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## DIVIDING RISKS: TOWARD A DETERMINATE TEST OF PROXIMATE CAUSE

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*The central question in the law of proximate cause is how to divide risks into parts. The leading test of proximate cause, the foreseeability test, requires the jury to decide whether the “general type” of outcome that occurred was too improbable to be foreseeable. Before the jury can address this question, though, it has to aggregate the possible outcomes of the defendant’s conduct into “general types.” In effect, then, the foreseeability test requires the jury to divide the risk into parts. So does a promising alternative to the foreseeability test, Judge Posner’s increased-risk test. Nobody has developed a workable, determinate method of dividing risk into parts, however. Instead, adherents of both tests have settled for telling juries vaguely to aggregate possible outcomes according to the “sort of mishap” that occurred. As a consequence, both tests are fundamentally indeterminate.*

*This Article argues that this aggregation difficulty is solvable, though only within the framework of Judge Posner’s increased-risk test. The solution lies in dividing up risks as Darwin divided up life forms—according to “community of descent.” Specifically, outcomes may be situated in relation to one another (1) on the basis of their “descent” from a particular mediating event; and (2) on the basis of their non-descent from a particular extrinsic condition. This method of dividing up the risks isn’t just determinate. When it’s used to frame the increased-risk question—that is, when it’s used to define the aggregate of possible outcomes that must be characterized by increased risk—this method of dividing risk produces intuitively satisfying answers to a wide range of proximate cause questions.*

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## I. INTRODUCTION

The proximate cause requirement isn't dead. But it isn't exactly thriving, either. Traditionally, of course, criminal statutes that required proof of causation were thought invariably to require proof that the defendant's conduct was both a cause-in-fact and a proximate cause of the result.<sup>1</sup> Not so today. One state supreme court, Oregon's, did away with the proximate cause requirement entirely in 2016.<sup>2</sup> Another, Washington's, held in 2019 that proximate cause should be

1. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.4, Westlaw (3d ed. Oct. 2020 update).

2. See *State v. Turnidge*, 374 P.3d 853, 923 (Or. 2016) (“[T]he term ‘cause,’ when used in a statute that attaches liability or responsibility for conduct that causes a result, means cause-in-fact. It does not also mean the now-discredited—under Oregon law at least—concepts of proximate or legal cause.”).

treated as “a question of law for the court,” rather than as an element of the government’s case.<sup>3</sup> Meanwhile, federal courts have seized on slight variations in statutory language as a basis for eliminating the proximate cause requirement in some federal homicides, including cases where the defendant is charged with causing another person’s death by providing him with a controlled substance<sup>4</sup> and cases where the defendant is charged with causing another person’s death by engaging in healthcare fraud.<sup>5</sup>

It’s not hard to understand why courts might look on the proximate cause requirement with disfavor. The dominant test of proximate cause nowadays is the foreseeability test,<sup>6</sup> which requires the jury to decide whether the actual outcome was one the defendant “should reasonably have anticipated” when he acted, given the result’s probability *ex ante*.<sup>7</sup> This sounds intuitive enough. In practice, though, the foreseeability test proves hopelessly indeterminate.<sup>8</sup> The trouble, or part of it, is that the test doesn’t tell us exactly *what* has to be foreseeable.<sup>9</sup> The question posed by the test can’t just be whether the exact sequence of events that led to the result was “too improbable to be foreseeable.”<sup>10</sup> Extended

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3. See *State v. Frahm*, 444 P.3d 595, 599 (Wash. 2019) (“While actual cause is a question of fact generally left to the jury to ‘determin[e] what actually occurred,’ . . . legal cause ‘is a question of law for the court based on policy considerations.’” (quoting *Colbert v. Moomba Sports, Inc.*, 176 P.3d 497 (Wash. 2008))). This view is unusual, needless to say. The usual view is that “[p]roximate cause is generally a question for the jury.” *Taylor v. State*, 814 S.E.2d 353, 358 (Ga. 2018).

4. See, e.g., *United States v. De La Cruz*, 514 F.3d 121, 137–38 (1st Cir. 2008) (holding that 18 U.S.C. § 841(b)(1)(A), the drug-induced homicide statute, does not require proof that the defendant’s conduct was a proximate cause of the victim’s death); *United States v. Patterson*, 38 F.3d 139, 145 (4th Cir. 1994) (same); *United States v. Harden*, 893 F.3d 434, 449 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 394 (2018) (“[T]he ‘death results’ enhancement in § 841(b) does not require proof that the death was reasonably foreseeable.”); *United States v. McIntosh*, 236 F.3d 968, 972 (8th Cir. 2001) (same); *United States v. Houston*, 406 F.3d 1121, 1125 (9th Cir. 2005) (same). In *Burrage v. United States*, 571 U.S. 204, 210 (2014), the Supreme Court granted certiorari on the question whether 18 U.S.C. § 841(b)(1)(A) requires proof of proximate cause, but then ducked this issue, holding that the Eighth Circuit Court of Appeals had applied the wrong test of cause-in-fact.

5. See *United States v. Webb*, 655 F.3d 1238, 1254–55 (11th Cir. 2011) (“The statute [18 U.S.C. § 1347] requires a cause-in-fact connection between the victim’s ingestion of the drugs and death. It does not require that the defendant’s conduct proximately cause the death.”). Other federal courts have reached the opposite conclusion; see also *United States v. Martinez*, 588 F.3d 301, 317–19 (6th Cir. 2009) (“We . . . conclude that proximate cause is the appropriate standard to apply in determining whether a health care fraud violation ‘results in death.’”). See generally *Laura A. Feldman, Determining the Proper Standard of Causation to Support a Conviction Under 18 U.S.C. § 1347 When Healthcare Fraud “Results in Death,”* 98 IOWA L. REV. 2061, 2063 (2013).

6. See GUYORA BINDER, *CRIMINAL LAW* 211 (2016) (identifying “the foreseeability of the result” as the principal test of proximate cause in criminal law). Foreseeability is also the dominant test of proximate cause in tort law. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. j (AM. L. INST. 2010) (identifying the “foreseeability” test as the dominant test of proximate cause in tort); David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1293–94 (2009) (“[T]he concept of ‘foreseeability,’ in one formulation or another, is the ‘touchstone’ or ‘cornerstone’ of proximate cause.”). Foreseeability also “has a dominant position in English causation law.” CEES VAN DAM, *EUROPEAN TORT LAW* 318 (2d ed. 2013).

7. 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI § 15.05 (7th ed., July 2019) (framing the critical question as whether “the defendant should reasonably have anticipated the later independent intervening [cause, force, or act]”). See generally W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 951 (2005) (explaining that the foreseeability test requires the jury to apply its normative judgment in deciding “how much epistemic probability is sufficient to render an actor outcome-responsible”).

8. See MICHAEL S. MOORE, *PLACING BLAME* 367 (1997).

9. *Id.*

10. *James v. Meow Media, Inc.*, 300 F.3d 683, 691 (6th Cir. 2002).

sequences of events nearly always are very improbable in their particulars.<sup>11</sup> Accordingly, courts have long recognized that the foreseeability question must be posed in relation to the “general type” of the causal sequence.<sup>12</sup> Before posing the foreseeability question, then, the jury must aggregate the actual outcome and other similar outcomes into a “general type.”

This required aggregation of possible outcomes into “general types” is a fishy business, however.<sup>13</sup> Consider *People v. Rideout*.<sup>14</sup> Kevin Rideout was driving drunk when, as a result of his impairment, his car crossed the highway’s centerline and struck another car head-on.<sup>15</sup> After the collision, Rideout’s car ended up in the grass on the side of the road, but the other car was left disabled in the middle of the highway.<sup>16</sup> The other car’s two occupants, who were uninjured, left their car and first checked on Rideout, who was still sitting in his car.<sup>17</sup> It was nighttime, so the two men realized that their own disabled (and unlighted) car would be difficult for other drivers to see.<sup>18</sup> When the two men returned to their disabled car to try to activate its flashers, one of them, Jonathan Keiser, was struck and killed by another car.<sup>19</sup> For Keiser’s death, the government charged Rideout with drunk-driving homicide.<sup>20</sup>

In the *Rideout* case, as in other cases, the foreseeability question must be posed of the outcome’s “general type.” But what’s the “general type” of the outcome in *Rideout*? To put the question slightly differently, what other possible outcomes belong to the same “general type” as the actual outcome? Part of the difficulty with this question is that the foreseeability test doesn’t tell us just *how* similar two outcomes must be to qualify as of the same general type.<sup>21</sup> That is, the test doesn’t specify, and really couldn’t, the “appropriate level of generality”

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11. See Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 799 (1951) (“But [outcomes] must not be described in too specific and detailed a way—it is enough that their general nature be indicated, and this will vary from situation to situation.”); MOORE, *supra* note 8, at 367 (explaining why it wouldn’t make sense to pose the foreseeability question in relation to the specific causal sequence: “These details [of the specific causal sequence], and the fortuity of the discrete physical forces that conjointly caused them, would be unforeseeable to all but an omniscient being.”).

12. See *Johnson v. State*, 224 P.3d 105, 105–06 (Alaska 2010) (identifying the relevant question as whether “a general type of harm was foreseeable,” rather than whether “the exact manner in which the actual harm occurred was foreseeable”).

13. See MOORE, *supra* note 8, at 367 (“[T]he multiple description problem threatens the foreseeability test with complete vacuousness.”).

14. *People v. Rideout*, 727 N.W.2d 630 (Mich. Ct. App. 2006), *rev’d in part*, 728 N.W.2d 459 (Mich. 2007).

15. *Id.* at 632.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* Michigan’s version of drunk-driving homicide is defined at MICH. COMP. LAWS ANN. § 257.625(4) (West 2018).

21. See H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 80 (2d ed. 1985) (acknowledging that the degree of generality or specificity in the fact finder’s description of the result’s type is one of the sources of indeterminacy in the law of proximate cause).

at which to frame the outcome's general type.<sup>22</sup> As a consequence, the test is indeterminate.<sup>23</sup> If we frame the outcome's general type very broadly—as, say, “traumatic death in an auto accident”—the outcome in *Rideout* obviously is foreseeable. If we frame the outcome's general type narrowly—as, say, “death attributable to a decision by a man named Jonathan to try to activate the flashers on his car”—the outcome is unforeseeable.

The foreseeability test's failure to specify the “appropriate level of generality” is only part of the problem, though. What's worse is that the foreseeability test doesn't provide us with any criteria for situating outcomes in relation to one another.<sup>24</sup> “Every reality has an infinity of aspects or properties,”<sup>25</sup> as William James said. And any of these aspects or properties can serve as a basis for judging the similarity of one outcome to another.<sup>26</sup> To decide whether another possible outcome of *Rideout*'s conduct belonged to the same general type as the actual outcome, then, the jury would need to decide which aspects or properties to use in judging the similarity of the outcomes. Should the jury rely on the timing of the death in relation to the initial collision? The involvement of a third vehicle? What the victim was doing when he was killed? The color of the vehicles? The foreseeability test doesn't tell us, and really couldn't. As a consequence, the test is indeterminate.<sup>27</sup> The best we can do is hope the jury shares our intuitions about what sorts of results are fortuitous.<sup>28</sup> As a “test” of what makes some outcomes fortuitous, foreseeability is a failure.

Is there an alternative? In two recent criminal cases, Judge Richard Posner has formulated the proximate-cause requirement as a requirement simply that the defendant's conduct “increase the risk” that something like the actual outcome would occur.<sup>29</sup> In *United States v. Hatfield*,<sup>30</sup> where the defendants were charged with causing the victims' deaths by selling them illegal drugs, Judge Posner said that the proximate cause question was whether the defendants' conduct had “increase[d] the risk that *this* sort of mishap would occur.”<sup>31</sup> Judge Posner invoked roughly the same formula in *Brckett v. Peters*,<sup>32</sup> a state court murder case. In

22. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. i (AM. L. INST. 2010) (explaining the difficulty faced by the factfinder in posing the probability question at the “appropriate level of generality”).

23. MOORE, *supra* note 8, at 367.

24. *Id.*

25. WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 668–69 (Robert Maynard Hutchins et al. eds., 1952) (1890).

26. See MOORE, *supra* note 8, at 369 (“[E]very event-particular is similar in some ways to every other event-particular, dissimilar in other ways. Until we know the relevant respects in which we are to judge two events to be similar, we can give no answer (because we can equally well give both answers).”).

27. See *id.* (arguing that the failure to specify criteria for judging similarity makes the foreseeability test “completely vacuous”).

28. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. i (AM. L. INST. 2010) (acknowledging that the difficulty in framing the result at “the appropriate level of generality” sometimes must be resolved by leaving the question “to the community judgment and common sense provided by the jury”).

29. See *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010); *Brckett v. Peters*, 11 F.3d 78 (7th Cir. 1993).

30. *Hatfield*, 591 F.3d at 945.

31. *Id.* at 948.

32. *Brckett*, 11 F.3d at 82.

summarizing the law of causation, he said that conduct will qualify as a legal cause of a result if, in addition to satisfying the cause-in-fact requirement, the conduct “made the event more likely.”<sup>33</sup>

Judge Posner’s attraction to the increased-risk test appears to have been rooted in his scholarly work in law and economics. Just a few years before the Seventh Circuit decided *Brackett*, Judge Posner and co-author William Landes argued in *The Economic Structure of Tort Law* that “[f]rom an economic standpoint” a defendant’s wrongdoing “is not a cause” of the plaintiff’s harm if the wrongdoing “did not increase the probability of an accident *ex ante*.”<sup>34</sup> But the increased-risk test also appears to capture, intuitively, what makes some results seem fortuitous.<sup>35</sup> After all, the risk that makes conduct wrongful is the increased risk *ex ante*; so if a particular result isn’t part of the increased risk, it isn’t among the risks that make the conduct wrongful.<sup>36</sup> This basic logic has appealed to others besides Judge Posner.<sup>37</sup> For example, the drafters of the Model Penal Code considered, as an alternative to the proximate cause test that eventually was adopted by the American Law Institute’s (“ALI”) membership, a version that would have required only that the result “occur[] in a manner which the actor knows or should know is rendered substantially more probable by his conduct.”<sup>38</sup>

The increased-risk test seems promising, then. Unfortunately, when we try to apply the test, we encounter an aggregation problem not much different than the foreseeability test’s. The question posed by the increased-risk test can’t be

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33. *Id.* at 79; see also William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 120 (1983) (saying of a proximate-cause case: “[T]here is no need to invoke concepts of foreseeability to explain the result; the case could just as easily have been decided on the ground that the decedent’s wrongful conduct, the trespass, did not increase the probability of injury.”).

34. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 235–39 (1987) (emphasis added).

35. *Hatfield*, 591 F.3d at 948 (invoking increased-risk test to explain why imposing liability for some consequences of the defendant’s wrongdoing feels “strange”).

36. See John C.P. Goldberg, Comment, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2061 (1997) (explaining the “risk rule” approach to proximate cause as “the rule that one should be held responsible only for harms flowing from the realization of the sort of risks that led society to regard the conduct as wrongful in the first place”); see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. i (AM. L. INST. 2010) (framing the proximate cause question as whether the plaintiff’s injury “result[ed] from the risks that made the actor’s conduct tortious”).

37. American tort scholars have long recognized the existence of at least a narrow class of cases where the seeming fortuitousness of the victim’s harm is best explained by an absence of “increase[d] risk.” See RESTATEMENT (THIRD) OF TORTS § 30 cmt. a; see also Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 71–72 (1975). The increased-risk approach is also the dominant approach to proximate cause in German tort law, where courts have held that a tort defendant’s conduct will count as a cause of the plaintiff’s injuries only “if it has in a general and appreciable way enhanced the objective possibility of a consequence of the kind that occurred.” CEES VAN DAM, *supra* note 6, at 312–13; see also HART & HONORÉ, *supra* note 21, at 465–97 (discussing continental variants of the increased-risk test).

38. MODEL PENAL CODE § 2.03(3)(b) (AM. L. INST., Tentative Draft No. 4, 1955). The drafters’ preference for another test—whether the result was “not too accidental in its occurrence to have a just bearing on the actor’s liability or on the gravity of his offense”—wasn’t attributable to any real shortcoming in the increased-risk formula. Rather, the drafters’ comments suggest that they were concerned merely that jurors would be reluctant to apply the increased-risk formula. See *id.* cmt. 4; see also Lawrence Crocker, *A Retributive Theory of Causation*, 5 J. CONTEMP. LEGAL ISSUES 65, 77 (1994) (arguing that a victim’s death should qualify as fortuitous if “it was an event the probability of which was not increased by [the actor’s] homicidal actions”).

simply whether the defendant's conduct increased the probability of the *specific* sequence of events that culminated in the victim's harm. The defendant's conduct always will increase the probability of this specific sequence, since the sequence couldn't have occurred without it. Nor can the question be whether the defendant's conduct increased the risk that the proscribed harm would occur *somehow*. If the defendant's conduct hadn't increased the risk that the proscribed harm would occur somehow or other, the defendant's conduct wouldn't be wrongful, and the jury therefore wouldn't have occasion to address the proximate cause question. For the increased-risk test to make any sense, the increased-risk question has to be posed in relation to some "part" of the risk that is (1) broader than the sequence of events that actually transpired; and (2) narrower than the risk as a whole. The test requires the jury to divide the risk into parts, then. At first glance, moreover, the increased-risk test's aggregation problem doesn't appear to be any more tractable than the foreseeability test's. When Judge Posner formulated the increased-risk test in *Hatfield*, he divided the risk exactly as adherents of the foreseeability test do—according to the general "sort" or "type" of the outcome that transpired.<sup>39</sup> But division of outcomes according to their general sort or type is no more determinate in this setting than it is under the foreseeability test.

This Article will argue that the aggregation problem is solvable, albeit only within the framework of the increased-risk test. The solution to the aggregation problem is to divide up the universe of possible outcomes as Charles Darwin divided up life forms—according to "community of descent."<sup>40</sup> Specifically, the increased-risk test produces intuitively satisfying results when the universe of possible outcomes is divided up (1) according to whether a particular outcome is or is not "descended from" a particular mediating event;<sup>41</sup> and (2) according to whether a particular outcome is or is not descended from a particular extrinsic condition.<sup>42</sup> This method of dividing up outcomes is determinate, moreover, unlike the practice of dividing outcomes according to "general type."<sup>43</sup> As a result, the increased-risk test, unlike the foreseeability test, is capable of providing real answers to proximate cause questions.

This Article will begin, in Part II, with a brief comparative introduction to the foreseeability and increased-risk tests. Part III will explain the aggregation problem, first within the context of the foreseeability test and then within the context of the increased-risk test. It also will explain why existing solutions to the aggregation problem aren't workable. Part IV will propose a novel solution to the aggregation problem, namely, dividing outcomes according to community of descent. It will explore three specific techniques for dividing risks according

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39. *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010) (framing the increased-risk question as whether the defendant's conduct "increase[d] the risk that *this* sort of mishap would occur").

40. CHARLES DARWIN, *THE ORIGIN OF THE SPECIES* 534 (1869).

41. *Id.*; see Crocker, *supra* note 38, at 100.

42. See Crocker, *supra* note 38, at 100; see also 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI § 15.05 (7th ed., July 2019).

43. See *Johnson v. State*, 224 P.3d 105, 111 (Alaska 2010) (identifying the relevant question as whether "a general type of harm was foreseeable").

to community of descent, and it will show how each of these techniques works with the increased-risk test to produce intuitively satisfying answers to proximate cause questions. Part V will explore three potential difficulties with the proposed method of dividing the risks and, along the way, will explain why the proposed method can't save the foreseeability test. Part VI will explain tentatively *why* the increased-risk test works—why it appears to identify a class of risks that aren't among the risks that make the conduct wrongful. Finally, the Article's conclusion will propose a model jury instruction.

## II. INCREASED RISK AND FORESEEABILITY: A VERY BRIEF INTRODUCTION

The increased-risk and foreseeability tests are different in some respects, similar in others. Let's explore these differences and similarities against the background of a standard-issue example of causal fortuity. Suppose a motorist on the freeway fires a gun in anger at another motorist. The shot misses the other motorist. In reaction to the shooting, though, the other motorist immediately exits the freeway, then calls the police from a nearby gas station. As he's waiting for the police to arrive, the gas station bursts into flames, badly injuring the driver.<sup>44</sup> He dies two days later in the hospital, despite efforts by doctors and nurses to save his life. In this case, the defendant's wrongful conduct obviously was a cause-in-fact of the other driver's death: if the defendant hadn't shot at the other driver, the other driver wouldn't have exited the freeway when he did; and if he hadn't exited the freeway when he did, he wouldn't have been at the gas station when it exploded. Still, it would be "strange indeed" to treat the defendant's conduct as a legal cause of the other driver's death.<sup>45</sup>

For proponents of the foreseeability test, the reason why the defendant's conduct wouldn't qualify as a proximate cause of the victim's death is that this outcome—or, more precisely, this "general type" of outcome—just wasn't probable enough *ex ante* to require the defendant's attention.<sup>46</sup> To apply the foreseeability test, then, the jury first would estimate the probability that an outcome of this "general type" would occur. Since any general type of outcome will encompass lots of different *specific* outcomes, the jury presumably would estimate the aggregate probability for the general type by (1) estimating, albeit roughly and intuitively, the probabilities associated with each of these specific outcomes; and

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44. According to the Petroleum Equipment Group, there were at least 170 static electricity fires at gas stations between 1992 and 2006. Marcia Biederman, *Static Fires Are a Peril at the Pump*, N.Y. TIMES (July 27, 2008), <https://www.nytimes.com/2008/07/27/automobiles/27STATIC.html> [<https://perma.cc/8BWD-TQQ5>].

