HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 7-10 & n.3, 109 n.1, 120-21 (RAND, Document No. R-3999-HHS/ICJ, 1991). The study concluded: "Americans' behavior does not accord with the more extreme pictures of litigiousness that have been put forward by some . . . . [W]e did not find statistically significant differences between Americans and Britons in initiating legal claims." *Id.* at 110, 111. See also BRIAN J. OSTROM & NEAL B. KAUDER, NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1996, at 26 (1997) (NCSC Pub. No. R-205) (stating "there is no evidence of a tort litigation 'explosion.'"); *id.* at 15-16 (describing civil litigation rates and trends in the United States as similar to those in other industrial nations); Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Tort Litigation in the 1990s*, 34 GA. L. REV. 1049 (2000); Deborah J. Merritt & Kathleen A. Barry, *Is the Tort System in Crisis?: New Empirical Evidence*, 60 OHIO STATE L.J. 315 (1999).

traditional" claims. Hence, there is no need to bring it under control.<sup>73</sup>

There is, however, a serious defect in the prior restatements' treatment of the duty issue that needs to be fixed, which is the reverse of the problem that Stapleton imagines. The problem exists on the continent of traditional claims, for which the Restatement actually states the duty too *narrowly*. Neither Stapleton nor Gary Schwartz—the Reporter for the General Principles project—notes this problem. Stapleton assumes that courts in the United States and abroad generally have adopted the general-duty principle for physical injuries that do not involve "affirmative duties" to aid or control the conduct of others.<sup>74</sup> Schwartz affirms (in a backhanded manner) the general-duty principle for such cases in sections 3 and 6 of his General Principles discussion draft.<sup>75</sup> However, Stapleton

73. Cf. Eric A. Feldman, *Blood Justice: Courts, Conflict, and Compensation in Japan, France, and the United States*, 34 LAW & SOC'Y REV. 651 (2000).

Most strikingly, in comparison to courts in the United States, those in France and Japan have been significantly more responsive to plaintiffs' claims [for infection with HIV-tainted blood]. When one looks beyond the courts to legal and legislative action more broadly, the United States has been the least accepting of the plethora of demands for recompense.

*Id.* (abstract of article); see also THE LIMITS OF LIABILITY: KEEPING THE FLOODGATES SHUT (Jaap Spier ed., 1996) (discussing concerns about expanded tort liability in European countries). When non-traditional claims have been recognized in the United States, the duties have been limited relational duties and the decisions to create, expand, or limit them have been based on consideration of a number of factors in addition to foreseeability, including:

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.

*Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976) (psychotherapist's duty to warn person endangered by patient) (quoting *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) (land occupier's duty to warn of hazards on her land)). Other cases have focused more on the credibility of the claims and the need to define clear limits on liability. Compare *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (expanding duty to avoid causing pure emotional distress), with *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (limiting duty to avoid causing pure emotional distress), and *Tobin v. Grossman*, 249 N.E.2d 419 (N.Y. 1969) (refusing to expand duty to avoid causing pure emotional distress).

74. See Stapleton, *supra* note 1, at 945-49 & nn.14-15.

75. See Discussion Draft, *supra* note 49, § 3, § 6 & cmt. a. I agree with Goldberg and Zipursky that the Discussion Draft goes too far in excising the concept of duty, with the result that many sections in the draft are awkward, inconclusive, and misleading. See John C. P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence*, 54 VAND. L. REV. 657 (2001) 657. I sympathize with the reporter's (and advisers') decision not to mention the duty requirement in section 3, the basic negligence section, and to ignore or downplay it in section 6 and other sections dealing with the "traditional" physical injury cases. As Gary Schwartz, the reporter, explains, given the general duty of care to avoid physical injury to others' persons and property as a result of one's negligence, it is "superfluous" to state or discuss the duty issue in a case involving physical injury, unless it is an "affirmative duty" situation,

and Schwartz also assume, incorrectly, that the general-duty principle was recognized in the prior restatements, and therefore that its recognition in the Third Restatement does not represent a correction of any defect in the prior restatements.

I previously noted Stapleton's assertion that the Second Restatement, "reflect[ing] the dominant academic fashions of the time," expressed a "skepticism about the role of the duty concept and a preference for jury judgment,"<sup>76</sup> and that it therefore "embrace[d] a general duty owed 'to the whole world' [which] left most issues to be dealt with under the rubric of the other recognized elements of the tort, including 'legal cause.'"<sup>77</sup> Schwartz similarly asserts:

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since the duty issue immediately dissolves into the negligent-conduct (breach of duty) issue. See Discussion Draft, *supra* note 49, § 6 cmt. a & Reporter's Note to cmt. a. It is also potentially confusing and misleading to invoke the duty-breach mantra in such situations, as I ruefully observe each year when grading my students' exams. Nevertheless, although section 3 is literally limited to cases involving physical injury, it is the basic section on negligence liability and thus should not be so limited. Moreover, many readers may not notice this limitation, especially since section 3 is presented as the basic section on the negligence cause of action.

Thus, among other revisions, the duty requirement should be explicitly stated in section 3, as in Goldberg's and Zipursky's "section N," see Goldberg & Zipursky, *supra*, at 737. A subsequent section, such as their section D1 or Schwartz's section 6, should state the general duty owed to the world at large in physical-injury cases not involving affirmative duties and should explain, as Schwartz's section 6 comment a does, that the general duty makes the duty issue a superfluous and potentially misleading "nonissue" in such cases.

Goldberg and Zipursky's discussion of the *Palsgraf* case, in comment *e* to their section N, overlooks the fact that *Palsgraf* was a physical injury case, for which Andrews' general-duty principle, rather than Cardozo's narrow relational-duty principle, is the proper principle under their section D1. In fact, Goldberg and Zipursky are reluctant, superficial supporters of the general-duty principle for physical injuries. Their "nexus" requirement, which is articulated as a mysterious accretion to the duty-breach issues and replicates Cardozo's narrow relational-duty principle and arguments, would nullify their section D1. See Goldberg & Zipursky, *supra*, at 738-39.

76. Stapleton, *supra* note 1, at 945 (footnotes omitted).

77. *Id.* (footnotes omitted). Stapleton may have been misled by Schwartz's treatment of this issue in the Discussion Draft. See *infra* note 85 and text accompanying notes 78 & 85. The only support that Stapleton provides for her assertion is a statement in comment *d* of the Second Restatement's first section that "[e]very man has a right, as against every other, not to have his interest in bodily security invaded [by any type of tortious conduct]." See *id.* at 945 n.8. However, this statement, in a comment on "legally protected interests" in a definitional section defining the word "interest," is part of an elaboration of the notion that different types of interests are protected against different types of tortious conduct, rather than a statement about any general duty owed to the world at large not to negligently cause any physical injury. The purpose of the comment is to note that while some interests (such as the interest against bodily security) are protected by tort law against all types of tortious conduct, other interests (such as the interests in not suffering purely dignitary, economic, or emotional injury) are only protected against intentional injury, and other interests (such as the interests in not being embarrassed or properly criticized) are not protected against any type of tortious conduct. The comment is focused on the issue raised by section 281(a), which is whether the type of interest that was injured is protected against the negligence type of tortious conduct (in the abstract), rather than on

The Restatement Second of Torts tended to regard duty as a nonissue [i.e., as a general duty owed to the world at large], except for problems of affirmative duty. Its definition, in § 281, of "The Elements of a Cause of Action for Negligence" does not include any explicit duty element.<sup>78</sup>

Both of these assertions are clearly incorrect.

There is a long-standing debate, most famously argued in the opinions of Chief Judge Cardozo and Judge Andrews in the *Palsgraf* case,<sup>79</sup> over whether the duty of reasonable care in negligence law normally is, or should be, conceived as (1) a general duty that is owed to the "world at large" (Andrews' view)<sup>80</sup> or (2) a particularized "relational" duty that is owed only to those persons who were within the class of persons foreseeably put at risk of suffering the types of foreseeable injuries that made the defendant's conduct negligent (Cardozo's view).<sup>81</sup> Many of the principal advisers for the drafting of the prior restatements were strong proponents of the relational "harm within the risk" limitation on negligence liability, although they disagreed on whether it should be a duty limitation or a legal-cause limitation.<sup>82</sup> The proponents of the duty version of the limitation won out in the drafting of the prior restatements. Restatement Second section 281, which states the elements of the negligence cause of action, declares:

The actor is liable for an invasion of an interest of another, if:

- (a) the interest invaded is protected against unintentional invasion, and
- (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
- (c) the actor's conduct is a legal cause of the invasion, and
- (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion [by being contributorily negligent].<sup>83</sup>

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the issue addressed by section 281(b), which is whether only foreseeable plaintiffs or the world at large are protected against a negligently caused invasion of that interest. *See infra* text accompanying notes 83-84.

78. Discussion Draft, *supra* note 49, § 6 cmt. a, Reporter's Note at 88.

79. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

80. *Id.* at 101, 102 (Andrews, J., dissenting).

81. *Id.* at 99-100. Contrary to a widely held belief, Cardozo's duty analysis does not seem to have been intended to shift power from juries to judges. *See supra* note 53.

82. *See Wright, Causation, supra* note 3, at 1763-66, 1769 & n.140, 1771 & n.149.

83. RESTATEMENT (SECOND) OF TORTS § 281 (1965) (emphasis added). The comment on clause (d) states, "The rules which determine whether the other's conduct is such as to disable him from bringing an action for [a negligent invasion of his protected interest] are stated in §§



Comment *c* elaborates on clause (b):

*Risk to class of which plaintiff is member.* In order for the actor to be negligent with respect to the other, his conduct must create a recognizable [foreseeable] risk of harm to the other individually, or to a class of persons—as, for example, all persons within a given area of danger—of which the other is a member. If the actor's conduct creates such a recognizable [foreseeable] risk of harm only to a particular class of persons, the fact that it in fact causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not make the actor liable to the persons so injured.<sup>84</sup>

Schwartz recognizes that clause (b) expresses the “foreseeable plaintiff” requirement, which is a major part of Cardozo’s narrow relational-duty principle, but he argues, “Whether this ‘foreseeable plaintiff’ requirement is an aspect of the doctrine of duty or instead of the doctrine of proximate cause is a point that the Comment to § 281(b) does not make clear.”<sup>85</sup>

Yet it is quite clear that the phrase “negligence with respect to the other” in section 281(b) refers to the negligent-conduct (breach of duty) issue rather than to the proximate-cause element or the negligence cause of action as a whole (which would make section 281 viciously circular). The proximate-cause element is stated separately in section 281(c), using the Restatement’s preferred phrase “legal cause” rather than “proximate cause.” Furthermore, section 281 comment *a* explicitly states, “Clauses (a) and (b) state the conditions necessary to make the actor’s conduct negligent. Clauses (c) and (d) state the conditions which are necessary to make negligent conduct actionable.” The point is made even more explicitly in the first section on legal causation, section 430, and its comments. Section 430 states:

In order that a negligent actor shall be liable for another’s harm, it is necessary not only that the actor’s conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other’s harm.<sup>86</sup>

Comment *a* to section 430 adds Cardozo’s “foreseeable type of hazard” requirement to the “foreseeable plaintiff” requirement and emphasizes that both of these requirements are elements of the negli-

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463 to 496.” *Id.* § 281 cmt. *l*. Sections 463 to 496 deal with the defense of plaintiff’s contributory negligence.

84. *Id.* § 281 cmt. *c*.

85. Discussion Draft, *supra* note 49, § 6 cmt. *a*, Reporter’s Note at 88. Schwartz similarly discounts the statement in the Scope Note to Topic 4 in the Second Restatement, which encompasses section 281, that “conduct which is negligent . . . does not result in liability unless there is a duty owed by the actor to the other not to be negligent.” *Id.* (emphasis added). He does not mention the comments and reporter’s notes that are cited *infra* in note 88.

86. RESTATEMENT (SECOND) OF TORTS § 430 (1965).

gent-conduct (duty-breach) analysis, which is distinct from, and precedes, any issue of actual or legal causation:

*Relation of negligence problem to cause problem.* The conditions which are necessary to make the act negligent in respect to the harm of which the other complains, as set forth in § 281, Clause (b) and Comment thereon, may be summarized as follows:

The actor's conduct, to be negligent toward another, must involve an unreasonable risk of:

- (1) causing harm to a class of persons of which the other is a member and
- (2) subjecting the other to the hazard from which the harm results.

Until it has been shown that these conditions have been satisfied and that the actor's conduct is negligent, the question of the causal relation between it and the other's harm is immaterial. . . .<sup>87</sup>

Comments to various sections of the Second Restatement, including the basic negligence section, section 281, explicitly describe the foreseeable plaintiff and type of hazard requirements as limitations on the scope of the defendant's duty.<sup>88</sup>

The First Restatement contained almost identical language in almost all of the same sections and comments.<sup>89</sup> The only significant difference was in the wording of section 281(b), which stated

87. *Id.* § 430 cmt. a; see *id.* § 430 cmts. b, c.

88. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 281 cmts. e & h, § 435 cmt. c (1965); see RESTATEMENT (SECOND) OF TORTS, APPENDIX § 281(b) Reporter's Note at 305 (1966) ("The leading case supporting Clause (b) is *Palsgraf* . . . , the facts of which are stated in Illustration 1."); 3 RESTATEMENT (SECOND) OF TORTS, APPENDIX § 435 Reporter's Notes at 151-52 (1966) ("The question of the effect of the unforeseeability of the impact or harm itself is inextricably interwoven with that of duty to the plaintiff. See § 281(b), and Comments and the Note to that Section."). Stapleton quotes the relevant language in the cited comments, yet she does not note that they conflict with her assumption that the Restatement adopts an unlimited general duty of care. See Stapleton, *supra* note 1, at nn. 86, 97, 123. At one point, she seems to acknowledge that the Restatement imposes a "harm within the risk" or "foreseeable hazard" limitation on the duty of care in all negligence actions, but she dismisses the Restatement's duty approach to the "foreseeable hazard" limitation as "cryptic and confused," "incoherent," and "circular." See *id.* at 991 & nn. 123 & 125, 994.

89. The First Restatement did not contain the explicit duty language that is in the comments cited at *supra* note 88 until 1948, when the initial versions of the Second Restatement's comments *e* and *h* to section 281 were added to the First Restatement as comments *e* and *ee*, respectively, and comment *c* was added to section 435. RESTATEMENT OF THE LAW, 1948 SUPPLEMENT, Torts § 281 cmts. *e* & *ee* at 650-51 (1949); *id.* § 435 cmt. *c* at 737. A reporter's note to section 281 on "Reason for Change" contains the Restatement's strongest statement of both the harm-matches-the-risk rule and its adoption as a duty limitation. See *id.* at 651-52. The reporter for the 1948 amendments was Laurence Eldredge, see *id.* at iv, who was one of the strongest proponents of the harm-matches-the-risk rule. See Wright, *Causation*, *supra* note 3, at 1771 & nn.146, 148-49.

that an actor is liable under the negligence cause of action for an invasion of an interest to another only if "(b) the conduct of the actor is *negligent with respect to [the interest invaded] or any other similar interest of the other* which is protected against unintentional invasion."<sup>90</sup> This wording was meant to add a foreseeable type-of-interest-injured requirement to the foreseeable plaintiff and foreseeable type-of-hazard requirements that were elaborated (as in the Second Restatement) in comments *c* and *e* on clause (b). The foreseeable type-of-interest-injured requirement was elaborated in comment *g* on clause (b), which reflected Cardozo's argument in *Palsgraf* that the hazard encompassed by the defendant's duty of care should be limited to the particular type of interest that was foreseeably and tortiously put at risk, e.g., an "interest in personality" versus an "interest in land or chattels."<sup>91</sup> The illustration following comment *g* was a variation on the facts in *Palsgraf*, in which the risked injury was to the boarding passenger's *packages*, which were "obviously fragile" and likely to be dropped, and the dropped package—which, unbeknownst to the conductor, contained fireworks—exploded and injured the boarding passenger's *eyes*.<sup>92</sup>

The essential identity between the First Restatement's approach and Cardozo's opinion in *Palsgraf* could hardly be clearer. Neither the First Restatement nor its successor recognized a general duty of care, owed to the world at large, for any type of injury. Each adopted Cardozo's view rather than Andrews'. I agree with Schwartz and Stapleton that most courts in the United States recognize (and always have recognized) a general duty for physical injuries that do not involve affirmative obligations to aid or control others. In the General Principles draft, the Restatement finally acknowledges that reality. However, it does not acknowledge, as it should, that this is a significant change from the prior restatements. At the very least, it should not explicitly misrepresent the position of the prior restatements on this issue, as it now does.

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90. RESTATEMENT OF TORTS § 281(b) (1934) (emphasis added).

91. See *id.* § 281 cmt. g; RESTATEMENT (SECOND) OF TORTS, APPENDIX § 281 cmt. j, Reporter's Note at 307 (1966) (noting that comment *j* reversed the position taken by comment *g* in the First Restatement, which "was based primarily upon the [relevant] language of Cardozo, C.J., in *Palsgraf* . . .").

92. See RESTATEMENT OF TORTS § 281 cmt. g, illus. 3.

## IV. CAUSAL CONTRIBUTION

A. *The Restatement's Tests*

As we have seen, the Restatement's concepts of "legal cause" and "substantial factor" confusingly merge the empirical issue of causal contribution and the normative issue of the extent of legal responsibility for tortiously caused consequences, while providing no useful guidance for resolving either issue.<sup>93</sup> However, adhering to Jeremiah Smith's original proposal,<sup>94</sup> the Restatement does incorporate some tests of causal contribution, although it does not label them as such. Restatement section 432 sets out two alternative, necessary but not sufficient, conditions for something to be a "substantial factor":

- (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.
- (2) If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.<sup>95</sup>

Subsection (1) states the familiar "but-for," "made a difference," necessary-condition test of causal contribution.<sup>96</sup> Subsection (2) states that a condition "may" be found to be a substantial factor if it is one of two (or more) actively operating forces, each of which "of itself is sufficient" for the occurrence of the injury.

Subsection (2) is based on cases such as *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*,<sup>97</sup> and *Kingston v. Chicago & Northwestern Railway*,<sup>98</sup> in which two fires, each of which was or may have been independently sufficient to burn down the plaintiff's house, joined together to burn down the house, and *Corey v. Havener*,<sup>99</sup> in which two motorcycles, emitting steam, si-

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93. See *supra* text accompanying notes 5-30.

94. See *supra* text accompanying notes 22-26.

95. RESTATEMENT (SECOND) OF TORTS § 432 (1965). The First Restatement contained identical language, except it had the words "held by the jury" in place of the word "found" in subsection (2). RESTATEMENT OF TORTS § 432 (1934).

96. See RESTATEMENT (SECOND) OF TORTS § 432 cmt. a (1965) (interpreting section 432(1) as a "necessary antecedent" test).

97. *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45 (Minn. 1920).

98. *Kingston v. Chicago & Northwestern Ry.*, 211 N.W. 913 (Wis. 1927).

99. *Corey v. Havener*, 65 N.E. 69 (Mass. 1902).

multaneously roared noisily and at a high rate of speed by either side of the plaintiff's wagon, startling the horse pulling the wagon with resulting injuries to both the plaintiff and the wagon. The requirement that each force be sufficient "of itself" is not meant to require that each force be sufficient all by itself in the absence of any other contributing condition. Few if any conditions are sufficient in this strong sense. It merely requires that each force be "independently sufficient"—that is, sufficient independently of the other competing force (e.g., the other fire or the other noisy motorcycle), but in conjunction with the other causally relevant conditions (e.g., oxygen and fuel to feed the fires, or air to transmit the noisy sound and animal ears to hear the sound).<sup>100</sup>

The independently-sufficient condition test in section 432(2) is necessary to avoid the absurd conclusions, which would be required under the necessary-condition (but-for) test in section 432(1) that:

- (1) neither fire contributed to the destruction of the plaintiff's house in *Anderson* or *Kingston* because, if either fire had been absent, the house would or might have been destroyed anyway by the other fire; and
- (2) neither noisy motorcycle contributed to the damage to the plaintiff's wagon in *Corey* because, if either motorcycle had been absent or quiet, the horse would have or might have bolted anyway due to the other noisy motorcycle.

That is, contrary to what is often stated,<sup>101</sup> although the necessary-condition (but-for) test works well as an *inclusive* test for identifying contributing conditions, it cannot be relied upon as a test for *excluding* a condition as a possible cause; rather, it must be supplemented by the independently-sufficient-condition test.

However, there are several problems with the Restatement's formulation of the independently-sufficient-condition test. First, it does not clearly distinguish cases of *duplicative* causation, such as *Anderson*, *Kingston*, and *Corey*, in which the different competing forces reinforced one another, from cases of *preemptive* causation, in which one competing force preempted the potential causal effect of the other. For example, assume in *Anderson* and *Kingston* that the

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100. For a discussion of the different (weak, strong, and strict) senses of necessity and sufficiency, see Wright, *Bramble Bush*, *supra* note 3, at 1020-21.

101. See, e.g., PROSSER & KEETON, *supra* note 14, at 266.

other fire had reached the plaintiff's house and burned it down before the defendant's negligently set fire reached it. Clearly, the house was destroyed by the other fire, and not by the defendant's fire, which *would have been* sufficient if it had not been preempted but was not *actually* sufficient since it arrived too late.<sup>102</sup> Section 432(2) does require that each force "of itself is sufficient" and thus may correctly require actual sufficiency rather than would-have-been sufficiency. Yet this interpretation of section 432(2), which saves us from the absurd conclusion that the defendant's fire (which arrived too late) contributed to the destruction of the house, forces us into the equally absurd conclusion that *neither* fire contributed to the destruction of the house. Why? Because section 432(2) requires, in order for either fire to be a cause, that "*each* [force] of itself [be] sufficient." This defect in the wording of section 432(2) can and should be remedied, by merely requiring that the tortious force be actually sufficient, independently of the other competing force but in conjunction with the other relevant conditions.

A second problem with section 432(2) is that it will only treat "actively operating" forces as being independently sufficient, and again only if both competing forces were actively operating. Neither of these limitations can be justified as a matter of empirical causal contribution (or even as a general limitation on legal responsibility). For example, assume a chain has a maximum load capacity of 200 pounds, so that putting more than 200 pounds on the chain will cause it to break. Through improper storage and maintenance, Bob knowingly or negligently allows a link in the chain to get rusty. The link is thereby weakened, such that the chain will only hold 150 pounds without breaking. Carol, who is aware of the load limit, but unaware of the chain's weakened condition, deliberately or negligently puts 220 pounds on the chain. The chain breaks at its rusty, weakened link. Section 432(2) would incorrectly deny that the rusty, weakened link (which is a passive condition caused by Bob's *inaction*) contributed to the chain's breaking, even though (1) the chain broke at the rusty, weakened link and (2) the rusty, weak-

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102. Language from a recent case is praised by David Robertson as "captur[ing] the thought [of an independently sufficient force] perfectly." Robertson, *supra* note 13, at 1778. However, the language he quotes is far from perfect: "When two causes concur to bring about an event, and either cause, operating alone, *would have* brought about the event *absent the other cause*, the appropriate test is the "substantial factor" test." *Id.* (quoting *Magee v. Coats*, 598 So.2d 531, 536 (La. Ct. App. 1992)) (emphasis added). Note the circular references to "cause(s)," the reliance on the unhelpful and misleading substantial-factor formulation, and the failure to distinguish duplicative causes from preempted conditions (non-causes).

ened link was actually sufficient to cause the chain to break independently of Carol's putting 20 excess pounds on the chain. Worse yet, since section 432(2) requires in order for *either* condition to be a cause that *each* be an actively operating force, section 432(2) would also incorrectly deny that Carol's putting 20 excess pounds on the chain contributed to the chain's breaking, even though the 20 excess pounds were actually sufficient independently of Bob's allowing the chain to become weakened. Again, this defect in the wording of section 432(2) can and should be remedied, by eliminating the "actively operating forces" language.

The third problem with section 432(2) cannot be so easily remedied. The problem is that, even when the independently-sufficient-condition test in section 432(2) is shorn of its excess verbiage and combined with the necessary-condition test stated in section 432(1), the resulting "necessary or independently sufficient condition" test is still only an inclusive rather than an exclusive test of causal contribution. For, it is clear that conditions can be causes (contributing factors) even if they were neither necessary nor independently sufficient for the occurrence of the plaintiff's injury. So the court correctly held in *Warren v. Parkhurst*.<sup>103</sup> Each of the twenty-six defendant mill owners in *Warren* discharged "sewage and other foul matters" into a creek above the plaintiff's land. The court stated that the amount discharged by each defendant was itself "merely nominal" and would not have caused any injury to the plaintiff. However, the court noted, the stench from the combined discharges had destroyed the usefulness of the plaintiff's property. The court concluded: "No one defendant caused that injury. All of the defendants did cause it."<sup>104</sup> Although none of the defendants' individual discharges, by itself, was either necessary or independently sufficient to produce the legal injury to the plaintiff, it again would be absurd, as the court recognized, to conclude that none of the discharges contributed to the plaintiff's injury.

This third problem is more widespread than one might think. For example, although we assumed earlier that it had been established in *Anderson*, *Kingston*, and *Corey* that the defendant's negligence was independently sufficient for the occurrence of the plaintiff's injury, this seems to have been established only in *Kingston*. The plaintiff in *Anderson* was not required to prove that the defen-

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103. *Warren v. Parkhurst*, 92 N.Y.S. 725 (N.Y. Sup. Ct. 1904), *aff'd*, 93 N.Y.S. 1009 (A.D. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906).

104. *Warren*, 92 N.Y.S. at 725, 728.

dant's fire was either necessary or independently sufficient for the destruction of the plaintiff's property, but rather only that it was "a material or substantial factor" in causing plaintiff's injury.<sup>105</sup> Similarly, the plaintiff in *Corey* was not required to prove that each defendant's noisy (and steam-emitting) motorcycle was either necessary or independently sufficient to startle the plaintiff's horse with resulting damage to the plaintiff and his wagon, but rather only that each defendant's noisy motorcycle "contributed to the injury."<sup>106</sup> These sorts of phrases are common in these types of situations, in both court opinions and legislative enactments.<sup>107</sup>

It seems obvious in *Anderson*, *Corey*, and *Warren* that each defendant's negligence contributed to the plaintiff's injury, as each court held, since in each case the conditions created by each defendant's negligence combined with, duplicated, or reinforced the causal effect of the other competing condition(s)—the other fire(s), the other noisy motorcycle, and the other discharges of sewage—rather than having had their potential causal effect preempted by the other competing condition(s). But in each case the "necessary or independently sufficient condition" test would deny causal contribution. We need a more inclusive test of causal contribution.

