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Consolidating Causation:
Groundwork for a Pragmatic Approach to Causation in the Law

A Dissertation submitted in partial satisfaction
of the requirements for the degree of

Doctor of Philosophy

in

Philosophy

by

Heinrik Ziehm Hellwig

September 2019

Dissertation Committee:

Dr. Carl Cranor, Chairperson

Dr. Larry Wright

Dr. John Martin Fischer

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The Dissertation of Heinrik Ziehm Hellwig is approved:

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University of California, Riverside

Acknowledgements

One cliché that a doctoral student with my temperament hears a lot is, “A good dissertation is a finished dissertation.” There is also Voltaire’s line, “Perfect is the enemy of the good”; I heard that one a lot too. Whatever controversies might attach to these two pieces of advice individually, after a while I realized that they form a syllogism:

A good dissertation is a finished dissertation.

Perfect is the enemy of the good

Therefore, perfect is the enemy of a finished dissertation.

It is unorthodox, a bit nerdy perhaps, to open an acknowledgements page with a syllogism (then again, this is philosophy). I mention it because, having now gone through the dissertation process, the above syllogism is the best piece of advice I can give to doctoral students in the early stages. On the off chance that a student should stumble across this thesis looking for a model of how to go about their own, I want to say the sooner you understand the syllogism’s conclusion, the better your dissertation experience stands to be. I say this with deep humility—because it is a lesson that took me *years* to learn, and I might never have learned it but for my good fortune of consistently being surrounded by so many kind, patient, wise, wonderful people. I am very grateful to be finished and to have the opportunity to thank them in writing.

Part of my good fortune is that I was accepted at the University of California-Riverside in the first place. UCR has a first-rate Ph.D. program in Philosophy. Few students entering advanced study in philosophy will find a department better than UCR’s in terms of offering a vibrant, intellectually and emotionally supportive environment filled with world-class scholars

who teach one how to be a professional. UCR's Philosophy Department has been recognized for this by prestigious commentators on the academic profession, and deservedly so. My dissertation committee exemplified every one of the department's virtues, each member in their own unique way. Carl Cranor, my dissertation Chair, has been the most important person to my philosophical development. A random TA assignment for his Law and Society 100 course many years ago is what inspired my interest in causation in the law and legal philosophy more generally. (I sometimes joke that my decision not to ask for a different TA assignment was the best omission I ever made.) Carl is conversant about law and legal scholarship in a way that few other philosophers in the world are. His breadth of knowledge is matched only by his work ethic, which is among the best I have ever seen. I feel very fortunate to have received such a unique training in legal philosophy from him, one which emphasizes problems internal to law and legal systems as such over a priori considerations. Chapters 1 and 2 were borne directly out of my own Law and Society courses at UCR which were modeled on Carl's curricula. His expertise on causation was crucial to working out Chapter 3. More personally, Carl's warmth cannot be overstated. He is a consummate scholar, both in teaching and in print, and he is owed a great deal of respect. Larry Wright has also played a major part in my intellectual and personal development. Anyone who is familiar with Larry's philosophical views will recognize his influence on the main ideas of this dissertation, especially in Chapters 2 and 3. It was not until I met Larry, I think, that I began to understand how hard philosophy is—and necessarily so, given what he takes the main subject matter of philosophy to be (normativity in the broad sense). Understanding this helped me cultivate more patience for philosophies of which I had been dismissive in previous years, as well as improved senses of pacing and rigor in reasoning; all of which, in turn, helped me cultivate my feelings of appreciation for experiences *outside* of philosophy. Larry's overall positive effect on me shows that we really cannot underestimate the

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While at UCR I benefited from interacting with a large number of pleasant and talented graduate students, many of whom have gone on to do great things. Their names are too many to list here, but three deserve special recognition: Jason Gray, Meredith McFadden, and Jonah Nagashima. My friendships with these three terrific philosophers have been an enduring source of joy and fecundity. The Philosophy Department at UCR has had a number of excellent department chairs: Erich Reck, John Martin Fischer, Andrews Reath and Mark Wrathall. I would like to thank each of these gentlemen for their leadership, service, and numerous teaching opportunities. Gerardo Sanchez and Perla Fabelo have been of indispensable administrative help at several points. I think that if there was a Gerardo and a Perla in every department in higher education the world would be a better place; they deserve every available professional accolade.

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Of course, I could not have completed this dissertation without the support of family and friends outside the academy. I must first extend a full-hearted thank you to my parents, Michael and Jackie Waldron. To my mom: Thank you for being so selfless, for allowing me to do things at my own “Treebeard” pace, and for having more than a little faith in me during some unpleasantly intense periods. To my brother Bart Hellwig and my sister Lucie Hellwig: It seems to me that we help each other even when it feels like we don't, so thank you for that. To my pack—Charlotte Louise Waldron, Maisie Grace Waldron, and August Bruno Hellwig-Waldron: You will never know how much your love has meant to me. The same sentiment applies to the following human beings: Charlie Flowers and the entire Flowers family, Vierra Chakravarti, Katie Farmer, Rei and Piper Hochstrasser, Max Lotko, and Dr. Carole Findlay. Thanks also to Alicia Rounds (née Dailey) and Ava Mayberry for being there by my side during the early ABD years. I must acknowledge my cohort at LifeRing Secular Recovery: Lisa Swing-Conley, Ethen Weekley, Doug Drought, Mason Kepnes (R.I.P.), and my guys, Frank, Mike, and Scott. A very

special thanks to all of you for your perspectives and amazing brand of support, a reliable blend of reasonableness and compassion. My dissertation writing gained momentum after meeting you all, and the latter was a direct cause of the former. Finally, my conversations with Maria Genova, Oliver Golias, and Jeff Holcomb were nothing short of gifts in the closing months.

Last, and indeed the opposite of least, my utmost thanks to the true *sine qua non* of this dissertation, Morgan Treasure. (The reader will pardon me for loading this paragraph with references and metaphors that only she and I will comprehend.) When we first met some 17 years ago, I was a Captain of a certain stripe. But as that ship mercifully started to go down, you let me board yours and you became my captain and witness. You navigated this mutineer through some of the most turbulent seas, and for no good reason as far as I can see. Without you I don't know that I would have set sail again. Once I chartered a new boat I had to relearn how to navigate. I would rely on your maps, which gave me confidence that my coordinates were correct, and my vessel was in proper *alignment*. Without you, again, I might have yawed, and then I would have been back to feeling marooned or lost at sea. Thank you for helping me complete this voyage. I am looking forward to the next one and seeing how we are on the back end.

For Morgan

ABSTRACT OF THE DISSERTATION

Consolidating Causation:
Groundwork for a Pragmatic Approach to Causation in the Law

by

Heinrik Ziehm Hellwig

Doctor in Philosophy, Graduate Program in Philosophy
University of California, Riverside, September 2019
Dr. Carl Cranor, Chairperson

Causation in the law is an extremely complex issue which has vexed philosophers and legal scholars alike. A chief reason for the vexation, I claim, is that most scholars who have tackled the issue start from premises that are philosophically misguided. The conventional viewpoint is that proving causation in a legal case involves two completely distinct elements—cause-in-fact (the question of whether a defendant’s conduct actually causally produced the plaintiff’s injury), and proximate causation (the normative question of whether a defendant should be held responsible for having in fact caused the plaintiff’s harm).

In this dissertation, I argue that the conventional viewpoint is incorrect. The conventional approach draws a sharp dividing line between factual and normative questions that is unjustifiable. An accurate analysis of causation in the law will recognize norms of fact and norms of value as being intricately interconnected. I propose an analysis which interprets causation in the law in terms of *causal selection*—the practice of selecting a “cause” from a set of conditions that were also causally necessary for the effect. Because the selection-oriented

analysis emphasizes interests and purposes, it can account for the crucial interconnectedness of facts and values in legal determinations of cause-in-fact and proximate cause both. By consolidating causation in this way, we can *consolidate* our analysis of legal causation—that is, make it stronger.

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Introduction

*O madness of discourse,
That cause sets up with and against itself...*

—William Shakespeare, *Troilus and Cressida*¹

Once I heard John Doris remark that there are two standard critical responses to any philosophical position: “Oh yeah?”, and “So what?”² That was early in my graduate career, but his remark stuck with me. For it serves as a good litmus test of the worthwhileness of philosophical projects. No philosopher wants their position to be received as false (“oh yeah”) or uninteresting (“so what”), and I think many others would prefer not to have to answer that pesky yet legitimate question that has distressed philosophers since Plato, “What does this have to with ordinary life?” (the ordinary life version of “so what”). If one can give good answers to all these questions, the odds are good that one has a worthwhile philosophical project. This is true for legal philosophy as it is for situationist ethics or transcendental epistemology or anything else. Short of beginning on a cynical note, I mention the Doris anecdote because it expresses the organizing principle of this dissertation, as we will soon see.

Background on the Dissertation Topic

This dissertation is about causation in the law. It has two main related objectives: first, to critically examine some of the main ideas and arguments in contemporary scholarly debates about legal causation; and second, to lay the foundation for an alternative, philosophically-informed approach to legal causation that improves on the contemporary discourse. Causation

¹ Act V, Scene II.

² John Doris is currently Professor in the Sage School of Philosophy at Cornell University. He mentions the “Oh yeah?”/“So what?” dilemma in his book *Lack of Character: Personality and Human Behavior* (Cambridge, U.K.: Cambridge University Press, 2002), 92. It turns out that the line comes from Nicholas Sturgeon, “What Difference Does It Make if Moral Realism Is True?”, *Southern Journal of Philosophy* 24, issue S1 (1986): 115.

matters to law because in many areas of law—criminal, tort, contract, insurance, and others—proving a causal relation is often an essential element of legal liability. Tort, or personal injury law is unique in that proof of causation is always required. That is to say, for all torts, the plaintiff must prove by a preponderance of the evidence that the defendant’s act caused her injury.³ This dissertation focuses almost entirely on causation in tort law.

Causation in the law is an extremely complex subject for several reasons (the least of which is that neither philosophers nor scientists have figured out causation yet). Prime among them is a problem of language. By the end of nineteenth century judges and academic lawyers had become frustrated with courts’ equivocal use of the word “cause.” Sometimes “cause” simply expressed a court’s conclusion as to “what happened” between the defendant and plaintiff, while other times “cause” described what the law ought to do about defendant’s liability.⁴ From the frustration, a groundbreaking idea was born. Lawyers hypothesized that the law’s causation requirement contains *two* separate inquiries. There is “cause-in-fact,” the question of whether the defendant’s conduct actually causally produced the plaintiff’s injury, and then there is “proximate cause,” the normative question of whether the defendant should be held responsible for having in fact caused the plaintiff’s injury. This new analysis was seen as a breakthrough in clarity. Both inquiries are central to resolving a tort dispute, yet each one has a separate function; procedurally, we do not get to proximate cause questions unless the cause-in-fact question has been dealt with

³ Readers will likely be familiar with the high standard of proof in criminal law (“beyond a reasonable doubt,” “proof to a moral certainty”) but in tort law the standard of proof is lower. The plaintiff in a tort suit need only prove that the evidence supporting her case is *convincing*. Some other idioms describing the tort law standard include “more likely than not,” “51-49 for plaintiff,” “50% plus a feather,” “on the balance of probabilities.” For more details, see Carl Cranor, *Toxic Torts: Science, Law, and the Possibility of Justice*, 2nd ed. (Cambridge, U.K.: Cambridge University Press, 2016), 36-37.

⁴ Here I follow Wex S. Malone, “Ruminations on Cause-in-Fact,” *Stanford Law Review* 9, no. 1 (1956): 60.

first. The root of any confusion is that both types of inquiry share the word “cause,” when really, only “cause-in-fact” has anything to do with establishing actual causation.

The cause-in-fact/proximate cause distinction has dominated legal scholarship and legal education ever since. Indeed, for most 1L students, it is the only analysis of causation they ever learn. Predictably, the distinction ushered in a new set of debates:

1. **More debates about language.** Several legal scholars have argued that the phrase “proximate cause” should be eliminated from the legal canon altogether. The thought is that, even though courts have a tradition of using the “proximate cause” language, the ambiguity of the word “cause” in the phrase only stands to perpetuate courts’ confusion about the non-causal issues that are the proper station of proximate cause. Thus, legal scholars have debated replacement language for “proximate cause” that better describes for judges the nature of the inquiry. These debates appear to be settled at the moment as the American Law Institute adopted the phrase “scope of liability” as a substitute for “proximate cause” in its final draft of the *Restatement Third of Torts*.⁵ (In the discussions that follows, I have yielded to tradition and use the term “proximate cause” throughout.)
2. **Debates about the cause-in-fact/proximate cause distinction.** How exactly should we understand the categories of cause-in-fact and proximate cause? What is the nature of the difference between them? A popular answer is the view that I call *causal divisionism*, so called because it endorses a strong *division* between normative and non-normative aspects of attributions of legal responsibility in respect of causation. Causal divisionists answer that only cause-in-fact inquiries are “genuinely

⁵ American Law Institute, *Restatement of the Law Third, Torts, Liability for Physical and Emotional Harm* (St. Paul, Minn.: American Law Institute Publishers, 2010), § 29.

causal” in that they deal exclusively with the existence of a causal link between defendant’s act and plaintiff’s harm. Whereas proximate cause inquiries are completely non-causal and have only to do with normative policy questions about limiting defendants’ responsibility. The most vocal contemporary supporter of causal divisionism is Richard W. Wright, but standard hornbook presentations of causation articulate it in terms of causal divisionism. Some scholars have objected to causal divisionism’s treatment of proximate cause as “completely” non-causal, arguing that the grounds of limiting responsibility are actually based in descriptive norms of causation.⁶ Moreover, a meta-question: On what normative ground is the cause-in-fact/proximate cause distinction itself justified?

3. **Debates about the law’s concept of factual causation.** What concept of cause does the law operate with to establish the factual causal link required for liability? Is it the same concept of cause that we use in ordinary life or is it a legal notion specifically tailored to liability? It is well known that the law’s main test of factual causation (the “but for” test) expresses causation in terms of strong necessity between defendant’s act and plaintiff’s harm: had it not been for the defendant’s negligence, the injury wouldn’t have occurred. By way of ordinary language analysis and a rigorous study of the case law, Hart and Honoré famously argued that the law and ordinary life share the same concept of cause, one that views causal relationships in terms of weak necessity.⁷ While their work was and still is considered groundbreaking, overall

⁶ Theorists vary as to what *types* of descriptive norms are involved. Michael Moore, for instance, thinks they are the product of a metaphysical theory of causation that the law must presuppose to hold people liable per a corrective justice theory of responsibility. See Michael S. Moore, *Causation and Responsibility* (Oxford: Oxford University Press, 2009).

⁷ See H. L. A. Hart and Tony Honoré, *Causation in the Law*, 2nd ed. (Oxford: Clarendon Press, 1985). By “weak necessity” I mean the idea that a cause is “a necessary element of a true

there have been no strong advocates of Hart and Honoré's theory. The debates about factual causation have a normative dimension as well. The law's but-for test notoriously cannot be applied in cases of multiple causation. (I discuss this issue in more detail in Chapter 2.) Consequently, scholars have pursued the question: What test of factual causation should the law use other than the but-for test, either as a replacement or a supplement? Can the but-for test be modified to accommodate the problem cases? Numerous answers to these questions have been proposed. One influential answer comes from Richard Wright, who argues that the law should adopt the NESS (acronym for "Necessary Element of a Sufficient Set of conditions) test for factual causation.⁸ For Wright, the NESS test should be used because it embodies the essence of empirical, scientific understandings of causation. Thus, according to Wright, when courts use the NESS test to make factual findings about causation, those findings will really be *facts*, i.e., they will reflect the structure of causal facts as they exist in the real world. If that's correct, the NESS test keeps the cause-in-fact inquiry from becoming a mere legal device. The *Restatement Third of Torts* endorses Wright's NESS test as the preferred alternative for cases where the but-for test cannot be applied.

4. **Debates about the viability of proximate cause tests.** Are some of the law's tests for proximate causation more problematic than others, conceptually or normatively?

causal explanation of the result according to causal laws." (Ingeborg Puppe and Richard W. Wright, "Causation in the Law: Philosophy, Doctrine and Practice," in Maria Infantino and Eleni Zervogianni, eds., *Causation in European Tort Law* (Cambridge, U.K.: Cambridge University Press, 2017), 45)

⁸ See especially Richard W. Wright, "Causation in Tort Law," *California Law Review* 73, issue 6 (1985): 1735-1828. Wright has developed his view over several articles, but "Causation in Tort Law" is the seminal one.

Is it possible to taxonomize all the law's various tests for proximate cause, or condense them into a few formulae?

The above is my own brief inventory of debates about the cause-in-fact/proximate cause distinction. This dissertation concentrates on debates of types 2 and 3, and to a much lesser extent, type 1. I do not discuss debates of type 4 at all. My chief concern is with debates of type 2, particularly the claims of causal divisionism. The bulk of my dissertation is devoted to defending the claim that the causal divisionist analysis of legal causation should be rejected.

What's Wrong with Causal Divisionism

Causal divisionism is problematic on both philosophical and legal-theoretical grounds. I will explain the philosophical problem first. Philosophically-minded readers will surely notice a correlation between the cause-in-fact/proximate cause distinction in law and the fact-value distinction in philosophy. The conventional wisdom is that fact judgments and value judgments are two different kinds of thing. Here is how a traditional philosophical accounting might go. Ideas and beliefs in the minds of thinking subjects are true if and only if they correspond to an objective reality. Let us agree that the external world, i.e., the world as discovered by science, is "objective reality" (although the phrase could refer to a transcendental realm like a Platonic heaven that represents things in the external world as they "really" are). Value judgments—e.g., "x is good, y is bad," "x ought to do y," "x is desirable"—are therefore not true unless some aspect of the external world exists which confirms that they *are* true. Upon reflection one recognizes that no value judgment could be true or false, for one cannot say what entities or properties *in* the world would make them true or false, and there is no empirical method to test and verify the truth-bearer of a value judgment. Factual judgments are different. With facts we can empirically test and verify them. We can construct *evidence* that something in the world exists that corresponds to the idea, belief, or perception in our heads. Also, with facts, unlike values, once

we *know* something for a fact there is little-to-no room for disagreement: the thought is that we understand something so clearly that we see it how it would look from a “God’s eye” perspective. Since facts and values differ in these ways, *they must be two completely different types of entity*. (Then a whole rash of philosophical problems gets started. How do facts and values differ fundamentally—what are their respective natures? Can values be objectively true in any sense? Are they merely subjective, and if so, what do value judgments express—feelings, preferences? Can “ought” statements be derived from “is” statements? And on and on.). Causal divisionism, of course, accounts for cause-in-fact and proximate cause much like traditional philosophy does fact and value. Cause-in-fact judgments do not contain any evaluative content and can be verified with evidence; proximate cause judgments are not fact-based, and rest entirely on some policy reason that the law has deemed valuable.⁹

Since Hume virtually all modern philosophers have accepted some version of the distinction between facts and values. However, some have argued that the fact-value dichotomy is not absolute, and some have even argued that it is false. A powerful criticism comes from thinkers working in the classical American pragmatist tradition, particularly John Dewey.¹⁰

⁹ One might object that proximate cause rules are verifiable in that we can point to the legal source materials that contain them, e.g., cases, statutes. But this would be to affirm only the source of the legal values, not the existence of the legal values themselves. No matter the source there can still be disagreements about correctness (either descriptive or normative) of the law’s policy rationales for limiting responsibility. Therefore, the objection does not stand.

¹⁰ In philosophy, the meaning of “pragmatist” and its cognates depends on which area of philosophy—which philosopher, really—we are talking about. Mill, Wittgenstein, Quine, Putnam, Rorty, van Fraassen, even Kant and Plato may all be said to be “pragmatic” philosophers of a certain stripe. Most commonly the word refers to ideas and thinkers from the classical American pragmatist tradition of the late 19th- and early-20th centuries—John Dewey, William James, Josiah Royce, and Charles Sanders Peirce. It is hard to distill American pragmatism in a few sentences because the position is largely a reaction to the entire philosophical tradition (its problems and methodologies) going back to Plato; one cannot fully appreciate what the American pragmatists are up to without all that background. But one of the chief features of American pragmatism is its thoroughgoing rejection of *dualisms*—e.g., mind-body, appearance-reality, fact-value, theory-practice, and to some extent true-false. *Very* roughly, philosophers have mistakenly

Dewey argues that the dichotomous characterization of facts and values is a nonstarter because values are an indispensable part of the activity of fact discovery:

[The] element of direction by an idea of value applies to science as well as everywhere else. For in every scientific undertaking, there is passed a constant succession of estimates; such as “it is worth treating these facts as data or evidence; it is advisable to try this experiment; to make this observation; to entertain such and such a hypothesis, to perform this calculation,” etc.¹¹

Dewey’s point is that values are involved at every stage of the “factual” inquiry process.

Something stands out that *interests* us and we *desire* to have it explained. There’s a pattern that is *worth* investigating. Some data is *more helpful* than other data. We *should* try this experimental method instead of that one because it is *more conducive* to our inquiry. We actually experience our investigative activities as being influenced by values in this way. Moreover, without such values directing our activities *no facts could ever be established*.¹² It is therefore a mistake, Dewey would say, to consider facts and values in isolation from one another.