45. *Paroline v. United States*, 572 U.S. 434, 448 (2014). In *Paroline*, Chief Justice Roberts used an example of his own to illustrate this point. Suppose, he said, that the traumatized victim of a sex offense later "needed therapy and had a car accident on the way to her therapist's office." *Id.* It would be "strange indeed," he said, to treat the sex offense as a legal cause of the injuries. *Id.*

46. See JUDEA PEARL & DANA MACKENZIE, *THE BOOK OF WHY: THE NEW SCIENCE OF CAUSE AND EFFECT* 288 (2018) (arguing that the reason why some defendants aren't liable for the consequences of their actions is that "there is no way that [they] could have anticipated" the causal sequence that culminated in the victim's harm).

(2) adding up these probabilities, again roughly and intuitively.<sup>47</sup> Once the jury had calculated this aggregate probability, the jury would decide whether, as a normative matter, this probability was great enough to require the defendant's attention—was great enough, that is, that the defendant “should have” adverted to the risk.<sup>48</sup> In the gas station case, it wasn't. That's what makes the result seem fortuitous, at least for proponents of the foreseeability test.

For proponents of the increased-risk test, by contrast, what makes the outcome in the gas station case qualify as fortuitous isn't the *gross* probability of harm within the relevant “part” of the risk but, rather, the *net* probability.<sup>49</sup> When a defendant engages in wrongdoing, his conduct doesn't just create risks. It also averts risks.<sup>50</sup> For example, when our freeway shooter caused his intended target to exit the freeway early, he didn't just create a risk that the victim would be killed accidentally by a gas station explosion at this exit. He also averted a risk that the victim would be killed by a gas station explosion at the exit he *would have taken* if not for the shooting. If, within a particular part of the risk, the risks created by the defendant's conduct are no greater than the risks averted—if the risks averted offset the risks created, in other words—then this part of the risk isn't characterized by increased risk.<sup>51</sup> This probably is true in our hypothetical, since the risk *ex ante* of a gas station explosion or another similar disaster was no higher at the exit taken by the shooter's intended target than at any other exit. For adherents of the increased-risk test, the fact that this body of possibilities isn't characterized by increased risk is what makes the outcome fortuitous.

Notice that the foreseeability and increased-risk tests, as we've described them, have three critical features in common. First, the tests both assign a critical role to the probabilities associated with outcomes, and both accordingly presuppose that it's possible for the jury to assign probabilities to outcomes. Again, the increased-risk test requires the jury to decide whether, within a particular part of the universe of possibilities, the risks *created* by the defendant's conduct were greater than the risks *averted*.<sup>52</sup> Since the magnitude of a “risk” depends mostly on the probabilities associated with outcomes, the task of comparing the “risks

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47. See Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 955, 957 (2000) (explaining that, in criminal law, the jury calculates the risk by “determin[ing] the extent of harm risked by the conduct discounted by its likelihood of occurring”); 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI § 15.05 (7th ed., July 2019).

48. See Owen, *supra* note 6, at 1292 (“[F]oreseeability includes risks that an actor may not know but reasonably should, commonly explained in constructive-knowledge terms as risks the actor ‘should have known,’ meaning that prudence sometimes requires actors to investigate and evaluate possibilities of hidden or inchoate risk.”).

49. See *Brckett v. Peters*, 11 F.3d 78, 79 (7th Cir. 1993) (applying the increased-risk test by comparing the risk created by a hypothetical defendant's conduct (the risk that the victim would be killed by a “fire in a nursing home”) with the risk averted (the risk that the victim would be killed by a fire “in her own home”).

50. LANDES & POSNER, *supra* note 34, at 230 (explaining that calculating the increased risk requires the jury to compare the “probability of an accident in the event that the injurer violates the standard” with the “probability of an accident if he does not”).

51. See *Brckett*, 11 F.3d at 79.

52. See *id.*

created” with the “risks averted” obviously requires the jury to assign probabilities to outcomes.<sup>53</sup> The foreseeability test too requires the jury to assign probabilities to outcomes.<sup>54</sup> Though the ultimate question posed by the foreseeability test is a normative one—whether the defendant really “should have” adverted to the type of risk that came to fruition<sup>55</sup>—the answer to this question depends mostly on probabilities.<sup>56</sup> The question is basically whether the outcome was “too improbable to be foreseeable.”<sup>57</sup>

Second, the basic object of the jury’s attention under both the increased-risk test and the foreseeability test—the “outcome” of which the jury poses the increased-risk or foreseeability question—is the whole causal sequence connecting the defendant’s conduct to the harm, not just the harm that lies at the end of the causal sequence.<sup>58</sup> It’s the causal sequence, after all, that distinguishes fortuitous results from other results. In our gas station hypothetical, for example, what makes the result fortuitous isn’t the nature of the harm that lies at the end of the causal sequence, that is, the death of the shooter’s intended target; the death of the intended target was exactly what the shooter hoped to bring about. Rather, what makes the result seem fortuitous is the causal sequence that connected the defendant’s conduct to the result: the early exit from the freeway, the victim’s exposure to the gas station explosion, etc. Accordingly, the foreseeability test and the increased-risk test alike concern themselves with “the nature of the chain

53. See Joshua Dressler, *supra* note 47, at 957 (explaining that, in criminal law, the jury calculates the risk by “determin[ing] the extent of harm risked by the conduct discounted by its likelihood of occurring”); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 173 (5th ed. 1984) (observing that the “risk” posed by conduct is calculated “in light of the social value of the interest threatened, and the probability and extent of the harm”); Stephen R. Perry, *Risk, Harm, and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 321, 322 (David Owen ed., 1995) (defining risk as “the product of the probability of occurrence of the harm and the magnitude of the harm were it to occur ( $P \times H$ )”).

54. See Cardi, *supra* note 7, at 938 (“‘Reasonable foreseeability,’ as the term is commonly used, is a function of two separate effects: (1) the objective probability of an event occurring, and (2) a reasonable person’s knowledge and beliefs about that probability.”); Perry, *supra* note 53, at 326 (discussing the role of probability estimates in the foreseeability-centered conception of tort law).

55. See Cardi, *supra* note 7, at 970 (identifying the normative question posed by the foreseeability test as whether the defendant “ought to have considered,” before he acted, the possible outcome that ultimately transpired); W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 *VAND. L. REV.* 739, 799 (2005) (observing that “foreseeability determinations require . . . application of the standards and behavioral norms of the community”); Michael R. Quattrocchi & Robert F. Schopp, *Tarasaurus Rex: A Standard of Care That Could Not Adapt*, 11 *PSYCH. PUB. POL’Y & L.* 109, 117 (2005) (“Foreseeability is inherently normative in that in any circumstances foreseeability depends partially upon the weighing of policy considerations.”); Caroline A. Forell, *The Good News and the Bad News About Buchler v. Oregon Corrections Division*, 72 *OR. L. REV.* 919, 922 (1993) (“[R]easonably foreseeable, like offensiveness, presents the other kind of question—a normative question. Reasonably foreseeable ‘is a judgment of social standards’ about the conduct for which it is fair to hold a defendant responsible.”).

56. See *Jutzi-Johnson v. United States*, 263 F.3d 753, 756 (7th Cir. 2001) (“A person is not liable for such improbable consequences of negligent activity as could hardly figure in his deciding how careful he should be.”).

57. See *James v. Meow Media, Inc.*, 300 F.3d 683, 691 (6th Cir. 2002).

58. See *People v. Warner-Lambert Co.*, 414 N.E.2d 660, 666 (N.Y. 1980) (explaining that the foreseeability test, as applied in New York cases, is “concerned [with] the nature of the chain of particularized events which in fact led to the victim’s death[,]” not just with the probability that the defendant’s conduct would cause the victim’s death somehow); *MODEL PENAL CODE & COMMENTARIES*, pt. 1, § 2.03 cmt. 3, n.13 (AM. L. INST. 1985) (explaining that the proximate cause question must be posed in relation to the actual result’s “specific character and manner of occurrence”).

of particularized events which in fact led to the victim's [harm,]" not just with the result that lies at the end of the chain.<sup>59</sup>

Third, the "probabilities" at work in both the increased-risk and foreseeability tests are calculated from the perspective of the defendant at the moment of the wrongful act.<sup>60</sup> This is not to say, of course, that the jury merely assigns to outcomes the same probabilities the defendant himself assigned to them.<sup>61</sup> (If the probabilities that mattered were the probabilities assigned by the defendant himself, neither of the tests would impose liability except in cases where the defendant had consciously adverted to, and so had assigned a non-zero probability to, the very possibility that came to fruition.) Rather, the jury in criminal cases calculates the relevant probabilities on the basis of "the circumstances known to [the defendant]" at the moment of the wrongful act.<sup>62</sup> Though obviously rooted in the defendant's perspective *ex ante*, probabilities derived according to this Model Penal Code formula are objective in two critical respects. First, as John Maynard Keynes argued, and as the courts long have recognized, "once the facts are given which determine our knowledge, what is probable or improbable in these circumstances has been fixed objectively . . . ."<sup>63</sup> Second, since a belief by the defendant won't qualify as "knowledge" unless it also is objectively true, the known-circumstances formula calculates the probabilities only on the basis of facts and circumstances that are objectively true.<sup>64</sup>

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59. *Warner-Lambert Co.*, 414 N.E.2d at 666; *see also* *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010) (framing the increased-risk question not as whether the defendant's conduct increased the risk of death generally, but rather as whether the defendant's conduct "increase[d] the risk that *this* sort of mishap would occur").

60. *See* Crocker, *supra* note 38, at 100 ("[T]he key concept is probability—probability as it would be understood by ordinary persons antecedent to the event, with no special access to information about the facts of the event.").

61. *See* Perry, *supra* note 53, at 327 ("The radical subjectivist account assumes there is no objective conception of probability that extends beyond the weak constraints of the coherence requirement. On this view there is no general inter-subjective basis for distinguishing among risks, and hence no basis for holding someone morally responsible for risk creation.").

62. MODEL PENAL CODE § 2.02(2)(c), (d) (AM. L. INST. 1985) (requiring jury to evaluate risk on the basis of the "circumstances known to him" (*i.e.*, the defendant) in deciding whether the defendant acted recklessly or with criminal negligence). *See generally* Eric A. Johnson, *Knowledge, Risk, and Wrongdoing: The Model Penal Code's Forgotten Answer to the Riddle of Objective Probability*, 59 BUFF. L. REV. 507, 567 (2011) (discussing and defending "known circumstances" formula).

63. JOHN MAYNARD KEYNES, A TREATISE ON PROBABILITY 4 (1921). The idea that it is possible to derive agent-independent probabilities from a body of facts or circumstances defined by what the agent knows is uncontroversial, at least among lawyers. Johnson, *supra* note 62, at 532–33. It is commonplace for lawyers and judges to refer to the probabilities inherent in or generated by a body of facts or evidence, and to assume that it is possible to be wrong, or right, about these probabilities. *Id.* at 533–34; *see also* Perry, *supra* note 53, at 343 ("Epistemic probability judgments, in so far as they presuppose inter-subjectively valid standards of reasoning, can be characterized as objective.").

64. *See* ALFRED J. AYER, THE PROBLEM OF KNOWLEDGE 31 (1956) (defining knowledge to include, among others, a requirement "that what is known should be true"). Stephen Perry appears to overlook this possibility in his critique of the Keynesian "logical-relation understanding of epistemic probability." Perry, *supra* note 53, at 327–29. Perry acknowledges, naturally, that probability estimates can't have any "moral import" except to the degree that they're grounded in real-world facts. *Id.* at 328 ("[L]ogical truth cannot . . . have any moral import."). But he assumes that the only way of grounding probability estimates in real-world facts is by adopting a more-than-logical method for deriving probabilities from the "given body of evidence." *Id.* at 329. He overlooks the

In short, what the foreseeability and increased-risk tests have in common is that both pose questions about the *ex ante* probabilities associated with causal sequences. What distinguishes the two tests, meanwhile, is the nature of the specific *questions* they pose about these *ex ante* probabilities. The first critical difference between the two questions, as we've seen, is that the question posed by the increased-risk test is about *net* probabilities, while the question posed by the foreseeability test is about *gross* probabilities.<sup>65</sup> The increased-risk test just requires the jury to decide whether, within a particular part of the risk, the probability that the defendant's conduct would *cause* the harm was greater than the probability that the defendant's conduct would *avert* the same harm.<sup>66</sup> By contrast, the foreseeability test requires the jury to decide whether, within a particular part of the risk, the gross probability that the defendant's conduct would cause the harm exceeded a certain probability threshold.<sup>67</sup>

The second critical difference between the two tests concerns the nature of this probability threshold. Notice, first, that the only probability threshold involved in the application of the increased-risk test is the one derived from the probability calculation itself.<sup>68</sup> Under the increased-risk test, again, the jury need only compare two probability estimates—the probability that the defendant's conduct would *cause* the proscribed harm, and the probability that the defendant's conduct would *avert* the proscribed harm.<sup>69</sup> If the first exceeds the second, the increased-risk test is satisfied.<sup>70</sup> The foreseeability test, by contrast, doesn't provide the jury with a built-in descriptive probability threshold. Rather, after calculating the gross probability of harm, the jury needs to look elsewhere—outside the probability calculation itself—to decide whether this gross probability, as estimated, is high enough to trigger liability.<sup>71</sup> Where the jury looks is to community norms.<sup>72</sup> Once the jury has calculated the gross probability of harm, it has to decide whether this probability is great enough that the defendant really “should have” adverted to the risk before he acted.<sup>73</sup> This is the second critical

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possibility of tying the probability estimates to the real world by adding real-world facts to the factual setup—to the “given body of evidence” from which the probabilities are derived.

65. See *Brackett v. Peters*, 11 F.3d 78, 79 (7th Cir. 1993). See generally Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963 (2003); Benjamin C. Zipurksy, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009).

66. See LANDES & POSNER, *supra* note 34, at 230.

67. See *James v. Meow Media, Inc.*, 300 F.3d 683, 691 (6th Cir. 2002) (framing question as whether the outcome was “too improbable to be foreseeable”); Cardi, *supra* note 7, at 951 (“Some normative judgment is . . . required in determining how much epistemic probability is sufficient to render an actor outcome-responsible.”).

68. See *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010); Jacob Schuman, *Probability and Punishment: How to Improve Sentencing by Taking Account of Probability*, 18 NEW CRIM. L. REV. 214, 217–22 (2015).

69. See *Brackett*, 11 F.3d at 79.

70. See *id.*

71. See Owen, *supra* note 6, at 1292; Cardi, *supra* note 55, at 799.

72. See Cardi, *supra* note 55, at 799 (observing that “foreseeability determinations require . . . application of the standards and behavioral norms of the community”).

73. See 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI § 15.05 (7th ed., July 2019).

difference between the two tests: While the question posed by the increased-risk test is purely *descriptive*, the question posed by the foreseeability test is *normative*.

### III. THE AGGREGATION PROBLEM

The foreseeability and increased-risk tests have one more thing in common too, namely, an aggregation problem. Both tests require the jury somehow to situate the actual outcome in relation to other possible outcomes—to define the “part” of the risk in which the actual result is located.<sup>74</sup> The tests also have in common that proponents of both tests have, so far, failed to identify any determinate method of dividing risks into parts.<sup>75</sup> To this shared aggregation problem we now turn.

#### A. *Aggregation and Indeterminacy Under the Foreseeability Test*

As everybody agrees, the question posed by the foreseeability test can’t be whether the actual outcome—the specific causal sequence that connected the defendant’s wrongful conduct to the victim’s harm—was sufficiently probable *ex ante* to qualify as foreseeable.<sup>76</sup> Specific causal sequences, in all their details and all their twists and turns, nearly always are spectacularly improbable.<sup>77</sup> Part of the reason is that what actually happened at any particular turn in the causal sequence will be just one of, say, a thousand things that might have happened. But it’s when the individual mediating events are combined into causal sequences that the probabilities get *really* small.<sup>78</sup> To calculate the probability of the causal sequence as a whole, we’d basically have to *multiply* the probabilities of each of the individual events.<sup>79</sup> If the causal sequence was, say, just three steps long and the probability associated with each of the specific mediating events was, say,

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(framing critical question as whether “the defendant should reasonably have anticipated the later independent intervening [cause, force, or act]”); Cardi, *supra* note 7, at 970 (identifying normative question posed by foreseeability test as whether the defendant “ought to have considered,” before he acted, the possible outcome that ultimately transpired).

74. See Owen, *supra* note 6, at 1292.

75. See Cardi, *supra* note 7, at 951 (explaining that normative judgment is used to determine liability, not a clear test including risk division); Owen, *supra* note 6, at 1292.

76. See HART & HONORÉ, *supra* note 21, at 257 (“It is usually agreed that ‘it is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.’”); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 72, 100 (Gerald Postema ed., 2001) (“It . . . makes most sense to think that, in foreseeing possible future harm, we are not referring to particular harmful events but rather using a general description to pick out a certain type or category of harmful event.”).

77. MOORE, *supra* note 8, at 367 (explaining that even seemingly “foreseeable” causal sequences are highly improbable “if we describe the harm-event in enough detail”); Clarence Morris, *Duty, Negligence, and Causation*, 101 U. PA. L. REV. 189, 198 (1952) (explaining that the determination of whether an outcome is improbable or unforeseeable often will hinge on the level of specificity adopted in describing the event).

78. See Henry T. Terry, *Proximate Consequences in the Law of Tort*, 28 HARV. L. REV. 10, 28 (1914–15).

79. See *id.*

one in a thousand, or .001, then the probability of the causal sequence would be .000000001, or one in a billion.<sup>80</sup>

Consider how this calculation might play out in a case like the one described in the introduction, *People v. Rideout*.<sup>81</sup> Few of us would characterize the outcome in Rideout's case as unforeseeable.<sup>82</sup> But the probability associated with the *particular* chain of events that occurred in *Rideout* is spectacularly small, as Rideout's lawyer undoubtedly argued to the jury. How likely was it that Rideout would cross the centerline exactly where he did, rather than at some other location; that Rideout, after crossing the centerline, would encounter the car occupied by Jonathan Keiser, rather than some other oncoming car; that, after the collision, Keiser's car would wind up where it did, in the middle of the roadway; that Keiser's car would be left disabled and unlighted; that Keiser would try to turn on the disabled car's flashers; and that he then would be struck and killed by the very driver who struck and killed him, rather than some other driver? Even with the benefit of hindsight, the specific sequence of events that led to Keiser's death seems extraordinarily improbable.

If all specific causal sequences are improbable, though, how can we explain the fact that some causal sequences seem relatively probable, while others don't? The answer appears to be that when people ask about the probabilities of particular events, or a particular series of events, they're really asking about the probabilities associated with *aggregates* of events or series of events.<sup>83</sup>

To illustrate: Suppose you were to flip a coin ten times in succession. If you flipped ten straight heads, you probably would characterize this outcome as improbable.<sup>84</sup> If instead you got, say, six heads and four tails, in a random-seeming order, you probably *wouldn't* characterize this outcome as improbable. Your decision to characterize the first sequence as "improbable" and the second as "not improbable" is not, however, attributable to any difference in the probabilities associated with the two specific sequences of heads and tails. The second sequence, if exhaustively specified—as, say, "tails, heads, heads, tails, heads, heads, heads, tails, tails, heads"—was exactly as likely to come up as the sequence consisting of ten straight heads.<sup>85</sup> The probability of this or any other specific pattern coming up was 1/1024.

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80. See *id.* ("If the probability of the definitional consequence following the act was  $\frac{1}{2}$  and the probability of the violative consequence following the definitional one was also  $\frac{1}{2}$ , then the probability of the violative consequence being produced by the act was at the outset only  $\frac{1}{2} \times \frac{1}{2}$ , or  $\frac{1}{4}$ .")

81. *People v. Rideout*, 727 N.W.2d 630 (Mich. Ct. App. 2006), *rev'd in part*, 728 N.W.2d 459 (Mich. 2007).

82. See *People v. Rideout*, 728 N.W.2d 459, 460 (Mich. 2007) ("A reasonable jury could find that the actions of the decedent were foreseeable based on an objective standard of reasonableness.")

83. See DANIEL KAHNEMAN, THINKING FAST AND SLOW 115 (2011).

84. See *id.* (acknowledging an ordinary person's intuitive reaction to learning of two sequences of births at a particular hospital, "boy, girl, boy, boy, girl, boy" and "girl, girl, girl, girl, girl, girl": "Are the sequences equally likely? The intuitive answer—"of course not!"—is false. Because the events are independent and because the outcomes B and G are (approximately) equally likely, then any possible sequence of six births is as likely as any other.")