### B. The NESS Test

I have previously expounded and defended a comprehensive test of causal contribution that is known by its acronym: the NESS (necessary element of a sufficient set) test. I have argued, and still believe, that the NESS test fully captures the empirical concepts of causation and causal contribution,<sup>108</sup> incorporates the necessary-

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105. See *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45, 46 (Minn. 1920).

106. See *Corey v. Havener*, 65 N.E. 69, 69 (Mass. 1902).

107. See Wright, *Bramble Bush*, *supra* note 3, at 1022-23 & n.112, 1038-39.

108. In a prior essay, Stapleton criticized my statements that the NESS test "captures the essence of the concept of causation," but she misinterpreted my statements as being assertions that the NESS test not only captures the essence of purely empirical causation or causal contribution—causation in its core or central sense—but also all of the additional judgments of significance, importance, and responsibility that are often layered on top of the issue of empirical causal contribution in the ordinary uses of causal language. Stapleton, *Perspectives*, *supra* note 2, at 66 & n.13, 80; *infra* text accompanying notes 166-168, 172-174. I am puzzled by her misinterpretation of my statements, since those statements are made in articles in which I have (i) strongly emphasized the need to distinguish the empirical issue of causal contribution from the further issues of significance or responsibility and (ii) presented the NESS test as a test which clearly is limited to the empirical issue of causal contribution. See, e.g., Wright, *Causation*, *supra* note 3, at 1737-58, 1774-1813; Wright, *Bramble Bush*, *supra* note 3, at 1002-1044. In the same essay, Stapleton herself accepts the NESS test (in combination with the but-for test, which



condition and independently-sufficient-condition tests, explains and justifies our shared causal judgments in cases like *Anderson*, *Corey*, and *Warren*, and helps us properly resolve the causal-contribution issue in more controversial situations.<sup>109</sup>

The NESS test is a refinement and further development of the concept of a causally relevant condition that was first proposed in 1959 by Herbert Hart and Tony Honoré.<sup>110</sup> As Hart and Honoré noted, the core concept of (empirical) causation that we all employ conforms with, and is explained by, the regularity account of causation that was first elaborated by David Hume and subsequently modified by John Stuart Mill. Hume revolutionized philosophic thinking on causation when he insisted, contrary to the then-popular belief, that singular causal judgments are not based on direct perception of causal qualities or forces inherent in objects or events. No such perceptible quality or force has ever been identified. Instead, causal judgments are based on the belief that a certain succession of events fully instantiates one or more causal laws or generalizations, which in turn are induced from empirical observation and experimentation. A causal law would list in the antecedent (the "if" part of the causal law) all of the conditions that together are sufficient for the occurrence of the consequent (the "then" part of the causal law). A causal generalization is an incompletely described causal law. To avoid including causally irrelevant conditions in the antecedent, the conditions included in the antecedent must be restricted to those that are necessary for the sufficiency of the antecedent. Thus the necessity requirement is subordinate to the sufficiency requirement. To this Humean analysis, Mill added the observation that there may be a plurality of distinct sets of conditions that are each sufficient to produce the consequent, both in general and on a particular occasion, so that there is no unique sufficient set.<sup>111</sup>

This basic concept of causation is formalized in the NESS (necessary element of a sufficient set) test of causal contribution, which, in its full form, states that a condition contributed to some consequence if and only if it was necessary for the sufficiency of a

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is merely a corollary of the NESS test) as an appropriate, apparently comprehensive test of empirical causal contribution. See, e.g., Stapleton, *Perspectives*, *supra* note 2, at 63, 67 n.15, 78.

109. See Wright, *Causation*, *supra* note 3, at 1788-1803; Wright, *Bramble Bush*, *supra* note 3, at 1018-42.

110. See HART & HONORÉ, *supra* note 34, at 110-14, 122-25, 235-53; H.L.A. HART & A.M. HONORÉ, CAUSATION IN THE LAW 104-08, 116-19, 216-29 (1959).

111. See HART & HONORÉ, *supra* note 34, at 10-11, 14-22; Wright, *Causation*, *supra* note 3, at 1789-90, 1823; Wright, *Bramble Bush*, *supra* note 3, at 1019-20, 1031-34, 1045-46.

set of existing antecedent conditions that was sufficient for the occurrence of the consequence.<sup>112</sup> The relevant notion of sufficiency is not merely logical or empirical, but rather requires that each element of the applicable causal generalization, in both the antecedent ("if" part) and the consequent ("then" part) must have been in actual existence (concretely instantiated) on the particular occasion.<sup>113</sup>

The NESS test subsumes and integrates the Restatement's necessary-condition test and its (cleaned up) independently-sufficient-condition test, which are merely corollaries of the NESS test that apply in certain types of situations. The NESS test reduces down to the necessary-condition (but-for) test if there was only one set of conditions that was or would have been sufficient for the occurrence of the consequence on the particular occasion, or, if there was more than one such set, if the condition was necessary for the sufficiency of each of the sets. Yet the NESS test is more inclusive than the but-for test. A condition was a cause under the NESS test if it was necessary for the sufficiency of any actually sufficient set, even if, due to other duplicative (actually sufficient) or preempted (would have been sufficient) sets of conditions, it was not—as required by the but-for test—necessary in the circumstances for the consequence.

The independently-sufficient-condition test is simply an application of the NESS test in appropriate situations. Implicit in the independently-sufficient-condition test is the requirement that the

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112. This formulation, which requires that the NESS condition be necessary for the sufficiency of a sufficient set, is more carefully worded than my prior canonical formulations, which merely required that the condition be a necessary element of a sufficient set. See Wright, *Causation*, *supra* note 3, at 1790; Wright, *Bramble Bush*, *supra* note 3, at 1019. However, I have always insisted that the condition must be necessary for the sufficiency of the set. See *id.* Most readers likely will not see any analytic difference between the two versions, but the more carefully worded version is needed to avoid certain technical philosophical objections, which I thank Richard Fumerton and Ken Kress for bringing to my attention. See Richard Fumerton & Ken Kress, *Causation and the Law: Preemption, Lawful Sufficiency and Causal Sufficiency*, 64 LAW & CONTEMP. PROBS. (forthcoming 2001).

113. I again thank Richard Fumerton and Ken Kress for pointing out that I needed to be more explicit than I previously have been in describing the sense of sufficiency that is employed in the NESS test. See Fumerton & Kress, *supra* note 112. As should be clear from my earlier articles, I have always viewed the NESS test as embodying not merely a requirement of logical or even empirical necessity or sufficiency, but also a notion of causal directionality according to which the conditions specified in the antecedent ("if" part) of the causal generalization are causally relevant conditions for the occurrence of the condition specified in the consequent ("then" part), but not vice versa, and a notion of causal sufficiency which requires that all the conditions specified in the antecedent and the consequent be concretely instantiated on the particular occasion. See, e.g., Wright, *Causation*, *supra* note 3, at 1789, 1803-04, 1808-09, 1823; Wright, *Bramble Bush*, *supra* note 3, at 1019, 1041-43, 1045-46, 1049-53.

condition at issue be necessary for the sufficiency of the set of existing antecedent conditions of which it, but not the competing condition, is a part. Without this requirement, totally irrelevant conditions, such as the fact that the person who negligently started an independently sufficient fire had a pink ribbon in her hair, could be treated as independently sufficient conditions merely by adding them to an already sufficient set of existing antecedent conditions.

The NESS test can be used, and implicitly is used, to confirm the independent sufficiency of each fire in cases such as *Kingston*,<sup>114</sup> in which the two large fires merged to burn down the plaintiff's house. Each fire was necessary for the sufficiency of a set of existing antecedent conditions that contained it but not the other fire. The two sets overlap to a considerable extent, since they share such existing necessary conditions as oxygen, fuel to burn on the route to the house, lack of a downpour, the fire's reaching the house while there is still a house left to burn, etc. Since the set containing each fire was fully instantiated, the two fires are duplicative causes of the destruction of the plaintiff's property.

On the other hand, if one of the fires arrived first and burned the house down before the second fire arrived, only the first fire was independently sufficient. It was necessary for the sufficiency of an actually sufficient set that contains it but not the second fire. The second fire was not independently sufficient, since the set containing it but not the first fire was not fully instantiated. Remember that sufficiency means complete instantiation of the applicable causal generalization for destruction of the house by a fire. That causal generalization includes, as a necessary element, the fire's reaching the house while there is still a house left to burn. That element was instantiated, along with all the other elements of the causal generalization, for the set that includes the first fire but does not include the second fire. It was not instantiated for the set that includes only the second fire. The second fire would have been sufficient if the first fire had not existed, but it was not actually sufficient since the first fire did exist and preempted the potential causal effect of the second fire.

Hart and Honoré's elaboration of the NESS test developed the test to this point. However, they failed to note that it could be developed further, and they imposed restrictions upon it that prevented it from reaching its full potential as the complete, comprehensive test of causal contribution. They apparently assumed that

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114. See *supra* text accompanying note 98.

in order to be a causally relevant condition, the condition had to be either necessary or independently sufficient for the occurrence of the consequence.<sup>115</sup> In addition, they added some normative glosses to the test to avoid findings of causal contribution that would conflict with commonsense "causal" judgments in certain types of situations. They deemed the NESS test to be inapplicable to reasons for action or inaction or to the mere "provision of opportunities" for others to act.<sup>116</sup> They refused to treat a NESS condition as a causally relevant condition if the connection between the NESS condition and the consequent was an analytically necessary connection, such as the condition of one's being married being analytically and empirically necessary (but not sufficient) for one's being a widow,<sup>117</sup> or Stapleton's favorite example of an assassin's great-grandmother's having a child being necessary (at least prior to modern developments in genetic engineering) for the assassin's being alive and shooting the President.<sup>118</sup> They refused to treat excess speed as a causally relevant condition if the excess speed (in the past or present) merely coincidentally brought the person causing or suffering some injury to the place where the injury occurred at the precise time that the injury occurred, even though the injury would not have occurred if the person had not been at that place at that time.<sup>119</sup>

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115. See HART & HONORÉ, *supra* note 34, at 123-24, 125, 206-07, 235-39, 245, 249; Wright, *Causation*, *supra* note 3, at 1791-92.

116. See HART & HONORÉ, *supra* note 34, at 22-23, 51-61, 111, 129, *criticized in* Wright, *Causation*, *supra* note 3, at 1748 & n.44. Honoré continues to insist on this restriction. See Honoré, *supra* note 45, at 363, 364 & n.6, 382-84. Without mentioning it or the other restrictions in the text, none of which I accept, he describes his version of the NESS test as being only "marginally different" than my version, insofar as I might require that there be a time gap between each antecedent condition and the consequent, rather than allowing, as he does, at least some of the antecedent conditions to persist to the time when the consequent occurs. See *id.* at 366. I did not mean to exclude such persistence, or even (the theoretical or science-fiction possibility of) backward-in-time causation, although it is useful and in accord with practical reality to think of the word "antecedent" in the NESS test in terms of temporal priority (which does not exclude but rather often assumes persistence of the temporally prior condition up to and even beyond the time that the consequent occurs). What I mean to emphasize by the word "antecedent" is that the condition appears in the antecedent ("if" part) of the causal law or generalization, rather than in the consequent ("then" part).

117. See HART & HONORÉ, *supra* note 34, at 114-15.

118. Stapleton, *Perspectives*, *supra* note 2, at 67, 71 n.23, 72-75, 78 n.41; Stapleton, *supra* note 1, at 948 n.15, 975-76, 977 n.88, 978 n.90, 986.

119. See HART & HONORÉ, *supra* note 110, at 114-16. As a result of criticism by John Mackie, Hart and Honoré retreated from this position in the second edition of their book. They acknowledged that the excess speed is a causally relevant condition and that findings of "no causal connection" in such situations depend on "proximate cause" extent-of-responsibility arguments framed in terms of a lack of a sufficient relationship between the negligently created risks and the actual injury. See HART & HONORÉ, *supra* note 34, at xxxviii-xxxix, 121-22, 168-70.

Discarding all of the restrictions that had been imposed on the NESS test by Hart and Honoré, I attempted to demonstrate its comprehensiveness as the test of causal contribution. The first task was to demonstrate that the NESS test explains and justifies our common judgment in the *Warren* case that each of the twenty-six defendants' independent discharges of sewage was a cause of (contributed to) the destruction of the downstream plaintiff's use of his property, even though each individual's discharge by itself was "merely nominal" and would not have resulted in any injury to the plaintiff.<sup>120</sup> Clearly, no individual defendant's discharge was independently sufficient for the occurrence of the plaintiff's injury. Although it is not explicitly stated by the court, it also seems clear that no individual defendant's discharge was necessary for the occurrence of the plaintiff's injury. Yet each defendant's discharge was a NESS condition. Some total number of discharges,  $N$ , where  $N$  is much greater than one but less than twenty-six, was necessary and sufficient for the plaintiff's injury. Each defendant's discharge was necessary for the sufficiency of a set of existing antecedent conditions which includes  $N-1$  of the other defendants' discharges, and the sufficiency of that set was not preempted, but rather was reinforced, by the  $26-N$  other defendants' discharges that were not included in the description of the sufficient set.<sup>121</sup>

As a matter of empirical causal contribution, the analysis should not and would not change if there were only two defendants, one of whom produced  $N$  of the discharges (the necessary and sufficient amount), and the other of whom produced the remaining  $26-N$ . The first defendant's  $N$  discharges were independently sufficient. The second defendant's  $26-N$  discharges would also be independently sufficient if  $N$  is thirteen or less. If  $N$  is greater than thirteen [e.g., fifteen], the second defendant's  $26-N$  [e.g., eleven] discharges were necessary for the sufficiency of a set of existing antecedent conditions which includes, in addition to the second defendant's  $26-N$  [e.g., eleven] discharges,  $N-(26-N)$  [e.g., four] of the first defendant's discharges. Again, the sufficiency of this set was not preempted, but rather was reinforced, by the  $N-(N-(26-N))$  [e.g., eleven] of the first defendant's discharges that were not included in the description of the sufficient set.