If it is a mistake in the sciences, why is it not also a mistake in the law? The question is sensible considering that law as an institution exists *to realize social values*. In every instance

treated these categories as pre-existing ontological realities but in fact they are products of thought that developed out of a need to actively cope with the conditions of ordinary experience. Philosophy’s abstractionist tendency to make a priori claims about the nature of reality has deleterious effects on the activity of philosophy itself—such as creating pseudo-problems, creating unreasonable standards for securing meaning in human life (e.g., finding *certain* knowledge), presenting a distorted and inaccurate picture of life and thought by ignoring the sensitivities of context and *direct* human experience, and worst of all, offering nothing that can help people or institutions solve real-life problems. See John Dewey, “Escape from Peril,” in John J. McDermott, ed., *The Philosophy of John Dewey* (Chicago: University of Chicago Press, 1981), 355-71.

¹¹ John Dewey, “The Construction of Good,” in John J. McDermott, ed., *The Philosophy of John Dewey* (Chicago: University of Chicago Press, 1981), 581. Incidentally, Dewey does think that value judgments are empirically testable, but his argument is technical and covering it here is unnecessary.

¹² Here I follow David A. Granger, *John Dewey, Robert Pirsig, and the Art of Living: Revisioning Aesthetic Education* (New York: Palgrave Macmillan, 2006), 74.

fact discovery in a legal case is done in the interest of securing something that both the litigants and the larger community value—among other things, justice (however construed), the protection of rights, the restoration of order. On that score it is puzzling how anyone could say that there are “purely factual” inquiries in law, or that such a notion is even possible. This leads to the legal-theoretical problem with causal divisionism. When one looks at the actual operation of cause-in-fact rules in law, one finds that they are pregnant with normative influences. Courts pick and choose which cause-in-fact tests to use for policy reasons. “Legal tradition demands, in the interest of continuity and predictability in the legal system, that we use the but-for test wherever possible to prove cause-in-fact”; that is a policy reason. If a plaintiff’s rights have been prima facie violated, and the opportunity to prove her case is precluded because of a conceptual defect in the but-for rule that prevents it from being applied to her case, the court will look for a reasonable alternative to proving causation that affords her the opportunity; that also is a policy reason. As I argue in Chapter 2, there are even openings *within* the but-for test itself for the influence of policy. The causal divisionist cannot resort to suggesting that the cause-in-fact/proximate cause distinction is a “useful” fiction—i.e., something which law treats as real for liability purposes but isn’t actually real—because that would be to justify the distinction in terms of policy and besides, causal divisionists do not believe *that*. They think the law’s causation requirement really is constituted by these two separately functioning inquiries. But again, it is hard to see how their description matches the law’s actual practices. The causal divisionist picture is inaccurate and artificial.

To make the full case against causal divisionism, subtler distinctions and more careful arguments need to be made. I do that in the chapters that follow, but the discussion above captures the overall flavor of my position. Values affect all factual inquiries inside and outside

the law, and any plausible analysis of causation must account for this. An alternative to causal divisionism is therefore needed.

The Sense of “Pragmatic” in the Dissertation Title

In legal theory, the word “pragmatic” has come to mean many things, so I need to say something about the sense of “pragmatic” I have in mind. In legal theory the term “pragmatism” primarily refers to a certain set of views on judging and legal reasoning. Generically, legal pragmatism is the idea that judicial decision-making should not be based on abstract moral or political theory, but by consideration of what would be the most reasonable decision, where “reasonableness” is understood in terms of reasoning about the consequences of deciding a case.¹³ Whenever possible the pragmatist will rely on empirical data to make decisions. The main consequences of interest to the pragmatist judge will be case-specific ones, that is, how these particular litigants will be affected, but also systemic ones like consistency and impartiality in the definition and administration of legal rights; the unity that marks pragmatic adjudication is a singular concern for social well-being.¹⁴ In contemporary legal theory the best known pragmatist is certainly Richard Posner, who views pragmatism as a mood or attitude as much as a species of judicial philosophy:

The brand of pragmatism that I like emphasizes the scientific virtues ... elevates the process of inquiry over the results of inquiry, prefers ferment to stasis, dislikes distinctions that make no practical difference ... is doubtful of finding “objective truth” in any area of inquiry, is uninterested in creating an adequate philosophical foundation

¹³ See the outline of pragmatic adjudication in Richard Posner, *Law, Pragmatism, and Democracy*, 59-60.

¹⁴ See Jefferson White and Dennis Patterson, “Consequentialism,” in Jefferson White and Dennis Patterson, eds., *Introduction to the Philosophy of Law: Readings and Cases* (Oxford: Oxford University Press, 1999), 95. Social well-being can be construed in different ways on legal pragmatism. Posner, for example, has a reductionist view that says most all justifiable legal decisions can be analyzed in terms of economic well-being. As the present discussion is a mere introductory note, I will not indulge in the complicated details of this aspect of legal pragmatism.

for its thought and action, likes experimentation, like to kick sacred cows, and—within the bounds of prudence—prefers shaping the future to maintaining the past.¹⁵

Posner claims that his brand of pragmatism reflects the attitude of “everyday” pragmatism, i.e., that business-like, “how-does-this-get-us-where-we want-to-go” way of thinking that tends to be disdainful of abstract thinking in the service of results.¹⁶ That seems to me to be an overstatement. Forward-looking though everyday pragmatists may be, it isn’t clear that ordinary people of a pragmatic bent are skeptics about objective truth or are so contrarian that they like to “kick sacred cows.” So, Posner’s sense of “pragmatic” is somewhat idiosyncratic, but I digress.

Posner says that he has found “little in classical American pragmatism ... that law can use.”¹⁷ I disagree. In my view, the discourse on causation in the law can be improved by incorporating the ideas of classical pragmatism, particularly its rejection of the fact-value distinction. *Classical pragmatism provides us a sound philosophical reason for rejecting the fact-value distinction and legal notions that assume the fact-value distinction.* I think that by blending this feature of classical pragmatism with the attractive features of Posner’s legal pragmatism—emphasizing the scientific virtues and elevating the process of inquiry, ferment over stasis, disliking distinctions that make no practical difference—a fresh approach to adjudicating matters of causation may be developed. There are no extant, well-developed, pragmatic treatments of causation, much less a judicial philosophy that strongly relies on classical pragmatist ideas. So really, I have in mind a hybrid sense of “pragmatic”: legal pragmatism that incorporates ideas from classical American pragmatism.

¹⁵ Richard Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990), 28.

¹⁶ Posner, *Law, Pragmatism, and Democracy*, 50.

¹⁷ *Ibid.*, 49.

While the dissertation title emphasizes pragmatism, an alternative subtitle might have been “Groundwork for a More Sensible Causal Divisionism.” By pointing out that factual inquiries have normative features, I am not saying something so bold as all causal judgments are ultimately value judgments. Dewey would not say that either. My thesis is that neither the cause-in-fact nor proximate cause element in legal causation is ontologically “pure,” as it were: each element has factual and normative aspects *necessarily*. Values play a role in picking out facts, but facts and values will differ in terms of their functional roles.¹⁸ Causal divisionism is unacceptable unless it is more sensitive to this point. Perhaps I could have presented the dissertation as a solo critique of causal divisionism, but I include the pragmatism because I think the prospect of a pragmatic (in the hybrid sense) theory of legal causation is more interesting.

The Need for Groundwork

Beyond this introduction I do not discuss classical pragmatism in the dissertation. This is appropriate because, I must reiterate, my dissertation claims only to be laying *groundwork* for a pragmatic approach to causation in the law. A quick study of classical American pragmatism reveals that it covers a vast amount of philosophical terrain—metaphysics, epistemology, social and political philosophy, education, aesthetics, human psychology, and even the paranormal.¹⁹ Supposing Posner is wrong, to show what legal pragmatism has to gain from classical pragmatism’s insights in all of these areas, even in a single area like causation, is a separate dissertation project. My aim is very modest by comparison. I am using classical pragmatism’s criticism of the fact-value distinction to provide a philosophical motivation for criticizing and

¹⁸ I am grateful to John Fischer for pressing me on this point.

¹⁹ William James famously dabbled in seances and spiritual mediumship. For more details, see Krister Dylan Knapp, *William James: Psychological Research and the Challenge of Modernity* (Chapel Hill: The University of North Carolina Press, 2017).

rejecting causal divisionism. On that basis, I identify three questions to be answered and discussed thoroughly *if* one wishes to develop a more complete, pragmatic (again in the hybrid sense) analysis of causation in the law. Those three questions are:

- (i) How does one distinguish a proximate cause issue?
- (ii) Where exactly does causal divisionism go wrong?
- (iii) If we do not analyze causation in the law in terms of causal divisionism, how should we think of it?

I answer each of these questions in Chapters 1 through 3, respectively.

Plan of the Dissertation

This dissertation is comprised of three long essays. Criticizing certain varieties of legal analysis is the unifying theme of the essays. Here is a chapter-by-chapter summary.

In Chapter 1, I identify the norms of law that matter most for identifying a proximate cause issue in a legal case. I do this by developing a new interpretation of the famous tort law case *Palsgraf v. Long Island Railroad*. I reject the popular interpretation that *Palsgraf* is a “proximate cause case.” Rather, the main legal dispute being resolved in *Palsgraf* is a question of breach: Did the defendant railroad company fail to do a legal duty it owed to Mrs. Palsgraf? Focusing mainly on Justice Cardozo’s majority opinion, I reject the standard interpretations of Cardozo that take him to be relieving the railroad of liability because the plaintiff was unforeseeable, or because the plaintiff’s harm was unforeseeable. I argue that what’s important to Cardozo, for purposes of assigning liability in torts, is the defendant’s relationship to the *risk* that led to the harm. Tort liability, according to Cardozo’s lights, must be determined using concepts of unlawful risk rather than concepts of harm or unlawful conduct. Cardozo’s views on breach, responsibility and risk as they relate to *Palsgraf* has broader significance for how we understand the proximate cause concept—its role in tort liability, where it applies, and what sort of limitation

on liability proximate cause actually is. Specifically, *Palsgraf* teaches us that proximate cause questions arise in a case only if a defendant is found to be culpable (negligent) in the first place. Where a defendant has not created the risk to plaintiff, it would be wrong to analyze and decide the case in terms of causation. I develop these points by emphasizing that what seems most crucial to Cardozo's decision is the fact that the railroad employees had no way of knowing the risks of mishandling the boarding passenger's package. Chapter 1 also aims to introduce the reader to the crucial role of negligence in tort causation.

In Chapter 2, I address myself to causal divisionism directly. I argue that courts and especially legal scholars have exaggerated the distinction between cause-in-fact and proximate cause. My argument proceeds in two steps. First, I argue that cause-in-fact is not a "purely factual," non-normative inquiry. I analyze the law's two favored tests for cause-in-fact—the "but for" test and the NESS test—and show that both tests may call for normative policy judgment at numerous points in the cause-in-fact inquiry. Courts must place constraints on the but-for test so that fact finders can reasonably predict how the world would have gone had the defendant not committed a breach. I argue that these constraints are ultimately normative. Regarding the NESS test, I argue that it is also subject to normative constraints, particularly when it comes to fact finders' deliberations about how to construct sets of sufficient conditions. The upshot is that neither test for cause-in-fact is "purely factual." The second step of my argument applies a similar strategy. I show that proximate cause is not a "purely non-factual," normative inquiry. I analyze two general proximate cause principles that do not exclude causal explanations of plaintiffs' harm—the "abnormal coincidences" rule, and the risk rule. Both rules need to correspond to a natural interpretation of the strength of the causal link in order to be good "policy reasons" for limiting liability in a case. Thus, background knowledge and competence with causal concepts affect the acceptance of proximate cause principles. If my analysis is correct,

then proximate cause assessments are not “purely non-factual.” Therefore, causal divisionism’s two main theses are false.

In Chapter 3, I develop the arguments of Chapter 2 and argue that courts should be more aware of the complex, and necessary, interplay of fact and value norms when deciding legal causation issues. I suggest that causation in the law should be thought of in terms of (indeed, as an instance of) the more basic philosophical issue of *causal selection*—the issue of how, in ordinary judgment, one selects only some of the causal conditions as “causes” of an effect while ignoring the many other conditions that were also causally necessary for the effect. I propose that both the cause-in-fact and proximate cause elements should be thought of in terms of causal selection. As any instance of causal selection involves the selector’s interests, and interests are fundamentally evaluative, I argue that a selection-oriented picture can account for the interplay of facts and values in both elements while causal divisionism cannot. I develop my proposal by defending—and in a sense, reviving—Wex Malone’s causal-selection analysis against causal divisionism. If Malone’s selection-oriented picture is accepted, it follows that the cause-in-fact/proximate cause distinction is a difference of degree not a difference in kind. This conclusion has several potential implications for the legal scholarship and the courts. But I emphasize that the selection-oriented picture is a more accurate presentation of what actually goes on in tort determinations of causation.

Chapters 2 and 3 are so closely related that Chapter 1 may appear to be disconnected or remote. However, let me say that the lessons about proximate cause from Chapter 1 will inform the reader how causal selection will work at the proximate cause stage. I elaborate this point in Chapter 3.

By rejecting causal divisionism and reconciling fact and value in both elements of the law’s causation requirement, my project consolidates causation—that is, it combines two things

(cause-in-fact and proximate cause) into a single more effective whole. In doing so, my aim is to *consolidate* causation, that is, to make our analysis of legal causation in the law stronger, more solid.

I have made several claims in this introduction. Per the Doris anecdote, I should prepare to hear the “oh yeah” response. In other words, “Show me that what you say is not false!” I will endeavor to do just that in Chapters 1 through 3.

Once More unto No Breach: The True Significance of *Palsgraf* for Proximate Cause¹

Chapter 1

Many events have an important causal role in the production of any injury. Yet the law does not hold all the actors who causally contribute to a plaintiff's injury legally responsible. Take two fully grown adults, Smith and Jones. If Smith injures Jones, Smith's parents will not be held liable for Jones's injury even though they caused Smith to be born, who in turn caused Jones's injury. Courts use the concept of proximate cause to determine which events are *sufficiently related* to plaintiff's injury support a holding of legal liability. Generally speaking, the less attenuated the causal relationship between the defendant's action (or inaction) and the plaintiff's injury, the greater the likelihood of judging the defendant's action to be a proximate or legally responsible cause: the more direct and less obstructed the causal connection is between defendant's action and plaintiff's injury, the more likely it is that the defendant's action will be judged the proximate cause.²

Courts inquire into the appropriateness of deeming a defendant a proximate cause only if the plaintiff has already established with evidence that the defendant in fact caused or causally contributed to the injury. Thus, proximate cause determinations implicate norms of causation, i.e., our understandings of how causal relationships work, as well as institutional norms of law. The most common context that gives rise to proximate cause concerns involves the need to determine how far to stretch the liability of a negligent defendant. The issue may also surface

¹ The title of this chapter contains an allusion to Henry's famous speech in Act III, Scene I of Shakespeare's *Henry V* ("Once more unto the breach, dear friends..."). One who undertakes to tackle the massive *Palsgraf* literature can't help but feel like one of Henry's troops, attempting to make an advance on a fortified city.

² For a set of illustrative proximate cause scenarios, Joseph Page, *Torts: Proximate Cause* (New York: Foundation Press, 2002), 13-17.

when courts grapple with whether to attach legal consequences to a plaintiff's own careless conduct that contributed to the harm she suffered at the hands of a tortfeasor.³

That courts rely on both norms of causation and norms of law is uncontroversial in the legal scholarship: typically, academic lawyers and legal philosophers assimilate norms of causation to cause-in-fact findings and norms of law to proximate cause. However, *which* norms of law matter for identifying when a proximate cause issue needs to be resolved in a legal case, and what the law's criteria really are (or should be, depending on the tenor of the debate) for a plaintiff's injury and a defendant's action to be "sufficiently related" for liability, are very much matters of controversy. Proximate cause issues can become quite confusing due to subtleties in the facts and types of events that led to the plaintiff's injury as they pertain to the defendant's alleged breach of a legal duty. Consequently, throughout the history of Anglo-American law courts have, somewhat notoriously, employed a range of tests and approaches that are enmeshed with different concepts—such as remoteness or hindsight (tracing a harm back to the event(s) that can be reasonably said to have caused it), foreseeability, risk and its relationship to one's duty to exercise due care, and several others—to decide proximate cause issues.

One observes that standard hornbook presentations of proximate cause stress the *relational* aspects of legal norms. Effectively the hornbook authors ask, what *relations* matter most for legal liability? With respect to proximate cause, authors usually focus on things like the relation between the defendant's act and the harm that occurred, or the relation between the actor and the victim. Within these discussions the concept of *foreseeability* is often emphasized. For example, discussions focusing on the relation between the defendant's act and plaintiff's harm usually emphasize whether the act was so *remote* (in time and/or space) from the harm that the

³ Ibid., 9.

harm was not foreseeable, while discussions that focus on the relation between the actor and the victim usually look at whether the victim herself, and thus any risk of harm to her, was not foreseeable. On these standard presentations, if either the harm or the victim was foreseeable and the defendant's act in fact caused the injury, the defendant is held to be a proximate cause of the injury and therefore liable.

I think this standard approach to presenting proximate cause is lacking. The relational content strikes me as entirely fine: the norms, structures, and expectations that law relies on to assign legal liability is exactly what should be studied. However, the standard approach focuses too rigidly on these two subclasses of foreseeability—of the harm and of the victim. In my view proximate cause judgments encompass a complex, wide-ranging network of normative relational phenomena; the two common subclasses of foreseeability (harm or victim) may be merely part of that network, and there are vast, intricate, normative relations at work *within* those subclasses when we employ them to analyze a legal case. Failure to appreciate this fact can yield worrisome consequences for the analysis of tort cases more generally. One such consequence is misinterpreting a legal case as a “proximate cause case”—i.e., a case in which the main legal dispute being resolved concerns proximate cause. When certain misinterpretations become popularized, they propagate misunderstanding about the concepts they implicate.

Nowhere is this misunderstanding more evident than in the literature on the case *Palsgraf v. Long Island Railroad*.⁴ *Palsgraf* is routinely presented in hornbooks and philosophy of law anthologies as a paradigmatic proximate cause case.⁵ Indeed, in some anthologies *Palsgraf* is the

⁴ *Palsgraf v. Long Island Railroad*, 248 N.Y. 339, 162 N.E. 99 (1928).

⁵ Hornbooks are legal treatises, typically one volume in length, that summarize the law in a specific field, e.g., torts, contracts, wills and trusts. They are written primarily for law students.

only legal case included in the sections on legal causation.⁶ *Palsgraf* therefore has an exclusive status in the minds of philosophers and legal scholars, who see it as an outstanding example of a real-life court resolving a proximate cause question and illustrative of legal causation problems. In this chapter, I argue that *Palsgraf* is not, and should not be viewed as, a proximate cause case. The main legal dispute being resolved in *Palsgraf* does not concern proximate cause. Rather, *Palsgraf* involves a question of breach. The main question in the case is, did the defendant railroad company breach (i.e., fail to fulfill) a legal duty it owed to Mrs. Palsgraf? At the same time, we can learn important lessons about proximate cause from *Palsgraf*. To discover those lessons and understand them correctly one must approach *Palsgraf* as a breach case and carefully look at Chief Judge Cardozo's (writing for the majority) and Judge Andrews's (writing for the dissenters) opinions for the normative aspects of tort law that underlie their rationales.⁷ I propose to develop these ideas by thoroughly analyzing and discussing both opinions in the *Palsgraf* case.

Although proximate cause is the kernel of Andrews's dissent, my discussion will concentrate on Cardozo's opinion. A popular interpretation of Cardozo takes him to be relieving the railroad of liability because the plaintiff herself was unforeseeable.⁸ Others say that it was the

⁶ See, for example, Frederick Schauer and Walter Sinnott-Armstrong, eds., *The Philosophy of Law: Classic and Contemporary Readings with Commentary* (Oxford: Oxford University Press, 1995).

⁷ See Benjamin Zipursky, "Rights, Wrongs, and Recourse in the Law of Torts", *Vanderbilt Law Review* 51, no. 1 (1998): 1-99. In Section II of that article, Zipursky argues that Cardozo is not resolving a proximate cause issue and that, for him, *Palsgraf* is a case of "substantive standing". Very roughly, this means that a plaintiff can bring a tort claim only if the wrong committed by the defendant was wrongful in the relevant respects in relation to the plaintiff. I am expanding on Zipursky's viewpoint in that I express and develop the principle on which Cardozo finds for the railroad: the railroad neither committed a wrong to the plaintiff nor violated one of her rights, because it did not stand in right relation to the risk that led to her harm.

⁸ See, for example, Richard A. Posner, *Cardozo: A Study in Reputation* (Chicago: University of Chicago Press, 1990), 41, and Richard A. Epstein and Catherine A. Sharkey, *Cases and Materials on Torts*, 11th ed. (New York: Wolters Kluwer, 2016), 272.

plaintiff's harm that was unforeseeable.⁹ I reject these interpretations and argue that what's important to Cardozo, for purposes of assigning liability, is the defendant's relationship to the *risk* that led to the harm. For Cardozo, to hold defendants legally responsible for accidents courts must assess defendants' involvement using concepts of *unlawful risk*: the concept of risk binds plaintiff and defendant together in rights and duties corresponding to the risk.¹⁰ It is not the case, according to Cardozo's lights, that concepts of unlawful conduct or causing of harm are what sufficiently relate plaintiff and defendant to each other in a holding of liability for negligence. Cardozo's analysis of the case—and how he decides the breach issue—illuminates the role of proximate cause in tort law, where it applies, and what sort of limitation on liability it actually is.

Appreciating Cardozo's views on responsibility and risk as they relate to *Palsgraf*, and ascertaining their significance for proximate cause, requires that one chief detail of the case be scrutinized: namely, that the risk that ultimately led to Mrs. Palsgraf's injury did not originate with the railroad's employees.¹¹ In Section 1 below, I explain why this detail is important, and that what seems most significant to Cardozo is the fact that the defendant railroad employees *had no way of knowing the risks* of mishandling the boarding passenger's package. This fact

⁹ See Andrew Kaufman, *Cardozo* (Cambridge, Mass.: Harvard University Press, 1998), 300.