85. See *id.*

Was it wrong, then, to characterize the sequence consisting of ten straight heads as “improbable,” and the other sequence as “not improbable”? Not really. This way of characterizing the outcomes makes perfect sense if what we care about is the overall number of heads and tails, rather than the appearance of any specific sequence. Though any *particular* sequence of six heads and four tails has only a 1/1024 probability of showing up, there are lots *more* possible sequences consisting of six heads and four tails (210/1024—roughly a 20% chance) than there are possible sequences consisting of ten heads (just 1/1024—roughly a 0.1% chance).<sup>86</sup> If we were to graph the possible outcomes of our ten coin-flips in terms of overall number of heads, the graph would show a concentration of outcomes in the middle—around five heads, five tails—with very few outcomes at the ends.<sup>87</sup> When we refer to a particular sequence as “improbable,” what we mean is that it is located on a part of this graph where other similar outcomes are few.<sup>88</sup>

Adherents of the foreseeability test appear to assume that jurors charged with applying the foreseeability test will aggregate outcomes in roughly this way. “Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen,” they say.<sup>89</sup> Rather, the foreseeability test ultimately is concerned with the probabilities associated with “general types” of sequences.<sup>90</sup> In effect, then, the jury must (1) identify the “general type” of the causal sequence that actually connected the defendant’s wrongdoing to the injury; and (2) calculate the probability that one of the many possible sequences of this general type would occur. It is this aggregate probability, rather than the probability of the specific causal sequence, that bears on the foreseeability of the outcome.

This doesn’t work, unfortunately. The trouble is that the aggregation required under the foreseeability test is indeterminate in at least two ways. First, it’s indeterminate in that the foreseeability test doesn’t tell us *how similar* two sequences of events must be in order to count as similar—in order to be aggregated together, in other words.<sup>91</sup> As the Restatement (Third) of Torts put this,

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86. See Stephanie Glen, *Binomial Distribution: Formula, What Is It and How to Use It*, STAT. HOW TO, <https://www.statshowto.com/probability-and-statistics/binomial-theorem/binomial-distribution-formula/> (last visited Mar. 22, 2021) [<https://perma.cc/K3GC-3NYQ>].

87. See Eric W. Weisstein, *Binomial Distribution*, WOLFRAM MATHWORLD, <https://mathworld.wolfram.com/BinomialDistribution.html> (last visited Mar. 22, 2021) [<https://perma.cc/8GES-UD22>].

88. See *id.*

89. *Harless v. Ewing*, 452 P.2d 483, 485 (N.M. Ct. App. 1969); see also James & Perry, *supra* note 11, at 799.

90. See *Johnson v. State*, 224 P.3d 105, 105–06 (Alaska 2010) (identifying the relevant question as whether “a general type of harm was foreseeable,” rather than whether “the exact manner in which the actual harm occurred was foreseeable”); *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326, 1338 (Or. 1987) (“[F]oresight does not demand the precise mechanical imagination of a Rube Goldberg nor a paranoid view of the universe. . . . [T]he concept of foreseeability refers to generalized risks of the type of incidents and injuries that occurred rather than predictability of the actual sequence of events.”).

91. See HART & HONORÉ, *supra* note 21, at 80–81 (acknowledging that it’s difficult to decide what level of specificity to adopt in describing the result in question); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. i (AM. L. INST. 2010) (“No rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for purposes of this Section.”).

it's difficult to frame the probability question at the "appropriate *level* of generality."<sup>92</sup> In the *Rideout* case, for example, we arrive at the wrong answer if we frame the question too generally—as a question simply about the probability of "death," say, or of a "traffic accident."<sup>93</sup> But, as we've seen, we also arrive at the wrong answer if we frame the question too specifically—as a question about the probability of the specific causal sequence with all its twists and turns.<sup>94</sup> We have to adopt an in-between level of generality in posing this question.<sup>95</sup> Unfortunately, adherents of the foreseeability test have not developed a formula for identifying the right level of generality. Instead, they've simply said that the jury has to apply its best judgment.<sup>96</sup>

The foreseeability test also is undercut by a second, much more fundamental kind of indeterminacy. The foreseeability test doesn't just fail to tell us when two outcomes are similar *enough* to count as "of the same kind." It also fails to provide us with any criterion for judging similarity—for situating outcomes in relation to one another in the first instance. "Every reality has an infinity of aspects or properties,"<sup>97</sup> as William James said, and any of these aspects or properties can serve as a basis for aggregating events or objects into general types. In order to aggregate causal sequences into general types, then, we first must decide on what basis—according to what aspects or properties—to judge the similarity of the causal sequences.<sup>98</sup>

By way of illustration, consider our coin-flipping example, where both sorts of indeterminacy are present. To sort sequences of coin flips into general types, we'd first have to decide how similar two sequences must be to count as members of the same general type. We might have to decide, for example, whether a sequence with seven total "heads" was similar enough to a sequence with five total "heads" to count as a member of the same general type. This is our first sort of indeterminacy—indeterminacy in the required *degree* of similarity.

Of course, even the question whether two sequences are "similar enough" presupposes a criterion for judging similarity—a criterion for situating sequences in relation to one another. Until now, we've assumed without saying so that what

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92. RESTATEMENT (THIRD) OF TORTS § 29 cmt. i (emphasis added).

93. See *People v. Rideout*, 727 N.W.2d 630, 633 (Mich. Ct. App. 2006), *rev'd in part*, 728 N.W.2d 459 (Mich. 2007).

94. See *James & Perry*, *supra* note 11, at 798–99 (acknowledging that we'll be led astray if we define the outcome either too precisely or too generally—as, say, the "risk of a traffic accident" in a speeding case).

95. RESTATEMENT (THIRD) OF TORTS § 29 cmt. d ("If the harms risked by that tortious conduct include the general sort of harm suffered by the plaintiff, the defendant is subject to liability for the plaintiff's harm.").

96. See *id.* cmt. i ("Factfinders, no doubt, respond to these efforts with their own judgment and common sense to decide the appropriate specificity with which to assess the scope of liability."); *Cardi*, *supra* note 7, at 939 ("[T]he law provides no guide for determining the appropriate breadth of description."); see *Perry*, *supra* note 76, at 100 (arguing that finders of fact, in dividing events by type, "will take account of . . . the level of generalization that ordinary persons typically bring to bear in describing and categorizing relevant event-types"); Ernest J. Weinrib, *The Monsanto Lectures: Understanding Tort Law*, 23 VAL. U. L. REV. 485, 523 (1989) ("The most that courts can accomplish through abstract prescription is point out that foreseeability of 'the precise concatenation of events' is irrelevant, while also cautioning against setting up excessively broad tests of liability.").

97. *JAMES*, *supra* note 25, at 668–69.

98. *MOORE*, *supra* note 8, at 369.

matters is the overall number of heads and tails in the sequence. But it would be possible for someone to judge the similarity of the sequences according to quite different properties—according, say, to whether heads or tails predominated early in the sequence, or according to whether the last flip of the coin landed on heads or tails, or even according to where the coin landed on the table. None of these criteria for situating the sequences in relation to one another is more “valid” than any other. This is our second sort of indeterminacy—indeterminacy in how to judge similarity.

*B. The Supposedly Constraining Effect of Linguistic Convention*

Though there’s no *right* way, no valid way, of situating sequences of coin flips in relation to one another, there is, of course, a conventional way, namely, by situating the sequences according to the degree of their seeming randomness.<sup>99</sup> Human beings probably are hardwired by evolution to distinguish seemingly random configurations of objects or events from seemingly ordered configurations, as Daniel Kahneman has said.<sup>100</sup> The predisposition to detect patterns—to distinguish order from randomness, in other words—helps human beings to determine when someone has arranged things intentionally, or when natural laws are operating: “We are pattern seekers, believers in a coherent world, in which regularities . . . appear not by accident but as a result of mechanical causality or of someone’s intention.”<sup>101</sup> It’s not surprising, then, that most or all human beings tend to divide up sequences of heads and tails in the same way—according to the degree of their seeming randomness.<sup>102</sup>

According to foreseeability’s proponents, convention also constrains the sorting of causal sequences into general types.<sup>103</sup> None of the proponents of the foreseeability test appear to argue that there’s a “right” way of dividing up causal sequences into general types. None of them argue, for example, that causal sequences divide up into “natural kinds,” as some physical phenomena—animals, chemical elements, etc.—do.<sup>104</sup> Nor does anybody appear even to argue that causal sequences are divisible into “intuitive kinds,” in Quine’s phrase.<sup>105</sup> Nobody argues, that is, that humans are predisposed by innate endowment to divide

99. See KAHNEMAN, *supra* note 83, at 115.

100. See *id.*

101. *Id.*

102. See *id.*

103. See MOORE, *supra* note 8, at 369.

104. See Alexander Bird & Emma Tobin, *Natural Kinds*, STAN. ENCYCLOPEDIA PHIL. (Feb. 15, 2017), <https://plato.stanford.edu/entries/natural-kinds/> [<https://perma.cc/RVJ5-8MNC>] (“[T]he general problem [of natural kinds] is to determine which of the kinds to which science makes appeal, if any, correspond to real natural kinds—those existing in nature, so to speak—and which of these kinds are merely conventional—those whose boundaries are fixed by us rather than nature.”); *cf.* *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 686 (9th Cir. 1990) (“‘Property rights’ and ‘contract rights’ do not have independent existence in the world as natural kinds, detached from any consideration of human purposes.”).

105. See W.V. QUINE, *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 121–31 (1969) (introducing notion of an “intuitive kind” and arguing that learning wouldn’t be possible without “an innate standard of similarity” and “innate qualitative spacing of stimulations”).

up causal sequences in one way rather than another. Rather, foreseeability's proponents argue merely that members of the same linguistic community will tend, by virtue of their "shared conceptual scheme,"<sup>106</sup> to use the same words in sorting causal sequences into general types and will, for this reason, tend to converge in their judgments about foreseeability.<sup>107</sup> The claims of foreseeability's proponents about the constraining effects of linguistic convention are modest, moreover. They don't argue that convention makes the test wholly determinate. Rather, they argue, as Stephen Perry does, that the constraints imposed by our shared conceptual vocabulary make the test's indeterminacy "more manageable."<sup>108</sup> "[T]here is," Perry argues, "enough agreement, enough of the time, to make foreseeability a normatively useful concept."<sup>109</sup>

This isn't a terrible argument. If the members of the defendant's linguistic community really were predisposed by convention to sort causal sequences in one way rather than another, then these conventions presumably would constrain the defendant's perception of the risk *ex ante*. And if they constrained the defendant's perception of the risk *ex ante*, then they ought equally to inform the jury's answer to the normative question posed by the foreseeability test, namely, whether the defendant really "should have" adverted *ex ante* to the sort of risk that later transpired. The jury can't really demand of the defendant, after all, that he transcend the conventions that determine how members of his community sort risk. Accordingly, in answering the normative question whether the defendant "should have adverted" to a particular risk type—in deciding whether a sequence of the type that occurred was "too improbable to be foreseeable"<sup>110</sup>—the jury ought to divide up the world as the defendant would have.

This is the theory anyway. It's doubtful, though, whether the required sorts of linguistic convention actually exist. The English language doesn't appear to offer a wealth of concepts for categorizing extended causal sequences, as the *Rideout* case illustrates.<sup>111</sup> One is tempted to describe the causal sequence that led to Jonathan Keiser's death in *Rideout* as, say, a "secondary collision," or as a "collateral collision." Neither of these terms has entered common usage, though. Nor has any other like term, despite the regularity with which persons are killed or injured by other vehicles in the immediate aftermath of highway collisions.<sup>112</sup> If our shared conceptual scheme lacks concepts for classifying even

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106. Perry, *supra* note 76, at 100.

107. See HART & HONORÉ, *supra* note 21, at 258 ("[The class of harms which must be foreseeable] can be determined by reference to the generalizations which one would have recourse to in describing conduct as negligent"); Perry, *supra* note 76, at 100 ("It seems reasonable to think that the similarities among our individual conceptual schemes are vastly greater than the differences, and that this fact is bound to be reflected in the categories we use to anticipate events in the future."); MOORE, *supra* note 8, at 392 (responding to suggestions by Shavell and others that custom allows the jury to sort events definitively into categories and showing that custom in fact provides us with a multitude of different ways of categorizing events into kinds, and likewise of judging the similarity of events).

108. Perry, *supra* note 76, at 101.

109. *Id.*

110. James v. Meow Media, Inc., 300 F.3d 683, 691 (6th Cir. 2002).

111. See People v. Rideout, 727 N.W.2d 630 (Mich. Ct. App. 2006), *rev'd in part*, 728 N.W.2d 459 (Mich. 2007).

112. *Id.* at 632.

commonplace kinds of causal sequences, as it appears to, then it's hard to see how this conceptual scheme plausibly can constrain the jury's (or the defendant's) sorting of causal sequences into general types.

Perry himself gestures toward an answer to this riddle, though the answer doesn't ultimately help his case.<sup>113</sup> Perry suggests that the shared conceptual scheme that constrains the sorting of causal sequences might resemble the human tendency, remarked by J.L. Austin, "to perceive the world in terms of medium-sized dry goods, rather than break it down into larger, smaller, less stable, less contiguous, or more abstract entities."<sup>114</sup> Perry doesn't say more than this, but he easily might have. If the tendency remarked by Austin—to divide up the physical world into "medium-sized" objects—has a counterpart in our causal reasoning, that counterpart probably is a tendency to divide up the world into individual events, rather than extended causal sequences. This would explain why the English language lacks words for causal sequences like the one that transpired in *Rideout*. Maybe people just don't divide up the world that way. Maybe they divide up the world into individual events.

If this is right, though, it hurts the case for foreseeability. While the English language has too few concepts for categorizing causal sequences, it has too many concepts for categorizing individual events.<sup>115</sup> The availability of countless, equally legitimate ways of classifying the various individual events that constitute the steps in the causal sequence undercuts the supposedly constraining effect of our membership in the same linguistic community.<sup>116</sup> Worse, because every extended causal sequence includes multiple individual events, the jury will have to decide—without any guidance from the law—which of the various events in the sequence to emphasize or preference in classifying the causal sequence by "general type." Should the jury, for example, classify causal sequences according to the last event in the causal sequence? According to the first? According to the least probable event?

Consider how these difficulties might play out in a routine proximate cause case like *Brackett v. Peters*.<sup>117</sup> Randy Brackett was convicted of murder, and his conviction later was upheld both on direct appeal and on federal habeas review.<sup>118</sup> Brackett's victim was Elizabeth Winslow, who was eighty-five years old when Brackett broke into her home, raped and robbed her, and beat her severely with his fists.<sup>119</sup> After the attack, Winslow was hospitalized with a broken

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113. See Perry, *supra* note 76, at 100–01.

114. *Id.* at 100.

115. See MOORE, *supra* note 8, at 392 (arguing that our typology of events "is far too rich to do the discriminating work demanded").

116. See JOHN DUPRÉ, *THE DISORDER OF THINGS: METAPHYSICAL FOUNDATIONS OF THE DISUNITY OF SCIENCE* 18 (1993) ("My thesis is that there are countless legitimate, objectively grounded ways of classifying objects in the world."); MOORE, *supra* note 8, at 392 (arguing that custom provides us with a multitude of different ways of categorizing events into kinds, and likewise of judging the similarity of events).

117. See *Brackett v. Peters*, 11 F.3d 78, 80 (7th Cir. 1993).

118. *People v. Brackett*, 510 N.E.2d 877, 882 (Ill. 1987) (affirming state court murder conviction); *Brackett*, 11 F.3d at 82 (affirming denial of federal habeas corpus petition).

119. *Brackett*, 11 F.3d at 79.

arm, broken ribs, and bruises on her face, neck, arms, trunk, and thighs.<sup>120</sup> During the hospitalization that followed, Winslow's physical injuries began to heal, but she became depressed and resisted efforts to feed her.<sup>121</sup> As a consequence, her overall condition gradually deteriorated.<sup>122</sup> After Winslow was transferred to a nursing care facility, her physician recommended that a nasal gastric tube be used to feed her.<sup>123</sup> But her facial injuries made insertion of the tube too painful.<sup>124</sup> A few days later, and five weeks after the attack by Brackett, she asphyxiated as she was being fed pureed food by nursing home personnel.<sup>125</sup> A subsequent autopsy showed that she had aspirated six ounces of food into her trachea.<sup>126</sup>

If there's a conventional way of describing how Winslow died, it probably is in terms of the last event in the causal sequence—"death by choking on food," for example, or perhaps "death by asphyxiation." This was roughly how Brackett's attorneys described the causal sequence that led to Winslow's death.<sup>127</sup> But the question whether Brackett should have foreseen that his conduct would result in a "death by asphyxiation" is surely the *wrong* question, since it would produce the same answer for every possible death by asphyxiation. Most of us probably would agree with the jury and the appellate courts that Brackett should be held responsible for Winslow's death by asphyxiation.<sup>128</sup> But it's easy to imagine variations on the facts of *Brackett* where a death by asphyxiation would qualify as purely fortuitous. Suppose, for example, that Winslow had been well along on the road to recovery, and was nearly ready to be released, when she had choked on food as the result of gross misconduct by the nursing aid who prepared her food. What we ask of a test of proximate cause is that it distinguish these two cases—and that it get both cases right.

To this argument, foreseeability's proponents presumably would respond that the workings of linguistic convention are deeper and subtler than I've supposed.<sup>129</sup> It's not as simple, they'd say, as identifying a word or phrase that all jurors would use in identifying the causal sequence by general type; though we can't really know exactly *how* linguistic convention constrains the jury's judgments in a case like *Rideout* or *Brackett*, the constraining effects of linguistic convention are evident in the fact that, as Clarence Morris observed long ago, jurors usually agree about liability in easy cases at both ends of the spectrum.<sup>130</sup> On this view, if jurors have arrived at the same judgments about liability in a

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *People v. Brackett*, 510 N.E.2d 877, 880 (Ill. 1987) ("Briefly stated, the defendant claims that death was caused by an intervening event, namely asphyxiation, which was totally unrelated to the crimes of rape and aggravated battery, which the defendant acknowledges he perpetrated against Mrs. Winslow five weeks before she died.")

128. *See id.*; *Brackett*, 11 F.3d at 80.

129. Fowler Vincent Harper, *Foreseeability Factor in the Law of Torts*, 7 NOTRE DAME L. REV. 468, 470 (1932).

130. Morris, *supra* note 77, at 196–97.

particular case, they must all have sorted the causal sequences in roughly the same way.<sup>131</sup> Only if they had agreed on the causal sequence's general type, after all, could they have agreed on whether that general type of causal sequence was probable enough to require the defendant's attention *ex ante*.

This doesn't follow, of course. The jurors' tendency to agree about liability in the easy cases might have any of a number of explanations, even in cases where the jury is instructed to apply the foreseeability test. The foreseeability test asks jurors to bring their normative judgment to bear in deciding whether the defendant should have adverted to the sort of risk that transpired.<sup>132</sup> The jurors' agreement might, then, be attributable to normative intuitions that have nothing to do with "general types" of causal sequences or the gross probabilities associated with those general types. For all we know, these normative intuitions might be generated unconsciously by an algorithm that resembles Judge Posner's increased-risk test, or Hart and Honoré's "free, deliberate, informed intervention" test,<sup>133</sup> or even the distinction between "dependent" and "independent" intervening events.<sup>134</sup> It's easy, for example, to imagine jurors agreeing to impose liability in *Brckett* itself and agreeing *not* to impose liability in our hypothetical variation on *Brckett* despite categorizing both as cases of "death by asphyxiation." In short, jurors' agreement about the easy cases isn't necessarily evidence that their judgments about foreseeability are constrained by the hidden workings of complex linguistic conventions. It might just be evidence that they're unconsciously applying another, more determinate test.

Even if jurors' agreement in the easy cases were evidence that their classification of causal sequences is constrained somehow by linguistic conventions, this would hardly be reassuring. If these conventions aren't recoverable—if they're too deep or too complex to be brought to the surface—then it's difficult to know how to instruct the jury in cases where the proximate cause issue *isn't* easy. It's difficult to know, too, how to square the foreseeability test with the criminal law's beyond a reasonable doubt standard, or with the requirement that the criminal law be knowable.<sup>135</sup> Finally, it's difficult to reconcile ourselves to a test that falls so far short of what we had hoped for. What made the foreseeability test attractive at first glance was its seeming objectivity.<sup>136</sup> By framing its central

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131. See Perry, *supra* note 76, at 100–01 (arguing that "there is enough agreement, enough of the time, to make foreseeability a normatively useful concept" and suggesting that this agreement is attributable to the fact "that typical human beings, or at least typical persons within a given society, share a roughly similar way of conceptualizing the world in which they live").

132. Cardi, *supra* note 7, at 926.

133. See HART & HONORÉ, *supra* note 21, at 326 ("The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.").

134. See Eric A. Johnson, *Two Kinds of Coincidence: Why Courts Distinguish Dependent from Independent Intervening Causes*, 25 GEO. MASON L. REV. 77, 83–85 (2017) (explaining the role of the traditional distinction between dependent and independent intervening causes in the law of proximate cause).

135. See *Burrage v. United States*, 571 U.S. 204, 218 (2014) (suggesting that "uncertainty" of the kind associated with the "contribution" test of cause-in-fact "cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend").

136. See Cardi, *supra* note 7, at 923, 948–49.

question in terms of probabilities, the test seemed to give objective content to the idea of causal fortuity.<sup>137</sup> So it's disappointing to learn that the foreseeability test's answers to proximate cause questions actually have as much to do with the hidden workings of mysterious and unrecoverable linguistic conventions as they do with objective probabilities.