A non-numerical way of presenting the analysis in the preceding paragraph is to describe the minimally sufficient set con-

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120. See *supra* text accompanying notes 103-104.

121. See Wright, *Causation*, *supra* note 3, at 1792-93.

taining the second defendant's total discharge as a set which also contains a total discharge by the first defendant "at least large enough" to ensure that the antecedent of the applicable causal generalization is fully instantiated. Given this description of the first defendant's total discharge, the second defendant's total discharge was necessary for the sufficiency of the set and thus is a NESS condition. Again, the portion of the first defendant's total discharge that is left out of this description did not preempt, but rather reinforced, the sufficiency of the described set. The same method of analysis can be used to establish that the defendant's fire in *Ander-son* and each of the two defendants' noisy motorcycles in *Corey* were, if not independently sufficient conditions, nevertheless still NESS conditions for the occurrence of the plaintiff's injury in each of those cases.<sup>122</sup> This analytic method is not a verbal trick or sleight-of-hand. The description of the competing fire as a fire "at least" so big or of the competing motorcycle noise as "at least" so loud is a factual description of an antecedent condition that was concretely instantiated on the particular occasion.<sup>123</sup>

I can visualize the reader's eyes glazing and her head shaking at this point. You are probably saying to yourself (and others) that this technical method of analysis *may* be fine for ivory-tower philosophers, but surely one cannot expect it to be applied by jurors, judges, lawyers, law students, or even law professors.<sup>124</sup> I agree, as I have previously said.<sup>125</sup> I have argued that, although one cannot expect the NESS test to be applied or even fully understood in all its technical rigor and (occasional) complexity, it does capture the concept of causation that we tacitly employ in all our (purely empirical) causal judgments. Therefore, a very useful understanding can be gained of how to properly analyze and persuasively argue the empirical issue of causal contribution by merely grasping the core notion of causation and causal contribution that is embodied in the NESS test. This core notion is that an actual singular instance of causation consists of a fully instantiated causal generalization or "story," and that a particular condition was a contributing condition only if it was part of the complete instantiation of the antecedent ("if" part) of an applicable causal generalization or story.<sup>126</sup>

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122. *Id.* at 1793-94; *supra* text accompanying notes 97-102, 105-107.

123. *See* Wright, *Causation*, *supra* note 3, at 1793-94; *Bramble Bush*, *supra* note 3, at 1035-38 & n.194.

124. *See* DOBBS, *supra* note 30, at 417.

125. *See* Wright, *Bramble Bush*, *supra* note 3, at 1038-39.

126. *See id.* at 1038-67.

I have expressed the hope that, given the insights about causation and causal contribution that underlie the NESS test, a more useful test of causation might be devised to replace the misleading and completely question-begging "substantial factor" formulation and the completely question-begging "contribution" formulation.<sup>127</sup> The following proposed Restatement section, which adds a third test to the cleaned-up Restatement (Second) formulation, is the best formulation that I have been able to come up with for the empirical issue of causal contribution in tort law:

### § CC. Causal Contribution.

- (1) The defendant's tortious conduct (or the plaintiff's negligent conduct) contributed to an injury if and only if each act, omission, and condition that must be included in the description of the conduct in order to make it tortious (or negligent) contributed to the injury.<sup>128</sup>
- (2) An act, omission, or condition contributed to an injury if the act, omission, or condition was:
  - (a) necessary for the occurrence of the injury (that is, without it the injury would not have occurred), or
  - (b) independently sufficient for the occurrence of the injury (that is, sufficient in combination with the existing non-competing conditions, but independently of and without being preempted by any competing conditions), or
  - (c) a causally relevant part, no matter how minimal, of an actually completed (non-preempted) story of how the injury came about.

*Comment on clause (1).* A person's conduct does not include the person's state of mind, even though one's state of mind shapes one's conduct. The negligent aspect of a defendant's (or plaintiff's) conduct is the minimum change in the conduct that is required to make it non-negligent.<sup>129</sup>

*Comment on clause (2).* When analyzing the causal-contribution issue, always begin with the necessary-condition test (which is the "but for" test when stated negatively or the "made a difference" test when stated affirmatively). If the act, omission, or condition was necessary for the occurrence of the injury in the particular circumstances (if, but for the act, omission or condition, the injury would *not* have occurred), the act, omission, or condition contributed to the injury and no further analysis of causal contribution is necessary.

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127. See *id.* at 1039.

128. Wright, *Causation*, *supra* note 3, at 1766-71.

129. *Id.* at 1767-68.

If it was not a necessary condition, but it nevertheless seems that it may have contributed to the injury, try the independently-sufficient-condition test, making sure to distinguish *actually* sufficient conditions from mere would-have-been sufficient (preempted) conditions. Make sure that a condition or set of conditions which seems to have been sufficient actually fully existed and was sufficient, rather than having had its potential causal effect preempted by some other condition or set of conditions. If the independently-sufficient-condition test is satisfied, the act, omission, or condition contributed to the injury and no further analysis of causal contribution is necessary.

If neither the necessary-condition test nor the independently-sufficient-condition test is satisfied, but causal contribution still seems plausible, consider whether there is some causal story which might link the act, omission, or condition with the injury that occurred in the particular situation. If not, the act, omission, or condition was not part of any possibly sufficient set of conditions and thus could not have been a cause of the injury. If there is some possibly applicable causal story, determine whether in the particular situation the causal story actually was fully completed (instantiated), rather than being preempted by some other causal process. Finally, determine whether the act, omission, or condition fits in, no matter how minimally or bizarrely, as part of that actually completed causal story. If so, the act, omission, or condition contributed to the injury. If not, it did not.

*Jury instructions.* When in the particular case there is no possibility of duplicative or competing potential causes (contributing conditions), only the necessary-condition (but-for) test needs to be given to the jury. Otherwise, all three tests, or only the first and third tests, should be given to the jury.

### *C. Stapleton's Targeted But-For Test*

Stapleton proposes an alternative test of causal contribution, the “targeted but-for” test, which she describes as follows:

[T]ake all factors existing at the time of the actual transition, including the factor that we are investigating, say the tortious conduct of hunter X . . . . If there is a notional sequence of removing factors from that set such that

- a stage is reached where, given the remaining factors the actual transition to the outcome might still have occurred, but that
- the further removal of the targeted factor leaves a set that would not (in the course of things that we now know happened) have produced the transition,
- then the targeted factor played a role in the history of the original transition.

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

This reduces to a simple forensic test that allows the plaintiff to ignore multiple sufficient factors when proving that the defendant's tortious conduct was historically relevant to the outcome. For example, in the [situation in which two hunters each negligently shoot the plaintiff with simultaneous fatal shots] the plaintiff can



show that the tortious conduct of hunter X satisfies this test of historical involvement in the victim's death. This is because (a) by notionally removing the tortious conduct of hunter Y, the set of remaining factors is such that the victim would still have died, but (b) the further removal of the tortious conduct of hunter X leaves a set where the victim would not have died. If there is no notional sequence that shows the targeted factor making such a difference . . . then the factor . . . played no role in the history of the transition.<sup>130</sup>

My initial reaction to the "targeted but-for" test was that it might be the fairly simple method of practically implementing the NESS test for which I had been hoping. However, upon reflection, I realized that it was not. To begin with, the method is not so simple. It critically depends on properly selecting and sequencing the notional removal of factors, a mental process that, depending on the particular situation, might or might not be less complicated than the NESS test.

More significantly, Stapleton insists that her targeted but-for test is different from (and more scientific than) the NESS test.<sup>131</sup> It is different. However, the difference makes it inadequate and inferior to the NESS test. Like the usual but-for test, the targeted but-for test emphasizes necessity rather than sufficiency as the most important aspect of our concept of empirical causation. It gives the necessity aspect far too prominent a role by focusing (albeit in a cut-down, targeted form) on the necessity of the condition

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130. Stapleton, *supra* note 1, 959-60 (footnotes omitted).

131. In her presentation at the Wade Conference, Stapleton distinguished her "scientific" targeted but-for test from the "philosophic" NESS test. She now states that her targeted but-for test "builds on" the NESS test, which she acknowledges is "the correct approach" to the empirical issue of causal contribution. *See id.* at 959. She analogizes the targeted but-for test to "a series of experiments that strip out one by one the factors to be studied" to determine whether their removal "makes a difference" in the result. *See id.* at 956-60 n.44. While this is the scientifically accepted experimental method for determining the causally relevant conditions in a causal law or generalization, it is simply an application of the Difference Method that was elaborated by Mill as the proper empirical procedure for determining the necessary elements of a causal law or generalization — i.e., abstract NESS conditions. *See* JOHN STUART MILL, A SYSTEM OF LOGIC, bk. III, ch. V, § 3, ch. VII, ch. VIII, §§ 1-4, ch. X, §§ 1-3 (8th ed. 1872). Hence, while it is true that a "scientist . . . does not need to use causal language," Stapleton's claim that the assessment of empirical causal contribution "neither requires nor is illuminated by 'causal theories'" is not true. *See* Stapleton, *Perspectives*, *supra* note 2, at 72 n.24. Moreover, it is not true, as Stapleton contends, that "given an exhaustive set of such experiments, any over-determination will be revealed." *See* Stapleton, *supra* note 1, at 960 n.44. The problems are not merely the ones that Stapleton identifies: that we must replace actual experiments with thought experiments due to "time and expense" and the inability of courts to "re-run cases involving human behavior." *See id.* at 961 n.48. The problem is that such experiments, whether in thought or for real, will not enable us to determine which of several competing causal generalizations actually was instantiated on a particular occasion, unless we employ a very fine-grained description of the result that begs the causal question, and sometimes not even then. *See infra* text accompanying notes 145-149.

for *the result* (the “transition”),<sup>132</sup> rather than subordinating the necessity aspect to the sufficiency aspect, as the NESS test does, by asking whether the condition was necessary for *the sufficiency of the set of antecedent conditions* which, together, were sufficient for the result.<sup>133</sup>

The targeted but-for test does seem to properly resolve the easiest duplicative causation cases, such as her double-hit hunters’ case, in which each of two or more conditions was independently sufficient for the occurrence of the result.<sup>134</sup> The double-hit hunters’ case is Stapleton’s only textual illustration of an over-determined-causation situation in her article in this symposium.<sup>135</sup> Apart from one exception to be discussed below,<sup>136</sup> it is also the sole illustration in a previous essay, in which Stapleton repeatedly claimed that, once the facts are known or agreed upon, the over-determined-causation cases present no issue of causal contribution, but rather only the normative issue of individual responsibility.<sup>137</sup> Indeed, she declared that it is bizarre to view such cases as involving any issue of causation as a question of fact.<sup>138</sup> In her article in this symposium, she wavers. She now acknowledges that the empirical issue of causal contribution must be resolved in the over-determined-causation cases before addressing the normative issue of the extent of responsibility for consequences, but at the same time she insists that the “characteristic problem” in such cases is not the former issue but rather the latter issue.<sup>139</sup> She continues to assert that “[t]he challenge over-determined events pose for the legal system is normative. Therefore, to describe this challenge, as traditional analysis does, as one going to ‘cause in fact’ is dangerously misleading and generates sterile debates.”<sup>140</sup>

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132. The result at issue often is not a transition to a new state but rather the maintenance of an existing state. Even Hart and Honoré, upon whose “causal” theories Stapleton strongly relies, state that, although the central notion of a “cause” is something which “makes a difference” by producing some change in an existing state of affairs or course of events, the result we are interested in producing or explaining sometimes is the maintenance of an existing state of affairs. See HART & HONORÉ, *supra* note 34, at 29, 37. For example, watering plants or feeding people contributes to their staying alive, and failing to salt a street contributes to its remaining icy.

133. See *supra* note 112 and accompanying text.

134. See *supra* text accompanying note 130.

135. See Stapleton, *supra* note 1, at 958-60; see *id.* at 957 n.38. For discussion of the only other illustration, which appears in a footnote, *id.* at 960 n.43, see *infra* note 149.

136. See *infra* text accompanying notes 150-160.

137. See Stapleton, *Perspectives*, *supra* note 2, at 62-66, 77, 79-80, 81-84.

138. See *id.* at 77.

139. See Stapleton, *supra* note 1, at 967; cf. *id.* at 957 & n.38.

140. *Id.* at 966 n.60 (citations omitted).