¹⁰ Here I follow Ernest J. Weinrib, *The Idea of Private Law: Revised Edition* (Oxford: Oxford University Press, 2012), 158-70. My analysis of *Palsgraf* is similar to Weinrib's in certain key respects. However, unlike Weinrib, I do not think that Andrews's conception of duty is incorrect in the overall context of negligence liability. I expand on this in Section 2 below.

¹¹ In this respect, my rendition of *Palsgraf* resembles Peter M. Gerhart, *Tort Law and Social Morality* (Cambridge, U.K.: Cambridge University Press, 2010), 127-49, especially 140-41. Unlike Weinrib (see fn. 10 above), Gerhart situates Cardozo's understanding of *Palsgraf* in the facts of the case. For an earlier statement of Gerhart's views, see Peter Gerhart, "Resuscitating *Palsgraf*," *Case Western Reserve University Research Papers in Legal Studies*, Working Paper 04-11 (August 2004): 1-66. Draft available at SSRN: <http://dx.doi.org/10.2139/ssrn.574201>. This entire chapter is very much inspired by Gerhart's work.

distinguishes *Palsgraf* from other negligence tort cases, but it has the effect of highlighting that foreseeability of the *risk* of harm is crucially important for tort liability. From this consideration I derive a “no breach” interpretation of *Palsgraf*. Then I develop my claim that breach of duty is the main issue in *Palsgraf* and I argue that it is correct. In Section 2, I defend my interpretation of *Palsgraf* against two standard analyses—*Palsgraf* as a “no duty” case, and *Palsgraf* as a foreseeability case. In addition to pointing to several flaws in the “no duty” and foreseeability analyses, I attempt to reestablish the roles of duty and foreseeability in *Palsgraf* and similar cases (i.e., where the defendant does not create the risk that leads to plaintiff’s harm). In Section 3 I reject the claim that *Palsgraf* is a proximate cause case while identifying three unique lessons about proximate cause that can be learned from *Palsgraf*. Specifically, *Palsgraf* teaches that the idea of “limiting” liability is actually a very subtle notion; that proximate cause is about the extent of liability for consequences of *culpable* conduct; and that analyzing a defendant’s relationship to risk, although central to determining a defendant’s culpability, is not central to determining whether a defendant is a proximate cause. I develop each of these lessons. Then finally, in Section 4, I conclude the chapter.

1. How to Understand *Palsgraf*: Breach as the Issue in the Case

Another Foray into Murky Waters?

It is not hyperbole to say that perhaps no other legal case has attracted more commentary in the legal literature than *Palsgraf*.¹² Indeed, Richard Posner has said he believes that *Palsgraf* is “the only case reprinted in *all* American casebooks on tort law.”¹³ So much ink has been spilled

¹² For an inventory of some of the commentaries on *Palsgraf*, see W. Page Keeton, et al., *Prosser and Keeton on Torts*, 5th ed. (Minnesota: West Publishing Group, 1984), §43, 284, n. 31, and John T. Noonan, Jr., *Persons and Masks of the Law* (Los Angeles: University of California Press, 1976), 114-22, 191-92.

¹³ Posner, *Cardozo: A Study in Reputation*, 42. Emphasis original.

over *Palsgraf* that it has become all but customary for commentators to begin by pointing out how much ink has been spilled over it. For example, Prosser writes:

The legal writers [on *Palsgraf*] have galloped off in all directions, in a tangle of duty, negligence, foresight, hindsight, direct and intervening causes, the division and classification of interests and injuries, liability without fault or in excess of fault, social policy, the balancing of various claims to protection or immunity, and everything else that inevitably becomes involved in any discussion of “proximate cause.”¹⁴

Considering Prosser’s words, one might wonder if there is anything left to be said about *Palsgraf*. Prosser was suggesting that *Palsgraf* had been analyzed to the point where there exists no organized debate about it: people are merely commenting and opining on whichever particulars of the case fancy them. That was in 1953. More than sixty years later, the state of *Palsgraf* is much the same: like Prosser said, it’s a “celebrated, . . . controversial”¹⁵ case that has generated sundry opinions and interpretations such that debates about *Palsgraf* now have an unappealing, nebulous quality.

So, why another long discourse on *Palsgraf*? Despite the desultory state of things, I think there is much to be gained by revisiting and analyzing *Palsgraf* once more. At the risk of hyperbole, I think it is possible to say that one can develop a theory of the analytical structure of tort law based on one’s interpretation of *Palsgraf*.¹⁶ Of course, I do not wish to undertake something that

¹⁴ William L. Prosser, “Palsgraf Revisited,” *Michigan Law Review* 52, no. 1 (1953): 1.

¹⁵ *Ibid.*

¹⁶ See Jules Coleman, Scott Hershovitz, and Gabriel Mendlow, “Theories of the Common Law of Torts,” *Stanford Encyclopedia of Philosophy*, published December 17, 2015, accessed June 25, 2019, <https://plato.stanford.edu/entries/tort-theories>. Here I am utilizing Coleman et al.’s distinction between *analytical* and *normative* theories of tort law. Analytical theories aim “to identify the concepts that figure centrally in tort law’s substantive norms and structural features (the latter being the procedures and mechanisms by which the institution of tort enforces its substantive norms) and . . . to explain how tort’s substantive norms and features are related” Normative theories on the other hand aim to *justify* tort law. A normative theory of tort, for example, might defend the values that tort law embodies or the goals it aims to achieve, or it might recommend changes that would help tort law do a better job of realizing certain values or achieving certain policy objectives.

ambitious here. But *Palsgraf* is so rich regarding the foundational concepts of tort liability that it is well worth diving back in. Let me provide some background, followed by a modest interpretation of the case.

Background and Cardozo's Logic

In August 1924, Mrs. Helen Palsgraf was waiting for a train at a Long Island Railroad station; she had made plans for a Sunday outing to with her two daughters. Two men attempted to board the train before hers. While boarding, one of the men, aided by railroad employees, dropped a package that exploded. The explosion caused a large penny scale on the station platform to hit Mrs. Palsgraf on the arm, hip, and thigh. She was shaken up. Her physical injuries consisted of some small bruises on her shoulder, but a few days after the incident she developed a traumatic neurosis which caused her to stutter and stammer. She sued the railroad on the theory that its employees had been negligent while assisting the man with the package, and that this negligence harmed her. In May 1927 a jury reached a verdict in favor of Mrs. Palsgraf. She was awarded \$6,000 in damages, which Long Island Railroad appealed. In the New York State Appellate Division, Palsgraf won a 3-2 decision, which the railroad appealed to the Court of Appeals of New York (state supreme court). In a narrow 4-3 decision, the Court of Appeals reversed; the jury verdict was overturned, and the railroad won the case. The Court of Appeals decision is what people have come to know as “the *Palsgraf* case.”¹⁷

The facts of the *Palsgraf* case are well known, but in the interest of accuracy, here is Cardozo's statement of the facts:

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to Rockaway Beach. A train stopped at the station bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap,

¹⁷ Most of the information in this paragraph is taken from William H. Manz, *The Palsgraf Case: Courts, Law, and Society in 1920s New York* (Newark, N.J.: LexisNexis, 2005).

though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact, it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.¹⁸

The key detail contained in Cardozo's statement is that "there was nothing in [the package's] appearance to give notice of its contents." Because a newspaper covered the package, it was effectively unmarked: there was no indication what risks would be precipitated if the package was not carefully handled. Thus, when the railroad employees decided to help the man board, they could not have known that the package carried a risk of exploding. That risk was known only to the one who created it, namely, the man boarding: he and he alone brought the fireworks onto the platform. Mrs. Palsgraf would have never been hurt by the railroad's negligent conduct toward the man boarding had he instead brought a different package, say, a box of sponges. The boarding passenger was the source of the hazard that led to Mrs. Palsgraf's injury; the railroad guards could not have protected against that hazard because they were not aware of it

To bolster the point, Cardozo puts forward the following hypothetical:

One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger.¹⁹

¹⁸ *Palsgraf*, 248 N.Y. 339, 341 (1928). There has been some controversy over how Cardozo framed the facts of the case, but I will not be discussing it here because it's immaterial to my argument. For more on that controversy, see Posner, *Cardozo: A Study in Reputation*, 33-37, Noonan, Jr., *Persons and Masks of the Law*, 111-151, and Kaufman, *Cardozo*, 286. Andrews's statement of the facts is briefer but very much the same. Notably, Andrews agrees that the railroad had no reason to know that the package presented a danger to other passengers. See *Palsgraf*, 248 N.Y. 339, 347 (1928).

¹⁹ *Palsgraf*, 248 N.Y. 339, 343 (1928).

In other words, neither the person who unknowingly occasioned the risk nor the person who failed to prevent the risk from becoming a harm is “the wrongdoer.” Quite the contrary, the person who created the risk—the man carrying the bomb—is the one who has done wrong.²⁰ Consequently, the railroad’s culpability must be assessed knowing the railroad was unaware of the package’s risks. Did the railroad engage in conduct that put Mrs. Palsgraf at risk? Is there a reason to connect the railroad to a risk that some other actor(s) created? Cardozo would argue that if the answer to these two questions is no, then it cannot be a wrongdoer as to Mrs. Palsgraf.

Given the facts of the case, the second question is more relevant to the railroad’s culpability than the first. And the answer to it is no: no such connection exists because the railroad had no reason to suspect that the package was hazardous, for the package was unmarked. Moreover, they had no reason to believe that they ought to behave differently toward the man with the package than toward other passengers.²¹ Even if the railroad employees had time to think

²⁰ See Ernest J. Weinrib, “The Case for a Duty to Rescue,” *Yale Law Journal* 90, no. 2 (1980): 247-93, especially 251-58. See also American Law Institute, *Restatement of the Law Third, Torts, Liability for Physical and Emotional Harm* (St. Paul, Minn.: American Law Institute Publishers, 2010), §§ 7 and 37 (hereafter *Restatement Third*). Both Weinrib and the drafters of the *Restatement Third* draw a distinction between actors who create a risk and those who do not in negligence. Risk creation can be defined as follows: an actor has created a risk if the risk would not have existed independently of the actor’s decision or conduct. Linguistically, this definition is reminiscent of “but-for” causation, but one must be careful not to infer from it that the distinction is about causing harm. Counterfactual language is being used to describe a relationship (the *existence* of risk) between an actor and the risk of harm. In *Palsgraf*, the railroad is not a risk creator because the risk of explosion would have existed quite independently of the railroad’s conduct: the man’s simply bringing fireworks onto a platform carries the risk of explosion no matter what the railroad does. While Cardozo does not explicitly invoke the distinction between risk creators and non-creators, I think it is implicit in his reasoning.

²¹ One passage especially affirms that the railroad’s lack of knowledge is a paramount consideration for Cardozo when deciding whether the railroad acted negligently: “If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless (at least outward seeming) with reference to [Mrs. Palsgraf], did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else . . . [T]he orbit of danger as disclosed to the eye of reasonable vigilance would be the orbit of duty.” (248 N.Y. 339, 342-43). In other words, would an ordinary person watching all this unfold have had any reason to think, or could they have known, that the

about what was in the package, it is extremely unlikely that they would ever have guessed it contained explosives. Practically the railroad could not have protected anyone from the package's risk either: even if the railroad had measures to protect passengers on the platform from certain hazards, the railroad could not have reasonably known about the risk in this instance. All the risks that led to Mrs. Palsgraf's injuries did not originate from the railroad's conduct but from other sources. The railroad played no role—no culpable or knowing role, at any rate—in *increasing her risks*, nor did it do anything culpable to cause or causally contribute to the harm from the exploding fireworks.

With regard to the first question—did the railroad engage in conduct that put Mrs. Palsgraf at risk?—the answer is also no; but this is not to say that the railroad engaged in *no* risky conduct. Cardozo acknowledges that the actions of the guards might have been careless *toward the passenger carrying the package*.²² For, by pushing him onto the train as they did, the railroad engaged in conduct that put both he and his property at risk. Consequently, as with any negligence, the railroad should have acted differently—more carefully. To guard against the risk of personal injury, its employees should discourage passengers from boarding a moving train. If the railroad doesn't discourage this, then, to protect against property damage, it should help

passenger with the package presented a risk to Mrs. Palsgraf? If no, why think the railroad employees are any different?

²² Cardozo acknowledges this but downplays its significance to the main legal question. See *Palsgraf*, 248 N.Y., 339, 343 (1928). However, cf. Don Herzog, *Defaming the Dead* (New Haven: Yale University Press, 2017), 139: “[I]f anyone was wronged here, it was the man with the parcel. The guards’ wronging him happened to harm Mrs. Palsgraf. But that doesn’t mean they wronged Mrs. Palsgraf. And if they didn’t wrong her, she can’t conceivably prevail in a tort action. Cardozo is not thinking that if he were on the jury he wouldn’t find the railroad liable. He is saying it was legal error to let the jury finding stand.” As the quotation shows, Herzog interprets Cardozo’s opinion to *mean* that only the passenger with the package was harmed.

passengers board more carefully so that their belongings don't fall. So there is some negligence on the railroad's part here.

That the railroad was negligent toward the passenger carrying the package is, I believe, why many interpret, and Justice Andrews himself did interpret, *Palsgraf* as a proximate cause case.²³ If one frames the issue as starting with the railroad's negligence toward the passenger, then at first glance *Palsgraf* looks like a straightforward case of negligence causing injury: Negligence toward passenger → package falls → fireworks explode → scale hits plaintiff. On that rendering, one could say that had the railroad acted reasonably toward the passenger in the first instance, Mrs. Palsgraf would not have been injured. Thus, the railroad must be responsible for Mrs. Palsgraf's injuries as well. Notice also that if one accepts the above rendering the court would have cut off liability only if it had found that the railroad's negligence was not the proximate cause of her injuries; also, obviously, if the railroad had no duty to her. Accordingly, commentators incorrectly interpret the *Palsgraf* decision to stand for general principles of duty, foreseeability and proximate cause. (I will give more expansive arguments for this claim in Sections 3 and 4 below.)

From Cardozo's point of view, the issue should be framed in a different way. Though the railroad indeed was negligent toward the passenger carrying the package, what needs to be understood is the relationship between the railroad's conduct and *the risk of explosion*. That risk is what needs to be isolated for analysis because it is the risk that brought about the plaintiff's injuries. For the railroad to be held liable in negligence, there must be a finding that it failed to behave according to a standard of care relevant to the plaintiff. Again, the railroad isn't

²³ See *Palsgraf*, 248 N.Y. 339, 347 (1928), where Andrews remarks: "...where there is an act which unreasonably threatens the safety of others, is the doer liable for all its proximate consequences, even where they result in injury to one who would generally be thought to be outside the radius of danger."

connected to the risk of explosion because it did not know the package contained explosives and therefore did not fail to behave according to a standard of care relevant to the plaintiff. While the railroad's negligence did bring about the explosion, its conduct (by way of its employees) did not create the *risk* of explosion. Knowledge about the risk being impossible, the railroad had no duty to protect Mrs. Palsgraf from the risk.

Phrased in a more general way, Cardozo's view seems to be this. Defendants should be responsible for harms that result from the scope of the risk for which they are responsible. When are defendants legally responsible for a risk in negligence? There are two basic circumstances. The first is if the defendant has a legal duty to avoid the risk. The railroad certainly has a legal duty to avoid a risk of explosion to its passengers because of the harms that could ensue, *but only if it knows that a risk of explosion is likely or present*. The other circumstance is when the defendant fails to do their duty and this failure created the risk. Neither of those situations exists here. The railroad did not fail to do its duty on account of not knowing the package's hazards, and so their failure did not create a risk of harm to Mrs. Palsgraf. If anyone failed to do their duty to avoid a risk, which subsequently led to the risk that resulted in Mrs. Palsgraf's injuries, it was the man with the package: for he did not exercise due care to his fellow passengers when he decided to rush onto a moving train with a box of explosives.

Cardozo Against the Jury

Because the majority in *Palsgraf* effectively reverses the jury decision, one might worry that Cardozo is retrying the case from the bench. Such a worry should be discouraged. There is a way of explaining how the jury's verdict is in legal error. To be clear, Cardozo is not merely superimposing his own theory of negligence onto the facts and deciding how he thinks it should have gone at trial. In fact, we know that the trial judge framed the case similarly to Cardozo. The only direct testimony about the railroad's conduct emphasized the guard's act of dislodging the

man's package.²⁴ The trial judge stressed this aspect of the case in his instructions to the jury on the issue of breach:

She claims that the guard upon the platform, the station platform, and the guard upon the train platform, were careless and negligent in the way they handled this particular passenger after he came upon the platform and while he was boarding the train, and that is the question that is submitted to you for your consideration. Did those men omit to do something which ordinarily prudent and careful train men should not omit to do? Or did they do something which an ordinary prudent and careful office in charge of a railroad train in the station platform should not have done?²⁵

The language Cardozo uses in his statement of the facts suggests that he and the trial judge are working with the same account of negligence, for Cardozo says “another guard on the platform pushed from behind,” and then, “In *this* act, the package was dislodged, and fell upon the rails.”²⁶ Cardozo's attention, like the trial judge's, is on the conduct of the railroad employees toward boarding passengers. Hence Cardozo's view is consistent with the prior legal proceedings.

However, if this is accepted, an important question arises: If both Cardozo and the jury are working with the same theory of negligence, how could the jury have found that the railroad breached a duty to Mrs. Palsgraf while Cardozo concludes the opposite?

Unfortunately, there is no way to know exactly how the jury deliberated but I can offer a rational speculation. To place ourselves in the jurors' shoes, I submit that we start with the trial judge's exact language. How was the railroad “careless and negligent in the way they handled this particular passenger”? To my mind, the railroad employees could have been negligent in two ways. On the one hand, the jury could find that they were negligent in just undertaking to help the passenger board. On the other hand, the jury could find that they helped the passenger board

²⁴ See Manz, *The Palsgraf Case: Courts, Law, and Society in 1920s New York*, 44-45.

²⁵ Transcript of Record, *Palsgraf*, 1928, https://www.law.berkeley.edu/files/Palsgraf_Record.pdf, accessed July 14, 2018, 35.

²⁶ *Palsgraf*, 248 N.Y. 339, 341 (1928). Emphasis added.

in a negligent manner: the act of helping him board itself was not negligent, but they performed that task clumsily. Now, what kinds of risks did these two negligent behaviors create that were within the railroad employees' purview and which they should have considered? I count three: risks to the passenger himself (say, if he had fell because of their assist), risks to his property (the package), and risks to bystanders nearby (say, if the package had fallen and hit some people). For a finding of negligence, risks to bystanders nearby is out because the package fell on the tracks not on any person. Risks to the passenger himself are also out because he boarded safely. Actionable civil wrongs require that a defendant create a risk that results in harm. Since the risks created by the railroad employees' behavior did not cause bodily injury to any passenger, the railroad cannot be liable for creating a risk of bodily injury to any passengers. The only relevant risk here is the one the railroad took with respect to the package, for that was the risk that led to Mrs. Palsgraf's harm. The jury, therefore, must have found that the railroad created an unacceptable risk of the package falling. What was unacceptable about it? Recall the two negligent behaviors I mentioned a few sentences ago. The risk to the package was unacceptable either because the railroad should have been more careful helping the passenger board, or it should not have helped him board at all.

Suppose the previous paragraph is how the jury deliberated and reached its verdict for Mrs. Palsgraf. It then becomes easy to see how Cardozo arrived at a different result. Cardozo would say that even if the railroad acted unreasonably with respect to the risk that the package would be damaged, it did not act unreasonably regarding the risk of explosion. For Cardozo, the correct comparison for determining whether the railroad breached the standard of care with respect to the package is between what the railroad did and what a reasonable person would have owed to a package *of that type in those circumstances*—an unmarked, apparently safe one. As the railroad was unable to know that the package's contents were dangerous, what likely

happened is that the jury made an incorrect comparison. The jury might have asked itself whether the railroad handled the package with enough precautions to avoid the risk of explosion and compared it to what a reasonable person would have done to guard against *that* risk. If that was the jury's basis for finding the railroad negligent, then Cardozo correctly held that the jury's finding of negligence was erroneous. The precautions the railroad owed to the package were not those that a reasonable person would owe to a package of fireworks on the railroad platform. Therefore, the jury decision should be reversed.

An Objection: Can We Not Infer Attitudes about Risk?

We have seen, then, that it can be explained how Cardozo reaches the opposite result of the jury on the same theory of negligence. Still, one might object that the jury's presumptive deliberation is nevertheless defensible. If the railroad acted unreasonably in relation to the modest risk of a package falling, wouldn't it follow that the railroad *also* acted unreasonably in relation to the bigger risk of an explosion occurring? To crystallize the point, suppose the package did contain sponges instead of fireworks. Since the package is unmarked, the railroad is unable to know that it contains sponges and therefore can't take precautions against the risk of a dropped box of sponges. But the railroad employee acts unreasonably toward the package in any case. Consequently, *whatever* was in the package, the railroad employee must not have been willing to protect against the risk of damage to the package because he was focused on negligently helping the passenger board. *Ceteris paribus*, if the railroad did not behave carefully to keep a small risk of harm from occurring – i.e., to the sponges – then it must not have been willing to behave carefully to keep a high risk of harm from occurring – i.e., to a box of fireworks.