### C. *Aggregation Under the Increased-risk Test*

At first glance, the increased-risk test seems to face an aggregation problem just as intractable as the foreseeability test's. When the increased-risk test poses the question whether the risks created by the defendant's conduct were offset by the risks averted, it's obviously not asking about *all* the risks created and averted by the defendant's conduct. Again, if *all* the risks created by the defendant's conduct were offset by *all* the risks averted, the defendant's conduct wouldn't be wrongful at all—it wouldn't create an unjustifiable risk—and the jury therefore wouldn't have occasion to confront the proximate cause question.<sup>138</sup> Obviously, then, the increased-risk question has to be posed in relation to some discrete *part* of the risk. But identifying the relevant *part* of the risk seems to involve us in the same kind of difficulties as did identifying the outcome's "general type" under the foreseeability test.<sup>139</sup>

Neither Judge Posner's nor any other existing variant of the increased-risk test appears to solve this aggregation problem. In *Hatfield*, Judge Posner acknowledged that the increased-risk test required the division of the risk into parts: the defendant's conduct must increase the risks, he said, across a body of possible outcomes defined by the "sort of mishap" that occurred in the defendant's case.<sup>140</sup> To illustrate what he had in mind, Judge Posner constructed a hypothetical variation on the Hatfields' case.<sup>141</sup> In *Hatfield*, the defendants had been charged under 21 U.S.C. § 841(b)(1)(C) with causing the victims' death by selling them heroin.<sup>142</sup> The victims had died from drug intoxication, so there was little question whether the Hatfields' conduct was a proximate cause of their death.<sup>143</sup> But Judge Posner said the increased-risk requirement would not have been satisfied if the defendants' sale of illegal drugs had led, say, to a person's death from the collapse of a bathroom ceiling: "Suppose a defendant sells an illegal drug to a person who, not wanting to be seen ingesting it, takes it into his bathroom, and while he is there the bathroom ceiling collapses and kills him."<sup>144</sup> In applying the increased-risk test to this hypothetical case, Judge Posner appears

137. Owen, *supra* note 6, at 1287.

138. See MODEL PENAL CODE § 2.02(2)(c)–(d) (AM. L. INST. 1985) (requiring government to prove, as a component of recklessness and criminal negligence, that defendant's conduct created an "unjustifiable" risk); *id.* § 3.02 (recognizing choice-of-evils defense, which is available if the risks posed by the defendant's criminal conduct were outweighed by its benefits).

139. *Cf.* Johnson, *supra* note 134, at 83 n.39.

140. *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010).

141. *Id.* at 948–49.

142. *Id.* at 947.

143. *Id.* at 951.

144. *Id.* at 948.

to have defined the relevant part of the risk as the part involving “building accidents”<sup>145</sup>—that is, the part where the outcome of the Hatfields’ wrongdoing was mediated by a building accident. In other words, he divided up the outcomes just as the foreseeability test does—by general type.

Judge Posner appears to have applied the same method of dividing up the risk in *Brackett v. Peters*.<sup>146</sup> In *Brackett*, recall, the elderly victim of Brackett’s assault died in a nursing home five weeks after the assault from aspirating food into her trachea.<sup>147</sup> In his opinion for the Seventh Circuit panel, Judge Posner naturally concluded that Brackett’s assault qualified as a proximate cause of the victim’s death.<sup>148</sup> But he said the proximate cause requirement—that is, the increased-risk requirement—wouldn’t have been satisfied if, say, the victim had died in a fire at the nursing home, since “there would have been no greater danger of fire in a nursing home than in her own home . . . .”<sup>149</sup> In *Brackett*, then, as in *Hatfield*, Judge Posner divided the risk according to the “sort of mishap” that occurred; he defined the relevant part of the risk in the nursing-home-fire hypothetical as the part where the result of Brackett’s conduct was mediated by a “fire.”<sup>150</sup> Since a fire wasn’t any more likely to kill her at the nursing home than at her home, this part of the universe of possible outcomes wasn’t characterized by increased risk.

Other variants of the increased-risk test, too, appear to incorporate roughly the same “sort of mishap” approach to dividing the risk.<sup>151</sup> Take Section 30 of the Restatement (Third) of Torts, which adopts a variant of the increased-risk test, albeit as a supplement to the foreseeability test rather than as an alternative.<sup>152</sup> Section 30 provides that “[a]n actor is not liable for harm when the tortious aspect of the actor’s conduct was of a type that does not generally increase the risk of that harm.”<sup>153</sup> As a preliminary matter, notice that this version of the increased-risk requirement, which the Restatement’s drafters took from Judge Calabresi, adds a whole new layer to the aggregation problem by requiring the jury to classify the defendant’s *conduct* according to its general “type.”<sup>154</sup> In

145. *Id.*

146. 11 F.3d 78, 79, 82 (7th Cir. 1993).

147. *Id.* at 79.

148. *See id.* at 82.

149. *Id.* at 79–80.

150. *Id.*

151. *See, e.g., Crocker, supra* note 38, at 77–78 (framing the critical inquiry as whether the actual result “was a member of a *family* of bad results the probabilities of which are substantially increased by aiming one’s car at high speed at a pedestrian” (emphasis added)).

152. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 30 cmt. a (AM. L. INST. 2020) (“While § 29 contains the primary limitation on liability, this Section creates another limit on the scope of liability.”).

153. *Id.* § 30.

154. *Id.* The Restatement’s focus on the general type of conduct appears to be designed to introduce a kind of frequentist calculation into the mix. *See id.* at cmt. a (“The critical inquiry is whether the risks posed by the tortious conduct of the actor would, if repeated, make it more likely that harm such as that suffered by the other person would also occur.”). It uses “the general type of tortious conduct engaged in by the actor (e.g., speeding)” to define a kind of reference class, in relation to which it judges the question of increased risk. Jane Stapleton, *The Risk Architecture of the Restatement (Third) of Torts*, 44 WAKE FOREST L. REV. 1309, 1327 n.105 (2009); *see also* Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1491

classifying *conduct* according to general type, the jury naturally will face the same sorts of difficulties that juries face in dividing *outcomes* according to general type under the foreseeability test. The jury will have to decide, without guidance from the law, how narrowly or broadly to define the general “type” to which the defendant’s conduct belongs. And it will have to decide, again without guidance from the law, according to what aspects or properties to judge the conduct’s type.<sup>155</sup>

But this aggregation of cases according to the type of the defendant’s *conduct* is only a preliminary to the real aggregation problem. Like the foreseeability test, and like Judge Posner’s formulation of the increased-risk test, the Restatement’s causal-link requirement necessarily requires the jury to aggregate *outcomes* too. The text of Section 30 doesn’t say anything about the aggregation of outcomes. But the necessity of aggregating outcomes is apparent from the illustrations in the official comments to Section 30.<sup>156</sup> Take, for example, the Restatement’s falling-tree illustration, which is based on *Berry v. Sugar Notch Borough*.<sup>157</sup>

Gordie is driving 35 miles per hour on a city street with a speed limit of 25 miles per hour with Nathan as his passenger. Without warning, a tree crashes on Gordie’s car, injuring Nathan. Gordie’s speeding is a factual cause of Nathan’s harm because, if Gordie had not been traveling at 35 miles per hour, he would not have arrived at the location where the tree fell at the precise time that it fell. Gordie is not liable to Nathan because Gordie’s speeding did not increase the risk of the type of harm suffered by Nathan. The speeding merely put Gordie at the place and time at which the tree fell. This is true even if the type of harm suffered by Nathan might be found to be one of the risks arising from speeding in an automobile.<sup>158</sup>

When the Restatement’s authors say that Gordie’s speeding “did not increase the risk of the type of harm suffered by Nathan,” they obviously can’t mean that conduct of the general “type” engaged in by Gordie—speeding—doesn’t increase the risk of physical injuries generally or doesn’t increase the risk of the type of injury suffered by Gordie. So, it isn’t enough to classify Gordie’s “conduct” according to its general “type;” it isn’t enough to aggregate Gordie’s conduct with other “conduct” of the same “type.” If we want to isolate a part of the universe of possible outcomes that isn’t characterized by increased risk, we

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(2003). In addition to adding another layer of indeterminacy to the test, though, the required “generalization” of the defendant’s conduct needlessly obscures details that may be critical to his liability. In Judge Posner’s bathroom-ceiling hypothetical, for example, this approach would require the jury to ignore, presumably, the question whether the defendant actually was aware of the danger posed by the bathroom ceiling when he sold the drugs to the victim. Cf. HART & HONORÉ, *supra* note 21, at 70 (“[W]e often trace a causal connection between an antecedent and a consequent which themselves rarely go together . . . .”); *id.* at 170–72 (explaining that when the defendant anticipates or tries to bring about a seeming “coincidence,” the “designed conjunction” isn’t really a coincidence at all and therefore won’t cut off liability).

155. See Card, *supra* note 55, at 803.

156. RESTATEMENT (THIRD) OF TORTS § 30.

157. 43 A. 240, 240 (Pa. 1899).

158. RESTATEMENT (THIRD) OF TORTS § 30 cmt. a, illus. 1.

also have to divide outcomes according to the causal sequence linking the conduct to the result.<sup>159</sup> This, moreover, appears to be just what the Restatement's authors had in mind.<sup>160</sup> They appear to have assumed that the causal sequence in Gordie's case would be aggregated with other causal sequences of the same general type—namely, sequences where the speeding's only contribution to the injury was to put the driver in a different “place and time” than he would have occupied but for the speeding.<sup>161</sup> They appear to have contemplated, then, that causal sequences, like conduct, would be aggregated according to their general type.

The same assumption informs the recent work of Robert Cooter and Ariel Porat, who are proponents of the Restatement's causal-link requirement.<sup>162</sup> Cooter and Porat construct a hypothetical case where a doctor negligently decides to deliver a baby vaginally, even though the baby's evident large size warrants a C-section.<sup>163</sup> The baby dies during the vaginal delivery, but his death has nothing to do with his large size.<sup>164</sup> Rather, his death is attributable to a knot in the umbilical cord.<sup>165</sup> In the setup constructed by Cooter and Porat, vaginal delivery *does* increase the risk of death from a knot in the umbilical cord, but this increased risk usually is offset by other risks associated with C-sections.<sup>166</sup> Moreover, the doctor had no indication beforehand that the baby was at any enhanced risk of dying from a knot in the umbilical cord.<sup>167</sup> Nevertheless, Cooter and Porat say of this hypothetical case that the doctor should be liable, since her conduct—performing a vaginal delivery rather than a C-section—increased the risk of the general type of outcome that occurred, namely, “death by a knot in the umbilical cord.”<sup>168</sup>

Notice how this result is driven by the description adopted by Cooter and Porat of the outcome's general type. They reach the “no liability” conclusion only by framing the general type of the outcome as “death by a knot in the umbilical cord.”<sup>169</sup> If Cooter and Porat had described the outcome differently—as, say, a death resulting from factors unrelated to the baby's large size—they would have concluded that the doctor's conduct did *not* increase the risk of this type of harm. After all, as stipulated, the increased risks associated with vaginal delivery generally are offset by increased risks associated C-sections, except where the

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159. *Cf. id.* § 29 cmt. f.

160. *See id.* at cmt. a.

161. *Id.*

162. *See* ROBERT D. COOTER & ARIEL PORAT, GETTING INCENTIVES RIGHT: IMPROVING TORTS, CONTRACTS, AND RESTITUTION 55 (2014) (“Liability should be restricted to wrongdoing that increased the probability of the injury occurring.”).

163. *Id.* at 53.

164. *Id.*

165. *Id.*

166. This, presumably, is what Cooter and Porat mean when they say that the risk of death from a knot in the umbilical cord does not generally make vaginal deliveries “wrongful.” *Id.*

167. *Id.*

168. *Id.* at 54.

169. *Id.* (assigning dispositive import to the fact that “vaginal delivery increased the background risk of death by a knot in the umbilical cord”).

baby is unusually large.<sup>170</sup> Thus, the result is driven by how the jury decides to define the outcome's general type. It is driven, that is, by both (1) the level of generality adopted by the jury in characterizing the outcome, and (2) the aspects or properties according to which the jury judges the similarity of various possible outcomes.<sup>171</sup> Under Cooter and Porat's formulation of the increased-risk test, then, as under the Restatement's, the test is subject to exactly the same kinds of indeterminacy that undercut the foreseeability test.

Adherents of the Restatement's version of the increased-risk test as much as acknowledge that the necessity of aggregating outcomes by general type makes the test indeterminate.<sup>172</sup> Cooter and Porat, after discussing the umbilical-cord example, acknowledge candidly, albeit in a footnote, that the causal-link requirement provides no ready-made test for identifying an outcome's general type: "It is possible, of course, to concretize the risk and argue that the specific risk we should consider is not the baby's risk emanating from a knot in the umbilical cord but its risk emanating from a knot in the umbilical cord *that is typical to vaginal delivery*."<sup>173</sup> The comments to Restatement section 30 acknowledge the same problem. The comments say of the causal-link requirement just what they say of the foreseeability test,<sup>174</sup> namely, that the test requires care in defining the general type of the outcome: "[a]pplication of the principle in this section may require careful attention to, and description of, the risks created by the actor's conduct."<sup>175</sup> But "careful attention" is entirely beside the point. If there is no principled basis for distinguishing one description of the outcome's "general type" from another—for adopting one method rather than another of aggregating outcomes—then "careful attention" to the description accomplishes exactly nothing.

#### IV. HOW TO DIVIDE RISKS

During the nineteenth century, biologists faced an aggregation problem of their own, namely, how to divide up living things into categories.<sup>176</sup> Classic and medieval taxonomists divided up living things pretty much as adherents of the foreseeability test divide up outcomes: they divided them up according to their "affinities."<sup>177</sup> On this approach, the taxonomist's role was to "arrang[e] together those living objects which are most alike," and to "separat[e] those that are most

170. *See id.* at 53–54 (acknowledging that the risk of death from a knot in the umbilical cord does not generally make vaginal deliveries "wrongful").

171. *See id.* at 54.

172. *Id.* at 57.

173. *Id.* at 55 n.17 (emphasis added).

174. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. i (AM. L. INST. 2010) (acknowledging that "[n]o rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for purposes of this Section" but nevertheless emphasizing the importance of "careful reference to the risks that made the actor's conduct tortious").

175. *Id.* § 30 cmt. a.

176. DAVID QUAMMEN, *THE RELUCTANT MR. DARWIN: AN INTIMATE PORTRAIT OF CHARLES DARWIN AND THE MAKING OF HIS THEORY OF EVOLUTION* 64–65 (2006).

177. *Id.*

unlike.”<sup>178</sup> These affinities and disaffinities were thought to be attributable to God’s plan.<sup>179</sup> And so taxonomy was conceived of as “an endeavor to discover the laws according to which the Creator has willed to produce organized beings.”<sup>180</sup>

Darwin challenged this traditional view, of course. Efforts to divide up beings according to their affinities were meaningless, he said.<sup>181</sup> The only defensible way of classifying living beings, said Darwin, was to group them “according to their actual *relationship*, *i.e.*, their consanguinity, or descent from common stocks.”<sup>182</sup>

[T]he characters which naturalists consider as showing true affinity between any two or more species, are those which have been inherited from a common parent, and, all true classification is genealogical . . . . [C]ommunity of descent is the hidden bond which naturalists have been unconsciously seeking, and not some unknown plan of creation, or the enunciation of general propositions, and the mere putting together and separating objects more or less alike.<sup>183</sup>

What does this have to do with proximate cause? The answer is that the possible outcomes of a defendant’s conduct, too, can be divided up according to community of descent.<sup>184</sup> Moreover, when community of descent is used to divide up the risk—to define the “sort of mishap” involved in the defendant’s case—the defendant’s liability really does appear to depend, intuitively, on whether the defendant’s conduct “increase[d] the risk that *this* sort of mishap would occur.”<sup>185</sup>

Division of risks according to community of descent can take any of three forms, as I’ll explain below. First, possible outcomes can be divided up according to whether they are or aren’t descended from a particular mediating event.<sup>186</sup> This first technique for dividing outcomes enables the increased-risk test to handle so-called “dissipation of the risk” cases.<sup>187</sup> Second, outcomes can be divided up according to their *non*-descent from a particular extrinsic condition.<sup>188</sup> This second technique for dividing outcomes enables the increased-risk test to handle so-called “wrongful-aspect” cases.<sup>189</sup> Third, and finally, possible outcomes can be divided up according to *both* their descent from a shared mediating event *and*

178. DARWIN, *supra* note 40, at 492.

179. *Id.* at 492–93 (observing that many naturalists believe that this arrangement of living objects according to their affinities “reveals the plan of the Creator”).

180. Charles Darwin, *Letter from Darwin to G.R. Waterhouse*, in CHARLES DARWIN, CORRESPONDENCE, VOL. II: 1837–1843 (Frederick Burkhardt & Sydney Smith, eds., 1987).

181. *See id.*

182. *Id.*

183. DARWIN, *supra* note 40, at 499.

184. *See* Israel Gilead & Michael D. Greene, *Positive Externalities and the Economics of Proximate Cause*, 74 WASH. & LEE L. REV. 1517, 1544–45 (2017) (mentioning twice, but not discussing, the possibility of dividing up risks according to “causal chains”).

185. *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010).

186. *See* discussion *infra* Section IV.A.

187. *See* discussion *infra* Section IV.A.

188. *See* discussion *infra* Section IV.B.

189. *See* discussion *infra* Section IV.B.

their non-descent from a particular extrinsic condition.<sup>190</sup> Combining the two techniques in this way enables the increased-risk test to handle cases that otherwise would elude proximate cause analysis.

*A. Dividing Risks According to Their Descent from a Particular Mediating Event*

A defendant's wrongful act sets in motion a whole universe of possible causal sequences. Suppose, again, that a motorist fires a gun at another motorist on a busy freeway. In this scenario, the gunshot fired by the defendant sets in motion a number of distinct causal forces.<sup>191</sup> The bullet itself might strike the motorist who was the defendant's target; it might strike an occupant of another car; or it might ricochet off the pavement and enter a nearby building. Even as the bullet is continuing its travels, however, the gunshot also will have set in motion discrete sequences of events that have nothing to do with the bullet's pathway. The gunshot might, for example, engender fear in the driver who was the gunshot's target. This fear might cause the driver to take evasive action: he might veer sharply away from the direction of the gunshot, or he might brake suddenly. Worse, he might decide to return fire. He might also decide just to leave the freeway at the next available exit.

Each of these possible consequences of the shooting will lead, in turn, to other possible consequences. Suppose, for example, that the fear engendered by the gunshot causes the motorist who was the intended target of the shooting to brake suddenly. This motorist's braking will cause his own car to behave in a particular manner, of course. But it also will cause other nearby motorists to react. A motorist traveling behind the intended target might brake too, for example, and this other motorist's braking might cause yet another motorist to veer so sharply that his car overturns. Alternatively, a near collision might just cause this third motorist to think about the shortness of life, as a result of which he decides to propose to his girlfriend later that day. From this momentous decision, anything might follow—"[t]he broken wall, the burning roof and tower [a]nd Agamemnon dead," perhaps.<sup>192</sup>

As we've described it so far, the universe of possible causal sequences is like a family tree with lots and lots of branches.<sup>193</sup> The defendant's wrongful act

190. See discussion *infra* Section IV.C.

191. Cf. *Marshall v. Nugent*, 222 F.2d 604, 610–11 (1st Cir. 1955) (Magruder, C.J.) ("Regarding motor vehicle accidents in particular, one should contemplate a variety of risks which are created by negligent driving. There may be injuries resulting from a direct collision between the carelessly driven car and another vehicle. But such direct collision may be avoided, yet the plaintiff may fall and injure himself in frantically racing out of the way of the errant car. Or the plaintiff may be knocked down and injured by a human stampede as the car rushes toward a crowded safety zone. Or the plaintiff may faint from intense excitement stimulated by the near collision, and in falling sustain a fractured skull. Or the plaintiff may suffer a miscarriage or other physical illness as a result of intense nervous shock incident to a hair-raising escape. This bundle of risks could be enlarged indefinitely with a little imagination." (citations omitted)).

192. WILLIAM BUTLER YEATS, *THE COLLECTED POEMS OF W.B. YEATS* 182 (2008).

193. For criticism of the use of physical metaphors—chains, branches, etc.—in theorizing about proximate cause, see Arthur L. Goodhart, *The Unforeseeable Consequences of a Negligent Act*, 39 *YALE L.J.* 449, 467 n.8 (1930) (criticizing judges' and scholars' use of metaphors in describing causal processes: "To the present writer

will have lots of possible direct “descendants,” so to speak—the bullet striking the intended target’s windshield, for example, and the sound of the gunshot reaching the ears of other drivers. Each of these possible direct descendants will, in turn, have lots of other possible descendants. And so on down through the generations. Every possible adverse outcome of the defendant’s conduct—every possible instance of the harm proscribed by the applicable statute—will be traceable back to the defendant’s wrongful act through a series of intermediate descendants of the defendant’s conduct. It will be traceable back, in other words, through a series of mediating events.

Causal descent, then, provides a way of dividing causal sequences. Just as we can sort a person’s great-grandchildren according to whether they share or don’t share a particular intermediate ancestor, so too we can sort the possible consequences of a defendant’s wrongful conduct according to whether they are or aren’t produced by the same mediating event.<sup>194</sup> In other words, we can divide up all the possible causal sequences set in motion by the defendant’s conduct according to whether they include, or don’t, a particular mediating event. For example, we could divide up all the possible causal sequences set in motion by the freeway shooting according to whether they include or don’t, as one of the mediating steps in the causal sequence, the intended target’s decision to exit the freeway where he did.