However, there are significant and sometimes difficult issues regarding empirical causal contribution in the over-determined-causation cases. The NESS test properly resolves these issues. The targeted but-for test does not.<sup>141</sup>

The targeted but-for test will not reach the correct answer on causal contribution when there are two duplicative causes, one of which was necessary and independently sufficient for the occurrence of the injury and the other of which was neither necessary nor independently sufficient. As noted above, this may have been the situation in both *Anderson*, a merged-fires case, and *Corey*, the noisy-motorcycles case.<sup>142</sup> We have already seen that the NESS test can be used to explain and justify the common judgment that each fire or each noisy motorcycle contributed to the plaintiff's injury.<sup>143</sup> The targeted but-for test could be used to establish that the independently sufficient fire or noisy motorcycle contributed to the plaintiff's injury, but it would erroneously conclude that the other fire or noisy motorcycle did not contribute to the plaintiff's injury. Regardless of the sequencing of the notional removal of factors, the "transition" to no injury occurs only when the independently sufficient fire or noisy motorcycle is removed.

A much more serious problem is the inability of the targeted but-for test to distinguish situations involving duplicative causation from those involving preemptive causation—an issue that exists in every situation involving over-determined causation, even the "easy" double-hit hunters' case. For example, assume that Bob, with the intent to kill Mary, puts a deadly poison for which there is no antidote in Mary's tea, which she is certain to drink in the next few minutes (if not killed first), but before she drinks the tea Dave shoots her with a fatal shot. It should be clear, without having to *explicitly* apply any test of causal contribution, that Mary's death was caused by the shooting and not by the poisoning of the tea. Yet the targeted but-for test would treat Bob's putting the poison in the tea, as well as Dave's shooting Mary, as a cause of Mary's death. If one first notionally removes Dave's shot, the transition (Mary's

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141. The targeted but-for test is not as wildly overinclusive as the aggregate but-for test that is suggested in PROSSER & KEETON, *supra* note 14, at 268-69, and 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS 92 (2d ed. 1986), which would allow anything, no matter how causally irrelevant, to be treated as a cause merely by adding it to an already sufficient set of antecedent conditions. See Wright, *Causation*, *supra* note 3, at 1780-81. But it shares with the aggregate but-for test the inability to distinguish duplicative from preemptive conditions. See *infra* text accompanying notes 144-149.

142. See *supra* text accompanying notes 105-107.

143. See *supra* text accompanying notes 121-123.

death) would still have occurred as a result of Bob's putting the deadly poison in the tea which Mary was certain to drink in the next few minutes, but if one then subsequently removes Bob's poisoning of the tea, the transition (Mary's death) would not have occurred. Thus, the targeted but-for test is satisfied and incorrectly indicates that Bob's poisoning of the tea contributed to Mary's death. The same problem exists even in the double-hit hunters' case, which is easy only if one assumes the answer—that both hunters' shots contributed to the victim's death—before posing the question.<sup>144</sup>

The NESS test and its corollary, the independently-sufficient-condition test, reach the correct conclusion on causal contribution. The set of conditions sufficient to cause death by shooting (Mary's being alive, a shot, the shot entering a vital organ, etc.) all actually occurred, and the shot was necessary for the sufficiency of this set of conditions. Therefore the shooting was a cause of (contributed to) Mary's death. On the other hand, the set of conditions sufficient to cause death by poisoning (Mary's being alive, a deadly poison, no antidote, the poison being put in the tea, Mary's drinking the tea, the poison remaining in Mary's body a certain amount of time while she is still alive, etc.) was not actually satisfied. Several of the elements necessary to make the set sufficient were missing—most obviously, Mary's drinking the tea. So the poisoning of the tea did not contribute to Mary's death. The NESS test explains and underlies our initial causal judgment, even though we usually have no conscious, explicit awareness of the test.

Stapleton might argue that the targeted but-for test will reach the correct conclusion regarding causal contribution in preemption situations like the poisoned tea hypothetical if the result is properly described as Mary's death at the time that it actually occurred.<sup>145</sup> I have commented elsewhere on attempts to save the but-

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144. To determine whether the double-hit hunters' case "is indeed one of overdetermination," by which she apparently means duplicative rather than preemptive causation, Stapleton does not apply her targeted but-for test, but rather applies a complete-instantiation sufficiency test that is (inadequately) similar to the NESS test. She requires that it be proven "that each gun discharged, that each shot a bullet that hit the victim, that each wound *would have been* sufficient to kill, and so on." Stapleton, *supra* note 1, at 966 (emphasis added). This test is still inadequate, since, to establish causal contribution, it must be proven that each wound *was* sufficient to kill the victim, not merely that it *would have been* sufficient if the other wound had not existed. See *supra* text following note 114.

145. This death-at-the-time-it-occurred argument appeared in note 42 of the paper that Stapleton presented at the Wade Conference. It is not in the published note, which however continues to state that one of the "two important variables that affect the answer to the 'historical involvement' question . . . is how the transition/end state/consequence is defined." Stapleton, *supra* note 1, at 959 n.42; see *id.* at 957 n.38 (noting that, "[h]ad the event in the double-hit

for test from failure by detailing the injury or the manner of occurrence (e.g., "death by two bullets"). The use of this technique assumes the causal conclusion one is attempting to prove. It therefore would allow one to prove that *anything*, no matter how causally irrelevant, contributed to the injury as so described (e.g., "death while wearing pink suspenders").<sup>146</sup> Moreover, the relevant legal injury in tort law (or for homicide in criminal law) is not death at any particular time, but rather death *per se*.<sup>147</sup>

But put that objection aside. Even this detailed-description technique will not save the targeted but-for test from reaching the incorrect conclusions on causal contribution when the death would have occurred at the same instant as a result of a preempted would-be factor. For example, assume that, if Mary had drunk the tea, she would have died at precisely the same time that she actually died as a result of the shot. The NESS test continues to reach the correct conclusion on causal contribution, using exactly the same reasoning as was described above. The set of conditions sufficient for death by shooting was satisfied. The set of conditions sufficient for death by poisoning was not. An element necessary to make the set sufficient was missing—Mary's drinking the tea.<sup>148</sup> The targeted but-for test continues to reach the incorrect conclusion. Applying the targeted but-for test, we are forced to conclude that both the shot and the poisoning of the tea contributed to Mary's death, even though the poison never entered Mary's body.<sup>149</sup>

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hunters case been defined as 'death by two bullets in the brain' the event would not have been over-determined"); Stapleton, *Perspectives*, *supra* note 2, at 82-83 (arguing that, in the desert traveler hypothetical, "both enemies [could] be held responsible for the [traveler's] death . . . [given] a suitably widely specified outcome, for example 'death by lack of a supply of fresh [unpoisoned] water'"); *id.* at 83 n.53 (discussing "death by dehydration").

146. See Wright, *Causation*, *supra* note 3, at 1777-80, 1807, 1823-24; Wright, *Bramble Bush*, *supra* note 3, at 1025-26 & nn. 129 & 132, 1040 n.219.

147. The time of death will be relevant in calculating the damages suffered (e.g., the amount of lost income), but the damages issue arises only after the negligence cause of action (including the causal-contribution element) has been proven.

148. If Mary drank the tea, and the necessary time specified in the causal generalization for the poison to be in her body while she was still alive elapsed at the same time that the (immediately) lethal shot entered her vital organ, then we would have to conclude that the death-by-poisoning causal generalization and the death-by-shooting causal generalization were both fully instantiated, so that the poison and the shot were duplicative causes of her death. The NESS test can distinguish between this duplicative causation situation and the preemptive causation situation described in the text, while the targeted but-for test cannot, precisely because it ignores the crucial issue of sufficiency.

149. Stapleton suggests another patch to her targeted but-for test to enable it to handle the preemption cases: "The only constraint on this test of historical involvement is that the plaintiff is not allowed to remove a factor that had actually been present which had completely preempted the relevant effect of the defendant's tortious conduct." Stapleton, *supra* note 1, at 960 n.43; *see*

The poisoned-tea hypothetical is similar to the much-discussed desert-traveler hypothetical, which Stapleton featured in a previous essay.<sup>150</sup> In this hypothetical, one enemy of a desert traveler poisons the water in the traveler's water keg, a second enemy (not knowing that the water has been poisoned) empties the poisoned water out of the keg, and the victim subsequently dies of dehydration in the desert. Clearly, the traveler died of thirst as a result of the emptying of the keg, rather than by poisoning, and the first enemy's poisoning of the keg had nothing to do with the death. It was a preempted condition rather than a duplicative cause of the traveler's death.

Similarly to the poisoned tea hypothetical, the NESS test reaches the correct conclusion on causal contribution, while the targeted but-for test does not. Applying the NESS test, the set of antecedent conditions sufficient for death by thirst all actually occurred, and the emptying of the water from the keg was necessary for the sufficiency of this set of conditions. The entire set of antecedent conditions sufficient for death by poisoning did not actually occur. Once again, several elements necessary for the sufficiency of this set are lacking, most especially the drinking of the poison. So the emptying of the water from the keg, but not the poisoning of the water in the canteen, was a cause of (contributed to) the traveler's death.<sup>151</sup>

Stapleton purports to find this conclusion surprising.<sup>152</sup> She makes a number of contrary arguments, none of which are valid. First, she attempts to avoid the conclusion by modifying the hypothetical:

The rationalization of Wright (of the view that only Enemy No. 2 was a cause of the death) is flawed by its implicit reliance on the factual assumption that the poi-

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*id.* at 1005 & n.168. She presents a hypothetical in which *D2* replaces the bomb *D1* had put under *V*'s car with *D2*'s own bomb. Her constraint would prevent one from removing *D2*'s switching of the bombs when applying the targeted but-for test to *D1*'s bomb. *Id.* The constraint is circular. It is employed to avoid the targeted but-for test's being used to find that a preempted condition was a cause, but it operates by assuming that it has already been determined that the condition was not a cause because it was preempted. Rather than being an application of her targeted but-for test, this ploy is merely a transparent refusal to apply the test in preemption situations.

150. See Stapleton, *Perspectives*, *supra* note 2, at 82-84.

151. Wright, *Causation*, *supra* note 3, at 1802; Wright, *Bramble Bush*, *supra* note 3, at 1024-25; Honoré, *supra* note 45, at 377-79; see RESTATEMENT (SECOND) OF TORTS § 435A cmt. a (1965) (giving as an example of a lack of a causal connection between tortious act and injury "a person who, with murderous design, substitutes poison for the drinking water of a traveler, [who dies] in a train wreck before he has had a chance to taste the potion").

152. See Stapleton, *Perspectives*, *supra* note 2, at 84 n.59.

son was not pungent (and that therefore the plan of No. 1 was death by poisoning, which plan was preempted by No. 2).<sup>153</sup>

She assumes that the poison was "so pungent the traveller would never have drunk it."<sup>154</sup> She apparently assumes that the first enemy's plan—like the second enemy's—was "death by dehydration" rather than "death by poisoning" (but then why use a poison?) and that, as so construed, the first enemy would then be a NESS cause of the traveler's death.<sup>155</sup>

There are several flaws in this argument. First, it ducks the original hypothetical, which everyone assumes involves a first enemy whose plan is to poison the traveler using an undetectable (and therefore non-pungent) poison. Second, even if the facts were as Stapleton assumes, the first enemy's poisoning of the water still did not contribute to the traveler's death, but rather was preempted by the second traveler's emptying of the keg. The causal story (set of antecedent conditions) sufficient for death by dehydration that involves the first enemy includes, among other necessary conditions: (1) someone's making the water pungent; (2) the traveler's becoming aware of that pungency; (3) the continued availability of the pungent water; and (4) the traveler's deciding not to drink the pungent water because it is pungent. Setting aside the implausibility of the traveler's choosing to die of thirst rather than drink the pungent water, none of conditions (2) through (4) actually occurred, so the causal story (set of antecedent conditions) that includes the first enemy's making the water pungent was not completed (fully instantiated), but rather was preempted by the causal story involving the emptying of the keg, which was completed.<sup>156</sup>

Stapleton also argues (and pressed this argument on me during the Wade Conference) that the first enemy did contribute to the traveler's death, as indicated by the targeted but-for test, or at least could and perhaps should be held solely or jointly liable for the traveler's death since, prior to the second enemy's emptying of

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153. *Id.* at 84 n.60; *see id.* at 83 n.54.

154. *Id.* at 84.

155. *See id.* at 83 n.54, 84 n.60.

156. Stapleton and Fischer incorrectly assume that, when one applies the NESS test to analyze the sufficiency of a set of antecedent conditions, one ignores the existence or causal effect of any actual condition that is not included in the description of that set and thus assesses causal contribution "from the perspective of a hypothetical, fictitious set of circumstances." *Id.* at 83; *see id.* at 84; Fischer, *supra* note 29, at 1359, 1362. As the discussion in the text indicates, and as I have previously emphasized, when applying the NESS test one must always double-check to make sure that the actual conditions that are excluded from the description of the supposedly sufficient set of actual antecedent conditions do not in fact undermine the sufficiency of the described set by preventing the instantiation of one or more of the necessary elements in that set.

the keg, the first enemy's poisoning of the keg "doomed" the traveler to die or, to put it another way, made the traveler's life expectancy beyond the next few days nil.<sup>157</sup> Stapleton's argument suggests several distinct arguments, which she fails to distinguish clearly:

- 1) Causing a reduction in a person's life expectancy is the same as causing that person's death.
- 2) It is not only practically possible but also analytically and normatively sound to hold a defendant individually responsible for having *caused a person's death* even if it is clear that the defendant did *not* cause the death.
- 3) It is analytically and normatively possible, and perhaps sound, to hold a defendant liable for the harm resulting from a person's death, even if it is known that the defendant did not contribute to the death, because the defendant irrevocably reduced the person's life expectancy to almost nil prior to the person's death.
- 4) It is analytically and normatively possible, and perhaps sound, to hold a defendant liable for having irrevocably reduced a person's life expectancy to almost nil, or for having caused any substantial reduction in the person's life expectancy, even if it is known that the defendant did not contribute to the person's death.