The problem with this argument is that it simply is not persuasive. We cannot infer from the railroad's behavior toward an ordinary-looking package how it would have acted had it

known about the high risk of an explosion. A railroad employee might be willing to take on, unreasonably, the risk of an apparently small danger, but that does not tell us what greater risks he would have been willing to accept. It is more plausible to think, just generalizing from casual observations of human behavior, that people may not be willing to accept the risk of great harms but *are* willing to accept the risk of small harms. For example, a person who boards a boat is willing to accept the risks of being out on the water, but this does not mean they are willing to go deep sea diving. As a general matter when people *are aware of* greater than normal risk, they exercise greater care. To see this, imagine a scenario where the package had been labeled “DANGER: FIREWORKS INSIDE.” In that situation, it seems to me very likely that the railroad employees would have distanced themselves from the running passenger for the precise reason that it was more dangerous to help him board while moving; and being aware of the greater-than-normal risk, if they had stayed away, the railroad would not have had a hand in advancing the risk that resulted in harm to Mrs. Palsgraf.

I have relied on a lot of musing about human behavior to answer the foregoing objection. To be sure. But it is musing that relates to points critical to understanding *Palsgraf* and the norms around which Cardozo thinks tort law is essentially structured. Obviously, there is a difference between small harms and great harms. One key regularity of the world to which we attend to distinguish small and great harms is people’s behavior toward risks. Very often, people are willing to accept risks of small harm but would not be willing to accept risks of great harm in the same circumstances. If I am trying to beat another driver to the one available gas pump at a filling station, I might be willing to risk a minor collision with a parked vehicle to get to the pump first; but I would not take that risk if an open fuel truck was parked near the pump to refill the station’s gas supply. Greater harms give rise to people’s instinct to protect themselves. When the passenger was boarding the train, the railroad employee would not have thought he was at risk

because he probably was not thinking about the expected harm from a falling package. But if the railroad employee had known about the risk of explosion it is very likely that he would have behaved differently, for then he himself could have been hurt in any careless interaction with the passenger. It is uncontroversial that this is just what would be expected of any ordinary person of normal intelligence.

Cardozo Is Employing a Culpability Analysis

Cardozo's rationale in the *Palsgraf* case rests on a broader vision he has of the analytical structure of tort law. Let me try to briefly gloss what that vision is. In the middle of explaining the Court's ruling in favor of the railroad, Cardozo gives a muddled argument on how he thinks the concept of negligence should be understood:

Negligence, like risk, is a term of relation. Negligence in the abstract, apart from things related, is not a tort, if indeed it is understandable at all. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right. ... But [such rights are] protected, not against all forms of interference or aggression, but only against some. ... [One] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. ... The victim ... sues for breach of duty owing to himself.²⁷

There are two main related threads of thought in Cardozo's argument that need to be unpacked. First, Cardozo is elaborating the logic of the negligence concept. As negligence entails wrongdoing and wrongdoing implies a violation of someone's rights, a rights-violation occurs only when the holder of the right is unreasonably *risked* ("...the act as to him had *possibilities* of danger..."). Victims' rights are rights not to be put at risk by another (with respect to unintentional interference in particular). If a victim's rights are not violated, they have not suffered a wrong that entitles them to compensation in the tort law. This is because, as Michael Moore articulates it, "only those who are themselves wronged (by having their rights violated) are

²⁷ *Palsgraf*, 248 N.Y. 339, 345-46 (1928).

the beneficiaries of the wrongdoer's duty to correct the injustice his actions have produced."²⁸ In other words, Cardozo is saying that the right conceptual relation between wrongdoing, rights-violations, and duty-violations in tort law is this: our rights are rights against having others risk harms of certain kinds; the correlative legal duties of others are duties not to risk such harms, and wrongdoing in negligence consists in creating risks of such harms.²⁹ For Cardozo, in negligence, which necessarily involves evaluating the extent to which a defendant's behavior deviated from a standard of care it owed to plaintiff, *wrongness consists in the risking of harm*—not the causing of harm.³⁰ Additionally, in the first two sentences, Cardozo asserts that negligence is a relational concept: duties are not duties to everyone but they are always duties *to some particular person(s)*; a wrong is always *a wrong to somebody*; duties and wrongs are owed or done only *to a particular person* who holds the correlative rights. Yet tort law does not aim to eliminate risk-taking per se.³¹ Defendants are not entitled to compensation simply because they have been

²⁸ Michael S. Moore, *Causation and Responsibility* (Oxford: Oxford University Press, 2009), 169.

²⁹ A more accurate description would have been "rights against having others *intend* or risk certain harms." However, I am omitting intentional wrongdoing from my elaboration mostly because Cardozo does not explicitly address himself to it in the above passage. Of course, intentional rights-violations are covered in tort law. One has rights against being intentionally harmed by another; the correlative duties are duties not to intend such harms, and wrongdoing occurs when one forms an intention to do such harms. Victims who are harmed intentionally may sue for an *intentional tort*, which is a special area of tort law requiring proof that the actor acted with a certain mental state as well as proof of causation, e.g., battery. It is also possible to sue an intentional actor in negligence, say, generically, if one's theory was the flavor of "the defendant failed to exercise due care *because* he threatened to harm the plaintiff." If such a theory was accepted by a court, the defendant's culpability would exceed the negligence standard.

³⁰ If one disagreed with Cardozo on this point and wanted to claim that rights in tort law are rights against being *caused* harm, then the logic of the negligence concept would go as follows: rights protect us from being caused harm by others; the correlative duties are duties not to cause harm, and indeed wrongdoing consists in *causing* harm.

³¹ Arguably, tort law as an institution could not exist for that purpose. To create a deterrence effect so strong that risk-taking is eliminated from society, tort law would need to

exposed to a risk (“...[such rights are] protected, not against all forms of interference or aggression, *but only against some*...”). Only certain degrees of negligence and acts of risk-taking will do for tort liability: namely, when an actor takes risks that are unreasonable, *and* those unreasonable risks result in harm to others.³² The compensation system is designed to award injured parties damages for harms resulting from risks imposed on people by unreasonable actors. What risk did the railroad unreasonably impose in *Palsgraf*? Based on the railroad employee’s act, the answer can only be the risk of dropping the package. Thus, the railroad should have to pay damages for any harms to the package resulting from *that* risk. The railroad did not impose the risk of an explosion, however. If the court were to hold the railroad responsible for a risk it did not create because of a risk that it *did* create (to the package), it would be holding the railroad liable for harms outside the scope of the risk for which it is responsible. The harm should be

require defendants to pay damages greater than plaintiff’s harms. This would never happen for fairness reasons at the very least.

³² *Palsgraf*, 248 N.Y. 339, 345-46 (Cardozo quoting Sir Frederick Pollock’s famous remark, “Proof of negligence in the air, so to speak, will not do.”). Strangely, Michael Moore describes Cardozo as excluding causation from the liability analysis: “[This is] Cardozo’s intended conclusion: if duties are owed to particular people and if those people are those risked harm rather than those caused harm, then only those who are within the orbit of unreasonably imposed risk can sue for negligently imposed injury” (Moore, *Causation and Responsibility*, 169). I do not see how Moore gleans from Cardozo’s argument a contrast between those risked harm and those caused harm. It is true that for Cardozo *wrongness* in tort consists not in the causing of harm but in unreasonable risk of harm, but it does not follow from this that Cardozo thinks causation should be excluded from the liability analysis. The risk has to manifest in some harm for the plaintiff to receive compensation. Cardozo even says in the above quote “to be protected against *the doing of it*,” i.e., *effecting* the risk. Cardozo just thinks that we do not inquire into the causation of the harm unless it has first been established that the plaintiff has suffered a wrong, which is a non-causal determination. Furthermore, let us isolate for the moment “the orbit of unreasonably imposed risk.” If Moore is right that Cardozo believes that only people within that orbit – people in the danger zone, as it were – who are risked harm *rather than* caused harm can sue for injury, then for the people in the orbit, wouldn’t proof of negligence in the air do after all?

“within the risk,” as some legal scholars like to say, meaning that “the harm caused to another is an instance of the type of harm the risk of which made the actor negligent.”³³

Palsgraf is a case of unintentional risk-taking: the railroad employee did not calculate the costs of his risky behavior in advance but made a hurried decision in the moment. This is different than intentional risk-taking—as when one decides to impose a certain amount of risk on people having done a careful, time-consuming, cost-benefit analysis on some act and its alternatives. Frequently our moral attitudes regarding their culpability differ as to both types of risk. In cases of unintentionality damages are awarded to the victim when the actor’s decision is unreasonable. At the same time, tort law does not wish to scare society from *all* risk-taking: if people worried that they might have to pay damages for any risk they accept, well, then people might never undertake to act. So long as human beings exist, risks will exist. Tort law makes sure that there is a symmetry between risks and harms: damages are awarded for harms that result from defendants who acted on unreasonable risks. Unreasonable actors are penalized for their risky behaviors, but the damages are limited to the *costs of their risks* to society.³⁴ Cardozo

³³ Moore, *Causation and Responsibility*, 157. Also, of course, the injured plaintiff must be “a member of the class of persons the risk to whom made the actor negligent” (ibid.). For Cardozo, including this addendum would be crucial since negligence is relational in his view.

³⁴ By mentioning “society,” it is not my intention to commit Cardozo to a kind of instrumentalism about tort law—the idea that tort law exists to achieve some overarching purpose, e.g., deterring risk, or remedying the social problem of allocating the costs of life’s accidents. (Non-instrumentalist theories, on the other hand, see tort law giving expression to moral or political principles, not as aiming to achieve a social purpose. The instrumental-non-instrumental distinction bisects the analytical-normative theoretical distinction I mentioned in fn. 14 above.) I agree with Gary Schwartz that Cardozo’s rhetoric in *Palsgraf* cannot be identified as expressing either an instrumentalist or non-instrumentalist viewpoint. (Actually, Schwartz is more harsh: “[T]he Cardozo opinion is replete with grandiloquent quasi-philosophical rhetoric that captures but also confounds the reader [and there] is not a word in the opinion that counts as genuine legal philosophy—that deals with the purpose or functions of the tort system.” See Gary T. Schwartz, “Cardozo as Tort Lawmaker,” *DePaul Law Review* 49, issue 2 (1999): 316. Obviously, I disagree with Schwartz’s broader claim that Cardozo’s opinion contains no legal philosophy.) Where within this taxonomy Cardozo falls is not important for my discussion. As far as I can see, instrumentalists and non-instrumentalists can agree that damages are limited to

is thinking precisely along these lines in *Palsgraf*. The railroad is responsible for no other risk than the one to the package because it imposed no other risk.

At this point I would do well to remind the reader that the foregoing is my own modest interpretation of the *Palsgraf* case. Nowhere in Cardozo's opinion does he elaborate negligence in terms of what tort law is or is not aiming to do. But explicating the relations that Cardozo thinks tort law maintains for negligence liability, I think, is helpful for understanding how he decides *Palsgraf*. The origin of the risk to the plaintiff was the boarding passenger, for he himself was carrying the explosives. For Cardozo, then, the issue is, "what steps could the railroad take to prevent passengers getting on with bundles of fireworks, or how could it develop a way to prevent bundles from dropping."³⁵ To say that the railroad should have exercised more care to ensure that the fireworks would not hurt Mrs. Palsgraf would be not only strange, but it would contravene the relation between risks and harms that tort law maintains. It would be strange because the railroad had no idea that the package contained fireworks! But, as to the symmetry between risks and harms, what would a reasonable railroad have done in the same circumstance? A reasonable railroad could not have protected Mrs. Palsgraf from explosion, for it never could have known that she needed to be protected in the first place. Reasonableness does not imply omniscience. If a reasonable railroad was forced to pay damages for a harm resulting from a risk that it neither created nor could have known about, railroads might be reluctant to have *any* passengers or trains whatsoever. Holding Long Island Railroad responsible for the risk of explosion would get wrong the relation between risks and harms.

the costs of unreasonable actors' risks to society. Each camp would explain the limitation differently, however.

³⁵ Leon Green, "The Palsgraf Case," *Columbia Law Review* 30, no. 6 (1930): 799.

Academic lawyers would say that my interpretation of the majority opinion in *Palsgraf* ascribes to Cardozo a “culpability analysis.” That is, for Cardozo, the railroad should be responsible for the risk only if it bore some culpability—in laymen’s terms, is to blame—in relation to the risk of explosion. I do think that is how Cardozo analyzes the case. Where the defendant has not created the risk (the railroad didn’t create it) or is not responsible for allowing the risk that was created by another actor (the railroad wasn’t), the defendant is not legally responsible for the harm that results from the risk; a defendant is legally responsible only if they are related to the risk in a way that makes them culpable for the harm that results from the risk. Being in no position to know about the risk of explosion precludes the railroad from being culpably related to Mrs. Palsgraf’s harm.

An Analogy with Duty to Rescue

The culpability language is perhaps more helpful for distinguishing what *Palsgraf* isn’t. As I mentioned at the outset, *Palsgraf* is routinely presented as a proximate cause case. But it is extremely misleading to call *Palsgraf* this. For one thing, the majority’s holding does not turn on causation or anything having to do with causation; it is not the issue in the case for them. For another thing, if *Palsgraf* was a causation case, the majority likely would have reached the opposite result and Cardozo should have said virtually the opposite of what he did say. A causation analysis of *Palsgraf* would yield the result that the railroad’s negligence toward the passenger was a necessary condition of Mrs. Palsgraf’s harm (but for the employee’s negligence, her injury wouldn’t have occurred). Therefore, they should be held liable for failing to prevent her harm from occurring.³⁶ Such an analysis could not be further from what Cardozo announces.

³⁶ Unless there are good “public policy” reasons not to impose liability. I discuss this exception in Sections 3 and 4 of the chapter.

For Cardozo, what is important for deciding the *Palsgraf* case is determining who is responsible for what risks.

To crystallize the principles *Palsgraf* stands for, a useful rubric may be found in the duty to rescue debates in the philosophy of law literature. To provide a little background, a duty to rescue is a tort law concept describing a circumstance in which an actor can be sued for failing to rescue a person in danger—that is, if the person faces potential injury or death if they are *not* rescued. Generally, in common-law systems there is no duty to rescue, except when the potential rescuer and the endangered party are in a special relationship.³⁷ Many of the debates address themselves to the question of whether actors have a general moral duty to rescue and, what's related, whether actors have a moral duty to rescue that should prevail even where the law does not sanction failure to rescue. One of the stock hypotheticals for illustrating that actors have no duty to rescue is the case of the drowning swimmer. Suppose A, who is an expert swimmer and has a life ring at hand, sees B drowning, but instead of saving B, A sits on the dock, smokes a cigarette, and watches B drown.³⁸ Traditionally common law has said that A need not take measures to help B, unless A is somehow responsible for putting B at risk.³⁹ Put more formulaically, A breaches no standard of care it owes to B by failing to protect B, unless the failure to protect B results from a risk originating with A.

³⁷ See Keeton, et al., *Prosser and Keeton on Torts*, 5th ed., § 44, 307; and § 56, 373-78. See also Ernest Weinrib, "The Case for a Duty to Rescue," 247, n. 1. For more on special relationships, see fn. 44 below. Where a duty to rescue arises, the rescuer is held to a reasonable care standard: rescuers can be held liable for injuries suffered due to an unreasonable rescue attempt, e.g., if the rescuer rescues recklessly.

³⁸ This hypothetical is adapted from Prosser, "Palsgraf Revisited," 16.

³⁹ See the *Restatement Third*, § 37 and §§ 38-44 which governs other affirmative duties that may apply to prima facie cases of "no risk creation." It is not clear to me that a general duty to rescue can be derived from any of the affirmative duties in §§ 38-44. For an explanation of affirmative duties, see fn. 44 below.

Cardozo would probably say that the railroad in *Palsgraf* is like the swimmer A. Just as A did not put B in danger, the railroad did not put Mrs. Palsgraf in danger; the man with the package did. The *Restatement Third* says that actors are free to ignore risks that they did not create.⁴⁰ While such a principle may be objectionable in the abstract and even repugnant to some, in the context of *Palsgraf* it may not be controversial.⁴¹ Let's say that A is sitting, smoking on the dock but cannot see B drowning, just like the railroad cannot see that the package contains fireworks. Now let's say that B drowns. Will A be held responsible for B's drowning? No, and I should think for the same reasons that Cardozo absolved the railroad of liability. A did not act such that he created a risk to B, A had no reason to know of the risk (he didn't see B), and therefore A was not responsible for protecting B from the resulting harm. If that verdict makes good sense in the case where B drowns because A cannot see him, then it follows that the principle Cardozo uses to decide *Palsgraf* makes good sense, for it is the same basic principle.

This completes my interpretation of *Palsgraf*. I have been arguing that, to understand *Palsgraf* correctly, one must examine it knowing that the boarding passenger with the package, not the railroad, created the risk to the plaintiff by bringing fireworks onto the platform. At the risk of repeating myself, let me distill in a few sentences how I think the majority opinion should be understood. The majority in *Palsgraf* accepts the following broad principle of tort law: a defendant is not responsible for others who create risks when the defendant cannot know about or control the risks. As applied to the case, a railroad is not responsible for harm resulting from an explosion that was created by fireworks brought onto a platform by a third party over whom the

⁴⁰ Ibid.

⁴¹ For more on the duty to rescue generally, in addition to Weinrib's classic 1980 paper (see fn. 18 above), see Marin Roger Scordato, "Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law," *Tulane Law Review* 82, no. 4 (2008): 1447-1503.

railroad had no control and whose risks they could not have known or anticipated. Now as with any interpretation, the next natural question to ask is, why? Why should my interpretation of *Palsgraf* be accepted over the numerous other interpretations? And what is my basis for claiming that the risk of harm is what's significant to Cardozo? How can the reader know that I am not just doing what Prosser accuses all the other *Palsgraf* commentators of doing?

In the next two subsections I will develop answers to these questions. Ultimately, my goal is to show that *Palsgraf* can lead the way toward a subtler understanding of proximate cause while denying that *Palsgraf* is a case *about* remoteness or proximate cause like the conventional wisdom says. To develop both points, I must discuss in greater detail why the railroad did not breach a standard of care relating to the risk of explosion.

Theoretical and Textual Support for My Interpretation

In the tort law, one of the essential elements of plaintiff's case is breach of duty: the plaintiff must prove a failure on the defendant's part to do a legal duty it owed to plaintiff. Breach is an essential element of all torts—negligence, intentional, and strict liability. For negligence torts, establishing a breach amounts to showing that a defendant's act failed to sufficiently conform to the standard of care required by law.⁴² On my interpretation of *Palsgraf*, the issue in the case for the majority concerns not the impact of the railroad's breach on the plaintiff, but rather the distinctive *character* of the railroad's breach. In this particular case, not the defendant but a third party created the risk that led to plaintiff's injury. Cardozo was articulating that, where the defendant is not the risk creator, the standards of care it owes (and to whom) depends on the defendant's relationship to the risk that the third party has imposed on society. Consequently, the railroad owed a different standard of care to the people boarding than

⁴² Keeton, et al., *Prosser and Keeton on Torts*, 5th ed., § 30, 164.

the one it owed to Mrs. Palsgraf. The jurors failed to make this distinction, and thus they erred when they found that the railroad acted negligently toward her. More precisely, a finding that the railroad breached a standard of care it owed to boarding passengers (by taking an unreasonable risk to help the running men board) is not a finding that the railroad breached standard of care it owed to Mrs. Palsgraf.

Standards of care are determined primarily by the fundamental features of cases. Who are the litigants? What is the nature of the injury being complained of? In what context did the injury occur? However, the common law of negligence presupposes a uniform standard of behavior which has taken the form of a formula to be applied across cases. For a jury or a court to find negligence, the law evaluates defendants' behavior by the standard of reasonableness, i.e., by how a reasonable person would be expected to act in the same or similar circumstance.⁴³ Sometimes defendants' obligation to act reasonably arises from some special duty—often called an “affirmative duty”—it owes to plaintiff.⁴⁴ But typically, the duty of reasonable care is general: any person who makes a decision and acts on it must execute that decision reasonably.

⁴³ Ibid., § 32, 173-92. Prosser's statement that the reasonable person amounts to “what ... an ideal individual would be supposed to do in [defendant's] place” is an exaggeration. Defendants alleged of breach are not held to standards of perfect behavior, but rather a comparison with a hypothetical actor similar in circumstance to the defendant but who did not act negligently.

⁴⁴ On affirmative duties, see Chapter 6 of Epstein and Sharkey, *Cases and Materials on Torts*. Affirmative duties concern liability for *nonfeasance*, i.e., “failure to act” cases. In these cases, the duty of care in negligence requires rendering aid or support to other persons. On the first few pages of Chapter 6, Epstein and Sharkey note that, typically, an affirmative duty is owed to “individuals with whom the defendant has stands in what is commonly termed a special relationship.” One subclass of special relationship concerns prevention of harm to the plaintiff's person or property *because* the defendant stands in some sort of special relationship either to the plaintiff or with the person who threatens harm to the plaintiff. Some examples would be the duties a landlord owes to its tenants, a hotel to its guests, a club to its members, a university to its students. Thus, in the *Palsgraf* context, the railroad would have an affirmative duty if it had a duty to protect its passengers from risks that originate from other sources.