So how would we use this method of dividing risks to answer the increased-risk question? Recall, first, that the part of the risk that concerns us is the part where the actual outcome is situated. The question under the increased-risk test, again, is whether the actual outcome was situated in a part of the universe of possible outcomes that is characterized by increased risk.<sup>195</sup> To define the part of the risk where the actual outcome is situated, we’d use one of the mediating events in the actual causal sequence.<sup>196</sup> The relevant part of the risk, then, would be the set of all *possible* outcomes that have this mediating event in common with the *actual* outcome.<sup>197</sup> In our freeway-shooting hypothetical, for example, if the actual result was mediated by the intended victim’s decision to exit the freeway, then the relevant part of the risk would be the set of all possible outcomes of this decision to exit the freeway. The question posed by the increased-risk test would just be whether this decision to exit the freeway increased the risk—whether it created more risks than it averted.

This calculation of the probabilities associated with a particular mediating event probably sounds complicated. But it’s nothing the jury doesn’t already do. In cases where the jury is charged with evaluating the wrongfulness of the defendant’s conduct—in recklessness and criminal negligence cases, for example, and in cases where the defendant raises a justification defense—the jury already

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proximate cause is neither a chain nor a net nor a river, but is a labyrinthine maze. With all respect, may we not question the validity of a legal concept which cannot be defined in precise and accurate terms but which must be described by a series of conflicting analogies?”).

194. See Gilead & Greene, *supra* note 184.

195. See Goldberg, *supra* note 36, at 2061.

196. See Landes & Posner, *supra* note 33, at 112.

197. *Id.*

is required to conduct a kind of Hand-formula balancing of *all* the risks and benefits of the defendant's conduct.<sup>198</sup> When the jury performs this Hand-formula balancing, it necessarily will consider all the possible ways the defendant's conduct might have caused the proscribed result—all the possible causal sequences that might, *ex ante*, have led from the defendant's wrongdoing to the result.<sup>199</sup> The probabilities associated with each of these sequences will depend on the probabilities associated with the sequence's constituent mediating events, of course.<sup>200</sup> So we can imagine the jury's risk analysis as a stepwise calculation of probabilities associated with the events in the causal sequence.<sup>201</sup>

The jury's application of the increased-risk formula will, as we picture it, piggy-back on its application of the Hand formula. When the jury turns from the question of wrongdoing to the question of proximate cause—from the application of the Hand formula to the application of the increased-risk test—the jury will narrow its focus from the countless ways that the defendant's wrongdoing *might* have caused the proscribed result to the specific sequence of events that the jury knows, *ex post*, to have actually mediated the causal connection between the wrongdoing and the result.<sup>202</sup> With respect to each of these actual mediating events, though, the jury will calculate the probabilities—of risks averted, risks created, etc.—from the very perspective it adopted when it applied the Hand formula, namely, the defendant's perspective *ex ante*. The jury will decide whether the probability *ex ante* that the mediating event would cause the proscribed result to occur exceeded the probability *ex ante* that the event would avert the proscribed result—would cause the result *not* to occur.<sup>203</sup>

Consider, for example, our introductory freeway-shooting hypothetical, where the intended target of the shooting later was killed in a gas station explosion. In this scenario, one of the events that mediated the connection between the shooting and the death was the victim's decision to leave the highway. It's possible, then, to define the relevant part of the risk as the set of all possible causal sequences that share this mediating event with the actual causal sequence. It's possible, in other words, to define the relevant part of the risk as the set of all possible outcomes of this decision to exit the freeway. The question under the increased-risk test would be just whether this set of possible outcomes is characterized by increased risk—whether this mediating event created an increased

198. See Dressler, *supra* note 47, at 957 (“To determine justifiability [in connection with recklessness], we conduct a criminal law version of the Learned Hand formula for measuring civil negligence . . .”).

199. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 4 cmt. g (AM. L. INST. 2010) (acknowledging the jury will have to assign probabilities to events that lie along the various causal pathways connecting the conduct to harm: “In many situations, the likelihood of eventual harm depends in part on the likelihood of various events that may occur between the time of the actor's alleged negligence and the time of the harm itself.”).

200. See Terry, *supra* note 78, at 28.

201. See *id.* (“If the probability of the definitional consequence following the act was  $\frac{1}{2}$  and the probability of the violative consequence following the definitional was also  $\frac{1}{2}$ , then the probability of the violative consequence being produced by the act was at the outset only  $\frac{1}{2} \times \frac{1}{2}$ , or  $\frac{1}{4}$ .”).

202. See RESTATEMENT (THIRD) OF TORTS § 3; United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947)

203. See COOTER & PORAT, *supra* note 162, at 53; Cardi, *supra* note 7, at 950–51.

risk, in other words. It didn't, of course. From the defendant's perspective *ex ante*, the risk that the victim would be killed—by a gas station explosion or otherwise—was no greater at this freeway exit than at any other. Which means that the risks *averted* by the victim's decision to leave the freeway were just as great as the risks created by this decision. Accordingly, under the increased-risk test, the defendant would not be responsible for outcomes that lay on this causal branching.

Of course, a particular outcome won't usually lie downstream of just a single mediating event. The result usually will be separated from the defendant's conduct by several "branchings" of the causal "family tree."<sup>204</sup> So the question arises: Which of these several mediating events, or branchings, ought we to consider in dividing the risk? The first? The last? Common sense and the cases both point toward the same answer, namely, that if *any* of the mediating events that connect the defendant's conduct to the result does not produce net increased risk *ex ante*, then the defendant is not responsible for the outcome.<sup>205</sup> This answer is in keeping with the basic idea behind the increased-risk test: namely, that a particular part of the risk can't contribute to the risk that "makes the conduct wrongful"<sup>206</sup> if, within that part, the risks created are no greater than the risks averted.<sup>207</sup> This insight applies equally with respect to any discrete, identifiable part of the risk. Each event in the causal sequence connecting the conduct to the result defines a discrete, identifiable part of the risk, consisting of all possible outcomes that lie downstream of that event.

This answer—that a defendant isn't responsible if any of the mediating events in the causal sequence does not produce net increased risk—also makes sense intuitively. Consider again our freeway-shooting hypothetical, in which the shooting causes the would-be victim to stop at a nearby gas station, where he is injured by an explosion. The early events in this causal sequence—the defendant's firing of the gun, for example—obviously are characterized by increased risk. So too are the later events in the causal sequence—the burns suffered by the victim in the explosion, for example. What makes the victim's death in this scenario fortuitous is that *one* of the events connecting the shooting to the would-be victim's death wasn't characterized by increased risk, namely, the victim's decision to leave the freeway at the nearest exit rather than another, later exit. In the event, of course, the would-be victim's decision to exit where he did caused his death in the gas station explosion. But it might just as easily have averted risks posed by other exits and other gas stations.

The test also explains nicely why some results *aren't* fortuitous. Take *People v. Rideout*,<sup>208</sup> for example, where, again, Jonathan Keiser was struck and killed by another driver in the immediate aftermath of an accident caused by

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204. See discussion *infra* Section IV.A.

205. For discussion of the relevant cases, see *supra* text accompanying notes 212–220.

206. Goldberg, *supra* note 36, at 2061.

207. For elaboration of this point, see *infra* text accompanying notes 288–292.

208. 727 N.W.2d 630, 632 (Mich. Ct. App. 2006), *rev'd in part*, 728 N.W.2d 459 (Mich. 2007).

drunk-driver Kevin Rideout. The question under our formulation of the increased-risk test would be whether any of the events in the causal sequence—any of the events in the sequence of events that linked Rideout’s conduct to Keiser’s death—did not itself create an increased risk of the proscribed result. In *Rideout*, as it happens, each of the events in the causal sequence *did* pose an increased risk. By the time the fatal crash occurred, Rideout himself was out of commission on the side of the road.<sup>209</sup> But the danger hadn’t dissipated. Keiser’s unlit car, stranded in the middle of a state highway at night, posed a substantial continuing hazard to drivers and, ultimately, to Keiser.<sup>210</sup> Our formula produces the right result in *Rideout*, then. Rideout ought to be held criminally liable for the death of Keiser, as indeed the jury at Rideout’s trial concluded, albeit on the basis of flawed jury instructions.<sup>211</sup>

This formula doesn’t just deliver the right results in cases like Rideout’s, however. It’s also consistent with what courts, both in the United States and abroad, *say* sometimes in reaching results like these.<sup>212</sup> Courts in the United States often have said that a defendant won’t be held responsible for a result if the forces that made the conduct wrongful had “dissipated,”<sup>213</sup> or “come to rest,”<sup>214</sup> at any point before the result occurred—at any point in the causal sequence, that is. Scholars have rightly been skeptical of metaphors of motion and

209. *Id.*

210. *See id.* (“Reichelt indicated that he was aware that oncoming cars could hit his darkened car and that he wanted to determine if he could turn on the flashers.”).

211. *Id.* at 633. One of the mediating events in Rideout—namely, Keiser’s attempt to turn on the disabled car’s flashers—seems at first glance not to create increased risk *ex ante*. After all, if the attempt to turn on the flashers hadn’t seemed likely to avert more risks than it created, Keiser presumably wouldn’t have undertaken it. This will be true more generally in any case where the risk created by the defendant leads to an attempted rescue and the attempted rescue in turn leads to an adverse outcome. Attempted rescues, unless they’re badly misconceived, tend to decrease risk, not increase it. Why, then, are defendants generally not responsible for deaths mediated by an attempted rescue? *See* HART & HONORÉ, *supra* note 21, at 335–36 (observing that attempted rescues usually will not break the causal chain). The problem with our provisional analysis of Keiser’s attempted rescue is that we’re effectively giving Rideout credit for averting deaths that wouldn’t have needed averting if not for the defendant’s original wrongful act. To fix this problem, we need to recognize that whether something counts as a cost or benefit—as a risk created or a risk averted—depends on whether it counts as an improvement on the situation that would’ve existed if the defendant hadn’t acted at all, not just on whether it counts as an improvement on the situation that would’ve existed if the event that marks the branching hadn’t occurred. When we apply the increased-risk test, we’re comparing: (1) the probability that mediating event *D* will cause a death that wouldn’t have occurred but for the defendant’s act *A*; and (2) the probability that mediating event *D* will avert a death that would have occurred but for defendant’s act *A*. On this revised comparison, the defendant won’t get credit for averting a death via *D* if the death wouldn’t have occurred but for his conduct. And the defendant won’t be charged with a death caused via *D* if the death would have occurred without his conduct.

212. *See, e.g.,* Crooker v. Graft, 394 F.2d 2, 3 (9th Cir. 1968); Henningsen v. Markowitz, 230 N.Y.S. 313, 314 (Misc. 1928); *see also infra* notes 217–220 and accompanying text (discussing international approaches).

213. *See Crooker*, 394 F.2d at 3 (“The risk created by appellee’s negligence, under the findings, was dissipated when the plane was safely landed and rolling to a stop.”); John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1640 n.43 (2002) (“The idea . . . is that at a certain point the risks lurking within a wrongful act dissipate even though, as a matter of fact, the wrongful act ends up being a necessary step in a causal sequence leading to an injury unrelated to the risk.”).

214. *See Henningsen*, 230 N.Y.S. at 316 (observing that the “active force” set in motion by the defendant’s illegal sale of a gun to a child had “come to rest” when the child’s mother took the gun from him); Joseph H. Beale, *The Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 651 (1920) (“[W]here the defendant’s

rest and causal “force,”<sup>215</sup> but the basic idea at work in these cases is sound. When one of the events that mediates the causal relationship between the conduct and the result poses no net increased risk, the defendant’s responsibility comes to an end, as Richard Epstein explains:

[W]hen a traffic accident creates a blockage and confusion on a back country road, D may (indeed should) be held liable for P’s loss until she extricates herself from the dangerous situation, but not for the harm that occurs after she resumes her journey under normal road conditions. The traffic tie up creates immediate extra risks that are not offset by any risk reduction elsewhere. The mere fact of delay creates some risks but eliminates others, so that, on balance, the only uncompensated risk is the loss of time . . . .<sup>216</sup>

European courts have said much the same thing about the dissipation of risk. In Germany, for example, courts sometimes apply the “principle of continuity,” which requires that the result “be connected with the perpetrator’s illicit behavior by a chain of illicit circumstances.”<sup>217</sup> French law, meanwhile, has been influenced by Dejean de la Bâtie’s “continued spread of evil” theory, which is addressed to “the problem posed by long sequences of events.”<sup>218</sup> Under de la Bâtie’s theory, the defendant is liable for a result only if each of the events that occurs “between the initial act and the damage . . . contain an element of unlawfulness that explains the unlawfulness of the subsequent fact. Otherwise, the causal chain must be considered as broken.”<sup>219</sup> The French and German practice of referring to mediating events as “illicit” or “unlawful” is somewhat off-putting. After all, it’s the defendant’s conduct that’s wrong or unlawful, not the mediating events. But this phraseology obviously is intended to capture the same basic point as the increased-risk formula: each step in the causal sequence must

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active force has come to rest in a position of apparent safety, the court will follow it no longer; if some new force later combines with this condition to create the harm the result is remote from the defendant’s act.”)

215. HART & HONORÉ, *supra* note 21, at 96–97. For a wonderful illustration of the mischief done by metaphors of force and rest in the law of causation, see *Rideout*, 727 N.W.2d at 635–3. The Michigan Court of Appeals in *Rideout* appears to have concluded that the causal forces set in motion by a drunk driver had “come to rest” as soon as the cars involved in the collision stopped moving.

216. RICHARD A. EPSTEIN, TORTS § 10.7, at 261 (1999); see also Brett R. Nolan, *Are Railroads Liable When Lightning Strikes?*, 79 U. CHI. L. REV. 1513, 1546 (2012) (arguing that a tort defendant’s liability ends when the “excess risk” created by the defendant’s act of negligence “subside[s]”); cf. *Bussard v. Minimed, Inc.*, 129 Cal. Rptr. 2d 675, 681 (Cal. Ct. App. 2003) (holding that an employer’s vicarious liability for harms engendered by a work-site accident “follows the employee until the work-spawned risk dissipates”).

217. Ingeborg Puppe, *Negligence and Responsibility in German Road Traffic Law*, 11 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 151, 162 (2003) (“This is the principle of continuity. We can require that the result must be connected with the perpetrator’s illicit behaviour by a chain of illicit circumstances.”).

218. Duncan Fairgrieve & Florence G’Sell Macrez, *Causation in French Law: Pragmatism and Policy*, in PERSPECTIVES ON CAUSATION 111, 119 (Richard Goldberg ed., 2011) (“Dejean de la Bâtie defended a theory of causation based on the idea of unlawfulness or abnormality. Dejean de la Bâtie called this idea ‘the continued spread of evil’ (*l’empreinte continue due mal*). His theory was intended primarily to resolve the problem posed by long sequences of events. Dejean de la Bâtie believed that when many events occur between the initial act and the damage, each of these facts must contain an element of unlawfulness that explains the unlawfulness of the subsequent fact. Otherwise, the causal chain must be considered as broken.”).

219. *Id.*

be a social “evil” in the sense that it’s more likely, *ex ante*, to cause harm than to avert harm. Each step must be characterized by increased risk.<sup>220</sup>

*B. Dividing Risks According to Non-Descent from a Specific Extrinsic Condition*

Dividing the risks according to descent from a common mediating event doesn’t produce the right answer in every proximate cause case. Suppose that, in *Rideout*, Keiser hadn’t been struck by another car but instead had been struck by lightning as he was trying to turn on the flashers in his disabled car.<sup>221</sup> In this variation, Rideout’s drunk driving is still a cause-in-fact of the result: if Rideout hadn’t driven drunk and collided with Keiser’s car, Keiser would have been miles away, and safely inside his car, when the lightning struck. But in this variation the causal connection between Rideout’s conduct and the victim’s death seems too fortuitous to satisfy the proximate-cause requirement. Unfortunately, our tentative formulation of the increased-risk requirement seems not to treat this result as fortuitous. The risk that somebody would be struck by an oncoming car, or that an oncoming car would strike Keiser’s car, persisted throughout the sequence of the events that connected Rideout’s conduct to Keiser’s death from lightning. In other words, the risk traveling along this causal “branch” doesn’t appear to have dissipated by the time the lightning struck.

Roughly the same thing appears to be true of Judge Posner’s bathroom-ceiling hypothetical from *Hatfield*.<sup>222</sup> In the bathroom-ceiling hypothetical, the increased risk appears to persist throughout the sequence of events that mediates the connection between the heroin deal and the purchaser’s death. Each of the events in this sequence—the purchaser’s departure for the bathroom, the arrival in the bathroom, etc.—also represents a step toward the purchaser’s ingestion of the heroin, which would pose a massively increased risk to the purchaser. In other words, as of the moment the bathroom ceiling collapsed on the purchaser, the increased risk traveling along this causal “branch” doesn’t appear to have dissipated. In this case, too, then, our tentative formulation of the increased-risk test delivers the wrong answer.

So what went wrong? Why does the increased-risk test, as we’ve formulated it until now, fail to provide the right answer in the bathroom-ceiling hypothetical and the lightning-strike variation on the *Rideout* case? Notice first what these two hypotheticals have in common. In both cases, although the critical mediating events *do* pose an increased risk, this increased risk inheres in specific extrinsic conditions that don’t ultimately play any role in the victim’s death. In the bathroom-ceiling case, the increased risk posed by the heroin purchaser’s departure for the bathroom inhered exclusively in the heroin’s intoxicating properties; these properties, however, ultimately played no role in the purchaser’s death from trauma. Likewise, in the lightning-strike hypothetical, the increased

220. See Goldberg, *supra* note 36, at 2061.

221. Cf. HART & HONORÉ, *supra* note 21, at 462 (discussing lightning as illustration of coincidental causal intervention).

222. *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010).

risk posed by Keiser's disabled and unlighted car inhered exclusively in the fact that a roadway traveled through the spot where the car was stranded. But this condition—the presence of the roadway underneath the car—ultimately played no role in Keiser's death by lightning.<sup>223</sup>

This shared feature of the two cases—that the enhanced risk posed by the causal sequence is attributable entirely to an extrinsic condition that ultimately plays no role in bringing about the result—suggests the solution. The solution is to pose the increased-risk question not in relation to the set of all possible outcomes that lie causally downstream of a particular mediating event but, rather, in relation to a subset of this set of possible outcomes. To put this slightly more precisely, the solution is to pose the increased-risk question of a subset of possible outcomes consisting of just those outcomes that (1) were descended from a particular mediating event; but (2) were *not* descended from the risk-increasing extrinsic condition.

What does it mean, exactly, for an outcome to be “descended” from a particular extrinsic condition? When first we talked about the universe of possibilities created by the defendant's conduct, we focused exclusively on what the courts call “dependent” or “responsive” intervening events.<sup>224</sup> We focused, that is, on the events that (1) mediate the causal connection between the conduct and the result and (2) also are *caused by* the defendant's conduct.<sup>225</sup> In the bathroom-ceiling hypothetical, for example, the heroin purchaser's departure for the bathroom mediates the causal connection between the defendant's conduct and victim's death and also is itself caused by the defendant's conduct.<sup>226</sup> And in the *Rideout* case, the presence of Keiser's disabled car in the roadway mediated the causal connection between Rideout's wrongdoing and the victim's death and also was itself caused by Rideout's death.<sup>227</sup> There's nothing misleading about this picture of the defendant's conduct as setting in motion a series of dependent intervening or mediating events. But this picture leaves something out too. The defendant's voluntary act, by itself, doesn't bring about these mediating events, conditions, and states of affairs. Rather, at every step, the defendant's conduct combines with conditions *extrinsic* to the defendant's voluntary act—conditions

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223. See EPSTEIN, *supra* note 216, § 10.7 at 261–62 (describing a class of cases “where D creates some hazardous condition but is nonetheless free from liability given the way that the harm unfolds”—and arguing that what makes liability inappropriate in these cases “is that the aspect of the situation that makes D's conduct improper—the risk created—is not the risk that materializes in the fullness of time”).

224. See LAFAYE, *supra* note 1, § 7.5(d) at 676.

225. Terry, *supra* note 78, at 20 (“The principal cause seldom or never produces the consequence directly, but through a chain of intermediate causes, each of which is a consequence of the preceding one and a cause of the next.”); *cf.* Milwaukee & Saint Paul Ry. Co. v. Kellogg, 94 U.S. 469, 476 (1876) (“In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time.”).

226. *Hatfield*, 591 F.3d at 948.

227. *People v. Rideout*, 727 N.W.2d 630 (Mich. Ct. App. 2006), *rev'd in part*, 728 N.W.2d 459 (Mich. 2007).

not set in motion or caused to exist by the defendant's act—to bring about the subsequent step in the causal sequence.<sup>228</sup>

Suppose, for example, that the defendant kills the victim by firing a pistol at him, point blank. Despite the seeming directness of the causal relationship between this defendant's conduct and the victim's death, the causal relationship is mediated by a "causal chain" consisting of dependent intervening events. The defendant's voluntary act, which sets this sequence in motion, is just the crooking of his forefinger.<sup>229</sup> This crooking of the forefinger causes the gun's trigger to move, which causes the gun's hammer to fall, which in turn causes the gunpowder in the cartridge to explode, which causes the bullet to leave the gun at high velocity. I could go on, exploring the physiological events set in motion by the bullet's impact with the victim's body, but you probably get the picture. The defendant's conduct is connected to the result by a sequence of dependent intervening events:  $D_1, D_2, D_3$ , etc.<sup>230</sup>

But notice how each of these "links" in the causal chain is connected to the next. Though dependent intervening events are, by definition, caused by the defendant's conduct, they aren't caused *just* by the defendant's conduct.<sup>231</sup> In order for each step in the causal sequence to produce the next step—in order for  $D_n$  to produce  $D_{n+1}$ , in other words—the conditions that constitute  $D_n$  must combine somehow with *other* conditions *not* attributable to the defendant's conduct.<sup>232</sup> Granted, it's tempting to think of each step in the causal sequence,  $D_n$ , as just *causing* the next step,  $D_{n+1}$ , because in ordinary speech we often refer to one event as "causing" another.<sup>233</sup> As John Stuart Mill observed, however, the antecedents in causal relationships aren't individual events or conditions.<sup>234</sup> They are, rather, *sets* of conditions.<sup>235</sup> For example, though we might be tempted to say that a smoker's disposal of a cigarette butt was "sufficient by itself" to cause the resulting forest fire, on closer examination we find that the fire actually depended on a number of conditions as well: the presence of oxygen in the air, for instance, and of combustible materials on the forest floor.