The first two arguments are invalid.<sup>158</sup> The third and fourth are valid and raise contestable normative issues; however, as Stapleton recognizes, these issues have generally been resolved by declining to hold the defendant legally responsible. With respect to the third argument, Stapleton admits:

[I]f a person's behaviour was not relevant to the [empirical causal-contribution] enquiry of how the outcome came about—because it was neither a but-for nor NESS factor in relation to it—it will not be judged to have made a difference [i.e.,

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157. See Stapleton, *Perspectives*, *supra* note 2, at 83 & nn.56 & 57, 84 & nn.62 & 63.

158. Stapleton herself provides a limited refutation of the first two arguments, which focus on the empirical issue of causal contribution. She observes:

The coherence of a perspective based on merely dooming a person depends on a sufficient correspondence between the actual outcome and the specification of the fate to which the defendant doomed the victim. If D1 infects V with a terminal disease but V is then shot by D2, few if any would accept that D1 was individually responsible 'for the death.'

*Id.* at 83 n.58. Few if any would accept that D1 was responsible "for the death" because it is clear that D1 did not contribute to the death. The refutation applies even if the actual outcome precisely matches the doomed fate, once it is understood that one's being responsible "for the death" requires that one have caused (contributed to) the death. See *supra* text accompanying note 156.



be a basis for holding the person individually responsible] even if it is judged abnormal [tortious]."<sup>159</sup>

With respect to the fourth argument, Stapleton seems to recognize that allowing recovery for such "lost expectancies" of continued life or "lost chances" of avoiding death that are not the result of any physical injury, especially when death has not yet occurred or even when death has occurred but it is clear that the defendant's action did not contribute to the death, would expand legal liability far beyond its current limits.<sup>160</sup>

The only context in which there has been widespread recognition of liability for having tortiously caused the loss of a chance of avoiding death is the medical malpractice area. The dominant trend is to impose liability for having negligently caused the loss of such a chance, but only after the death has occurred and if, unlike the desert-traveler hypothetical, the negligence might have actually contributed to the plaintiff's death.<sup>161</sup> In other contexts in which it is inherently impossible or extremely difficult to prove or disprove causal contribution, courts have sometimes shifted the burden of proof to the defendant to prove a lack of causal contribution. In each of these contexts, a conscious normative decision has been made, on fairness and/or deterrence grounds, to allow partial or full recovery for the injury, even though it is explicitly recognized that it cannot be proven that the defendant's negligence contributed to the injury, as long as it has not been proven that the defendant's negligence did *not* cause the injury.<sup>162</sup> Although the issue of whether there should be an empirical causal-contribution requirement in tort law is a normative one, it is an issue that has been overwhelmingly, indeed universally, answered affirmatively. In certain special contexts the requirement has been relaxed, as indicated above, but it has never been abandoned.<sup>163</sup>

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159. See Stapleton, *Perspectives*, *supra* note 2, at 67 n.15.

160. See *id.* at 83 n.56.

161. See Wright, *Bramble Bush*, *supra* note 3, at 1067-72. Even in the medical malpractice context, courts which strictly construe their wrongful death statutes as requiring tortious *causation of death* hold that the statute does not apply where all that can be proved is causation of a lost chance of survival. See, e.g., *Weimer v. Hetrick*, 525 A.2d 643, 651-52 & n.7 (Md. 1987) (leaving open possibility of a common-law action); *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 398, 404 (Tex. 1993) (also rejecting lost-chance action under survival statute and common law).

162. See Wright, *Causation*, *supra* note 3, at 1809-21; Wright, *Bramble Bush*, *supra* note 3, at 1067-77.

163. This is true even in *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989), in which the New York Court of Appeals adopted the market-share theory of liability for birth defects caused to plaintiffs by their mothers' ingestion of the drug diethylstilbestrol ("DES") during

In any event, the issue with which we are concerned in this part is not the normative issue of legal responsibility but rather the empirical issue of causal contribution. Although Stapleton purports to distinguish the empirical issue of causal contribution from the normative issues that also enter into judgments of individual responsibility, her "new understanding of the nature of causation"<sup>164</sup> fails to do so. Stapleton declares:

The traditional lawyer's view is that usually you cannot be responsible for an outcome without being causally connected to it, and that this causal connection has to be established before you can construct a case for responsibility. In contrast, I argue that in legal disputes where the facts are agreed, it is notions of individual responsibility that determine the perspective a party adopts when looking at those facts to identify what had made a difference in bringing about the relevant outcome. In such cases, notions of individual responsibility can affect whether we call something a "cause". Thus where such disputes are framed as disputes about causation, this merely masks the true nature of the dispute: a dispute which involves competing notions of individual responsibility.<sup>165</sup>

Assuming that the over-determined-causation cases do not present any issue regarding empirical causal contribution, but rather only normative issues regarding individual responsibility, Stapleton accuses those (especially me) who have attempted to elaborate a comprehensive test to resolve the empirical issue of causal contribution in such cases of "masking [the] dispute about responsibility in terms of a dispute about the correct 'causal' test to

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pregnancy. The court refused to let a defendant drug company avoid liability to an injured plaintiff (for a share of the harm equal to the defendant's share of the national market for the drug) by establishing that it did not manufacture or supply the specific pills that the plaintiff's mother ingested, although it would allow a defendant to avoid liability by establishing that it did not market DES for use during pregnancy. *See id.* at 1078 & n.3. The New York court understood, better than other courts, that the basic rationale behind the proportionate-liability rule based on market share is that the defendant, by being held liable for its proportionate share of the market in each individual case, is thereby being held liable (roughly) for the share of the total aggregate injuries that it actually caused, and that to allow exculpation in particular cases would result in the defendant's being held liable for less than the total injuries that it actually caused.

The New York court would allow the second-best market-share theory of liability to be preempted by the traditional first-best theory of full liability if the plaintiff could prove that a particular defendant produced or supplied the specific pills that her mother ingested. *See id.* at 1073. This is proper, since a plaintiff who can prove which defendant actually caused her injury should not have her traditional, first-best tort claim sacrificed to the mathematical integrity of the second-best market-share scheme. Moreover, as is suggested by Justice Clark's dissenting opinion in *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324 (Ill. 1990), in which the majority refused to adopt the market-share theory (due in part to its failure to ever address the basic rationale underlying the theory), the adverse impact of the few first-best full-liability claims on the mathematical integrity of the second-best market-share scheme can be lessened by allowing a defendant which is held fully liable to bring a contribution action, based on market shares, against the other manufacturers and suppliers of DES. *See id.* at 345, 349 (Clark, J., dissenting).

164. *See* Stapleton, *Perspectives*, *supra* note 2, at 62.

165. *Id.* at 81-82.

apply."<sup>166</sup> Thus, she asserts that, once the facts in the desert-traveler case are described,<sup>167</sup>

[the] notorious disagreement among lawyers and philosophers . . . [which] has typically been framed as a dispute about causation, . . . is in fact a dispute about individual responsibility for an outcome: whether on those agreed facts the behaviour of the enemies should be seen as having 'made a difference' in responsibility terms in relation to the traveller's death.<sup>168</sup>

Treating the but-for and NESS tests of causal contribution as merely two among many competing "visions" of individual responsibility, Stapleton runs through various "visions" or "perspectives" whereby one or the other or both enemies could be held individually responsible for the traveler's death.<sup>169</sup> Although she notes the need to employ "concepts which will facilitate clear analysis" of the responsibility issue,<sup>170</sup> her conceptual apparatus for assessing individual responsibility borrows the vague, manipulable, and misleading concepts of "what made a difference" and "abnormality" from Hart and Honoré's "commonsense causal principles" for attributing responsibility, which she supplements with additional obscure concepts such as "comparator class," "perspective," and "vision."<sup>171</sup> Like Hart and Honoré, she ends up confusing rather than distinguishing the empirical issue of causal contribution and the normative issues that also enter into determinations of legal responsibility.

Yet, remarkably, Stapleton cites me as a person who has insufficiently distinguished the empirical issue of causal contribution from the normative issue of legal responsibility in the over-determined-causation cases. She quotes statements by me that

166. *Id.* at 84; *see id.* at 64, 66, 77, 79-80, 82; *supra* note 108; *infra* text accompanying notes 172-174. Stapleton cites Robertson's discussion of my criticism of the editors of the fifth edition of Prosser's torts treatise, who blurred the distinction between actual-causation as a pure question of fact and "proximate cause" as a normative issue of legal responsibility, to support her assertion that describing the challenge posed by over-determined events "as one going to 'causation in fact' is dangerously misleading and generates sterile debates." *See* Stapleton, *supra* note 1, at 966 n.60 (citing Robertson, *supra* note 13, at 1766-67 & n.5 (discussing Wright, *Causation*, *supra* note 3, at 1764 n.121)). In the portion of his article that Stapleton cites, Robertson supports the firm distinction that I draw between the two issues, although he thinks that my criticism of the editors of the fifth edition, though valid, was overstated.

167. "Enemy No. 1 poisons V's water barrel. Later, an unassociated Enemy No. 2 empties the barrel. Later still V dies of thirst." Stapleton, *Perspectives*, *supra* note 2, at 82 (*italics removed*).

168. *Id.* at 82.

169. *Id.* at 82-84 (The Desert Traveller Case); *supra* text accompanying notes 152-160.

170. Stapleton, *Perspectives*, *supra* note 2, at 82.

171. *See* HART & HONORÉ, *supra* note 34, at 2, 29, 33-38, 41-42, 130-31, 183-85; Stapleton, *Perspectives*, *supra* note 2, at 63-70; Wright, *Causation*, *supra* note 3, at 1745-50 & n.31 (discussing Hart and Honoré's causal theory).

were directed solely to the issue of empirical causal contribution and the use of the NESS test to resolve that empirical issue and misrepresents them as claims that the NESS test should be used as a policy-neutral "natural or universal test" for resolving the further issue of legal responsibility for tortiously caused consequences.<sup>172</sup> In one of the quoted statements, I declare that "the choice among [the various] senses of necessity and sufficiency is not governed by policy considerations, but rather by how well each test corresponds with our intuitive concept of causation."<sup>173</sup> Stapleton comments:

It is not some mysterious "intuitive concept of causation" that underlies the law's refusal to add necessity as a requirement in the certain over-determination cases . . . . Rather, it is our sense of how and why *responsibility* should be allocated in the case. This is something that *can* and *should* be expounded.<sup>174</sup>

The statements of mine that Stapleton quotes were addressed solely to the issue of empirical causal contribution. They were made in the context of expounding the NESS test as the test that tacitly underlies and renders *non-mysterious* our intuitive understanding of empirical causal contribution. At the beginning of the section of my article from which she quotes, I stated:

Despite the lack of an explicit comprehensive definition of causation, people from time immemorial have shown remarkable agreement in their causal judgments, at least once they are clearly focused on the [empirical] causal issue rather than on some noncausal inquiry regarding *the* (most significant for some purpose) cause. In particular, judges and juries, when not confined by incorrect tests or formulas, consistently have demonstrated an ability to make intuitively plausible factual causal determinations . . . .

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172. See Stapleton, *supra* note 1, at 966 & n.61; *supra* note 108 and text accompanying notes 166-168. Stapleton cites David Fischer as supporting her criticisms of my statements. See Stapleton, *supra*, at nn.38 & 61 (citing Fischer, *supra* note 29, at 1356-60, 1384). Fischer describes my discussion of some applications of the NESS test as "providing examples of *unfair* but-for results." See Fischer, *supra* note 29, at 1346 n.38 (emphasis added) (citing Wright, *Causation*, *supra* note 3, at 1793). However, in the cited examples, as in all of my discussions of the NESS test versus the but-for test, I do not mention unfairness or the issue of ultimate responsibility, but rather focus solely on the empirical issue of causal contribution. It is Fischer and Stapleton, rather than I, who fail to distinguish these two issues and the proper tests for resolving each in the over-determined-causation cases. They assume that the empirical causation issue is satisfied or can be ignored and thus drops away as a distinct issue, and they merge the two issues into a single issue of whether to "retain the necessary [but for] cause requirement" or instead to use the sufficiency (NESS) test or some other test, principle, or policy to resolve this merged issue of "causation" or responsibility. See Fischer, *supra* note 29, at 1344-60; Stapleton, *supra* note 1, at 957 n.38, 966-67 & n.60; Stapleton, *Perspectives*, *supra* note 2, at 66, 80, 82-84. Fischer's criticism of my application of the NESS test in some over-determined multiple-omission situations is discussed *infra* text accompanying notes 191-214.

173. Wright, *Bramble Bush*, *supra* note 3, at 1020, *quoted in* Stapleton, *supra* note 1, at 966 n.61.

174. Stapleton, *supra* note 1, at 966 n.61 (emphasis in original); see *id.* at 968 (arguing that the decision "not to impose the necessity requirement" when determining ultimate responsibility "can and should be explicitly defended").