This general reasonableness standard is what the railroad's employees owed to its boarding passengers in *Palsgraf*. The trial judge's instructions to the jury indicate that the railroad had an obligation not to create unreasonable risks to the passengers, and this was the sole ground on which the case was tried. The jury thus deliberated about risks originating from the railroad employees' acts: given those risks, what care would a reasonable railroad employee have taken (and to what degree) to reduce those risks? But the jury did not consider what risk the employees' conduct raised *in relation to* Mrs. Palsgraf, or what care they should have exercised *with respect to* her. Cardozo seems bothered that the railroad's unreasonable risks did not even touch Mrs. Palsgraf. Even though the jury decided in her favor, by Cardozo's lights they in fact made no determination about risks toward her that the *railroad* created.⁴⁵

I am not the first author to push this point. Others commentators have appreciated it; but then, in one way or another, they erroneously integrate *Palsgraf* into proximate cause or some other analysis.⁴⁶ What is not sufficiently acknowledged is the idea that Cardozo's chief insight in *Palsgraf* is that breach does not involve a singular assessment of whether the defendant engaged in some unreasonably risky act. Quite the contrary, breach involves a more careful *relational* assessment: evaluating the risks intrinsic to the act, the defendant's relation to those risks, and the relation of those risks to plaintiff's harm. In a well-known passage from the case, Cardozo says:

⁴⁵ Here I am paraphrasing Weinrib, *The Idea of Private Law*, 163. One might wonder why the majority did not consider whether the railroad reasonably maintained the scale that fell on Mrs. Palsgraf; if not, the railroad could be seen as a risk creator as to her and responsible for injuries. Prosser informs us that this issue was not pursued at the trial phase (Prosser, "Palsgraf Revisited," 7). However, any question of the scale's maintenance probably did not arise because the explosion was reportedly raucous. Assuming the reports are true, even a well-maintained scale likely would have been compromised. For more details, see Kaufman, *Cardozo*, 286.

⁴⁶ See, for example, Kenneth Abraham, *The Form and Functions of Tort Law*, 5th ed. (St. Paul, Minn.: Foundation Press, 2017), 149ff, Warren Seavey, "Mr. Justice Cardozo and the Law of Torts," *Columbia Law Review* 39, no. 1 (1939): 34, and Kaufman, *Cardozo*, 198.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in relation to the plaintiff standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed.⁴⁷

Without saying "breach," Cardozo is basically saying the railroad breached no standard of care it owed to Mrs. Palsgraf. And his choice of words confirms that he thinks about breach relationally: he cites multiple relations to be considered for a proper finding of breach.

What has prevented evaluators of *Palsgraf* from seeing breach and its nuances as the main issue for the majority? One possible explanation is that the evaluators have viewed the case with different understandings of negligence in mind. David Owen has observed that the word "negligence" is ambiguous in that it can mean two different things.⁴⁸ On the one hand, it could mean the *in toto* legal theory upon which the plaintiff brings suit (as when someone says "suing for negligence"). This amounts to the sum of all the elements that a plaintiff must prove to win her case. On the other hand, "negligence" could simply mean the breach element, i.e., the part of a plaintiff's case in which she shows that the defendant's conduct was unreasonable and did not conform to the obligatory standard of care. Following Owen's distinction, Cardozo is clearly thinking of negligence in the second sense—as the breach element. In the passage above, when Cardozo says, "Relatively to her it was not negligence at all," he is not saying that Mrs. Palsgraf has no negligence case whatsoever. Rather, he is saying that the defendant's conduct did not breach any standard of care that was required of the railroad. Therefore, the plaintiff cannot satisfy the breach element necessary for winning her case. Now this is a theoretical explanation. However, there is also evidence within *Palsgraf* that supports the proposition that Cardozo understood negligence in terms of breach. A quick investigation of the legal treatises that

⁴⁷ *Palsgraf*, 248 N.Y. 339, 341 (1928).

⁴⁸ David Owen, "Duty Rules," *Vanderbilt Law Review* 54, no. 3 (2001): 769-70.

Cardozo cited reveals that they all refer to negligence as the failure to act reasonably. For example, on p. 1 of Beven's *Negligence in Law*, the author spells out that negligence is not "legal duties generally... [but] legal duties as they appear *when the normal standard of performance is not attained*."⁴⁹ Later Beven gives a general definition of negligence, saying it is "the absence of care according to the circumstances."⁵⁰ In Frederick Pollock's chapter on negligence he develops Baron Alderson's understanding, which is that negligence is "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."⁵¹ These quotations make plain that Cardozo's contemporaries understood negligence elementally; and because Cardozo cites them, it is logical to infer that their understanding of negligence informs Cardozo's analysis of the case. Using the Pollock-Alderson language, Cardozo is saying that breach requires an unreasonable risk, and an actor who does not create or know of such a risk has not omitted to do something a reasonable person would do, nor have they done something that a reasonable person would not do. The railroad, then, did not act unreasonably, for it did not create any risk of danger to her; the risks she faced were far different than those that the man with the package faced when the guards helped him board. One could even put the point more severely. One could say that, for Cardozo, the railroad's actual breach (to the boarding passengers) is utterly irrelevant to the standard of care it should have afforded Mrs. Palsgraf. Hence why "[r]elatively to her [the railroad employees' act] was not negligence *at all*."⁵²

⁴⁹ William James Byrne and Andrew Dewar Gibb, eds., *Beven: Negligence in Law*, 4th ed. (London: Sweet & Maxwell, 1928), 1. Emphasis added.

⁵⁰ *Ibid.*, 37.

⁵¹ Sir Frederick Pollock, *The Law of Torts*, 11th ed. (London: Stevens, 1920), 442.

⁵² *Palsgraf*, 248 N.Y. 339, 341 (1928). Emphasis added.

An Objection: The Multiplicity of Standards of Care

I have been arguing that there are theoretical and textual bases for my claims that breach is the main issue in *Palsgraf* and that it should be interpreted as a case of “no breach.” One might nevertheless object that the “no breach” interpretation should not be accepted because it is conceptually problematic. More specifically, one might complain that Cardozo’s vision of tort law is incoherent, and especially with regard to the concept of breach in *Palsgraf*. The railroad’s employees did a singular act: namely, they helped the man carrying the fireworks onto the train. Singular acts are also held to a singular standard of care: was *this act* of the defendant’s unreasonable? If Cardozo is really saying that this single act can be, simultaneously, a breach of the standard of care owed to boarding passengers but not a breach of the standard of care owed to the plaintiff, it means that singular acts of negligence can be held to multiple standards of care. How can that be?

My answer is that focusing on negligent conduct in isolation—i.e., in terms of “singular” acts of negligence—would lead one to miss Cardozo’s point entirely.⁵³ Tort law is not concerned with holding people responsible for solo acts of negligence or “generally risky” behavior (if it were, then negligence in the air probably *would do*). Tort law holds defendants responsible for imposing risks on society that result in harm to others. Necessarily, context plays a crucial role in assessing the risk. The existence of a duty depends on what constitutes risky behavior in context; thus, the standards of care that citizens owe to each other depend on *who* all is involved, *how* they are involved, and *what* is involved in the unique circumstances, among other things. This principle had been accepted in the American courts well before *Palsgraf*. For example, in an old Maryland case cited by Cardozo, *West Virginia Central Railroad Co. v. Fuller*, a boy who was

⁵³ Here I am mildly extrapolating from Moore, *Causation and Responsibility*, 174.

out fetching a pail of water was killed by some train cars rolling down a track. The collision happened because the defendant railroad unreasonably let some train cars loose, and these cars crashed into some other cars, which in turn hit and killed the boy.⁵⁴ The court in *Fuller* declared that “as the duty varies with the circumstances and with the relation to each other of the people concerned, so the alleged negligence varies, and the act complained of never amounts to negligence of law or of fact if there has been no breach of duty.”⁵⁵ Accordingly,

[t]he duty due by a common carrier to its passengers is entirely different from the duty owed by the same carrier to a trespasser on its right of way; and, therefore, an act which in the first instance would be negligent because a breach of the particular duty there due would not be negligent in the second instance simply because the same duty is not due.⁵⁶

The point is that singular accidents can involve multiple standards of care being part of the liability determination.⁵⁷ This should come as no surprise since the law evaluates actors’ behavior through the lens of reasonableness. Had a worker been hurt by the loosing of the cars in addition to the boy, if the worker wanted to sue the railroad, the court would ask the breach question differently: did the railroad take the sorts of precaution against hazards to its employees that a reasonable railroad would take? It is *only* by appraising defendants’ acts in context that we can know whether they created an unreasonable risk.

Near the end of the majority opinion Cardozo gives an example that illuminates the importance of context for a finding of negligence:

We are told that one who drives at reckless speed through a crowded street is guilty of a negligent act and therefore of a wrongful one, *irrespective of the consequences*. ... If the same act were to be on a speedway or a race course it would lose its wrongful quality.⁵⁸

⁵⁴ *West Virginia Central Railroad Co. v. Fuller*, 96 Md. 652, 664-65(1903).

⁵⁵ *West Virginia Central Railroad Co. v. Fuller*, 96 Md. 652, 666 (1903).

⁵⁶ *West Virginia Central Railroad Co. v. Fuller*, 96 Md. 652, 666-67 (1903).

⁵⁷ Cf. Green, “The Palsgraf Case,” 790.

⁵⁸ *Palsgraf*, 248 N.Y. 339, 344 (1928). Emphasis added.

The driver's act of speeding could be negligent (unreasonable) as to pedestrians and motorists but not negligent as to the drivers he competes against on the race course. Analogously, the railroad's act of helping the man with the fireworks is negligent (unreasonable) as to him but not negligent as to Mrs. Palsgraf. In context, actors stand in different relations to the risks they create, and the culpability of their risks must be assessed correspondingly. Cardozo basically states this principle, albeit in more abstract language, when he says: "Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed, it is understandable at all."⁵⁹ Based on the driving example, one sees that the "things related" that Cardozo mentions is a reference to the relationship between the defendant's action and the *risk* of harm. That Mrs. Palsgraf was injured as she was (via falling scale from a reverberating explosion) is not what gets related to the defendant's act through the breach concept to prove the breach element in a case. Moreover, Mrs. Palsgraf's status as a patron who was exposed to a certain degree of risk is not what gets related to the defendant's act through the breach concept to prove the breach element. From these considerations we can see why Cardozo disagreed with the trial court verdict. While the jury found that the railroad was negligent toward its passengers, the jury's finding does not answer the question crucial to her case: did the railroad fail to take due care to protect *her*? In this context, the railroad employees could act unreasonably toward the man with the package without thinking about its potential impact on Mrs. Palsgraf—and this because they had no reason to believe the package was hazardous, and she was not sufficiently close to the transaction to be at clear risk of injury, either by the man falling or the package falling. A singular act, then, can be negligent (unreasonable) as to one type of risk but at

⁵⁹ *Palsgraf*, 248 N.Y. 339, 345 (1928).

the same time not negligent (unreasonable) as to a second type of risk, especially where the defendant lacks knowledge of, or does not create, the latter. Evaluating singular acts of defendants against multiple standards of care is both intelligible and appropriate.

2. Against “No Duty” Interpretations and Foreseeability Reconsidered

To persuade readers that *Palsgraf* should be viewed as a “no breach” case, I must discuss the myriad other interpretations and why the “no breach” understanding should be favored over them. The literature on *Palsgraf* is enormous, so I could not possibly address myself to all the extant interpretations. In this section I will restrict my analysis to two common interpretive trends: *Palsgraf* being viewed as a debate about duty, and foreseeability, respectively. I will argue that not only are these approaches to *Palsgraf* defective, but that the roles of duty and foreseeability in the case are properly understood only in view of the “no breach” interpretation that I have been developing. Let me explain.

“No Duty” Versus “No Breach”

Several authors have interpreted Cardozo in *Palsgraf* to be saying that the railroad was relieved of liability because it owed no duty to Mrs. Palsgraf.⁶⁰ Let me throw some light on the distinction between a “no duty” and a “no breach” case. A duty analysis explores the existence, and the extent, of one’s legal obligations to others. In the negligence setting, duty means that an actor is obligated to act reasonably—to exercise due care. Therefore, to say that the railroad owes no duty to Mrs. Palsgraf means that it has no obligation to exercise due care toward her. By contrast, a breach analysis looks at whether than the defendant’s conduct can be called *negligent*—i.e., whether the defendant did or did not violate the standard of reasonable care it

⁶⁰ See, for example, Kaufman, *Cardozo*, 299, and Green, “The Palsgraf Case,” 790ff. Green analyzes the case in terms of duty even though he recognizes that risk assessment is contextual.

owed to the plaintiff. Calling *Palsgraf* a “no breach” case means that the railroad was not negligent in this sense. “No breach” cannot imply “no duty.” Quite the contrary, “no breach” implies that a duty exists. Since breach in negligence is measured by whatever standard of care is relevant to the case, it follows that when one has breached a standard of care, one has therefore violated the duty to exercise reasonable care. For the same reason, when there is no breach, one has not violated the duty to exercise reasonable care.

Admittedly this is a very simple characterization of the difference between “no duty” and “no breach”; but it will do for my purposes because Cardozo never says anything to the effect that the railroad had no obligations to Mrs. Palsgraf. In fact, by saying that the railroad did not violate the standard of care it owed to Mrs. Palsgraf (“Relatively to her it was not a wrong at all...”), Cardozo is implying that the railroad clearly has *some* duty to her. Andrews appeals to a notion of duty which appears to be completely different than, and indeed incompatible with, Cardozo’s notion of duty. It would therefore be natural to read *Palsgraf* as suggesting that the disagreement between Cardozo and Andrews is about duty. On that basis, one can derive the following interpretive thesis: according to Andrews’s conception of duty the railroad should be held liable, while according to Cardozo’s conception of duty the railroad should not be held liable. Such a thesis presents a challenge for my “no breach” reading of *Palsgraf*. How do I explain that Cardozo and Andrews appear to be talking about two different concepts of duty? And how do I explain that Cardozo himself incorporates the language of duty into the majority opinion? These are important questions.

Cardozo and Andrews on Duties: Do They Disagree?

In the dissenting opinion, Andrews argues that the railroad was negligent to Mrs. Palsgraf in that it violated a *general* duty it owed to both her and society. To develop his argument, Andrews gives this example:

Should we drive down Broadway as a reckless speed, we are negligent whether we strike an approaching car or miss it by an inch. The act itself is wrongful. It is a wrong not only to those who happen to be within the radius of danger, but to all who might have been there—a wrong to the public at large. Such is the language of the street.⁶¹

From this example, Andrews articulates the following principle:

Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured even if he be outside what would generally be thought the danger zone.⁶²

In other words, for Andrews, negligence consists in unreasonably risky behavior itself. Andrews says that this is the commonsense notion of negligence (“the language of the street”) and tort law accepts it for reasons of “public policy.”⁶³ If someone is harmed as a natural consequence of the defendant’s initial, unreasonably risky act, the defendant has breached a duty it owed to the plaintiff; it does not matter how unforeseeable the harm or the victim is. So, while the package was not labeled as dangerous and Mrs. Palsgraf did not appear to be at risk, the railroad behaved negligently toward the passenger boarding; that instance of negligence resulted in injuries to her; therefore, she may complain. For Andrews, if a person is negligent there need be a reason—also a “public policy” reason, I presume—for not holding them responsible for harms that result from their negligence. I interpret Andrews as believing that defendants are *rebuttably presumed* to have violated a legal duty in negligence: a negligent defendant must have a compelling reason for being relieved of responsibility for his torts on the ground of lacking duty.⁶⁴

⁶¹ *Palsgraf*, 248 N.Y. 339, 349 (1928).

⁶² *Palsgraf*, 248 N.Y. 339, 350 (1928).

⁶³ *Palsgraf*, 248 N.Y. 339, 351 (1928).

⁶⁴ At first blush this may sound like a quasi-strict liability approach, but it isn’t. In strict liability, once the plaintiff has established that the defendant’s act was of a type for which strict liability is appropriate (e.g., manufacturing defective products, acts of animals, ultrahazardous activities) the plaintiff need only prove that the defendant’s act more likely than not caused their

As we have already seen, Cardozo treats duty differently than Andrews. For Cardozo, duty is a relational concept, which means that duty is an essential element of plaintiff's case. More specifically, the plaintiff must show that defendant's act stands in the right relation to the risk that led to her harm. Did the defendant breach a standard of care that it owed *to the plaintiff*? This, then, is the basis of the apparent divide between Cardozo and Andrews: Andrews appears to think a general concept of duty applies to the case and the railroad violated it, while Cardozo thinks a relational concept of duty applies and the railroad breached no standard of care it owed to Mrs. Palsgraf because it didn't create any unreasonable risk of danger to her. Additionally, Andrews would protest that Cardozo's reasons for relieving the railroad of responsibility are incorrect because they do not invoke any public policy considerations that would justify *not* holding the railroad responsible for its generally unreasonably risky behavior.⁶⁵

As I see things, Andrews and Cardozo do not disagree about duty as much as they might appear. Both their concepts of duty are, in a sense, *right* in the torts setting. The real question is, *Are Cardozo and Andrews applying their respective concepts of duty correctly to decide the case at hand?* My own view is that Cardozo is, but Andrews isn't. More exactly, Andrews's general duty principle, while it very much applies to other tort suits, does not apply to the situation in

injury. On Andrews's approach, plaintiffs would still need to prove that a breach occurred, i.e., that the defendant engaged in unreasonably risky behavior. However, if I am understanding Andrews correctly, the existence of a duty is not an essential element of plaintiff's case.

⁶⁵ Cf. *H. R. Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928). In *Moch*, defendant water company contracted with the City of Rensselaer to provide water for fire hydrants, but defendant's negligent failure to provide an adequate supply of water to put out fires led to plaintiff's building burning down. Cardozo held that water company's negligence (its failure to honor its contract with the City) was "at most the denial of a benefit" and "not a commission of a wrong" to the plaintiff, for the defendant did not contract directly with the plaintiff. A finding otherwise would create "crushing" or unlimited liability against contractors. "Crushing liability" is the idea that the duty of care owed ought to be restricted in some situations in order to limit the number of claims against potential defendants; this is an example of a public policy reason for cutting off liability.

Palsgraf. Cardozo correctly saw that *Palsgraf* is the kind of case in which it is proper to concentrate on duty, and thereby breach, as essential elements of plaintiff's case.

To develop these claims, let me begin by further analyzing Andrews's general duty principle and what it means. For Andrews, duty is relational in the sense that it involves one and only one relation: namely, between the defendant's risky act and "the world at large," i.e., civil society:

It [negligence] does involve a relationship between a man and his fellows. But not merely a relationship between man and those whom he might reasonably expect to injure. Rather, a relationship between him and those he does injure. If his act has a tendency to harm someone, it harms him a mile away as surely as it does those on the scene.⁶⁶

In Andrews's view, in situations where a defendant's act creates a risk of physical harm to another, the defendant *thereby* has a duty to exercise reasonable care to *everyone* who might be harmed.⁶⁷ When risk is created, duty is created; that is the purpose of the Broadway speeding example. How does duty issue from risk creation? One answer is that, for any risk, if one creates a risk one has an obligation to think about whether measures need to be taken to prevent the risk from harming others. If a paving company breaks up a large expanse of asphalt to repave a parking lot, it must consider what hazards the broken-up area and its debris will pose to people and their property. The duty is not, and cannot be, separate from the risk-creating act: the costs of deliberating about the risks, and taking reasonable care against them, are part of the cost of repaving (the risk-creating act). When a court finds a defendant negligent, then, it finds that the defendant violated a legal duty *by* the act of creating an unreasonable risk. Risk implies a duty to civil society; and the duty relates the defendant to society such that, if the defendant did not

⁶⁶ *Palsgraf*, 248 N.Y. 339, 349 (1928).

⁶⁷ This description incorporates the language of general duty from the *Restatement Third*, § 7, which reflects Andrews's understanding.

exercise reasonable care, he does not stand in right relation to civil society. This, I take it, is Andrews's logic of duty.

Whatever objections one may have to the substance or implications of Andrews's general duty principle, my concern is with how he employs it in *Palsgraf*. Andrews's principle is appropriate for a large number of negligence torts—where the defendant's act is the origin of the risk. However, *Palsgraf* is a special negligence case: as I have been stressing, the defendant railroad did *not* create the risk that led to plaintiff's harm. This makes a difference to the duty analysis. To illustrate, consider some variations on the facts of *Palsgraf* regarding the railroad's relationship to the risk. Suppose one of the guards had stopped the running passenger, took his package, opened it and brought the fireworks onto the platform. In that scenario the railroad would have directly created a risk to others, and thus it would have had a duty to consider what measures ought to be taken to keep the risk from causing harm. What risk would the railroad have created? Simply by bringing fireworks onto the platform the railroad would have created a risk of bringing people physically closer to explosives than they were before. Consequently, the railroad would have owed a duty of reasonable care to *everyone*; therefore, if a breach had occurred in this scenario which led to Mrs. Palsgraf being injured, the railroad could not avoid liability by pleading that it had no duty as to her. Now compare this hypothetical with what actually happened. Because Andrews thinks that wrongdoing in negligence consists in violating a duty to "the world at large," it is not clear that the railroad is connected to the risk in a way that would give Mrs. Palsgraf standing to sue and be compensated.⁶⁸ To have a tort cause of action *her* rights need to have been violated by the railroad's breach. Again, the only risk the railroad created was to the package. If a general duty of reasonable care is entailed by the creation of risk,

⁶⁸ Here I follow Weinrib, *The Idea of Private Law*, 161-62.

as Andrews's principle suggests, what does that duty amount to here? Surely, Mrs. Palsgraf could not claim her rights were violated because railroads have a responsibility to protect everyone from the risk of an explosion, for *that risk was unknowable and hence not theirs*. She also could not claim that her rights were violated because railroads have a responsibility to protect everyone from anything potentially hazardous in a package; for, that would imply not only that the railroad should know about all the potential hazards, but also the power to protect against all the potential hazards. There can be no such right (and therefore no such duty) because it demands way too much of human actors. For many hazards, it is impossible to tell if what's hazardous in one setting will be hazardous in another. Suppose that Mrs. Palsgraf is extremely allergic to silk. Now imagine that the fact pattern goes through in the exact same way except the running passenger is not carrying fireworks but a suitcase of clothes containing a silk shirt. The package falls, the shirt falls out and triggers an allergic seizure. According to the Andrews formula, the railroad's negligence would consist in failing to protect civil society, and hence Mrs. Palsgraf, from the hazards posed by typically un Hazardous articles of clothing. To deliberate about the precautions that ought to be taken, the railroad needs to be in a position to reasonably calculate the likelihood of certain harms manifesting. The railroad needs knowledge of risks for that. Not knowing of Mrs. Palsgraf's allergic condition, the only power the railroad has to fulfill its duty, really, is to refrain from handling any packages or bags at all. Mrs. Palsgraf cannot legitimately sue the railroad on the theory that the railroad's negligence, *its wrongdoing* to her, consisted in its failing to refrain from handling bags period. It would be a bizarre proposition.⁶⁹

⁶⁹ Which is why she would need some kind of special condition rule—e.g., precipitation, “take-the-victim-as-you-find-them” (eggshell-skull, or something like it)—to pursue her case. For more on rules that deal with unforeseeable consequences, see Keeton, et al., *Prosser and Keeton on Torts*, 5th ed., § 43, 280-301.