Our shooting hypothetical illustrates how extrinsic conditions drive the causal process. In the shooting hypothetical, what sets the causal chain in motion merely is the defendant's bare voluntary act of crooking his finger. Even at the

228. Johnson, *supra* note 134, at 88.

229. OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 54, 75 (1881); *see also* RESTATEMENT (FIRST) OF TORTS: INTENTIONAL HARMS TO PERSONS, LAND, AND CHATTELS § 2 cmt. c (AM. L. INST. 1934) (explaining that analysis of tort liability begins with the defendant's voluntary act, which "does not include any of the effects of such manifestation no matter how direct, immediate and intended").

230. Johnson, *supra* note 134, at 89.

231. HART & HONORÉ, *supra* note 21, at 19 (summarizing John Stuart Mill's insights about the multiplicity of causes); Terry, *supra* note 78, at 20 ("No consequence that ever happens is the result of a single cause or the end of a single sequence of causation. It is always the meeting place of many such sequences.").

232. Johnson, *supra* note 134 at 89–90.

233. *See* J.L. MACKIE, *THE CEMENT OF THE UNIVERSE* 248 (1974) ("Philosophers have long been inclined to speak of one event causing another."); MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY* 328 (2009) ("[W]e often treat events as both causes and effects, as in 'the firing of the gun caused Smith's death . . . .'").

234. JOHN STUART MILL, *SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE* 214 (10th ed. 1879).

235. *Id.*

earliest stages, this voluntary act must combine with extrinsic circumstances—circumstances not produced by the voluntary act—in order to bring about the succeeding steps in the causal sequence. The defendant’s act of crooking his finger, for example, does not produce the movement of the trigger by itself. It produces the movement of the trigger only in combination with an extrinsic condition, namely, the proximity of the defendant’s finger to the trigger. Likewise, the falling of the hammer does not, by itself, cause the gun to fire. It causes the gun to fire only in combination with an extrinsic condition, namely, the presence of a round in the chamber.<sup>236</sup>

With this background, we’re now in a position to say what it would mean to divide up the outcomes according to their descent, or non-descent, from a particular extrinsic condition. Let’s begin with the easiest case, where we divide the risk as it exists at the moment of the voluntary act itself. The risk as it exists in the moment of the voluntary act encompasses, of course, all the possible outcomes of the voluntary act.<sup>237</sup> But it’s possible to divide this larger set of possible outcomes into two subsets: (1) those possible outcomes of the act that are mediated by the presence of a round in the gun’s chamber; and (2) those possible outcomes of the act that *aren’t* mediated by the presence of a round in the gun’s chamber. In the *Hatfield* case, likewise, it’s possible to divide up the universe of possible outcomes that existed in the moment of Hatfield’s voluntary act of delivering the heroin. It’s possible, specifically, to divide the set of all possible outcomes of the voluntary act into two subsets: (1) those possible outcomes of Hatfield’s voluntary act that are mediated by the heroin’s intoxicating properties; and (2) those possible outcomes of the act that aren’t.

This way of dividing the risk appears to deliver the right results, moreover. Take the bathroom-ceiling hypothetical. The heroin purchaser’s hypothetical death from the collapse of the bathroom ceiling is situated, of course, in the part of the risk consisting of possible outcomes that aren’t mediated by the heroin’s intoxicating properties. Under the increased-risk test, then, the question would be whether bad outcomes predominate in this part of the risk—whether, in this part of the risk, the risks created by the defendant’s conduct are substantially greater than the risks averted. The answer to this question appears to be no. The risks associated with the sale of the heroin appear to be almost entirely dependent on the heroin’s intoxicating properties. In the part of the risk defined by the *non*-involvement of heroin’s intoxicating properties, the various risks—from collapsing ceilings, etc.—are just a wash.

The success of the increased-risk test in cases like this one shouldn’t come as a surprise. In these cases, the increased-risk test functions exactly as the so-called wrongful-aspect test does. The wrongful-aspect test, which traditionally

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236. Neither the presence of the trigger next to the defendant’s finger nor the presence of a round in the chamber is part of the defendant’s voluntary act. As Holmes said, “to crook the forefinger with a certain force is the same act whether the trigger of the pistol is next [to] it or not.” HOLMES, *supra* note 229, at 54; *see also* Terry, *supra* note 78, at 11 (“If I strike in the air with a stick or throw a stone when no one is near, I do precisely the same act as though some person stood where he would be hit . . .”).

237. Johnson, *supra* note 134, at 99.

has operated as a kind of awkward supplement to the foreseeability test,<sup>238</sup> requires the jury to decide whether the result is causally attributable not only to the defendant's conduct but to the wrongful aspect of the conduct.<sup>239</sup> In drunk-driving homicide prosecutions, for example, the "wrongful aspect" of the defendant's conduct is his intoxication.<sup>240</sup> So the wrongful-aspect test would require the government to prove not only that the defendant's drunk-driving was a cause of the victim's death but, in addition, that the intoxication itself was a cause of the victim's death.<sup>241</sup> Likewise, in the classic illustration from torts, a defendant who negligently hands a loaded shotgun to a child won't be liable if the child breaks her foot by dropping the shotgun on it, since the wrongful aspect of the defendant's conduct—namely, the fact that the gun was loaded—doesn't play a role in bringing about the child's injury.<sup>242</sup>

The parallels between the wrongful-aspect test and our proposed extension of the increased-risk test probably are obvious. What the wrongful-aspect test means by an "aspect" of the conduct is, of course, just an extrinsic condition that existed at the time of the defendant's act<sup>243</sup>—the driver's intoxication, the presence of a live round in the gun's chamber, the intoxicating properties of heroin, etc. What the wrongful-aspect test means in describing this extrinsic condition as the "wrongful" aspect is just that, in the absence of this extrinsic condition, the risk posed by the conduct wouldn't be unjustifiable—that the risks created by the conduct would be no greater than those averted.<sup>244</sup> The wrongful-aspect test, then, does exactly what the increased-risk test would do under the proposed extension. It divides up the universe of possible outcomes according to whether a particular extrinsic condition was or wasn't involved in bringing about the result.<sup>245</sup> Then it poses the question whether, in the part of the risk defined by the noninvolvement of this extrinsic condition, the risks created by the defendant's conduct were greater than the risk averted.

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238. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 30 cmt. a (AM. L. INST. 2010) ("While § 29 contains the primary limitation on liability, this Section creates another limit on the scope of liability.").

239. See Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1083 (2001) (observing that courts in tort cases frequently have required the plaintiff to "prove that the tortious aspect of the defendant's conduct contributed to the plaintiff's injury"); *Zuchowicz v. United States*, 140 F.3d 381, 390 (2d Cir. 1998) (formulating the scope-of-the-risk question as whether the wrongful aspect of the defendant doctor's conduct—namely, the amount by which the drug dose administered to the patient by the doctor exceeded the dose recommended by the Food and Drug Administration—was "a but for cause of Mrs. Zuchowicz's illness"); *Commonwealth v. Molinaro*, 631 A.2d 1040, 1042 (Pa. Super. Ct. 1993) (requiring the government to prove, as an element of "homicide by vehicle while driving under the influence," that the defendant's "intoxication was a direct and substantial cause of the accident"); *Hale v. State*, 194 S.W.3d 39, 42 (Tex. App. 2006) (holding that, in order to prove intoxication manslaughter, the State must prove that driver's "intoxication, not just his operation of a vehicle, caused the fatal result").

240. See *Hale*, 194 S.W.3d at 44.

241. Eric A. Johnson, *Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide*, 46 CONN. L. REV. 601, 622–23 (2013).

242. RESTATEMENT (THIRD) OF TORTS § 29 cmt. d, illus. 3.

243. *Id.* § 30 cmt. a.

244. *Id.*

245. Johnson, *supra* note 134, at 91.

C. *Dividing Risks According to Both Descent from a Particular Mediating Event and Non-Descent from a Particular Extrinsic Condition*

This convergence of the increased-risk approach with the traditional wrongful-aspect test is striking evidence of the increased-risk test's explanatory power.<sup>246</sup> For adherents of the foreseeability test, the wrongful-aspect cases require the adoption of an awkward supplemental test that proceeds on a fundamentally different principle than the foreseeability test itself.<sup>247</sup> For adherents of the increased-risk test, by contrast, the wrongful-aspect cases require only the adoption of a slightly broader conception of what it means to divide outcomes according to lines of descent. In the end, then, the increased-risk approach explains the wrongful-aspect cases on exactly the same principle as the dissipation-of-risk cases.<sup>248</sup> In both classes of cases, the increased-risk test explains the seeming "fortuity" of the result as a reflection of the fact that the result is situated in a part of the universe of outcomes where the risks offset the risks created.<sup>249</sup>

There's more good news, though. As modified by our broader conception of what it means to divide outcomes according to lines of descent, the increased-risk test doesn't just explain the wrongful-aspect cases. It explains another class of cases that, though they share features of both the dissipation-of-risk cases and the wrongful-aspect cases, cannot be satisfactorily resolved *either* under a traditional dissipation-of-the-risk test *or* under a traditional wrongful-aspect test.

Consider the hypothetical variation on *Rideout* with which we began the previous section. In this variation, Keiser wasn't struck by another car but instead was struck by lightning as he was trying to turn on his car's flashers.<sup>250</sup> This variation is just the kind of case for which proximate cause requirements are designed: though *Rideout*'s drunk driving obviously is a cause-in-fact of the result, the connection between *Rideout*'s drunk driving and the result seems too fortuitous to justify liability. This instance of causal fortuity doesn't fit neatly into either of our two existing categories of cases, though. This isn't a dissipation-of-the-risk case: the risk that somebody would be struck by an oncoming car, or that an oncoming car would strike Keiser's car, persisted throughout the sequence of the events that connected *Rideout*'s conduct to Keiser's death from lightning. Nor is this a wrongful-aspect case: the wrongful aspect of *Rideout*'s conduct, his gross intoxication, obviously played a role in bringing about the accident that led, indirectly, to Keiser's death.

Or consider this somewhat more realistic hypothetical: suppose a drunk driver takes a wrong turn as a result of his intoxication and winds up traveling away from his intended destination. As he is traveling away from his intended destination, his car is "T-boned" at an intersection by a motorist who entered the

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246. RESTATEMENT (THIRD) OF TORTS § 3.

247. *See id.* cmt. a ("While § 29 contains the primary limitation on liability, this Section creates another limit on the scope of liability.").

248. *See Crooker v. Graft*, 394 F.2d 2, 3 (9th Cir. 1968).

249. *See United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010).

250. *See supra* text accompanying note 216.

intersection unlawfully on a red light. The other motorist is killed in this collision. In this scenario, there's no denying that the wrongful aspect of the defendant's drunk driving played a role bringing about the collision; if the driver hadn't been intoxicated, he wouldn't have taken the wrong turn and so wouldn't have been in the intersection when the other driver disregarded the red light.<sup>251</sup> This isn't a wrongful-aspect case, then. But neither is it a dissipation case. As of the moment when the other driver T-boned the defendant, the risk associated with the defendant's drunk-driving hadn't dissipated; he was still intoxicated, after all. How, then, do we explain the fact that the result in this case seems causally fortuitous—that the outcome seems not to be among those that made the defendant's conduct wrongful in the first instance?

The answer is rooted in the same principle that underlies our disposition of the wrongful-aspect cases, namely, the principle that outcomes may be divided up on the basis of their non-descent from a particular extrinsic condition.<sup>252</sup> To dispose of the wrongful-aspect cases, we use this principle to divide up the risk as it existed at the moment of the defendant's voluntary act. But we can use the same principle to divide up the risk at any step in the sequence of dependent intervening events— $D_1$ ,  $D_2$ ,  $D_3$ , etc.—that mediates the causal connection between the conduct and the actual result. This means dividing the risk twice, rather than once. We first would divide the risk according to whether the outcome was or wasn't descended from a particular mediating event,  $D_n$ , just as we do in the dissipation cases.<sup>253</sup> Then we would divide this set of risks as we divide risks in the wrongful-aspect cases: namely, according to whether a particular extrinsic condition was or wasn't involved in bringing about the outcome. Then, of course, we would inquire of this subset of outcomes whether it was or wasn't characterized by increased risk.

This appears to solve the drunk-driving hypothetical, where the defendant takes an intoxication-induced wrong turn before being T-boned by another driver. When we applied the wrongful-aspect test the first time, we focused on the moment before the defendant's wrong turn. As of this moment, the wrongful aspect of the defendant's conduct is his intoxication, which does play a role in bringing about the wrong turn and thus plays a role, too, in bringing about the fatal crash. But if we re-enter the causal sequence at a moment after the defendant's wrong turn, we get a different result. In the moment after the wrong turn but just before the fatal collision, the increased risk created by the defendant's drunk driving persists, so the dissipation test isn't satisfied. But the increased risk as of this moment still depends on an extrinsic condition—the defendant's intoxication—which doesn't thereafter play a role in bringing about the other motorist's death. It's possible, then, to identify a part of the risk where the risks created

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251. See Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113, 129 (2008) (discussing this example and arguing, in criticism of the wrongful-aspect test, that it's easy to construct hypotheticals where the wrongful aspect of the defendant's conduct *does* play a role in bringing about the result—and where the wrongful-aspect test doesn't foreclose liability—but where the harm nevertheless appears to be fortuitous in just the same way as in the wrongful-aspect cases).

252. Johnson, *supra* note 134, at 99.

253. See *supra* Section IV.A.

by the defendant's conduct are no greater than those averted, namely, the part defined as (1) causally downstream of the defendant's continued driving in the moments after the wrong turn; and (2) not involving the defendant's intoxication. Since the victim's death lies in this part of the risk, the victim's death is not among the risks that made the defendant's conduct wrongful.

In this drunk-driving hypothetical, the extrinsic condition that's responsible for the increased risk associated with the later mediating event is, as it happens, the same extrinsic condition that's responsible for the increased risk associated with the defendant's original voluntary act: the driver's intoxication. But this won't always, or even usually, be true. Take the *Rideout* case.<sup>254</sup> By the time Jonathan Keiser was killed by an oncoming vehicle, defendant Kevin Rideout was sitting in his wrecked car on the side of the road, where his intoxication couldn't really affect anything.<sup>255</sup> So Rideout's intoxication no longer was the critical risk-increasing condition. Rather, in the moments before Keiser's death, the continuing risk was attributable entirely to the fact that Keiser's car sat disabled, and unlit, in the middle of a highway, where it might be struck by oncoming traffic.<sup>256</sup> As it turned out, of course, this critical risk-increasing condition did play a role in ultimately bringing about Keiser's death—Keiser approached the car in an effort to stem this ongoing risk and was struck by an oncoming car<sup>257</sup>—so even our extended version of the wrongful-aspect test would be satisfied.

The test wouldn't be satisfied, however, if Keiser had been struck by lightning as he tried to turn on his car's flashers, as in our earlier hypothetical.<sup>258</sup> Indeed, our extended version of the wrongful-aspect test perfectly captures what makes the death in this hypothetical case feel fortuitous. In this scenario, the risk hadn't dissipated by the time Keiser was struck by lightning. The increased risk persisted throughout the sequence of mediating events that preceded his death: his decision to try to turn on the flashers, his approach to the car, etc. But this increased risk was entirely attributable to an extrinsic condition that ultimately wound up playing no role in his death, namely, the fact that the car lay in the middle of a well-traveled highway. In this hypothetical, then, Keiser's death lies in a part of the risk where bad outcomes don't predominate, namely, the part of the risk defined as: (1) causally downstream of the mediating events that immediately preceded Keiser's death; and (2) not involving the condition that made these events potentially dangerous, namely the highway.

The increased-risk test is, in this respect, far superior to the wrongful-aspect test. The wrongful-aspect test, as traditionally formulated, focuses too narrowly on a single risk-enhancing event, namely, the defendant's voluntary act.<sup>259</sup> Of this event only, the wrongful-aspect test asks whether the increased risk attributable to the event inhered in an extrinsic condition that didn't wind up playing a

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254. *People v. Rideout*, 727 N.W.2d 630 (Mich. Ct. App. 2006), *rev'd in part*, 728 N.W.2d 459 (Mich. 2007).

255. *Id.* at 632.

256. *Id.*

257. *Id.*

258. *See supra* text accompanying note 216.

259. *See Johnson, supra* note 134, at 90.

role in the actual result.<sup>260</sup> The increased-risk test, by contrast, permits us to pose the same question of *every* event in the sequence of mediating events connecting the defendant's conduct to the actual result. This modification solves the remaining cases.

## V. THREE POTENTIAL DIFFICULTIES

When community of descent is used to divide the risk into parts, the increased-risk test delivers intuitively satisfying results across a broad array of cases. In a moment, we'll consider a possible explanation for the test's success in capturing our shared intuitions about proximate cause. Before we do, though, I'd like to address very briefly three somewhat digressive questions raised by our basic elaboration of the increased-risk test. First, given the leeway afforded to criminal defendants in defining the relevant part of the risk, doesn't the increased-risk test lend itself to manipulation? Second, if community of descent can be used to solve the increased-risk test's aggregation problem, why can't it be used to solve the foreseeability test's similar aggregation problem? Third, in relation to what sorts of "risks" are we asking whether the defendant's conduct increased the risk? All risks of harm? Or only risks of the sort of harm specified by the statute defining the offense?

### A. *Why the Increased-Risk Test Doesn't Lend Itself to Manipulation by Criminal Defendants*

It might seem as though our methods of dividing the risk—according to descent from a shared ancestor and according to non-descent from a particular extrinsic condition—would lend themselves to manipulation by defendants. The question posed by the increased-risk test is basically whether it's possible to identify *any* part of the universe of possible outcomes, however large or small, which (1) includes the actual outcome and (2) isn't characterized by increased risk. In effect, then, the defendant gets to decide how to define the body of outcomes in relation to which the increased-risk question is posed. The defendant gets to decide, first, which mediating event to use in dividing up outcomes according to shared descent from a common causal ancestor.<sup>261</sup> And the defendant gets to decide, second, which extrinsic condition to use in dividing up outcomes on the basis of shared non-descent from an extrinsic condition. The defendant even could decide to divide outcomes on the basis of multiple extrinsic conditions. A defendant who was both drunk and speeding when he caused a fatal accident, for example, might define the relevant body of outcomes as those to which neither his car's speed nor his intoxication contributed.

The increased-risk test isn't really subject to manipulation, however. Narrowing the risk by, say, excluding outcomes attributable to multiple extrinsic conditions, won't work unless the actual outcome is situated within the body of

260. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 30 (AM. L. INST. 2010) (focusing narrowly on "the tortious aspect of the actor's conduct").

261. See *supra* text accompanying notes 205–207.

outcomes so defined. A defendant who, in the hope of avoiding liability, defines the relevant body of outcomes very narrowly—as, say, those to which neither his car’s speed nor his intoxication contributed—won’t succeed in avoiding liability unless the actual outcome is situated within this body of risk. He won’t succeed, that is, unless neither his speeding nor his intoxication contributed to the actual outcome. This, of course, is exactly the right outcome.<sup>262</sup> If, without his speeding and intoxication, the defendant’s conduct wasn’t unjustifiably risky, and if the actual outcome wasn’t attributable either to his speeding or to his intoxication, then he shouldn’t be liable.

As a more general matter, it won’t be in the defendant’s interest to define the relevant body of outcomes as narrowly as possible. The narrower the defendant’s definition of the relevant body of outcomes is, the more prominent the actual outcome, which of course will count as a “risk created.”<sup>263</sup> To succeed under the increased-risk test, the defendant will need to define the relevant body of outcomes broadly enough to encompass lots of “risks averted,” in the hope that these risks averted will offset the risks created.<sup>264</sup> In our introductory hypothetical, for example, where the would-be victim of a freeway shooting died in a gas station explosion, the defendant would lose out if he defined the relevant body of outcomes too narrowly—as, say, just those outcomes that lay causally downstream of the explosion of the gas pump. Rather, the defendant would succeed in this hypothetical, and succeed he should, only by defining the relevant body of outcomes more broadly—as, say, the body of possible outcomes that lay causally downstream of the would-be victim’s decision to exit the freeway immediately after the shooting.