Some scholars rely heavily on this shared yet undefined concept of causation . . . by grounding their arguments on intuitive responses to hypothetical situations. Yet intuitions that are not conjoined with theory in a search for underlying principles are often inadequate for the hard cases and sometimes may mislead even in the easy cases. In these situations in particular we would benefit greatly from elaboration of the concept that, unarticulated and imperfectly understood, underlies the intuitive judgments . . . .

A better response, therefore, is to set forth a workable definition of causation. . . . Recently . . . a number of . . . philosophers have formulated substantively identical definitions that capture the essence of the concept of causation by subordinating the necessity requirement to the sufficiency requirement [the NESS test].<sup>175</sup>

Stapleton seems to have overlooked an entire section of my first article on causation, entitled *Distinguishing the Damages Issue: The Successive-Injury and Overwhelming Force Cases*.<sup>176</sup> In that section, I directly addressed the normative issue of legal responsibility, which I distinguished (once again) from the empirical issue of causal contribution. Through an analysis of the cases, I elaborated the rarely noted but generally applied "independently sufficient non-liable condition" limitation on the extent of responsibility for tortiously caused consequences:

The successive-injury cases have engendered much debate and confusion, particularly in the Commonwealth countries, where the legal community seems unable to free itself from the but-for concept of causation. The causal situation is clear in these cases. The first injury caused the [harm at issue]; the second did not. The issue is not causal. It is a proximate-cause issue of policy or principle that is most appropriately placed under the heading of damages, and it also arises in the duplicative-causation cases. The issue is whether a defendant who has tortiously caused injury to the plaintiff nevertheless should be absolved from liability if the injury would have occurred anyway as a result of independent duplicative or preempted conditions.

Courts generally absolve the defendant from liability if he proves that the injury would have occurred anyway as a result of independent nontortious conditions. In such a case, the plaintiff's corrective-justice claim—that he would not have been injured if not for the tortious conduct of others—fails. On the other hand, if the duplicative or preempted conditions also resulted from tortious conduct, the plaintiff's corrective-justice claim is intact.<sup>177</sup>

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175. Wright, *Bramble Bush*, *supra* note 3, at 1018-19.

176. See Wright, *Causation*, *supra* note 3, at 1798-1801.

177. *Id.* at 1798 (footnotes omitted). Stapleton seems to agree that the defendant should be (and is) held liable if and only if the independently sufficient condition was also tortious. She assumes that the law would be "brought into disrepute" if a plaintiff injured by two tortfeasors were treated worse (by being denied recovery) than a plaintiff injured by a single tortfeasor, and she suggests that "the legal concern with upholding the 'dignity of the law' outweighs concerns with deterrence, fairness to defendants, and so on" which she assumes would argue against holding the defendant liable. Stapleton, *supra* note 1, at 967-68, 1007 & n.175; see Stapleton, *Perspectives*, *supra* note 2, at 81, 83 n.57. *But cf.* Stapleton, *supra* note 1, at 968 ("Cases of se-

Stapleton now admits that there is a "first-level" empirical issue of causal contribution in the over-determined-causation cases, even when the facts in those cases are known or agreed upon. However, she continues to state that the "characteristic problem" in these cases is not the empirical issue of causal contribution but rather the normative issue of individual responsibility for any tortiously caused consequences.<sup>178</sup> Citing her previous essay, she asserts:

The scientific-derived notion of historical involvement and the targeted but-for test of historical involvement emphasize the processes that create the elements of the setting in which the conduct is seen, the various choices of perspective we have about how a piece of conduct might be viewed, and the importance of irrevocably narrowing a victim's 'expectancies.'<sup>179</sup>

Insofar as she treats these various "perspectives" and "expectancies" as aspects of the empirical causal-contribution inquiry, rather than as aspects of the analytically prior tortious-conduct and legal-injury inquiries which frame or focus the causal-contribution inquiry,<sup>180</sup> her targeted but-for test not only is inadequate as a test of empirical causal contribution, but it also fails properly to distinguish the empirical issue of causal contribution from the normative issues that also enter into determinations of legal responsibility.

#### *D. The Over-Determined Multiple-Omission Cases*

As I indicated in my first article on causation, some of the most difficult over-determined-causation cases, at least conceptually, are those involving multiple omissions, which usually involve failures to attempt to use missing or defective safety devices or failures to attempt to read or heed missing or defective instructions

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quential over-determination by multiple pieces of tortious conduct lie between these two extremes and, not unexpectedly, provoke varying responses from the law.") It is not clear to me why the formal "dignity" of the law should outweigh substantive fairness and efficiency concerns, or why the law's "dignity" is not similarly impugned when a plaintiff injured by a tortfeasor and an "act of god" is treated worse than a plaintiff injured solely by a tortfeasor. On the other hand, I do not understand why it would be unfair to defendants to hold multiple tortfeasors liable for an injury for which each was an independently sufficient tortious cause. In such a situation, fairness and justice support liability, as do efficient-deterrence considerations. However, contrary to the cases and the corrective-justice principle, efficient-deterrence considerations also support liability even when the injury would have occurred anyway due to a *non-tortious* condition. See Wright, *Economic Analysis*, *supra* note 3, at 445-48; Wright, *Efficiency Theory*, *supra* note 3, at 571-72.

178. See *supra* text accompanying notes 137-140.

179. Stapleton, *supra* note 1, at 959 n.42 (citations omitted).

180. See *supra* note 32.

or warnings.<sup>181</sup> Some actual cases include *Weeks v. McNulty*,<sup>182</sup> in which a hotel negligently failed to provide a fire escape, but the deceased hotel guest failed to check outside the window for a fire escape or other escape route; *Saunders System Birmingham Co. v. Adams*,<sup>183</sup> in which a car rental company negligently failed to discover or repair bad brakes before renting a car to a driver, but the driver negligently failed to apply the brakes to avoid running into a pedestrian; *Rouleau v. Blotner*,<sup>184</sup> in which a driver (allegedly) negligently failed to signal before turning in front of another driver's oncoming car, but the second driver was not looking and would not have seen any signal if it had been given; and *Safeco Insurance Co. v. Baker*,<sup>185</sup> in which a manufacturer sold a prefabricated fireplace with inadequate installation instructions, but the carpenter who improperly installed the fireplace did not read any of the manufacturer's instructions.

In each of these cases and many other similar cases, the courts held that the company or person who negligently failed to provide the proper safeguard (safety device or warning) was not legally responsible for the plaintiff's injury, since the negligent failure was not an actual cause of the injury.<sup>186</sup> These holdings reflect a common, tacit understanding of empirical causation in such situations: the failure to provide a proper safeguard has no causal effect when there was or would have been no attempt to use the safeguard, unless there was no attempt because it was known that the safeguard did not exist or was inadequate.<sup>187</sup>

Will any of the causal tests enable us to explain these causal judgments? The first person's failure to provide a proper safeguard would have been a but-for (necessary) cause of the plaintiff's injury if the reason that the second person did not try to use the safeguard was because she knew that the safeguard did not exist or was defective. However, in each case it was assumed or proven that the second person would not have tried to use the safeguard even if it had

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181. See Wright, *Causation*, *supra* note 3, at 1801.

182. *Weeks v. McNulty*, 48 S.W. 809 (Tenn. 1898).

183. *Saunders Sys. Birmingham Co. v. Adams*, 117 So. 72 (Ala. 1928).

184. *Rouleau v. Blotner*, 152 A. 916 (N.H. 1931).

185. *Safeco Ins. Co. v. Baker*, 515 So. 2d 655 (La. Ct. App. 1987), *cert. denied*, 519 So. 2d 130 (La. 1988); see *McWilliams v. Sir William Arrol & Co.*, 1962 Sess. Cas. 70 (H.L.), [1962] 1 All E.R. 623 (similar facts and result); Fischer, *supra* note 29, at 1352-56 (discussing and citing a large number of cases with similar facts and results).

186. *Saunders*, 117 So. at 74; *Safeco*, 515 So. 2d at 657-58; *Rouleau*, 152 A. at 916; *Weeks*, 48 S.W. at 812.

187. See Wright, *Causation*, *supra* note 3, at 1763 n.117, 1785 n.212, 1801 & n.277.

been properly supplied. Thus, neither omission considered by itself was a but-for (necessary) cause since, without it, the injury still would have occurred due to the other omission.

Yet it clearly is incorrect to conclude that neither omission was a cause,<sup>188</sup> since (applying the aggregate but-for test) in the absence of both omissions the plaintiff would not have been injured.<sup>189</sup> Thus, although neither omission by itself was a but-for (necessary) cause, at least one and perhaps each of them must have been an independently sufficient cause. Unfortunately, as in the multiple-act cases, the aggregate but-for test cannot tell us whether (1) both omissions were duplicative independently sufficient causes or (2) only one omission actually was independently sufficient and preempted the potential causal effect of the other omission.<sup>190</sup>

In my initial article on causation, I attempted to apply the NESS test to explain our causal judgments and the courts' holdings in these multiple-omission safeguard cases, using the defective-brake case as an example:

*D's failure to try to use the brakes was necessary for the sufficiency of a set of actual antecedent conditions that [does] not include C's failure to repair the brakes, and the sufficiency of this set was not affected by C's failure to repair the brakes. A failure to try to use brakes will have a negative causal effect whether or not the brakes are defective. On the other hand, C's failure to repair the brakes was not a necessary element of any set of antecedent actual conditions that was sufficient for the occurrence of the injury. Defective brakes will have an actual causal effect only if someone tries to use them, but that was not an actual condition here. The potential negative causal effect of C's failure to repair the brakes was preempted by D's failure to try to use them.*<sup>191</sup>

At the time that I wrote this explanation, I was aware that it was too brief and cryptic, relied upon an insufficiently elaborated notion of causal sufficiency and "negative causal effect," and therefore could seemingly be reversed to support the opposite causal conclusions merely by switching the references to the two omissions. Nevertheless, I thought it roughly stated the correct analysis in very abbreviated form.

The seeming reversibility of my explanation has been noted by others, including David Fischer.<sup>192</sup> Concluding that neither the NESS test nor any other suggested test of causation properly re-

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188. *Contra* ARNO C. BECHT & FRANK W. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES 82 n.116, 95-98, 210-11 (1961); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 239-40 n.25 (4th ed. 1971). For my previous discussion of these sources, see Wright, *Causation*, *supra* note 3, at 1787 & n.223.

189. See PROSSER & KEETON, *supra* note 14, at 267 n.27, 268-69.

190. See *supra* note 141.

191. Wright, *Causation*, *supra* note 3, at 1801 (footnote omitted).

192. Fischer, *supra* note 29, at 1357-59.



solves the empirical causation issue in these over-determined double-omission safeguard cases, Fischer assumes that there is no purely empirical causal issue in these cases—that “[i]n such cases causation is not a purely factual matter” but rather a matter of “policy unrelated to causation in fact.”<sup>193</sup> However, perhaps due to his recognition of the fundamental nature of the actual-causation requirement in tort law,<sup>194</sup> Fischer employs phrasing which implies that, in every over-determined multiple-omission case, both omissions were actual causes, so that the only issue that needs to be resolved is the normative issue of legal responsibility.<sup>195</sup> Indeed, he describes all over-determined-causation cases, including those involving multiple acts such as multiple negligently set fires, as “multiple-sufficient-cause” cases.<sup>196</sup> This phrasing is appropriate only when all the acts or omissions were (duplicative) actual causes, but not when one preempted the potential causal effect of the others, as when one fire arrived and burned down a house hours before the second fire arrived. Although the second fire *would* have been sufficient to burn the house down if the first fire had not already destroyed the house, it was not *actually* sufficient because the first fire had already destroyed the house. Thus, to describe all over-determined-causation cases as “multiple-sufficient-cause” cases, as Fischer does, is inaccurate and highly misleading.<sup>197</sup>

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193. *Id.* at 1359-60; *cf. id.* at 1335 (stating that over-determined multiple-omission cases that “create extremely difficult cause-in-fact problems . . . [which] [c]ourts can solve . . . satisfactorily only by reference to policy; pure factual analysis simply does not provide an adequate answer.”). Stapleton adopts Fischer’s thesis but expands it to encompass all over-determined-causation cases. *See supra* note 172 and text accompanying notes 164-71 & 178-80.

194. *See* Fischer, *supra* note 29, at 1335.

195. For example, in the unused-defective-brakes case, Fischer states that “both omissions were independently sufficient to cause the accident.” *Id.* at 1349.

196. *E.g., id.* at 1336 & n.3.