I believe the above argument shows why Andrews was wrong to analyze the railroad's negligence in terms of general duty. The *Palsgraf* case is a situation to which Andrews's general duty principle simply does not apply; it applies to negligence torts where the defendant is a risk creator.⁷⁰

Interestingly, Cardozo *accepts* the idea of a general duty. At one point in the opinion he writes:

The risk reasonably to be perceived defines the duty to be obeyed...This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path.⁷¹

Here, like Andrews, Cardozo is saying that where risk is created duty is generally created. The "one who launches a destructive force" is the risk creator. Cardozo adds that the scope of the duty that attaches to that risk—that is, what consequences of a breach the defendant can be held liable for—is not determined by the nature of the harm or the foreseeability of the victim. I will expound on foreseeability very soon, but if Cardozo and Andrews agree about the connection between duty and risk, how did they arrive at opposite conclusions? Where exactly do they disagree? One possibility, which I find plausible, is that Andrews and Cardozo each have a different sense of "launching a destructive force" in mind. From Andrews's point of view the railroad did launch a destructive force: strictly speaking, had it not been for the railroad's initial

⁷⁰ Andrews's general duty principle may also apply to negligence torts where the defendant's act does not involve a *direct* creation of risk. Suppose the package had been clearly labeled "DANGER: EXPLOSIVE MATERIALS." The running passenger trips over his own feet, drops the package onto the tracks, it explodes, and Mrs. Palsgraf suffers the same injuries from the falling scale. Although the railroad employees do not create the risk in this scenario, if they were aware of the risk and failed to act reasonably in response to it, that may be sufficient for negligent conduct. One would have to convincingly argue that having knowledge or awareness of the risk is virtually the same as being a risk creator, and on that score, the railroad breached its duty to protect Mrs. Palsgraf by not acting reasonably in relation to a risk of which it was aware. I will not explore the merits of that argument here.

⁷¹ *Palsgraf*, 248 N.Y. 339, 344 (1928).

negligence toward the boarding passenger, Mrs. Palsgraf would not have been injured. Andrews is assimilating “launching a destructive force” merely to breach causing injury. Cardozo thinks of it a different way: one launches a destructive force *when one creates an unreasonable risk*. Duty straightway attaches to risk *because* of the destructive forces that risk creation potentially generates. But such duty is owed only when the defendant is the one who creates the risk, and the railroad did not create the risk to Mrs. Palsgraf. The railroad failed to protect Mrs. Palsgraf from a risk it did not know about. In such a circumstance, although what happened to Mrs. Palsgraf is unfortunate, the defendant has not breached a duty of reasonable care.

Ultimately, then, the disagreement between Cardozo and Andrews is not over opposite conceptions of duty. The *Palsgraf* case is subtler than that. Indeed, we see from the language of the case shows that Cardozo does not reject Andrews’s general duty principle. Cardozo neither questions nor ignores the expectation that the railroad owes all its passengers “a duty of the highest care” to protect against the hazards it creates.⁷² Cardozo also does not necessarily deny that the railroad has a specific duty to protect its passengers from hazards that third parties create. Cardozo would just say that *Palsgraf* is the wrong case for employing any of these ideas about duty: the general duty is not involved because the railroad did not create the risk, and the specific duty is not involved because the railroad was not aware of the risk. To accommodate the unusual facts of *Palsgraf*, the duty inquiry must address itself to more nuanced ideas concerning the relations between defendants and risk.

MacPherson: An Interlude

One might object that I have not persuasively demonstrated that Cardozo accepts the idea of a general duty to civil society. “The risk reasonably perceived defines the duty to be

⁷² Prosser, “Palsgraf Revisited,” 7.

obeyed”—this maxim describes risk as inherently determining duty, but how do we know that the duty Cardozo cites is the same duty to “the world at large” that Andrews announced? Cardozo confirms that he accepts a general duty principle like Andrews’s in *MacPherson v. Buick Motor Co.*⁷³ *MacPherson* precedes *Palsgraf*. It is a landmark case in tort law; in law school circles *MacPherson* is at least as well known as *Palsgraf* and probably Cardozo’s other most famous opinion. In *MacPherson*, to briefly summarize, plaintiff was injured when one of the wooden wheels on his car collapsed. He sued Buick for damages. Buick manufactured the vehicle but not the wheels; the wheels were manufactured by a third party and installed by Buick. There was evidence that the defective wheel could have been discovered in inspection, but despite the company’s negligence in this regard, Buick argued that it was not liable for plaintiff’s injuries because the plaintiff purchased the car from a retailer (car dealer) and not directly from the manufacturer. (Buick was relying on the old privity of contract doctrine, and earlier precedent supported their position.) *MacPherson* is thus a duty case: does the manufacturer owe a duty of care to anyone besides the immediate purchaser?⁷⁴ Cardozo, again writing for the majority, answers yes, because “if [the manufacturer] is negligent, where danger is to be foreseen, a liability will follow ... the presence of a known danger, attendant upon a known use, makes vigilance a duty.”⁷⁵ In other words, Buick’s status in the chain of transaction relative to the plaintiff makes no difference to the duty he was owed. The fact that Buick vacated the vehicle to

⁷³ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

⁷⁴ *MacPherson*, 217 N.Y. 382, 385 (1916). This is exactly how Cardozo puts the question.

⁷⁵ *MacPherson*, 217 N.Y. 382, 390 (1916). Although Cardozo says “foreseen” danger in the first sentence and “known” danger in the second, it need not be the case that he is saying two different things. I read him to be using the words “known” and “foreseen” interchangeably here, considering “there is no claim that the defendant knew of the defect or willfully concealed it” (217 N.Y. 382, 385).

a third party does not matter, nor does any contract with a third party. Knowing that certain dangers attach to the operation of any vehicle, the maker of the vehicle, by definition, is a risk creator, from which it follows that they have a duty to guard against any potential harms that issue from that risk. This is, as G. Edward White says of *MacPherson*, “a reflection of generalized civil obligations.”⁷⁶ As *MacPherson* precedes *Palsgraf*, and there is no evidence to suggest that Cardozo radically changed his mind about general duty in the interim, it makes sense to think that Cardozo’s belief in a duty to civil society from *MacPherson* carries over into *Palsgraf*. The *MacPherson* holding shows that Cardozo, like Andrews, thought that a defendant cannot appeal to some narrower conception of duty to be relieved of liability *when the risk that causes the harm originates from the defendant*.

Why Does Cardozo Mention Duty if Breach Is the Issue?

The majority opinion in *Palsgraf* instructs us that, where the defendant’s act is not the source of the risk that led to the plaintiff’s injury, one must establish a relationship between the defendant and the risk that obligated the defendant to protect the plaintiff from the risk.

Discussing duty is therefore necessary in a case like *Palsgraf*. The defendant’s culpability in negligence cannot be investigated without first establishing that the defendant’s relationship to the risk was such that he had a duty to guard against it. Cardozo explains:

Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security ... One who seeks redress in the law does not make out a cause of action by showing without more that there has been damage to the person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.⁷⁷

⁷⁶ G. Edward White, *Tort Law in America: An Intellectual History: Expanded Edition* (Oxford: Oxford University Press, 2003), 125.

⁷⁷ *Palsgraf*, 248 N.Y. 339, 345 (1928).

Cardozo is saying that Mrs. Palsgraf must show that the railroad's act must have been unreasonably risky ("had possibilities of danger") as to her; this is essential to justifying her to claim that the railroad violated her "right to be protected" from the risk creator (the man with the package). Mrs. Palsgraf's lawyers were unable to establish this since the railroad did not know, and could not have known, that the man's package posed a risk to her. At most, they showed that her harm was causally connected to an act of negligence on the railroad's part. However, according to Cardozo's lights, proof of causation alone is not sufficient where the defendant's act is not the source of the risk that leads to the plaintiff's harm. More is required in such a case. Specifically, the plaintiff must prove that the defendant *did wrong*—that the defendant had an obligation to keep the risk from manifesting into harm. Hence the plaintiff must establish a duty to protect (which, recall from earlier, is "defined by the risk reasonably to be perceived"). Defendant's failure to do that duty is what must have caused plaintiff's harm for the plaintiff to receive compensation.

The Role of Foreseeability

As I mentioned at the outset of the chapter, another popular interpretation of *Palsgraf* is that Cardozo relieved the railroad of liability because the guards could not have reasonably foreseen what would happen to Mrs. Palsgraf when they decided to help the man with the package board. Again, there are two versions of this interpretation: the precise harm to Mrs. Palsgraf (that a scale would fall on her) was unforeseeable, or harm to Mrs. Palsgraf herself (because she was standing so far away) was unforeseeable. Both of these interpretations are incorrect. I grant that one might arrive at them if one were to focus on the facts of *Palsgraf* in isolation and then juxtapose the facts with the majority's holding of no liability. ("She's far removed from the explosion, no liability; ah, yes, unforeseeable victim!") I can only speculate that this might be what the commentators are doing. The concept of foreseeability does indeed

matter to the *Palsgraf* holding. However, neither the foreseeability of the harm nor the foreseeability of the victim is what's fundamentally at issue for the majority; the language of Cardozo's opinion does not reflect those particular considerations. What is at issue for the majority is *the foreseeability of the risk*—the foreseeability relevant to establishing breach.

To avoid confusion, one should get clear on the proper connection between the concepts of risk, harms and victims, and foreseeability. One cannot reasonably foresee a certain type of harm or a harm to a particular victim unless one can reasonably foresee a risk of harm. Indeed, if a risk is unforeseeable to some actor, it follows that the actor cannot foresee what harm(s) will manifest from that risk or *who* will be negatively affected by the risk. This is a logical point as much as it is a legal one: risk *comes before* harm. Thus, a defendant's culpability in negligence ultimately depends on their relationship to the risk and whether the *risk* of harm is not foreseeable. Without these initial risk assessments, it does not make sense to say that a defendant is relieved of liability *because* the harm was unforeseeable. Now of course it is plainly true that both the harm and the victim *were* unforeseeable in *Palsgraf*. But this proposition can be true (insofar as it relates to the actual holding) only through the lens of risk: from the railroad employees' point of view, the risk was unforeseeable and *consequently* both the harm and Mrs. Palsgraf were unforeseeable. The upshot is that analyzing the foreseeability of the risk is a crucial aspect of the breach inquiry—of determining whether the defendant acted *unreasonably* and therefore deserves blame for wrongdoing. (Especially in cases like *Palsgraf* where the defendant is not the risk creator or presumed to be aware or practically certain of the risk.)

The rudimentary conceptual point—that risk precedes harm logically—can help one avoid confusion in the following way. It is easy to mistake *Palsgraf* as a case of unforeseeable harm, simply because it is easy to conflate the foreseeability of the risk with the foreseeability of harm. For normally, harms and risks are linked together: harm either grows out of risk, or it is

the result of some risk. Usually the risks themselves inform us what harms should be foreseen. For example, the paving company from earlier knows that the large expanse of broken asphalt generates a risk of an unheeding driver traveling across and destroying the underbelly of their vehicle. Reasonable people could deduce that breaking up a parking lot does create such a risk. Yet, despite the close link, risks and harms are not identical. Whether a risk develops into harm depends on the events which occur following the creation of the risk. In other words, risk exists independently of whatever events follow, and these events may, or may not, bring about a harm from the risk. How the event sequences unfold—and the harms that subsequently befall victims—is important for determining whether the precautions an actor took were reasonable. Suppose the paving company cordons off the broken area with orange poles and caution tape. Heavy winds during the night knock the poles down, leaving the whole area open. A late-night driver fails to appraise the obstructed area (because it is dark) and rolls over it, causing major damage to his Camaro. Did the pavers act reasonably? Should they have foreseen that the poles might blow over if not weighted down, which might have prevented the risk of car damage from becoming actualized? These are pertinent, important questions for resolving liability. However, these questions are altogether different from inquiries into whether a risk reasonably exists, or how some risk was created in the first place. The separateness of these inquiries into the foreseeability of the risk is due to the separateness of risks and harms.

Distinguishing risk and harm in this way enables us to better understand what Cardozo was doing and the sense in which foreseeability matters for the *Palsgraf* holding. The foreseeability of the risk is different than the foreseeability of the harm. Cardozo himself says, “The law of causation, remote or proximate, is ... foreign to the case before us. The question of liability is always anterior to the question of the measure of the consequences that go with

liability.”⁷⁸ Put another way, the question of breach turns on the foreseeability of the risk; in negligence, Cardozo thinks, the breach element is what must be established first. The question of what harms were foreseeable goes to proximate cause element, which we look at only once breach has been proved: the culpability of the defendant’s conduct must be established before we can determine the scope of consequences for which the railroad is responsible. More precisely, the breach element and the proximate cause element, respectively, depend on different foreseeability requirements. For Cardozo, breach depends on the foreseeability of the risk, while proximate cause—the question of whether the plaintiff’s harm is too remote from the defendant’s culpable act to warrant holding the defendant legally responsible—depends on the foreseeability of the harm.

Before I proceed to discuss the proximate cause point in detail, there is another objection to be answered. At this juncture one might object that I have not sufficiently explained why the foreseeability of the risk, and not the harm or the victim, is what matters to the *Palsgraf* holding. All I have done, an objector might say, is distinguish risk and harm such that I have merely explained the *ordering* of essential elements that Cardozo accepts. Is the proposition that breach and proximate cause involve different notions of foreseeability intelligible? Why, for example, could a plaintiff *not* appeal to foreseeability of the harm to establish breach?

Aside from the fact that we know the case law preceding *Palsgraf* distinguishes between foreseeability of risk and foreseeability of harm, the inadequacy of the latter for establishing

⁷⁸ *Palsgraf*, 248 N.Y. 339, 346 (1928). I acknowledge that Cardozo uses the phrase “question of liability” instead of “question of breach” in the second sentence. I say this is a mistaken use of language on his part, for it is clear to me that he is distinguishing culpability from causation analysis in the passage. Ironically, I think Cardozo might have accidentally used the phrase “question of liability” along the lines of *in toto* negligence that I discussed in Section 1 of this chapter, even though he means the breach element of negligence.

breach in *Palsgraf* can also be explained conceptually.⁷⁹ Sometimes breach involves an actor actively violating a legal duty; but in negligence, breach mainly consists in an actor failing to fulfill an obligation to perform an action that would keep some harm from occurring. Of course, which harms are reasonably foreseeable is a factor that influences a court's perception of defendant's duties and, consequently, of breach. However, foreseeability of the harm cannot be the only factor for determining breach. The foreseeability of the risk is also essential, for not all injuries unfold or manifest in the same way. For example, suppose that a roller coaster operator accidentally bumps into a brake lever, causing the coaster cars to come to an abrupt stop. The force of the stop causes rider Jan to hit her head very hard on the seat back; she suffers a skull fracture. Let us also suppose that the coaster—whose name is The Tin Rex—is an inverted roller coaster, so the riders' feet are dangling free. The jolt of the stop frees another rider's steel-toed boot which lands on the head of Smith, who was walking in the midway adjacent to the ride area. Smith also suffers a skull fracture, and his is of the same degree as Jan's. Now both Smith and Jan will want to sue the amusement park for negligence, yet their injuries are the same. The amusement park's culpability will not turn on Smith and Jan having suffered fractured skulls and whether the park should have foreseen *this type* of injury. Rather, the amusement's park culpability will turn on whether it had duty to protect against the precise risks to which Smith and Jan were each exposed. Did the park have an obligation to protect Tin Rex riders against the risk of being hurt by the ride being operated improperly? Did the park have a duty to protect the midway users from the risk of being hurt by a falling boot resulting from the ride being operated improperly? A court may find that the park had a duty to take preventive measures to keep Tin Rex riders from being harmed, but not to keep the midway users from being harmed by a falling

⁷⁹ See Page, *Torts: Proximate Cause*, 33-39. *Smith v. London and South Western Railway*, L. R. 6 C. P. (1870), is probably the most important case in this area.

boot—in which case Jan would recover and Smith would not. Such a finding would show that fixing on the harm alone, and whether such harm was foreseeable, cannot be all that goes into establishing breach.

3. The Lessons about Proximate Cause

Lesson One: The Phrase “Limiting Liability” Must Be Handled with Care

Up to now, I have been explicating that the main question to be answered in *Palsgraf* is whether the railroad had violated the standard of care it owed to plaintiff, a question that can be resolved only by assessing whether the risk for which the railroad is responsible was foreseeable. Having clarified the roles of duty and foreseeability in *Palsgraf*, and having thoroughly argued that *Palsgraf* is a “no breach” decision, I am in good position to take up the issue with which I started: Why do very bright people routinely think of *Palsgraf* as a proximate cause case, particularly in tort law casebooks?⁸⁰

This is not a qualm about labels. Even though *Palsgraf* is just one case, this question about its connection to proximate cause goes to the heart of law as an intellectual enterprise, the very essence of which is generating knowledge and understanding about law’s concepts and principles from legal materials—of which cases are a central type. The proximate cause interpretation of *Palsgraf* seems peculiar in light of the foregoing analysis, not to mention Cardozo’s declaration that “[t]he law of causation, remote or proximate, is . . . foreign to the case before us.”⁸¹ To start, I want to clarify the claim that *Palsgraf* is a proximate cause case.

⁸⁰ As a sample, see Marc Franklin, et al., *Tort Law and Alternatives*, 10th ed. (St. Paul, Minn.: Foundation Press, 2016), 419f, Dominick Vetri and Lawrence C. Levine, et al., *Tort Law and Practice*, 5th ed. (Durham, N.C.: Carolina Academic Press, 2016), 452-56, and Victor Schwartz, et al., *Prosser, Wade, and Schwartz’s Torts: Cases and Materials*, 13th ed. (St. Paul, Minn., Foundation Press, 2015), 329-38. See also Dan B. Dobbs, *The Law of Torts*, 1st ed. (Minnesota: West Publishing Group, 2000), 455-56. Dobbs, who is careful to recognize that the railroad created no risk toward Mrs. Palsgraf, ultimately analyzes it as a proximate cause case.

⁸¹ *Palsgraf*, 248 N.Y. 339, 346 (1928).

Because the railroad was relieved of liability, to say that *Palsgraf* is a proximate cause case should mean that the railroad was relieved of liability on proximate cause grounds. Such relief would require a finding that the consequences of its negligent act were outside the scope of liability for consequences—i.e., that although the plaintiff’s harm resulted from the defendant’s culpable act, defendant nevertheless should not be held liable for plaintiff’s harm. Subsequently, to say that *Palsgraf* is a proximate cause case would be to say that the railroad was found to be negligent in the first place. None of these statements about *Palsgraf* can be correct. The majority opinion does not say that the railroad was not responsible for the consequences of its breach. Quite the contrary, the majority decided that there was *no breach at all*. The railroad had not breached the standard of care it owed Mrs. Palsgraf. This is because, in the first place, the railroad was not responsible for creating the risk that led to her injury, and in the second place, the railroad’s failure to safeguard her from a risk created by a third party was not a culpable failure (because the railroad did not know about the risk). Why, then, does *Palsgraf* get misclassified as a case in which proximate cause is the main legal dispute being resolved?

One possible explanation is the old language that jurists used to articulate the proximate cause concept. Consider this sentence from Warren Seavey: “[W]hatever expressions have been used to *define the limits of liability in this type of case [Palsgraf]*, expectability has always been in the background.” For a long time, it was typical of jurists to talk about proximate cause in terms of “limiting liability.” By this they meant that that proximate cause is a normative limitation on where liability for consequences should end in a case—that at a certain point, the consequences of a defendant’s negligence are too remote from his initial culpable act to justify holding him liable. Thus, there is a long tradition in the legal scholarship of thinking of proximate cause in terms of placing *limits* on liability. The language of limitation was

notoriously confusing, so much that the drafters of the *Restatement Third* abandoned it completely in favor of the phrase “scope of liability.” The commentators who think of *Palsgraf* as a proximate cause case might be interpreting Cardozo as setting a limitation on the railroad’s liability and therefore relieving it of liability; and then, by force of habit or associations surrounding “limitation,” they call *Palsgraf* a proximate cause case.⁸²

It would not be wholly inaccurate to say that the majority in *Palsgraf* does limit the railroad’s liability: by finding no culpable conduct on the railroad’s part, the majority cuts off (and therefore limits) liability for Mrs. Palsgraf’s injury. But this is a different sense of “limit” than the normative sense usually conveyed by proximate cause, which is that the railroad acted culpably but should not be liable for the consequences of its culpable act. Cardozo is explicit that this is not what the majority has in mind. To see how, look at the unabbreviated version of Cardozo’s speeding example:

We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and, therefore, of a wrongful one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality.⁸³

The consequences of the reckless driving are irrelevant to the stage on which Cardozo is focusing. Clearly, Cardozo is focused on *wrongdoing*—what’s culpable and therefore illegal about the defendant’s act. The inquiry into wrongdoing requires an analysis of the defendant’s relation to risk and, on that score, of whether the defendant behaved unreasonably. We rely on “the eye of ordinary vigilance” to answer the reasonableness inquiry. What *risk* would a reasonable person in the same circumstance as defendant be expected to perceive? The vigilance concept is

⁸² Seavey, “Mr. Justice Cardozo and the Law of Torts,” 34. Emphasis added.