*B. Why Community of Descent Can’t Be Used to Solve the Foreseeability Test’s Aggregation Problem*

It’s tempting to think that our method of dividing the risks—according to community of descent—also could be used to solve the foreseeability test’s aggregation problem, at least in relation to the dissipation-of-risk cases.<sup>265</sup> Unfortunately, it can’t. The difficulty arises from a fundamental difference between the foreseeability and increased-risk tests.<sup>266</sup> The increased-risk test poses a question about *net* probabilities. In the dissipation cases, for example, the increased-risk test basically requires the jury to compare (1) the probability that the defendant’s conduct would cause the proscribed harm via a particular mediating event; and (2) the probability that the defendant’s conduct would avert the harm via the same mediating event. In contrast, the foreseeability test poses a

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262. Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1768 n.135 (1985) (“When there is more than one tortious aspect, each must be considered, and the tortious-aspect causation requirement is satisfied if any of them contributed.”).

263. *See id.* at 1764 n.119.

264. RESTATEMENT (THIRD) OF TORTS § 30 cmt. a.

265. Nobody appears to think the foreseeability test is capable of resolving the wrongful-aspect cases. That’s why courts that apply the foreseeability test supplement it with the wrongful-aspect test. *See id.* (“While § 29 contains the primary limitation on liability, this Section creates another limit on the scope of liability.”).

266. *See* Wright, *supra* note 239, at 1083.

question about *gross* probabilities. It asks whether the outcome simply was “too improbable to be foreseeable.”<sup>267</sup>

What would happen if we tried to pose the foreseeability question of a body of possible outcomes defined by community of descent? As we did under the increased-risk test, we would first divide up all the possible causal sequences according to whether they included or didn’t include a particular mediating event, say  $D_n$ .<sup>268</sup> Then we would apply the foreseeability test to this body of outcomes. We would ask, perhaps: was it “too improbable to be foreseeable” that the defendant’s conduct would cause the proscribed harm via  $D_n$ ? Naturally, this question would require the jury to calculate the probability that the defendant’s conduct would cause the proscribed harm via  $D_n$ . But there’s nothing troubling in that. After all, as a prelude to its question about the *net* risk, the increased-risk test would require the jury to calculate *both* the probability that the defendant’s conduct would cause the proscribed harm via  $D_n$  *and* the probability that the defendant’s conduct would avert the harm via  $D_n$ .

So far, so good. But consider: how would the jury go about deciding which of the actual causal sequence’s mediating events— $D_1$ ,  $D_2$ ,  $D_3$ , etc.—to use in dividing up the universe of possible causal sequences? In applying the increased-risk test, we allowed the defendant to choose which of these mediating events to use. The defendant was entitled to be relieved of liability if the actual causal sequence included *any* mediating event,  $D_n$ , such that the risks created by the defendant’s conduct via  $D_n$  were offset by the risks averted. But this strategy wouldn’t work under the foreseeability test, since the foreseeability test poses a question about *gross* probabilities. The trouble, in short, is that the *gross* probability of harm, unlike the *net* probability, will get lower with each successive step in the actual causal sequence, so the defendant always will want to divide the outcomes using the last step in the sequence.<sup>269</sup>

Consider how this difference between gross and net probabilities might play out in our freeway-shooting hypothetical. In this hypothetical, the *net* probability that someone would die as a result of the defendant’s conduct decreased around the time the victim exited the freeway (and escaped the freeway shooter uninjured), then increased again dramatically when the victim was injured by the gas station explosion. To put this more precisely: in the set of all possible causal sequences that include the victim’s decision to exit the freeway, the risks created are no greater than the risks averted. By contrast, in the much smaller set of all possible causal sequences that include the victim being injured in the gas station explosion, the risks created are far greater than the risks averted.

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267. *James v. Meow Media, Inc.*, 300 F.3d 683, 691 (6th Cir. 2002); *see also* *Jutzi-Johnson v. United States*, 263 F.3d 753, 756 (7th Cir. 2001) (“A person is not liable for such improbable consequences of negligent activity as could hardly figure in his deciding how careful he should be . . . .”); *Edwards v. Honeywell, Inc.*, 50 F.3d 484, 491 (7th Cir. 1995) (articulating question as whether outcome was “too unusual, too uncertain, too unreckonable to make it feasible or worthwhile to take precautions against”).

268. *Johnson*, *supra* note 134, at 89–90.

269. *Cf. Morris*, *supra* note 77, at 198 (explaining why the defendant, in arguing for acquittal under the foreseeability test, will always have an incentive to define the outcome as narrowly and specifically as possible: “[A] defendant may induce psychological support for his position if he can convince judges and jurors that freakish details are a prominent and significant part of the case.”).

If what we care about are *gross* probabilities, however, things look different. The gross probability *ex ante* that the defendant's conduct will bring about the harm via the victim's decision to exit the freeway is *higher* than the gross probability *ex ante* that the defendant's conduct will bring about the harm via the victim being injured in the gas station explosion. After all, the victim's exposure to the gas station explosion is just one of countless different ways that someone might have been killed as a consequence of the victim's decision to leave the freeway. More generally, for any sequence of causally linked events ( $D_1, D_2, D_3$ , etc.), the probability *ex ante* that the defendant's conduct will cause the result is always higher at  $D_n$  than at  $D_{n+1}$ , since  $D_{n+1}$  will represent just one of many possible avenues by which  $D_n$  might have caused the result. As a consequence, the defendant will always want to divide the universe of possible outcomes using the last event in the causal sequence.

Where does that leave us? If we use the last event in the actual causal sequence to divide the outcomes by community of descent, we're left posing the foreseeability question of just one possible outcome, namely, the outcome that actually transpired, in all its details and all its twists and turns. This, of course, isn't a solution to the aggregation problem as much as a recapitulation of it. The foreseeability test's aggregation problem began, as you'll recall, with the insight that the foreseeability of a particular outcome can't possibly hinge on the *ex ante* probability of the actual causal sequence in all its particulars, since actual causal sequences in all their particulars always are spectacularly improbable.<sup>270</sup> Where the foreseeability test is concerned, then, dividing the risk according to community of descent doesn't solve the aggregation problem. It just takes us back to where we started.

### C. *Increased Risk of What, Exactly?*

Aggregating possible outcomes according to "community of descent," rather than by "general type," enables us to pose the increased-risk question in relation to a determinate set of possible outcomes. In one respect, though, this test remains incomplete. As we've formulated it until now, the question posed by the increased-risk test is just whether, within the discrete body of possible outcomes defined by descent from a common ancestral event, the "risks created" by the defendant are offset by the "risks averted." For this increased-risk question to be answerable, we still need to specify exactly what sorts of "risks" concern us. All risks of harm? Or only risks of the sort of harm specified by the statute defining the offense?

In civil negligence cases, this question is relatively easy to answer. The common law defines negligence in terms of the general "likelihood that the defendant's conduct will result in *harm* . . ." <sup>271</sup> So the risk that figures in common law negligence—the risk that makes the defendant's conduct wrongful, in other words—is just the risk of harm generally, not the risk of a particular statutory

270. See *supra* text accompanying notes 76–81.

271. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 3 (AM. L. INST. 2010).

harm. In civil negligence cases, then, the jury presumably would take *all* risks of harm into account in deciding whether, within a particular part of the universe of possible outcomes, the risks created by the defendant's conduct were offset by the risks averted. In other words, the jury first would use consanguinity—descent from a common mediating event, or non-descent from a particular extrinsic condition, or both—to identify the relevant “part” of the universe of outcomes. Then the jury would decide whether, within this part of the universe of outcomes, the total risk created—the risk of any sort of adverse outcome, in other words—was greater than the total risk averted.<sup>272</sup>

Another reasonable (and still determinate) option in tort cases would be for the jury to consider, as counterweights to the risks created, not just the risks averted, but other sorts of benefits as well. The “risks averted” by the defendant's conduct play the same role in the Hand formula balancing as other benefits associated with the conduct.<sup>273</sup> It's possible, then, that what really determines whether a particular outcome is causally fortuitous is not the balance of “risks created” and “risks averted,” but the broader balance of “risks created” and “benefits conferred.” If this is right, then the question for the jury is whether, within the part of the universe of possible outcomes occupied by the actual outcome, the risks created by the defendant's conduct outweigh *all* the benefits associated with the conduct, not just the risks averted.<sup>274</sup> We needn't decide here whether this broader, more encompassing approach better captures our intuitions about causal fortuity than does the narrower balancing implied by the “increased-risk” formulation. What matters for our purposes is just that either alternative would make the proximate cause inquiry workable and determinate.

Specifying the relevant type of “risk” is more complicated in criminal law than in tort. Criminal statutes almost always concern themselves with a particular kind of harm, not just with harm in general. Murder and manslaughter statutes, for example, concern themselves exclusively with the deaths of human beings; aggravated battery statutes concern themselves exclusively with serious bodily injury; criminal mischief statutes concern themselves exclusively with property damage.<sup>275</sup> In keeping with criminal statutes' narrow concern with particular sorts of *harm*, the criminal law requires the jury to evaluate the defendant's fault in relation to particular sorts of *risk*. The standard Model Penal Code definitions

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272. Using all of the “risks averted” to offset all of the “risks created” within a particular part of the universe of possible outcomes would be consistent, too, with the views of Ariel Porat, who has argued that the law's failure to credit a negligent tortfeasor “for the risks he decreased” creates a “misalignment” in tort law. See Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 116 (2011) (“[O]nce the injurer is deemed negligent he will be found liable for the entire harm that resulted, without being credited for the risks he decreased, which I refer to as ‘the offsetting risks.’ Courts’ failure to reduce damages by the offsetting risks creates a misalignment.”).

273. See RESTATEMENT (THIRD) OF TORTS § 3 cmt. e (“In certain situations, if the actor takes steps to reduce one set of injury risks, this would involve the burden or disadvantage of creating a different set of injury risks, and these other risks are included within the burden of precautions.”).

274. See Ariel Porat, *Offsetting Risks*, 106 MICH. L. REV. 243, 265–66 (2007) (arguing that the risks created by negligent medical treatment, for example, should be offset not just by the risks averted, but by the positive benefits conferred by the medical treatment); see also Gilead & Greene, *supra* note 184, at 1533–34 (“[W]here courts can associate expected harms with benefits . . . and thereby differentiate among reasonable and unreasonable risks (risk balancing), they should, from an efficiency perspective, prefer to do so.”).

275. MODEL PENAL CODE §§ 210–251 (AM. L. INST. 2019).

of recklessness and negligence, for instance, don't just require the government to prove generally that the defendant created a "substantial and unjustifiable risk."<sup>276</sup> They require the government to prove specifically that the defendant created a substantial and unjustifiable risk of the very result proscribed by statute.<sup>277</sup> In a reckless manslaughter case, then, the government must prove that the defendant created, and consciously disregarded, a substantial and unjustifiable risk that a human being would *die* as the result of his conduct.<sup>278</sup>

It might seem as if criminal law's narrow focus on particular kinds of risk would make our question—increased risk of what?—easy to answer. But it doesn't. The trouble is that, even in criminal law, risks of *other* sorts of harm—harms other than the harm proscribed by statute—sometimes play a role in the jury's determination of whether the risk posed by the defendant's conduct was unjustifiable. In deciding whether the risk posed by the defendant's conduct was unjustifiable, juries in criminal cases apply a kind of modified Hand formula: they decide whether, on balance, the risk of the statutorily proscribed harm was justified by countervailing benefits.<sup>279</sup> In a reckless homicide case, for example, the jury will decide whether the risk of death created by the defendant was justified by countervailing benefits.<sup>280</sup> These countervailing benefits will take a variety of forms. Sometimes, they'll take the form of risks averted by the defendant's conduct.<sup>281</sup> Whether a risk averted by the defendant's conduct qualifies as a cognizable benefit for purposes of the criminal law's modified Hand formula won't depend, of course, on whether the averted risk is a risk of the very harm that's proscribed by statute. In a criminal mischief case, for example, a risk of property damage might be deemed justified by an averted risk of property damage, of course.<sup>282</sup> But it might also be justified by an averted risk of death or bodily injury.<sup>283</sup> Probably, then, when we apply the increased-risk test, the "risks averted" side of the balance should include *all* the risks averted, not just the averted risks of the very harm proscribed by statute.

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276. *Id.* § 2.02(2)(c)–(d).

277. *Id.*

278. *Id.* § 210.3 cmt. 4 ("[A] person acts recklessly with respect to the death of another when he consciously disregards a substantial and unjustifiable risk that his conduct will cause that result."); see also *People v. Knoller*, 158 P.3d 731, 739 (Cal. 2007) (rejecting lower court's view that "a second degree murder conviction, based on a theory of implied malice, can be based simply on a defendant's awareness of the risk of causing serious bodily injury to another").

279. See Dressler, *supra* note 47, at 957 ("To determine justifiability [in connection with recklessness], we conduct a criminal law version of the Learned Hand formula for measuring civil negligence . . .").

280. In cases where liability hinges on the defendant's recklessness or criminal negligence, the jury will conduct this balancing in deciding whether the defendant acted with the requisite culpable mental state. See MODEL PENAL CODE & COMMENTARIES, pt. 1, § 2.02 cmt. 3 (AM. L. INST. 1985) ("Even substantial risks, it is clear, may be created without recklessness when the actor is seeking to serve a proper purpose, as when a surgeon performs an operation he knows is very likely to be fatal but reasonably thinks to be necessary because the patient has no other, safer chance."). In other cases—in cases involving intentional killings, for example—the jury will conduct the balancing, if necessary, under the rubric of the choice-of-evils defense. MODEL PENAL CODE & COMMENTARIES, pt. 2, § 3.02 cmt. 3 (AM. L. INST. 1985) (explaining drafters' decision to extend choice-of-evils defense to homicide cases).

281. See MODEL PENAL CODE § 2.02(2)(c).

282. See *id.* § 220.3 cmt. 2.

283. See *id.*

If that's right, however, then it probably makes sense as well to include all risks *created* by the defendant's conduct—including risks other than the statutorily proscribed risk—on the “risks created” side of the balance. If the jury, in applying the criminal law version of the Hand formula, takes account of the conduct's tendency to avert risks other than the risk of the statutorily proscribed harm, it logically has to take into account as well the conduct's tendency to *create* risks other than the risk of the statutorily proscribed harm.<sup>284</sup> Otherwise, the defendant in a homicide case, say, would get the benefit of *averting* a risk of physical injury or property damage without paying any price for *creating* such a risk. Really, then, even in criminal cases, all of the risks created and averted by the defendant have to play a role in the jury's application of the criminal law Hand formula. So perhaps all the risks should play a role in the application of the increased-risk test, not just the risk of the very harm proscribed by the statute defining the offense.

It would be difficult to decide which of these two alternatives—or three, if we count the alternative of balancing *all* the costs and benefits—better captures the intuitions underlying the increased-risk test. Indeed, it would be difficult even to construct hypothetical criminal cases that would tease out the differences between the alternatives. At least in criminal cases, risks of varying kinds tend to travel together.<sup>285</sup> Kevin Rideout's drunk driving, for example, posed just about every kind of risk that triggers statutory criminal liability: death, injury, property damage, etc.<sup>286</sup> So too did our hypothetical freeway shooter's conduct.<sup>287</sup> Perhaps that's why we've succeeded so far in getting intuitively satisfying results despite having failed to specify what sorts of “risks” the defendant's conduct has to increase.

Fortunately, we can set aside for resolution at a later date the question of exactly which of these three alternatives is the *right* one. What matters for our purposes is just that any of the three alternatives would, together with our strategy for dividing the universe of possible outcomes, make the increased-risk test determinate and workable. We will bracket for consideration at a later date, then, the question whether the increased-risk test requires the jury to balance: (1) just the risks (both created and averted) of the statutorily proscribed harm; (2) all the risks, including risks of non-statutory harms; or (3) all the risks and all the benefits.

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284. Dressler, *supra* note 47, at 957.

285. See Keith W. Simmons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283, 320 (2002).

286. *People v. Rideout*, 727 N.W.2d 630, 632 (Mich. Ct. App. 2006), *rev'd in part*, 728 N.W.2d 459 (Mich. 2007); see also *supra* notes 13–20 and accompanying text.

287. See *supra* notes 44–45 and accompanying text.

VI. HOW THE INCREASED-RISK TEST IDENTIFIES RISKS THAT FALL OUTSIDE  
THE RISK THAT MADE THE CONDUCT WRONGFUL

The argument to this point could be summarized by saying: when risks are divided according to community of descent, the increased-risk test appears to produce results that are both (1) determinate and (2) consistent with widely shared intuitions about causal fortuity. We haven't yet addressed the question that most scholars would pose of the test: namely, does the increased-risk test, as supplemented with the proposed method of dividing risks, succeed in identifying a class of risks that falls outside the risk that made the defendant's conduct wrongful?

To explain: nowadays most scholars appear to agree that causal fortuity arises from a kind of "mismatch" between (1) what the defendant did wrong and (2) what caused the result.<sup>288</sup> On this view, proximate cause rules are designed to ensure, as Glanville Williams said, that the law doesn't "extend liability . . . beyond the fault that is supposed to be its basis."<sup>289</sup> To put this slightly differently, and more conventionally, most scholars suppose that the point of the proximate cause requirement is to identify outcomes that, although caused in-fact by the defendant's wrongdoing, nevertheless weren't among the risks that made the defendant's conduct wrongful in the first place.<sup>290</sup> The Restatement (Third) of Torts, for example, frames the proximate cause question as whether the actual outcome "result[ed] from the risks that made the actor's conduct tortious."<sup>291</sup> The Model Penal Code's provision on proximate cause embodies the same "harm-within-the-risk" view, albeit somewhat less clearly.<sup>292</sup>

It is to this conception of causal fortuity that the foreseeability test is addressed.<sup>293</sup> For adherents of the foreseeability test, the "risks that make the conduct wrongful" are the risks that the jury (or, sometimes, the legislature)<sup>294</sup> considered when it conducted the Hand-formula balancing of the conduct's risks and

288. HART & HONORÉ, *supra* note 21, at 473 (explaining view of some continental theorists that "the normative judgment [that provides the basis for liability] cannot extend to an event of which the actor did not increase the probability though his act was a necessary condition of it"); KEETON ET AL., *supra* note 53, at 281 (explaining the roots of the foreseeability test in the view that "liability is restricted to the scope of the original risk created"); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 29 cmt. j (AM. L. INST. 2010) (explaining that, if "[p]roperly understood," the foreseeability test is designed to exclude liability for the results that, because the "unforeseeab[ility] at the time of the actor's tortious conduct . . . were not among the risks—potential harms—that made the actor negligent").

289. Glanville Williams, *Causation in the Law*, 19 CAMBRIDGE L.J. 62, 85 (1961) ("[I]t seems illogical and may be wholly absurd to extend liability in negligence beyond the fault that is supposed to be its basis.").

290. Goldberg, *supra* note 36, at 2041–42, 2061.

291. RESTATEMENT (THIRD) OF TORTS § 29.

292. See MODEL PENAL CODE § 2.03(2) (AM. L. INST. 2019) (framing proximate cause test inquiry in terms of the relationship between (1) the "actual result" and (2) the risks that made the defendant's conduct culpable); Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 346 (2002) (explaining this aspect of Model Penal Code).

293. See RESTATEMENT (THIRD) OF TORTS § 29 ("Properly understood, both the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks—potential harms—that made the actor negligent.").

294. Where crimes like drunk-driving homicide are concerned, the legislature in effect makes an antecedent determination that the risks associated with the proscribed conduct always outweigh the benefits. Richard A.

benefits. And for adherents of the foreseeability test, the only risks the jury (or legislature) considers when it performs the Hand formula balancing are risks to which the defendant “should have” adverted before engaging in the conduct—risks in relation to which the defendant actually was culpable.<sup>295</sup> The foreseeability test, then, doesn’t just purport to capture widely shared intuitions about causal fortuity. It also purports to identify the principle underlying those shared intuitions: namely, that unforeseeable risks aren’t among the risks that make the conduct wrongful.<sup>296</sup>

We should ask the same of the increased-risk test. The fact that the increased-risk test produces determinate answers to proximate cause questions is important, of course, particularly in the criminal law setting. But it isn’t enough. A test can be determinate and still be wrong. Nor is it enough that the test appears to capture our shared intuitions about proximate cause. Intuitions too can be wrong, after all. Our account of the increased-risk test will be incomplete until we’ve identified the principle that underlies the seeming explanatory power of increased risk.

In what follows, I’ll develop a tentative explanation for how the increased-risk test produces intuitively satisfying answers. The explanation, in short, is that the increased-risk test identifies outcomes that fall outside the risk that makes the conduct wrongful. Of course, this sounds just like the principle that supposedly underlies the foreseeability test. But the increased-risk test puts a different spin on the critical phrase—“the risk that makes the conduct wrongful”—than does the foreseeability test. The increased-risk test operates by identifying risks that, although they play a role in the jury’s balancing of the conduct’s risks and benefits, can’t change the outcome of that balancing from “non-wrongful” to “wrongful.” The reason these risks can’t change the balancing’s outcome from non-wrongful to wrongful, as I’ll tentatively argue, is that they’re “entangled” causally with other, offsetting risks. In developing this entanglement point, I’ll focus on what seems to me the clearest case, namely, where the relevant part of the risk is defined by the involvement of a particular mediating event.

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Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 744 (1960) (characterizing statutes like these as “requir[ing] an antecedent [legislative] judgment of *per se* unreasonableness”); see also Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 425 (2011) (providing general account of statutes like these); Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 14–15 (2009) (arguing that, where statutes like these are concerned, “[t]he legislature, not the jury, assumes the responsibility for balancing the three factors in the justifiability calculus”).