197. Fischer also claims that, even when there is no causal over-determination, the causal analysis in cases involving omissions is always more difficult than in cases involving acts because the chain of causal reasoning is always at least one step longer for an omission than an act. Comparing the negligent act of operating a steam locomotive given dangerous weather conditions with the negligence of failing to install a spark arrester on the locomotive, Fischer states that, while the causal analysis for the act involves the two issues of (i) whether a spark from the locomotive landed on the plant that first caught fire and (ii) whether the spark started the fire, the causal analysis for the omission involves those two issues plus the issue of whether the spark arrester would have prevented the escape of the spark. *Id.* at 1341-43. However, the negligent act is not simply the operation of the locomotive but rather its operation in the dangerous weather conditions, and it must be established that each necessary element in the description of the negligent act, including the dangerous weather conditions, contributed to the burning of the brush. *See supra* note 45. So the causal analysis of the negligent act must include the additional issue(s) of whether the spark would have landed on the plant and started the fire even if the weather had not been dangerous. Moreover, Fischer’s illustration does not compare similarly situated acts and omissions. An act comparable to the omission of the spark arrester would

Fischer briefly considers, as an alternative to the merging of the empirical-causation and normative-responsibility issues in the over-determined multiple-omission cases, the possibility that causation in such cases is "a question to be resolved on the basis of human intuition about causation that is not reflected in the mechanical tests of causation."<sup>198</sup> He initially suggests a notion of "temporal sequence," according to which "people may attribute cause to the second ommitter [the person who failed to try to use the safeguard] because the second ommitter's negligence occurs closest in time to the accident."<sup>199</sup> He observes that this notion would be consistent with the results in almost all the unused-missing-safeguard cases, which treat the failure to try to use the safeguard as a cause but not the temporally prior failure to provide a proper safeguard.<sup>200</sup> However, he concludes that "[t]he presence of such an intuitive sense appears unlikely . . . [because] it does not explain all the cases."<sup>201</sup> He mentions two cases, *Kitchen Krafters, Inc. v. Eastside Bank of Montana*<sup>202</sup> and *Cipollone v. Liggett Group, Inc.*,<sup>203</sup> in which the courts held that the jury could find that the first omission, the failure to provide a proper warning, was a "substantial factor" in causing the plaintiff's injury.<sup>204</sup>

The "last ommitter" notion also would fail to explain the different intuitive response that most people have to Hart and Honoré's examples of concurrent, causally independent omissions:

[S]uppose that two switches need to be turned off in order to avert a fire, and that X has a duty to turn off one, Y the other [but] neither does so and a fire which would have been averted had they both performed their duty breaks out . . . . Suppose, again, that a house can be built and profitably sold only if X delivers bricks and Y mortar [but] both . . . default in delivery so that the projected house cannot be built and sold . . . . [L]awyers and ordinary people would agree in saying . . . that the omission of each is causally relevant to the ensuing harm and that each could in a proper case be held responsible for it.<sup>205</sup>

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be the damaging of an existing spark arrester. For this act, as with the omission, the issue would arise of whether an undamaged spark arrester would have prevented the escape of the spark. Fischer's assumption that the causal analysis of omissions is more likely than the causal analysis of acts to require consideration of hypothetical human responses, see Fischer, *supra* note 29, at 1343-44, is also questionable.

198. Fischer, *supra* note 29, at 1359-60.

199. *Id.* at 1360-61.

200. See *id.*; *supra* text accompanying notes 182-87.

201. Fischer, *supra* note 29, at 1361.

202. *Kitchen Krafters, Inc. v. Eastside Bank*, 789 P.2d 567, 575 (Mont. 1990).

203. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 560-61 (3d Cir. 1990), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992).

204. See Fischer, *supra* note 29, at 1351-52, 1360.

205. HART & HONORÉ, *supra* note 34, at 128; see *id.* at 236.

Hart and Honoré use their version of the NESS test to support these causal judgments.<sup>206</sup> Fischer cites Hart and Honoré's resolution of the two-switch hypothetical and asserts that it is inconsistent with their refusal (consistent with the cases) to treat the failure to provide a proper safeguard as being a cause of an injury when there was no attempt to use the safeguard.<sup>207</sup>

Yet Fischer himself obliquely suggests a distinction between the two-switches hypothetical and the unused-missing-safeguard cases. The distinction is not mere temporal sequence, but rather that, "[i]n the missing-safeguard case[s], [to prevent the injury] one act (providing the safeguard) must take place before the other (using the safeguard)."<sup>208</sup> The notion is one of causal sequence or priority, rather than mere temporal sequence, but the causal sequence or priority is the reverse of how Fischer states it. The causal sequence for the operation of a safeguard is initiated when a person attempts to use the safeguard and then subsequently proceeds, as a result of such attempt, with the activation of the safeguard if the safeguard is present and in proper condition. That is, the activation of the safeguard depends on someone's first attempting to use it, so that if no such attempt is made, "the [temporally] first omission [the failure to provide a working safeguard] is not causal because it never came into play."<sup>209</sup>

There is no such causal priority in the two-switches case, in which the operation of each switch is not dependent on the prior operation of the other switch, but rather each switch operates independently of the other switch. There also is no such causal priority among the potentially contributing conditions in the *Kitchen Krafters* case, in which the defendant bank negligently failed to provide material financial information to the plaintiff, but the bank argued that the plaintiff's loss of business would have occurred anyway due to a poor economy.<sup>210</sup> Nor is there any such causal priority in the *Cipollone* case, in which the defendant cigarette company negligently failed to provide adequate warnings about the dangers of cancer both before and after 1966, when state causes of

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206. See *id.* at 128 n.33.

207. See Fischer, *supra* note 29, at 1356-57 (citing HART & HONORÉ, *supra* note 34, at 127, 128 & n.33, 235-36).

208. *Id.* at 1360.

209. *Id.* at 1361.

210. *Kitchen Krafters, Inc. v. Eastside Bank*, 789 P.2d 567, 575 (Mont. 1990). Note that *Kitchen Krafters* is not even a double-omission case, since the "poor economy" is not an omission. Moreover, unlike the unused-defective-safeguard cases, it is assumed that the plaintiff would have paid attention to and acted on the information if it had been provided.

action for failure to warn were preempted by federal law.<sup>211</sup> Thus, the notion of causal priority does seem to factually distinguish the unused-missing-safeguard cases, in which the courts treat the failure to try to use the safeguard but not the failure to provide a proper safeguard as a cause of the injury, from those cases in which the courts are willing to consider both omissions as causes.

Fischer asserts that anything "inherent in human intuition" about causation (such as the notion of causal priority described above) which would explain our common judgments and the courts' holdings on causation in the double-omission cases "is not reflected in the mechanical tests of causation," including the NESS test.<sup>212</sup> This is true if the NESS test is viewed "mechanically" as requiring mere analytical or empirical sufficiency. But it is not true if the test is properly understood as incorporating a concept of causal sufficiency, which requires the complete instantiation of the potentially applicable causal generalization,<sup>213</sup> and if proper attention is paid to the distinction between positive and negative causal effects and the need to take into account any causal priority within an applicable causal generalization when assessing negative rather than positive causal effects.

The distinction between positive and negative causal effects was noted by Mill in his elaboration of the concept of causation that underlies the NESS test:

[The failure of a sentry to be at his post] was no producing cause [of the army's being surprised by the enemy], but the mere absence of a preventing cause: it was simply equivalent to his non-existence. From nothing, from a mere negation, no consequences can proceed. All effects are connected, by the law of causation, with some set of *positive* conditions; negative ones, it is true, being almost always required in addition. In other words, every fact or phenomenon which has a beginning invariably arises when some certain combination of positive facts exists, provided certain other positive facts do not exist. . . .

The cause then, philosophically speaking, is the sum total of conditions positive and negative taken together; the whole of the contingencies of every description, which being realised, the consequent invariably follows. The negative conditions, however, of any phenomenon, a special enumeration of which would generally be very prolix, may be all summed up under one head, namely, the absence of preventing or counteracting causes.<sup>214</sup>

Consider the victims' deaths by shooting or dehydration, rather than by poisoning, in the poisoned-tea and desert-traveler

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211. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 546, 561 (3d Cir. 1990).

212. Fischer, *supra* note 29, at 1360-61; see *id.* at 1359.

213. See *supra* note 113 and accompanying text.

214. MILL, *supra* note 131, bk. III, ch. V, § 3.

hypotheticals.<sup>215</sup> In each hypothetical, the victim was bound to die soon, once the deadly poison with no antidote was put into the victim's cup or keg (from which the victim was certain to drink unless killed first or deprived of the liquid in the keg, respectively). The then-existing set of conditions was analytically and empirically sufficient for the victim's death within a short time. But it was not (causally) sufficient for the victim's death *by poisoning*. The omnibus negative condition, the absence of any "preventing or counteracting" cause, was not satisfied. In each hypothetical, the occurrence of one of the necessary positive conditions in the causal generalization for death by poisoning—the drinking of the poison—was prevented by a counteracting positive condition: the shooting of the victim in the poisoned-tea hypothetical and the emptying of the keg in the desert-traveler hypothetical.

Now consider the failure-to-brake case. The braking, if it occurs, is a counteracting positive condition that prevents the complete instantiation of the causal generalization for running over the pedestrian. In the usual case in which the brakes are successfully operated, both the driver's applying the brakes and the brakes' being in proper working order are concrete instantiations of different necessary positive conditions in the completely instantiated causal generalization for braking, and thus are NESS causes (and, in this situation, also but-for causes) of the successful operation of the brakes. The fact that, in the applicable causal generalization, the driver's attempting to use the brakes is causally prior to the "coming into play" of the brakes' being in proper working order need not be noted, since both conditions actually came into play.

However, when the situation is one in which we are attempting to identify the causes of the brakes' *not* being operated—that is, a *failure* of the causal generalization for braking, which is a "negative causal effect" rather than the positive causal effect discussed in the prior paragraph—the causal priority becomes significant and must be taken into account when applying the NESS test. The failure of any causal generalization is logically or empirically guaranteed to occur if any one of the necessary positive conditions in the antecedent of the causal generalization is absent. Yet, the failure can be explained *causally* only by taking into account any relevant causal priority among those positive conditions. The absence of any causally prior necessary condition preempts the possible coming into play (through presence or absence) of any other

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215. See *supra* text accompanying notes 144-51.

necessary condition in the causal generalization, the operation of which was causally subsequent to or dependent upon the causally prior necessary condition. On the other hand, if, as in the two-switches hypothetical, there is no causal priority among the multiple absent necessary conditions, then each absent necessary condition is a duplicative cause of the failure of the causal generalization.

## V. CONCLUSION

When I began writing this Article, I intended to devote considerable space to the issues encompassed by the Restatement's second requirement for an actor's tortious conduct to be a "legal cause" of the plaintiff's injury: that there be "no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."<sup>216</sup>

This topic is generally referred to as "proximate causation," and unfortunately it continues to be referred to as such in Gary Schwartz's draft of the Third Restatement.<sup>217</sup> As I previously indicated, I strongly agree with Stapleton that the phrases "proximate cause" and "legal cause," and other phrases that confusingly merge the empirical issue of causal contribution with the normative issue of the extent of legal responsibility for tortiously caused consequences, should be replaced with terminology that clearly distinguishes these two issues.<sup>218</sup> The confusion of these two issues, which is widespread and deep, sometimes traps even those, like Stapleton, who are most desirous of avoiding it.

In this Article, I have once again jumped into the bramble bush in an attempt to prune away some of the confusion.<sup>219</sup> Unfortunately, I also have once again found that (more than?) my allotted amount of space has been used up in merely trying to clarify the empirical issue of causal contribution and to distinguish it from the various normative issues that precede and follow it in the analysis of a tort claim. Thus, at this point, I will only state my disagreement with the general view, apparently shared by Stapleton,<sup>220</sup> that

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216. RESTATEMENT (SECOND) OF TORTS § 431(b) (1965).

217. Discussion Draft, *supra* note 49, § 3 cmt. a (" 'Legal cause' includes the doctrines of both actual cause and proximate cause, as they are set forth elsewhere in this General Principles Restatement." ).

218. See *supra* text accompanying notes 4-36.

219. See Wright, *Bramble Bush*, *supra* note 3, at 1002-03.

220. Stapleton states that, "[i]n most situations, the law's concerns are simply factors . . . for the decision-maker to have in mind." Stapleton, *supra* note 1, at 981; see *id.* at 984-86, 1007-09

it is hopeless to try to articulate any definite, workable rules that limit the extent of legal responsibility for tortiously caused consequences.

I believe that there are at least three definite, workable limitations, each of which, if found to exist, will limit the defendant's (or plaintiff's) legal responsibility for tortiously (or negligently) caused injury: (1) the injury would almost certainly have occurred anyway as a result of a non-labile condition; (2) there was a superseding (intervening, necessary, and highly unexpected) cause of the injury; or (3) the injury did not occur as part of the playing out of one of the foreseeable risks which made the person's conduct tortious (or negligent). Further elaboration of these three limitations and the extent to which they are recognized, ignored, or confused in the Restatement must await the separate publication of what originally was meant to be the second half of this Article.

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& n.191. She states that there rarely may be "crystallized rules" for certain torts, *id.* at 987, but she mentions only two and questions both. The first, for the tort of negligence, is that "foreseeability (of the kind/type/nature of the harm suffered)" supposedly is "a necessary requirement," but she immediately remarks that this is "a notoriously malleable 'rule' that will rarely provide control because it crucially depends on how broadly or narrowly the kind/type/nature of the harm is described." *Id.*; *see id.* at 997 ("what is critical to the law is not some *independent* general quality of an outcome, the foreseeability or directness of its type/manner/extent, all of which can be manipulated to cover virtually any result that is desired"). She also refers to an unelaborated "crystallized rule" in cases of "simultaneous over-determination by tortfeasors," *id.* at 1007, but previously she had denied that any general rule applies to such cases, *see id.* at 968. She rejects any distinct superseding-cause limitation. *See id.* at 999 & n.151.