⁸³ *Palsgraf*, 248 N.Y. 339, 344 (1928).

undoubtedly necessary for analyzing what harmful consequences the defendant should have foreseen, but we do not take up that question unless the defendant's unreasonable act *wrongfully* set off a chain of consequences which led to plaintiff's harm. While surely the eye of ordinary vigilance would not have reasonably foreseen that Mrs. Palsgraf would be harmed by the falling scale if the man's package was destroyed, it is an irrelevant point to liability if the railroad did not act culpably. As I argued near the end of Section 3, and as Cardozo seems well aware, the situation in *Palsgraf* is such that foreseeability of the harm cannot be our sole guide for establishing culpability.⁸⁴

Whether or not the proposed linguistic explanation is correct, the lesson is that one should be careful when using the terms "limit" and "limitation" to describe the holding in *Palsgraf*. The concept of limiting liability ought to be approached with subtler distinctions in mind, lest commentators misinterpret the majority in *Palsgraf* again as imposing a proximate cause limitation and fostering deeper misunderstanding about a legal concept that is notoriously difficult to understand. Similar words of caution apply to those who like the "no duty" interpretation of *Palsgraf*. If one were to say that the railroad's liability is cut off because, although the employees' act was unreasonable, the railroad had no duty to Mrs. Palsgraf, that would be to assimilate a duty-based limitation to a proximate cause limitation. The function of

⁸⁴ However, see David Owen, "Figuring Foreseeability," *Wake Forest Law Review* 44, no. 5 (2009): 1280-81 and 1307. According to Owen, the *Restatement Third* drafters long ago rejected Cardozo's elemental approach, treating foreseeability of the risk as one factor among many to be weighed determining negligence and not as a determinant of duty. I do not think that Owen's observation has any negative effect on my project in this chapter. My object is not necessarily to defend the merits of Cardozo's approach to liability, even if I myself find it sensible. The fact that the American Law Institute disagrees with Cardozo does not mean that unique insights about the concepts of proximate cause and foreseeability and their natures cannot be gleaned from an interpretation of *Palsgraf*.

the latter, at least by Cardozo's lights, is to settle responsibility for the consequences *of a culpable act*.

Lesson Two: Proximate Cause Is About the Extent of Liability for Consequences, Not the Extent of the Defendant's Culpability

Parts of Andrews's dissent are instructive as to what relationships are being inquired into when a case raises a proximate cause question. Consider this famous passage:

What we do mean by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. ... We may regret that the line was drawn just where it was, but drawn somewhere it had to be. ... The words we used were simply indicative of our notions of public policy.⁸⁵

Two paragraphs earlier, Andrews gives his reason for saying this by way of an example:

A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered to all eternity. It will be altered by other causes also. Yet it will forever be the resultant of all causes combined.⁸⁶

Andrews's point is that proximate cause does deal with limiting the culpable defendant's liability, but proximate cause is a unique concept in that it limits the defendant's liability for reasons that are unrelated to the defendant's *culpability*. Just as we do not hold the boy responsible for causing the ripples that lead to the water level rising (and thus any subsequent damage), in negligence we cut off liability for harmful consequences for reasons of "convenience" or "public policy" or a "rough sense of justice." Reasons such as these do not help us assess the extent of a defendant's actual wrongdoing, of whether they breached a standard of care. The task of relieving a defendant from liability for wrongful conduct—i.e., of finding no proximate cause—is a matter of finding that the harm was not closely connected enough with the defendant's

⁸⁵ *Palsgraf*, 248 N.Y. 339, 352-53 (1928).

⁸⁶ *Palsgraf*, 248 N.Y. 339, 351 (1928).

culpability to warrant holding the defendant liable. In contrast of Andrews, Cardozo explains that there is a difference between cutting off liability for the consequences of a culpable act and holding that a defendant is not culpable. With Cardozo the question of whether we should relieve the defendant of liability for consequences does not arise if the defendant is not liable to begin with (*because* the defendant is not culpable).

Lesson Three: Analyzing the Defendant's Relationship to Risk Is Not Central to Proximate Cause

Among his many famous dicta, Oliver Wendell Holmes explicitly distinguished culpability and proximate cause: “The measure of the defendant’s duty in determining whether a wrong has been committed is one thing; the measure of liability when a wrong has been committed is another.”⁸⁷ Obviously I think Cardozo accepts the principle expressed in Holmes’s dictum. But I think Cardozo develops Holmes’s idea in the following way: the majority opinion, at least as I have presented it, suggests that risk analysis may not be helpful to settling proximate cause queries. In tort law, we think about culpability differently than we think about the scope of liability for consequences. As the standard of culpability in tort is negligence, courts think about culpability largely in terms of the risks to which actors subject society; if an actor did not create the risk, the actor’s culpability is evaluated in terms of the risks an actor ought to have prevented or help prevent. Thus, culpability in tort law—what defines the presence or absence of wrongdoing in a case—is a matter of ascertaining people’s relationships to risk and inquiring into what actions society is prepared to take to reduce or eliminate risk without hindering society’s productivity.

Based on that rendering of culpability, one might object that “public policy” is as much part of Cardozo’s culpability analysis as it is Andrews’s causation analysis, and therefore

⁸⁷ *Spade v. Lynn & Boston Railroad Company*, 172 Mass. 488, 491 (1897).

Cardozo appears to be smuggling proximate cause considerations into the issue of breach when he wanted to keep the two elements he wants to keep separate. Perhaps my point in the previous paragraph can be crystallized as follows. Every harm is the result of some risk. As I read Cardozo, deciding whether a defendant is culpable for harm is a matter of figuring out whether the defendant should have reduced the risks that led to plaintiff's harms—either by being more careful in their actions generally, or by intervening to protect a plaintiff from a third-party risk. As I read Andrews, deciding whether a defendant is the proximate cause of plaintiff's harm involves assessing which harms caused by the risks are connected to the defendant's act and whether the defendant ought to be held responsible for them. If those readings are correct, then Cardozo and Andrews are talking about two entirely different kinds of analysis. The relations involved in each are different. Andrew Kaufman elaborates with respect to Andrews:

[By “public policy”] Andrews did not mean broad political or economic considerations—for example, enterprise liability, loss spreading, fairness to consumers or economic policy considerations. His “public policy” referred to practical considerations of everyday social life that had long been recognized as relevant to the issue of liability. Could the injury have been foreseen by a prudent person? Was there a continuous sequence between cause and effect...without too many [intervening] causes? Was the injury too remote in time and space from the conduct?⁸⁸

The questions that Kaufman attributes to Andrews are proper for an analysis of what harms ought to be cut off from liability because of their remoteness, just like Andrews's metaphor of the ripples gave us. However, they are not proper for analyzing what harms are within the scope of the risk, which is precisely what preoccupies Cardozo and the majority. “If the plaintiff's harm is within the scope of the risk for which the plaintiff is responsible, then the defendant is culpable.” Figuring out whether the antecedent has been satisfied requires a rubric that assesses the defendant's relationship to the risk, which is separate from the rubric which would assess the

⁸⁸ Kaufman, *Cardozo*, 297.

defendant's relationship to the consequences of his culpable act. In fact, if we use Kaufman's questions as a guide, we can see that the rubrics *have to be* separate. The second (about continuity of sequence) and third (about remoteness) of Kaufman's questions ask nothing about the defendant's relationship to the risk. Risk analysis *may* be helpful to the first question (about foreseeability of harm) depending on the particulars of the case and the court's test for proximate cause, but some proximate cause tests make no overt reference to risk. Take Andrews's own preferred test in *Palsgraf*, for example:

The proximate cause, involved as it may be with many other causes, must be, at the least, something without which the [plaintiff's injury] would not happen. The court must ask itself whether there was a *natural and continuous sequence* between cause and effect. ... Was there a connection between them, without too many intervening causes?⁸⁹

Andrews's test for proximate cause is what Joe Page and others have called a "hindsight" approach.⁹⁰ Under Andrews's version of hindsight, a court would look backward from the plaintiff's harm to the defendant's negligent act to determine whether the link between them is sufficiently close and *continuous*, meaning roughly that the defendant's act produced an unbroken sequence that culminated in plaintiff's harm; no event occurring subsequent to defendant's act intervened in the sequence to a degree that defendant's liability should be cut off because the intervening event was more causally relevant to plaintiff's injury. The defendant's *relationship to the risk* does not obviously enter anywhere in a hindsight appraisal, for hindsight is about the nature of the event sequence between act and harm only. Thus, relieving a defendant of liability for reasons of "public policy" or "rough justice" under a hindsight approach would amount to saying something like this: The nature of the causal sequence in this case is too attenuated or disrupted by subsequent events that it would be too severe to hold this defendant or others like

⁸⁹ *Palsgraf*, 248 N.Y. 339, 351 (1928). Emphasis added.

⁹⁰ Page, *Torts: Proximate Cause*, 19f.

him liable for injury. “Public policy” in this sense would have nothing to do with people’s relationships to risk or the societal implications of risk.

So again, Andrews and Cardozo *are* talking about different things. Risk analysis is different than proximate cause analysis, and the former is not central to the latter. This principle should stimulate us to reflect more deeply on Cardozo’s statement that the law of causation is “foreign to the [*Palsgraf*] case.” Cardozo may be saying something more than “there is no causation issue in this case.” He may be saying that, in a case where the defendant is not a risk creator, it would be *erroneous* to decide the case in terms of causation (as Andrews does) instead of culpability for risk. At the very least, that is an implication of Cardozo’s view. Recall the example of the drowning swimmer from Section 1 above. Instead of rescuing B, A sits on the dock, smokes a cigarette and watches B drown. How does a court justify relieving A from liability in negligence? After all, the proposition that A’s failure to rescue B caused B’s death is plausible. It can even be said that A, the expert swimmer and with life ring in hand, acted unreasonably. One way to justify not holding A responsible is to use a proximate cause rubric like Andrews: A is not responsible for B’s death because A’s omission to jump was not the proximate cause of B’s death (perhaps B’s unwise decision to swim was). This would be to employ a hindsight proximate cause analysis: we are identifying the last negligent act that is reasonably connected to the harm and whether defendant’s omission should “break” that connection. Now, such an analysis yields a result that is consistent with the law’s conclusion regarding duty to rescue (that there is no such general duty). Yet the hindsight Andrews picture does not give us the law’s *reasons* for not holding A responsible. A is not held responsible because A’s *culpability*—again, whether A did wrong—requires a different analysis: namely, *what is A’s relationship to the risk?* To be held responsible for B’s death, A would need to stand in relation to the risk of B drowning that makes A culpable for failing to rescue B, e.g., if A had

thrown B in the water himself. This is a culpability analysis, the same type that Cardozo employs in *Palsgraf*, not a causal analysis. One might ask, what legal-theoretical value rationale is behind deciding culpability in negligence in terms of risk? That is a difficult and highly debatable question that is well beyond the scope of this chapter. I cannot get delve into it here. But I do not want to punt either, so I will simply reiterate a point I made earlier in Section 1. The law does not wish to scare society from *all* risk-taking, which implies that the law *wants* people to be free to make their own decisions. In many instances one's own individual welfare will be in conflict with the social good. As such, the law endeavors to balance the goal of not encroaching too much on people's freedom of choice and the goal of identifying, and rectifying, individual instances of risky behavior that impose costs on society. This is a delicate balance; and as the "no duty to rescue" doctrine shows, even freedom of choice will have costs.⁹¹

4. Conclusion

In this chapter, I argued that *Palsgraf* is not a proximate cause case. I developed an interpretation of *Palsgraf* which says that breach is the main issue. According to Cardozo, writing for the majority, because there was no evidence that the railroad breached the standard of care it owed to Mrs. Palsgraf, it did not breach a legal duty as to her. Therefore, the railroad isn't culpable for her injury. If there is no breach, there is no reason talk about proximate cause because the question of relieving defendant of liability for consequences on grounds of remoteness is appropriate only if the defendant acted culpably. According to Andrews, writing for the dissenters, the railroad was negligent toward Mrs. Palsgraf in that it breached a general duty it owed to the world to protect the world against the risk of harm. If such breach is

⁹¹ See Richard A. Epstein, "A Theory of Strict Liability," *The Journal of Legal Studies* 2, no. 1 (1973): 197-98. Here I am faintly echoing Epstein's remarks that the common-law position on duty to rescue entails that law is committed to individual autonomy being a good-in-itself, and to people being entitled to act as they choose.

established, the defendant can be relieved of liability under the proximate cause concept, which subsumes different factors than those that determine the existence of breach. I argued that Andrews's understanding applies to cases where the defendant creates the risk that brings about the plaintiff's harm, but it is incorrect in the specific context of *Palsgraf* because the railroad was not a risk creator. Cardozo's understanding, on the other hand, does apply to cases like *Palsgraf*. I developed this claim by explaining how Cardozo's analysis of the breach issue integrates an assessment of the relation between the defendant's act and risk. A finding of negligence in tort law requires, first, that we identify and understand the risks an actor created by acting (or failing to act) as they did, and second, that we evaluate the actor's conduct—how they apprehended and appraised the risks—against how a reasonable actor in the same circumstance should have apprehended and appraised the risks. More generally, Cardozo's analysis of breach implies that in negligence courts evaluate defendants' decisions in terms of their obligations to help society reduce risks. On Cardozo's account, if the defendant created the risk, the law expects the defendant to take into consideration what measures would reasonably prevent the risk from leading to harm to others. However, if the defendant is not a risk creator as in *Palsgraf*, the defendant is culpable only if they stand in right relation to the risk (because risk determines duty), and this depends on considerations that are separate from the defendant's own deliberation and decision-making processes—such as whether there was some basis for believing the defendant knew about, or should have known about, the risk. Cardozo and the majority limit the railroad's liability on the ground that Mrs. Palsgraf's injury cannot be linked to the railroad's negligent act, either through duty or the railroad's relationship to the risk of explosion that brought about her injury. Such limitation is not an application of the proximate cause concept. Rather, it is an application of the reasonableness standard that courts use to find negligence, and it is a finding that the defendant railroad did not act unreasonably (wrongly).

I argued that the *Palsgraf* case illuminates the proximate cause concept in several respects, even though *Palsgraf* is not a “proximate cause case.” First, *Palsgraf* teaches us that there are different aspects of the relationship between defendant’s act and the risk that matter in different ways relative to limiting a defendant’s liability for proximate cause reasons or breach of duty reasons. Second, *Palsgraf* reminds us that the defendant’s culpability is a separate issue from the harm they caused. A defendant cannot be held liable for causing harm *unless* they caused the harm in a way the law deems wrongful. Third, *Palsgraf* suggests that risk analysis is more central to breach findings than to proximate cause findings. This is not to say that risk is irrelevant to proximate cause but that its role is limited by what legal test a court thinks is most suitable to the case. A court’s selection of a test or criterion will be shaped by a wide range of contextual and normative factors—such as the facts of the case at hand, prior case law, procedural value interests (i.e., how the court goes about resolving a particular dispute), the logical relations between legal concepts necessary for resolving the case at hand, community values and settled expectations, general knowledge about the world, and uncountably many more. This last point will be a prominent theme of the chapters that follow.

Appendix: *Stahlecker v. Ford Motor Company*

In the time between an early draft and the final version of this chapter, my adviser Carl Cranor brought to my attention *Stahlecker v. Ford Motor Company*, a 2003 Nebraska case which relates closely enough to my interpretation of *Palsgraf* to warrant a brief response.⁹² In *Stahlecker*, the plaintiffs sued Ford for wrongful death. The plaintiffs were the parents of Amy Stahlecker, who was raped and murdered after being stranded in a remote area because one of the Firestone tires on her 1997 Ford Explorer blew out. The Stahleckers alleged that Ford and Firestone knew, or should have known, “the likelihood of criminal conduct and/or sexual assault

⁹² *Stahlecker v. Ford Motor Company*, 266 Neb. 601, 667 N.W.2d 244 (2003).

against auto and tire industry consumers as a result of unexpected auto and/or tire failures.”⁹³ In the trial court, Ford and Firestone filed demurrers in response to the Stalheckers’ petitions, and the demurrers were sustained. The case was dismissed. The Stalheckers appealed.

The Supreme Court of Nebraska affirmed the trial court’s decision to dismiss. In its rationale, the Court explained that in a negligence cause of action, the plaintiff must establish both the defendant’s breach of the duty of care and that defendant’s breach was the proximate cause of the plaintiff’s injuries. The Court also specified that the foreseeability of the risk is the main determinant of a duty of care, while foreseeability in the proximate cause context has to do with whether the plaintiff’s injury “*reasonably flowed* from defendant’s breach” and this “relates to remoteness [of harm] rather than the existence of a duty.”⁹⁴ Referencing an earlier precedent, the Court declared that once it is shown that a defendant had a duty to anticipate an intervening criminal act, and protect against it, the criminal act cannot supersede, i.e., cut off, the defendant’s liability.⁹⁵ It was also explained that such duty generally involves situations where the defendant has control over the wrongdoer or the physical area where the crime occurs.⁹⁶ On these bases, the *Stalhecker* court ruled that there was no special relationship shown between Ford and Firestone and Amy or Cook (Amy’s murderer), which would extend their general duty to protect consumers from the risks of defective tires, as makers of products, to include a duty to anticipate and guard against the kinds of harm that Amy suffered. The Court also found “no authority recognizing a duty on the part of the manufacturer of a product to protect a consumer from criminal activity at

⁹³ *Stahlecker*, 266 Neb. 601, 603-05 (2003).

⁹⁴ *Stahlecker*, 266 Neb. 601, 608 (2003). Emphasis added.

⁹⁵ *Stahlecker*, 266 Neb. 601, 612 (2003), discussing *Anderson ex rel. Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W. 2d 732 (1995).

⁹⁶ *Stahlecker*, 266 Neb. 601, 613 (2003).

the scene of a product failure where no physical harm [to the consumer] is caused by the product itself.”⁹⁷ While the Court admitted that Ford and Firestone had general knowledge that criminal assaults can occur at the scene of vehicle failure, they added that “it is generally known that violent crime can and does occur in a variety of settings.”⁹⁸ Consequently, the risk of Cook’s criminal acts being unforeseeable, Cook’s acts constitute an efficient intervening cause breaking any possible causal connection between the tire failure and Amy’s death. In other words, Cook’s conduct is the proximate cause of Amy’s death, and Ford and Firestone are cut off from liability.⁹⁹

The *Stahlecker* case prima facie resembles my interpretation of *Palsgraf*. The main detail the Court seems to be focused on is the one that I say would interest Cardozo: namely, what is the defendant’s relationship to the risk that led to victim’s harm. Like Cardozo in *Palsgraf*, the *Stahlecker* court sees risk as determining duty. Thus, *Stahlecker* deals with a special duty on the part of vehicle and tire manufacturers to protect against the risk of criminal acts that result in harm to consumers. Special duty applies in *Stahlecker* because Ford and Firestone did not create the risk of Cook’s criminal conduct: they only created the risk of a tire blowout. (Compare: The railroad did not create the risk of explosion: it only created the risk of damaging the boarding passenger’s property.) Additionally, the risk of Amy’s being assaulted from a tire failing was unforeseeable. (Compare: The risk of a scale falling on Mrs. Palsgraf from a package being dropped was unforeseeable.)

⁹⁷ *Stahlecker*, 266 Neb. 601, 614 (2003).

⁹⁸ *Stahlecker*, 266 Neb. 601, 615 (2003).

⁹⁹ See also *Shelton v. Board of Regents of the University of Nebraska*, 211 Neb. 820 (1982).

However, *Stahlecker* is different from my interpretation of *Palsgraf* in two notable respects. First, *Stahlecker* is not a case of “no breach.” The plaintiffs’ lawsuit did not even reach the breach phase for the issue to be raised on appeal. *Stahlecker* is better classified as a case of “no duty” because the Court found that the defendant did not have the relevant special duty to the victim. However, *Stahlecker* is not a clear-cut “no duty” case because it merges the duty and proximate cause analyses: *because* Ford and Firestone did not stand in right relation to the risk of harm to Amy, Cook is the proximate cause of her death. (One wonders if the *Stahlecker* court is confusing the different notions of “limiting liability.”) There is no such similar merging in *Palsgraf*. Second, *Stahlecker* vacillates between special and general duties of reasonable care in a way that *Palsgraf* does not. In *Stahlecker*, the relevant special duty is not involved in the case because of the lack of the requisite special relationship between defendant and the risk to the plaintiff, not a lack of knowledge or awareness of the risk on the defendant’s part like in *Palsgraf*. Then, upon making that determination, the *Stahlecker* court seemingly shifts to general duty, claiming that the *general* knowledge Ford had that criminal assaults can occur at the scene of vehicle failure was not enough to support a finding of negligence. *Palsgraf* does not endorse any such move—to deal with a case in terms of general duty where a special duty applies but is found not to exist. As I argued in Section 2, Cardozo would say that general duty applies in cases where the defendant is a risk creator. With respect to *Stahlecker*, it seems to me that Cardozo would say that an analysis of general duty does not apply simply because Ford and Firestone did not create the risk as to Amy. Therefore, Cardozo would disapprove of the *Stahlecker* court’s move to general duty, though he would approve of the *Stahlecker* court’s approach to defining duty in terms of foreseeability of the risk.