295. See Hurd & Moore, *supra* note 292, at 381–82 (describing the underpinnings of the foreseeability view: “Inasmuch as negligence is a doctrine of culpability, the risks that go into its assessment should include only those that it was culpable for a defendant to ignore.”); Owen, *supra* note 6, at 1292 (“[F]oreseeability includes risks that an actor may not know but reasonably should, commonly explained in constructive-knowledge terms as risks the actor ‘should have known,’ meaning that prudence sometimes requires actors to investigate and evaluate possibilities of hidden or inchoate risk.”).

296. See Dilan A. Esper & Gregory C. Keating, *Putting “Duty” in its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1261–63 (2008) (explaining how proponents of foreseeability test approach the matching problem: “The reasons that justify the imposition of a duty of care in the first place should also limit the scope of liability for its breach.”).

A. *Community of Descent and Causal Entanglement*

What does it mean to say that a particular risk is not among the risks that made the conduct wrongful? One possible reading of the phrase “the risks that made the conduct wrongful” is that the phrase refers to all the risks that the jury considered when it performed the Hand formula balancing of the conduct’s risks and benefits. This, as we’ve seen, is the reading adopted by proponents of the foreseeability test.<sup>297</sup> It’s also probably the most intuitive reading of the phrase. After all, the Hand formula balancing of the conduct’s risks and benefits is what determines, in the usual case, whether the defendant’s conduct was wrongful.<sup>298</sup>

It wouldn’t be crazy to think that the increased-risk test operates on the same principle. That is, it wouldn’t be crazy to suppose that offsetting risks drop out of the Hand-formula balancing altogether. Maybe the tallying of risks under the Hand formula resembles the tallying of votes in the Electoral College system. In the Electoral College system, the question whether a particular individual’s vote was among the votes that contributed to the candidate’s election depends on where the vote was cast.<sup>299</sup> If a particular vote for the winning candidate was cast in a state where votes for the losing candidate predominated, then the vote isn’t among the votes by virtue of which the candidate was elected.<sup>300</sup> The vote doesn’t “travel through” to the final tally. It would be possible to suppose that the increased-risk test operates like the Electoral College. It would be possible to suppose that when, within a particular part of the universe of possible outcomes, the risks created are offset by the risks averted, the risks created don’t “travel through” to the Hand-formula balancing.

This argument isn’t right, however. Regardless of whether we divide the risks according to descent from a common ancestor—as in the dissipation cases—or according to non-descent from a particular extrinsic condition, *all* risks “travel through” to the final tallying of risks and benefits, even risks situated in parts of the universe of possible outcomes where the risks created aren’t as great as the risks averted. Consider:

A physician wrongfully causes a patient’s death by prescribing a drug under circumstances where the drug is contra-indicated. Under the known circumstances, the total risks associated with the conduct outweigh the benefits. Specifically, for every 1,000 cases where the drug is prescribed to patients like the deceased, the drug causes fifty-four deaths and averts fifty-

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297. Dressler, *supra* note 47, at 957.

298. *Id.* (arguing that “[t]o determine justifiability [in connection with recklessness], we conduct a criminal law version of the Learned Hand formula for measuring civil negligence”); Hurd & Moore, *supra* note 292, at 393 n.144 (observing that conduct will qualify as “reckless” under the Model Penal Code only if the risk is unjustified in the sense required by the Hand formula: “[A]ll the benefits of taking this risk need to be factored in, balanced against the detriments of taking this risk.”).

299. See Allyson Waller, *The Electoral College Explained*, N.Y. TIMES (Nov. 7, 2020, 12:21 PM), <https://www.nytimes.com/article/the-electoral-college.html> [<https://perma.cc/H3CV-Y4RQ>]; see also *The Electoral College*, NAT’L CONF. STATE LEGISLATURES (Oct. 28, 2020), <https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx> [<https://perma.cc/936F-S4G7>].

300. See Waller, *supra* note 299.

two. The drug causes and averts deaths through a variety of different mechanisms. In the deceased patient's case, however, the patient's death is known to have resulted from a specific mechanism, namely, the drug's tendency, as a side effect, to cause increased sexual appetite. As it happens, this side effect does not itself increase the overall risk of death. In every 1,000 cases where the drug is prescribed to a patient like the deceased, the increased-sexual-appetite side effect causes four deaths (by tempting the patient to overindulge in sex) but also averts five deaths (by, say, increasing the patient's joy in living).

In this illustration, the defendant physician presumably would be relieved of liability under the increased-risk test. Though the prescribed drug increases the overall risk of death, it doesn't increase the risk of death within the part of the risk that lies causally downstream of the increased-sexual-appetite side effect.<sup>301</sup> Within the part of the risk defined by the involvement of this mediating event, the risks created by the prescription drug are offset by the risks averted by a ratio of four to five. Therefore, the increased-risk test isn't satisfied.

Notice, however, that the four deaths caused by the side effect, though offset by the five deaths averted by the side effect, nevertheless play an important role in the jury's balancing of the conduct's overall risks and benefits. If we were to alter the hypothetical by reducing the number of deaths caused by the sexual-appetite side effect to just one, while holding the number of deaths averted by the side effect at five, the overall balance of costs and benefits would change. In this new scenario, the overall number of deaths averted by the drug, fifty-two, now is greater than the overall number of deaths caused, fifty-one. So the fact that, in our original example, the sexual-appetite side effect caused four deaths rather than one made an important difference in the balancing of costs and benefits. The risks created by the side effect mattered, then, even though they were offset by the benefits of the side effect.

A number of others have made roughly the same point, though not in connection with the increased-risk test. Heidi Hurd and Michael Moore have argued, as have Robert Cooter and Ariel Porat, that the very idea of "risks that make the conduct wrongful" is misconceived.<sup>302</sup> When the jury decides whether the defendant's conduct was wrongful—when it aggregates the risks posed by the defendant's conduct and balances them against the conduct's benefits—it necessarily considers all the possible adverse outcomes of the defendant's conduct.<sup>303</sup> On this view, every possible adverse outcome plays the same role in the fact-finder's reckoning of the overall risk. And so every possible adverse outcome equally is among the outcomes by virtue of which the conduct's risks outweigh its benefits.

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301. *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010).

302. Hurd & Moore, *supra* note 292, at 365–374 (arguing that "it would appear that all harms are within the risks that make a defendant's conduct negligent" and rejecting "five possible distinctions" designed to differentiate determinative from non-determinative risks); COOTER & PORAT, *supra* note 162, at 54 ("[C]ommon law should recognize liability when *any* foreseeable risk that was increased by the injurer's negligence materialized into harm, regardless of whether it was in the foreground or the background.").

303. See Hurd & Moore, *supra* note 292, at 393.

Though Hurd and Moore, and Cooter and Porat, are right in thinking that all the risks created by the defendant's conduct play a role in the jury's balancing of the conduct's risks and benefits, they're ultimately wrong in challenging the whole "harm-within-the-risk" conception of causal fortuity. The answer to the Hurd and Moore argument is to rethink what it means for a risk not to be among "the risks that make conduct wrongful." It doesn't mean that the risk doesn't play a role in the jury's balancing of the conduct's risks and benefits. It means, rather, that the risk can't play a *decisive* role in this balancing. Although risks that are offset by benefits can play a critical role in the jury's balancing of costs and benefits, they can't themselves *shift* the overall balance from "not wrongful" to "wrongful."<sup>304</sup> In other words, if the aggregate body of risks that includes the actual outcome is not characterized by increased risk, then the addition of this aggregate body of risks to the wrongdoing balance can't ever change the balancing's outcome from "not wrongful" to "wrongful."

To explain: in our original prescription hypothetical, the mediating event that led to the victim's death averted more deaths than it caused – for every 1,000 cases where the drug caused the increased-sexual-appetite side effect, the side effect averted five deaths and caused four. The four deaths caused by the side effect still were potentially consequential, as we saw, since the prescription might have been non-wrongful, on balance, if the side effect had caused fewer deaths. Still, the *addition* to the balance of this body of risk—the risks averted and risks created by the side effect—didn't *change* the overall balance. After this body of risk was added to balance, the overall ratio of "deaths caused" to "deaths averted" was fifty-four to fifty-two. Before this body of risk was added to the balance, then, the overall ratio of "deaths caused" to "deaths averted" would have been fifty to forty-seven. So the addition of the body of risk associated with the side effect didn't shift the overall balance. The conduct was wrongful after this body of risk was added to the balance only because it was wrongful *before* this body of risk was added. This will always be true, moreover. Again, if the risks associated with a particular sort of mishap are offsetting, then adding them as a body to the wrongdoing balance can't change the balancing's outcome from non-wrongful to wrongful.<sup>305</sup> This is what it means, finally, to say that offsetting risks can't "make the conduct wrongful."

Notice, though, that this account smuggles in a critical and so-far-undefended assumption, namely, that all the risks in a particular part of the universe of possible outcomes necessarily are added to the Hand formula balance *as a body*. This account assumes, for example, that when the risks created by a particular mediating event are added to the balance, the risks averted by this same mediating event are added to the balance at the same time. If the risks needn't be added to the balance together, as a single unit—if the risks created by the mediating event can be disentangled somehow from the risks averted and added to the overall balance independently—then there's no reason why the addition of the risks *created* to the balance can't change the balancing's outcome from non-

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304. See *id.* at 393–94.

305. See *id.* at 394.

wrongful to wrongful.<sup>306</sup> In short, what this account assumes is that some of the risks *created* by the defendant's conduct are "entangled" with some of the risks *averted* by the defendant's conduct, such that when the jury adds the risks created to the balance it necessarily adds the risks averted too.<sup>307</sup>

Under what circumstances, then, would it make sense to treat risks as entangled in the required way? The answer appears to be simply that risks are entangled when they are descended causally from the same mediating event or extrinsic condition. This would explain, of course, why our method of dividing outcomes—according either to their descent from a common mediating event or to their shared non-descent from a particular extrinsic condition—delivers satisfying results. It would explain, more specifically, exactly why our method appears to identify risks that fall outside the risk that makes conduct wrongful. When we divide risks according to community of descent, rather than according to conceptual or linguistic convention, we wind up identifying classes of risks that are entangled. And entanglement is what determines whether a risk is among those that make conduct wrongful.<sup>308</sup>

The workings of causal entanglement are easiest to trace in cases where the risk is divided on the basis of outcomes' shared descent from a particular mediating event. Take our wrongful-prescription hypothetical, for example, where we divided the risk on the basis of the outcomes' shared descent from the drug's increased-sexual-appetite side effect. Our method of dividing the risk produces an intuitively satisfying result in this hypothetical precisely because all the outcomes in the relevant part of the risk are entangled by their descent from this shared mediating event. Since any risks created by this shared mediating event obviously depend on the occurrence of the mediating event, and since this mediating event, when it occurs, also averts certain risks, it makes sense to regard the risks created as entangled with the risks averted. Because they're entangled, they're added to the balance together. And because they're offsetting, they can't tip the balance toward wrongdoing.

The entanglement analysis appears to be more complicated in cases that have a "wrongful-aspect" component.<sup>309</sup> In these cases, as you'll recall, we get the right results by posing the increased-risk question of a part of the risk that's defined by the *non*-involvement of a particular risk-enhancing extrinsic condition.<sup>310</sup> Where these cases are concerned, what appear to be "entangled" aren't the outcomes in the part of the risk that's defined by the *non*-involvement of the extrinsic condition, but rather, the outcomes in the *other* part of the risk. It's the outcomes in this *other* part of the risk, after all, that all depend causally on the same condition. Still, entanglement appears to be what drives the result. It appears to be by virtue of this entanglement that some risks, some "votes," play a different role in the balancing than others.

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306. *See id.*

307. *See id.* at 393.

308. *See id.*

309. *See* discussion *supra* Section IV.B.

310. *Id.*

B. *Disentangling Risks, Redefining Wrongs*

One possible response to this argument is that it sometimes will be possible to *disentangle* the risks attributable to a particular mediating event or extrinsic condition. It sometimes will be possible, for example, for the defendant to reduce or eliminate the risks *created* by a particular mediating event without also affecting the mediating event's tendency to *avert* other risks. Take our prescription-drug hypothetical, where the sexual-appetite side effect, in every 1,000 cases where it occurs, averts five deaths by increasing the patient's joy in living and causes four deaths from sexual overindulgence. Suppose it's possible for the doctor to reduce the number of deaths from sexual overindulgence from four to one through the simple expedient of advising patients of the dangers associated with sexual overindulgence. In this scenario, if a doctor failed to employ the expedient of advising her patients of the dangers associated with sexual overindulgence, and the patient later died from sexual overindulgence, we probably would want to say that the risk of deaths attributable to sexual overindulgence was among the risks that made the doctor's conduct wrongful, even though, on the whole, the risks created by mediating event *E* (including the risks of sexual overindulgence) were offset by the risks averted.

This argument is essentially correct, but it doesn't refute our basic thesis, namely, that if the risks averted by a mediating event offset the risks created, then the risks downstream of this mediating event aren't among the risks that make the conduct wrongful. Here's why. When we stipulated that the doctor could have limited the deaths attributable to the side effect by warning the patient, we inconspicuously changed the entire basis for liability. If the doctor could have prevented the patient's death by warning him, and if this warning would have reduced the total risk associated with the drug to an acceptable level, then the basis of the doctor's liability is not her act of administering the drug but rather her failure to warn. This shift in the basis of liability affects the wrongdoing inquiry facing the jury.<sup>311</sup> Before the shift, the jury was judging the risks posed by the doctor's conduct in comparison to a course of conduct consisting of *not administering the drug*. After the shift, the jury is judging the risks posed by the doctor's conduct in comparison to a course of conduct consisting of *administering the drug but warning the patient to avoid sexual overindulgence*.<sup>312</sup>

With this change in the question facing the jury, the risk associated with the side effect changed too. Specifically, and somewhat paradoxically, the change in the basis of liability affects our calculation of the number of deaths *averted* by the mediating event. When we ask about the number of deaths caused and averted

311. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 3 cmt. c (AM. L. INST. 2010) (explaining that, where a tortfeasor's negligence consists of the "failure to take a reasonable precaution," the preferable approach is to judge his liability exclusively in relation to the failure to take the needed precaution).

312. *See id.* ("[T]he plaintiff must prove that the reduction in the general risk of harm [associated with a negligently omitted precaution] would have prevented the plaintiff's particular injury . . ."); *see also* Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363, 393-94 (1984) (explaining how the answer to the cause-in-fact question depends on how the defendant's wrongdoing is framed: "Each . . . alternative untaken precaution . . . represents an alternative specific act of negligence that the plaintiff could prove against the defendant. Whichever specific act the plaintiff picks then becomes the basis of the cause-in-fact analysis.").

by a particular event, our baseline always is what would have happened if the defendant had not done anything wrong. When “not doing anything wrong” consisted of not administering the drug at all, the number of deaths averted by the increased-sexual-appetite side effect was *five*, since five patients survived—by virtue of increased “joy in living”—who would have died if they hadn’t taken the drug at all. But if “not doing anything wrong” consists of administering the drug but simultaneously warning the patient, the number of deaths averted by the side effect is *zero*. If “not doing anything wrong” consists of administering the drug but simultaneously warning the patient, then the patients who would have been saved by the side effect as a result of the doctor’s misconduct also would have been saved if the doctor had done the right thing—administered the drug but warned the patient—since the warning would not, presumably, have diminished the increased “joy in living” the patients experienced as a consequence of the increased-sexual-appetite side effect.

With this reduction in the number of deaths averted by the side effect—from five to zero—the balance of the risks associated with the side effect changes too, of course. The number of deaths *caused* by sexual overindulgence in the unwarned condition remains at four, so the number of deaths caused by the side effect in the unwarned condition now exceeds—by four to zero—the number of deaths averted by the side effect. What this means, finally, is that in our hypothetical where the doctor’s wrong consists of not warning the patient, and where the consequences of the doctor’s wrongdoing—and of the mediating event—accordingly are calculated by comparison to what would have happened if the doctor had administered the drug but warned the patient, the risks associated with the increased-sexual-appetite side effect *are* among the risks that make the conduct wrongful, since the risks caused by the side effect in the unwarned condition exceed the risks averted. Far from refuting our thesis, then, the warning hypothetical confirms it. Our intuition that the doctor is liable in the warning hypothetical is reflected perfectly in the fact that the risks created by the side effect in this hypothetical *are* greater than the risks averted.

To summarize: the increased-risk test succeeds even in cases where the risks and benefits associated with a particular mediating event or extrinsic condition can be “disentangled”—where it’s possible to identify a precaution that would have reduced the risks associated with the mediating event or extrinsic condition without also reducing the benefits. The only circumstance in which these disentangled risks might make a difference—might make the conduct wrong—is where the reduction effected by the precaution would have made the overall risk-level associated with the conduct acceptable or justifiable. In this circumstance, though, the defendant’s wrong really is the failure to take the precaution, rather than the underlying conduct that required the precaution.<sup>313</sup> When

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313. *Id.* (“[N]egligence frequently involves a failure to take a reasonable precaution. Thus, for example, a driver can be negligent for failing to step on the brakes when the driver’s car approaches other traffic on the road. Such a failure can be described as an omission, and it hence can be said that the omission is itself negligent. Alternatively and preferably, it can be stated that the driver is negligent for the dangerous action of driving the car without taking the precaution of braking appropriately.”).

we reframe the increased-risk question to reflect this new, more precise specification of the wrong—when we reframe the question as whether the defendant’s *failure to take the precaution* increased the risk rather than as whether the underlying conduct increased the risk—we get the right result. In the new reframed analysis, the “risks averted” don’t offset the “risks created” because they’re present in both conditions—where the defendant engages in the conduct but takes the precaution and where the defendant engages in the conduct but doesn’t take the precaution.

Of course, the increased-risk test also produces the right answer in cases where the risks and benefits associated with a particular mediating event or extrinsic condition *can’t* be disentangled. In these cases, the risks associated with the mediating event or extrinsic condition do “travel through” to the final Hand formula tallying of the risks and benefits. But they travel through *with* the associated benefits—the risks averted. Because the risks and benefits in each particular part of the risk are *entangled* with one another, risks that are situated in a part of the universe of possible outcomes where bad outcomes don’t predominate—where the risks created don’t exceed the risks averted—can’t really make the conduct wrongful.

## VII. CONCLUSION

All of this probably sounds as if it’s too complicated to explain to lay jurors. But it’s not. For one thing, the judge wouldn’t need to explain every facet of the proposed method of dividing the risk in every case. In cases where the defendant raised a plausible dissipation argument, the judge would instruct the jury on how to divide outcomes according to shared descent from a mediating event. In cases where the defendant raised a plausible wrongful-aspect argument, the judge would instruct the jury on how to divide outcomes according to non-descent from a particular extrinsic condition. Moreover, judges could further simplify the question facing the jury by adapting their instructions to the specific facts of the defendant’s case.<sup>314</sup> In dissipation cases, for example, the judge reasonably could require defense counsel to identify the point in the causal sequence where the increased risk associated with the defendant’s conduct supposedly dissipated, then could put to the jury directly the question whether this mediating event actually posed an increased risk. Likewise, in wrongful-aspect cases, the judge reasonably could require defense counsel to identify the specific risk-enhancing extrinsic condition that supposedly played no role in bringing about the result, then could instruct the jury accordingly.

Even if judges wanted to instruct the jury on every facet of the test in every case, and without adapting the instruction to the specific facts of the defendant’s

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314. See Anderson *ex rel.* Skow v. Alfa-Laval Agri, Inc., 564 N.W.2d 788, 792–93 (Wis. Ct. App. 1997) (“The better practice is for trial courts to customize the instructions based on the specific facts of the case to better assist the jury in understanding the nature of the law and how the law is to be applied to those specific facts.”).

case, they could do so without any real difficulty. The following draft pattern instruction probably would suffice in most cases:

**Jury Instruction—Proximate Cause Definition.** If you find that the defendant’s conduct was an “actual cause” of the victim’s injuries, you must then decide whether the defendant’s conduct also qualifies as a “proximate cause” of the injuries. The proximate cause requirement is designed to identify cases where the connection between the defendant’s conduct and the victim’s injuries is too fortuitous or coincidental to justify holding the defendant liable for the injuries.

The defendant’s conduct will qualify as a “proximate cause” of the victim’s injuries only if (1) the defendant’s conduct increased the risk that somebody would be injured; and (2) the elevated risk created by the defendant’s conduct persisted throughout the sequence of events that connected the defendant’s conduct to the result. In deciding whether a particular event in this sequence posed an elevated risk, don’t count risks that are attributable to specific conditions that, in the end, didn’t wind up playing any role in bringing about the victim’s injuries.

With care, judges probably can do much better. The important thing, though, is that the idea of “care” actually has content here. Because they’re indeterminate, the traditional methods of dividing up the risk—by “general type,” for example, or by “sort of mishap”—don’t lend themselves to the exercise of care. It doesn’t make sense to exhort lawyers to “care” (as the Restatement (Third) of Torts does, embarrassingly) when the possible ways of dividing up the risk are infinite and none of these ways has a better claim to being “right” than any other.<sup>315</sup> By contrast, when the risk is divided up on the basis of causal consanguinity, the increased-risk test yields determinate answers. Care in guiding the jury to these answers isn’t misspent.

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315. RESTATEMENT (THIRD) OF TORTS § 29 cmt. i (“No rule can be provided about the appropriate level of generality or specificity to employ in characterizing the type of harm for purposes of this Section. Nevertheless, some guidance can be obtained by careful reference to the risks that made the actor’s conduct tortious.”); *id.* § 30 cmt. a (“Application of the principle in this Section may require careful attention to, and description of, the risks created by the actor’s tortious conduct.”).