The details contained in this comparison with *Stahlecker* further clarify and distinguish the meaning of *Palsgraf*.

Fact-Value Entanglement in the Law's Causation Requirement:

A Critique of Causal Divisionism

Chapter 2

Palsgraf reminds us that the proximate cause concept is about determining the extent of a defendant's liability for consequences that they *culpably* cause. Courts are guided by legal notions such as negligence to distinguish the defendant's conduct from all the other conditions that causally contributed to the plaintiff's injury, whereupon a court analyzes the relationship between defendant's conduct and plaintiff's harm in terms of other notions (such as actual causation, foreseeability) to determine if holding the defendant liable is appropriate. This chapter deals with the role of causation in determining legal liability.

For more than a century, the dominant view among legal theorists concerning causation has been that, where causation is an essential element of liability, it entails two distinct sub-elements or steps.¹ The first is "cause-in-fact," which requires a plaintiff "to link the defendant's wrongful conduct to the plaintiff's injury, to show that the former did not merely coincide with the latter but rather produced it."² According to the theorists, cause-in-fact is supposed to reflect an empirical, "actual" or "natural" relationship between cause and effect, a "scientific" causal connection between conduct and injury.³ Within the courts the conventional test for proving

¹ See Patrick J. Kelley, "Proximate Cause in Negligence Law: History, Theory, and the Present Darkness", *Washington University Law Quarterly* 69, issue 1 (1991): 49-105, especially 54-82.

² Hillel J. Bavli, "Counterfactual Causation," *Arizona State Law Journal* (2019, forthcoming): 1; *SMU Dedman School of Law Legal Studies Research Paper* No. 409. Draft available at SSRN: <http://ssrn.com/abstract=3244109> or <http://dx.doi.org/10.2139/ssrn.3244109>. I am grateful to John Cioffi for directing me to Bavli's paper.

³ See Dan B. Dobbs, Paul Hayden, and Ellen Bublick, *Hornbook on Torts*, 2nd ed. (St. Paul, Minn.: West Academic Publishing, 2016), 314. See also Richard W. Wright, "The NESS Account of Natural Causation: A Response to Criticisms," in Richard Goldberg, ed., *Perspectives on Causation* (Oxford: Hart Publishing, 2011), 285.

cause-in-fact is the “but-for” test: would the plaintiff’s injury have occurred *but for* (i.e., in the absence of) the defendant’s alleged misconduct? The but-for test presumes a counterfactual model of causation to determine the historical *necessity* of the defendant’s conduct for plaintiff’s injury. Alternative tests of cause-in-fact, such as the “substantial factor” test and the NESS (Necessary Element of a Sufficient Set) test, are used in cases where the but-for test fails—specifically, cases involving multiple sufficient causes of harm (to be discussed later). The second step of proving causation is “proximate cause” or “scope of liability,” which, as we know, requires a normative assessment of whether the defendant *should* be held responsible for having in fact caused plaintiff’s injury. On this dominant, “two-step” view, cause-in-fact is logically prior to proximate cause: a defendant’s conduct cannot be a proximate cause unless it is factually causally related to plaintiff’s injury.

According to the “two-step” view’s proponents, such as Leon Green, Jane Stapleton, and Richard W. Wright, cause-in-fact and proximate cause have entirely different natures.⁴ Cause-in-fact is genuinely factual and non-normative, they say, while proximate cause is non-causal and normative. Objective, scientifically valid answers can be given only to cause-in-fact questions,

⁴ See generally, Leon Green, *Rationale of Proximate Cause* (Kansas City, Mo.: Vernon Law Book Co., 1927); Richard W. Wright, “Causation in Tort Law,” *California Law Review* 73, issue 6 (1985): 1735-1828, “Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts,” *Iowa Law Review* 73 (1988): 1001-77, “Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility,” *Vanderbilt Law Review* 54, no. 3 (2001): 1071-1132, and “The NESS Account of Natural Causation: A Response to Criticisms,” 285-322; and Jane Stapleton, “Choosing What We Mean by ‘Causation’ in the Law,” *Missouri Law Review* 73, no. 2 (2008): 433-80. See also James E. Viator, “When Cause-in-Fact Is More Than a Fact: The Malone-Green Debate on the Role of Policy in Determining Factual Causation in Tort Law,” *Louisiana Law Review* 44, no. 5 (1984): 1519-43.

not proximate cause questions.⁵ For convenience, let us call this idea *causal divisionism*—so called because it endorses a strong *division* between normative and non-normative aspects of attributions of legal responsibility in respect of causation. The advocates of causal divisionism (especially Wright) insist on the division because they want courts’ “factual” findings about to really reflect the structure of causal facts as they exist in the real world. Otherwise, normative and political considerations stand to strongly affect what courts are deeming “fact”; and in a liberal legal system, which ideally aims for neutrality in the resolution of cases, we do not want facts to be policy objectives in disguise.⁶

In this chapter, I challenge causal divisionism. As I stated in the Introduction, while I accept the basic idea that cause-in-fact and proximate cause are distinct elements, I argue that legal theorists have exaggerated the distinction between cause-in-fact and proximate cause. Ironically enough, my argument will proceed in two steps. First, I will show that cause-in-fact is not purely a matter of historical fact. Quite the contrary, cause-in-fact is a complex concept which may call for normative judgment at numerous points in the cause-in-fact inquiry. Second, I will show that proximate cause is not a purely normative, non-causal assessment. Indeed, the normative considerations that play a central role in applying proximate cause principles very often take account of causal properties, such as, e.g., the kind and strength of the causal connection between defendant’s breach and plaintiff’s harm, and what harms defendants can

⁵ I borrow this characterization from Arno Becht and Frank Miller, *The Test of Factual Causation in Negligence and Strict Liability* (St. Louis: Washington University Committee on Publications, 1961), 4.

⁶ To be fair, this description is what *I* think causal divisionists are up to; Wright and his ilk typically do not say things like this. But I should think that the potential for inconsistency and facts becoming policy-in-disguise is a chief reason for arguing so strongly in favor of a strong cause-in-fact/proximate cause division because, if not, the division seems purely analytical at best and arbitrary at worst.

reasonably foresee based on their own background knowledge about causal relationships. My goal here is not to reject the two-element analysis, but to preserve and *qualify* it so that the normative/non-normative distinction does not get overemphasized. By separating cause-in-fact and proximate cause so rigidly as it does, causal divisionism presents an artificial and inaccurate picture of the nature of causation in the law.

Candidly, the argument that cause-in-fact incorporates normative considerations is not new. Wex Malone said back in 1956 that “[t]he very fact that a new definition of cause is needed in many situations indicates clearly that the but-for rule does not always meet the policy requirements of law.”⁷ David Fischer and Alex Broadbent have made similar arguments.⁸ And more recently, David Hamer has raised the question of whether proximate cause is wholly normative like causal divisionists assert.⁹ My strategy is to develop both lines of thought in a definitive way, stressing the conceptual *interrelatedness* between cause-in-fact and proximate cause in their allegedly distinct aspects. The discourse on causation ought to be more sensitive to the rich interplay between norms of fact and norms of value in the cause-in-fact and proximate cause elements, so that courts can approach causation issues both *accurately* and *effectively*—i.e., with sufficient awareness of their complexity so that causation issues may be resolved on their actual terms.¹⁰

⁷ Wex S. Malone, “Ruminations on Cause-in-Fact,” *Stanford Law Review* 9, no. 1 (1956): 88.

⁸ See, for example, David A. Fischer, “Causation in Fact in Omission Cases,” *Utah Law Review*, No. 4 (1992): 1344-45, and Alex Broadbent, “Fact and Law in the Causal Inquiry,” *Legal Theory*, issue 3 (2009): 176-78.

⁹ See David Hamer, “‘Factual Causation’ and ‘Scope of Liability’: What’s the Difference?” *The Modern Law Review* 77, no. 2 (2014): 176ff.

¹⁰ Although the legal scholarship has all but eliminated the term “proximate cause” in favor of “scope of liability” to promote greater clarity, my claim is the same: cause-in-fact and scope of liability are interrelated. For more on the terminological controversy, see American Law

To provide more context for my argument, I will begin by sketching a modest outline of the fact-value dichotomy and its usage in legal commentaries. Such an outline will be helpful for understanding what is at stake for proponents of causal divisionism, as well as some other important preliminaries. Then in Section 2, I examine the law's two traditionally favored tests for cause-in-fact—the but-for test and the NESS test. I will argue that these tests are not “purely factual”: both tests allow, necessarily, for normative judgments to influence their execution. Next, in Section 3, I will examine two popular proximate cause tests—*novus actus interveniens* for abnormal coincidences, and the risk rule (Wagon Mound No. 1). I will argue that these tests have a potential causal basis as well as a normative basis. The upshot is that proximate cause tests include at least some consideration of causation and are not exclusively normative. Finally, in Section 4, I conclude the chapter and make some preparatory remarks about the next chapter's main topic, causal selection.

1. Fact Versus Value in the Law

Outlining the Basics

In legal theory there is a long tradition, going as far back as Aquinas, of distinguishing normative issues from those that are factual or have non-normative aspects.¹¹ Questions of fact

Institute, *Restatement of the Law Third, Torts, Liability for Physical and Emotional Harm* (St. Paul, Minn.: American Law Institute Publishers, 2010), § 29 (hereafter *Restatement Third*).

¹¹ See Lon Fuller, *The Morality of Law: Revised Edition* (New Haven, Conn.: Yale University Press, 1969). Fuller's entire book, really, is an intricate treatment of the distinction. See also H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71, no. 4 (1958): 593-629, and *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012). In contemporary legal theory the distinction was reinvigorated with the famous version of legal positivism that Hart developed in *The Concept of Law*. Put very simply, legal positivism is the thesis that the law is a matter of social facts and conventions and that law does not depend on more basic moral justification to be recognized *as* law. Legal positivism stands in opposition to, among other views, natural law theory, which maintains that there is an essential conceptual connection between law and morality.

are usually seen as having to do with the “real world”—as dealing not with intuition but with observable, objective reality. Consequently, they are viewed as having in-principle, correct answers. In the context of tort law, any question of causation would appear to be an obvious example of a factual, non-normative question. In order for Smith to successfully sue Jones for damages, one of the things Smith must establish is that Jones *did cause* his damages. This part of Smith’s burden seems unequivocally factual because it concerns what actually happened, i.e., what *is* the case. Value questions, on the other hand, are normative: they inquire into what *should* or *ought* to be the case. Answers to value questions may not, and need not, be based purely on empirical evidence; for they may simply reflect theoretical notions about policy and morality or perhaps even personal attitudes.¹² Again, in the tort law context, it seems plausible to say that negligence is a normative concept.¹³ As we saw in *Palsgraf*, if a defendant has acted negligently it means that they did not exercise due care: the defendant did not take the proper precautions against the risk of harms that they *ought* to have taken, or the defendant’s conduct deviated from a standard of care to which they *should* have conformed. The words “ought” and “should” are nonfactual *value* words, and both indicate that establishing a normative claim is part of the plaintiff’s burden. As negligence involves comparing a defendant’s conduct to hypothetical, ideally reasonable conduct in the same circumstance, the latter is not derived from empirical investigation; the reasonable person is a theoretical person that represents the kinds of unharmed conduct that the community holds in high regard.

¹² Hamer, “‘Factual Causation’ and ‘Scope of Liability’”, 157.

¹³ Here I follow Richard Fumerton and Ken Kress, “Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency,” *Law and Contemporary Problems* 64, no. 4 (2001): 84-85.

This is a rough, albeit pretty conventional outline of how the fact-value dichotomy operates in legal theory. It is worth mentioning, in respect of the oceanic philosophical literature on the subject, that many moral philosophers resist presenting the fact-value dichotomy along such a strongly bifurcated line.¹⁴ I cannot even begin to cover the terrain here, but for example, *objectivists* in meta-ethics argue that there is moral *truth* in the sense that ethical statements—e.g., “torture is wrong,” “it is right to honor one’s contracts,” “treating people with kindness is good”—express not mere opinions but factual propositions about robust, mind-independent features of the world and that some such propositions are objectively true.¹⁵ If one were to accept the objectivist thesis, it would follow that we should reject the contrast between the factual (“is”) and the normative (“ought”) that most legal theorists accept. Of course, an objectivist ethicist might be uncomfortable with going that far, and so they might suggest à la Hume that the

¹⁴ See G. E. Moore, *Principia Ethica: Revised Edition* (Cambridge, U.K.: Cambridge University Press, 1993), 66ff. Although Moore does not address himself explicitly to the fact-value dichotomy in § 13 of the *Principia*, I think Moore’s famous open question argument points toward a ground for resisting it in the context of moral theory. The distinction between moral and natural (observable) or non-moral properties is an instance of the fact-value dichotomy. That distinction is precisely what Moore targets in connection with ethical naturalism, the view that ethical concepts are definable in terms of natural properties (roughly, properties capable of being investigated by the natural sciences). To summarize Moore’s argument, for any candidate definition of an ethical term according to which “good” has the same meaning as some term that describes a natural property N, a competent interlocutor can always respond, “I see that this thing is N, but is it good?” Moore concludes that the existence of open questions such as this shows that any attempt to define goodness in terms of natural properties, or to reduce the former to the latter, is mistaken. (Because successful definitions should *close* any question about the meaning of the term being defined!) One might effectively avoid the problems that Moore’s open-question argument poses by avoiding a strong contrast between moral and non-moral/natural phenomena; for arguably, ethical naturalism’s attempt to reduce goodness to natural properties is philosophically interesting only in light of that distinction.

¹⁵ For a defense of meta-ethical objectivism, see Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2011), especially 23-37. See also Richard Boyd, “How to Be a Moral Realist,” in Geoffrey Sayre-McCord, ed., *Essays on Moral Realism* (Ithaca, N.Y.: Cornell University Press, 1988), 181-228. Boyd and other Cornell realists such as Nicholas Sturgeon and David Brink posit moral facts.

contrast, although real, is indeterminate.¹⁶ I do not wish to marginalize objectivist meta-ethics, but for the simple purpose of discussing causal divisionism, let us say a normative statement is one whose meaning can be expressed by any of the following word pairs: “ought/ought not,” “should/should not,” and “right/wrong.”¹⁷

As it pertains to tort law, the fact-value dichotomy may be illustrated by means of a simple example. Consider the following case:

Shortsighted Driver: Manny is a beer truck driver. Manny attempts to make a left-hand turn at a busy intersection. When the way is cleared, before Manny can complete the turn against oncoming traffic, Rich crashes his Dodge Challenger Yellow Jacket into Manny’s truck. Rich’s vehicle is totaled. Rich sues Manny for negligence, claiming that Manny failed to use his turn signal before turning across oncoming traffic. However, according to the police report, Rich was looking at the stretch of road immediately before his car (some 20 feet) when he should have been looking for a turn signal, which is why Rich did not see the beer truck until it was too late.¹⁸

¹⁶ Here I am referring to Book III, Part I of David Hume, *A Treatise of Human Nature*, eds. David Fate Norton and Mary J. Norton (Oxford: Oxford University Press, 2000), 293-306. The fact-value contrast being indeterminate is both the theme and the conclusion of Hume’s exploration in this section of the *Treatise*.

¹⁷ Here as well I follow Fumerton and Kress, “Causation and the Law,” 85. To be sure, “good/bad” is a relevant word pair, but I exclude it from our list for fear of oversimplifying the normative. For example, there are non-normative uses of “good,” e.g., “*The English Patient* is a good book,” “The fifth-generation Camaro is not a good car.” In addition, I do not know of a proximate cause discussion or case in which the nature of the debate has to do with it being *good* or *bad* to hold a defendant responsible for causing plaintiff’s injury, at least not explicitly. The pertinent normative words are “ought,” “should,” “right,” and their negative cognates. A brief word about how I’m following Fumerton and Kress here. Fumerton and Kress’s project is to thoroughly examine criticize Richard Wright’s NESS test of factual causation specifically, and they distinguish the normative from the non-normative to make clear that their target is a non-normative concept. I like the efficient way they sketch their preliminaries, so I have set about my own in like fashion in this paragraph to set up my arguments against causal divisionism.

¹⁸ This example is adapted from the facts in *Rouleau v. Blotner*, 84 N.H. 139, 152 A. 916 (1931). I grant that multiple sufficient cause cases involving omissions create special problems with respect to proving causation. However, I will not indulge them here because I am merely using the example to distinguish questions of fact and value.

Short-Sighted Driver presents a simple question of fact to be answered by reference as to what occurred in the physical world: Did Manny fail to use his turn indicator or was Rich not paying sufficient attention? Consider now a variation on *Short-Sighted Driver*:

*Shortsighted Driver**: Manny concedes that he did not use his turn signal. He acknowledges that he posed a risk of harm to other motorists by doing so. However, Manny claims that the risk was worth taking because his passenger, fellow deliverer Jerry, had just begun to show signs of a severe asthma attack. Manny claims that Jerry needed medical attention right away, and in his haste to get to the nearest hospital, Manny did not signal left. Also, the evidence indicated that the way was clear. Rich does not deny that Jerry needed medical attention, but Rich rejects Manny's claim that the circumstance justified him not using his turn signal.

In *Shortsighted Driver**, the dispute between Manny and Rich no longer centers on a fact about what did or did not occur. Instead, the disagreement is mainly about two competing value judgments. What weight should be given to the risk of posing harm to other motorists, relative to the risk of grave harm to an injured party if they are not immediately helped, but also the risks Rich posed to himself and others by driving shortsightedly? This is a question of competing value considerations—i.e., what considerations are more *important* in determining whether Manny should be held legally responsible for Rich's loss.

Causal divisionists hold that there is a correspondence between the fact-value dichotomy and the cause-in-fact/proximate cause distinction. Stapleton has said explicitly that cause-in-fact “is a factual relation. It is normatively neutral.”¹⁹ Wright remarks that the but-for test for cause-in-fact “reflects a deeply rooted belief that a condition cannot be a cause of some event unless it is, in some sense, necessary for the occurrence of the event. This view is shared by lawyers, philosophers, scientists, and the general public.”²⁰ The implication of Wright's remark, of course,

¹⁹ Jane Stapleton, “Cause-in-Fact and the Scope of Liability for Consequences,” *Law Quarterly Review* 119, part 3 (2003): 392.

²⁰ Wright, “Causation in Tort Law,” 1775.

is that normative considerations play no role in cause-in-fact determinations. Concerning proximate cause, Stapleton says that inquiring into the extent of liability for the consequences of one's breach is "an evaluative determination that depends on the purpose and the context of the inquiry."²¹ And Wright complains that both the courts and secondary literature "confusingly merge the scientific issue of [factual] causal contribution with the normative issue of [scope]."²² One might naturally protest that Stapleton and Wright's statements are controversial because arguably no legal proposition about facts is "normatively neutral." For, wherever the law requires litigants to establish factual elements (and in certain conceptual terms no less) it does so *in the context of legal liability*, an institution which exists to promote *community and social values*—e.g., deterring risky behavior, upholding citizens' rights.²³ In law, then, any finding of "non-normative" fact is itself rooted in the normative. I myself am quite sympathetic to this objection. However, the objection may not be entirely apt in its current form. In the interest of fairness to causal divisionism, and also of clarifying my argumentative strategy, let me say a few words about the connection between law and legal theory.

Two Levels of Analysis and Normativity as Protean

Richard Fumerton and Ken Kress have suggested that debates about causation in the law may be illuminated by distinguishing two different "levels" of analysis.²⁴ On the one hand, there is the *lawyer* level. When making a case, lawyers utilize a conception of causation that is empirically based, non-normative, and factual, to ascertain what did happen in the case and

²¹ Stapleton, "Cause-in-Fact and the Scope of Liability for Consequences," 411.

²² Wright, "The NESS Account of Natural Causation," 294.

²³ Hamer, "'Factual Causation' and 'Scope of Liability'", 158.

²⁴ Fumerton and Kress, "Causation and the Law," 86f.

discern what the applicable law is. On the other hand, there is what we might call the *theorist* level—which has to do with furnishing legal-philosophical reasons for the actual practices of lawyers and the courts. At the theorist level, one attempts to *justify* the legal system’s utilizing a non-normative notion of factual causation to promote certain outcomes. In *Shortsighted Driver**, the non-normative factual question of whether the accident would have occurred had Manny used his turn indicator is a lawyer-level question. However, in a legal dispute, this non-normative factual question is raised *because of* the law’s interest in furthering the realization of certain outcomes—such as corrective justice, or perhaps shifting the costs of accidents to the “cheapest cost avoider” (i.e., doing a cost-benefit analysis of defendant’s care choices and whether one choice would lead to more cost-effective, preventive measures of harm overall).²⁵ These are theorist-level issues.

Justifications given at the theorist level may be fully normative. For instance, if one argued that tort law operates within a corrective justice paradigm of negligence—the idea that one should be held liable only for morally blameworthy conduct, which requires an examination of one’s role in effecting harmful results—one might then argue that dividing up causation into a factual, non-normative element and a normative, proximate cause element will promote clarity in resolving legal disputes.²⁶ More just (in the sense of corrective justice) decisions will emerge because defendants will be blamed only for those harms they have culpably caused.

Alternatively, if one theorized that tort law operates within an economic efficiency paradigm, one would not necessarily look at the extent to which the defendant’s breach factually causally

²⁵ See Guido Calabresi, “Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.,” *The University of Chicago Law Review* 43, no. 1 (1975): 84.

²⁶ See Michael S. Moore, *Causation and Responsibility* (Oxford: Oxford University Press), 254-57. While Richard Wright would clearly accept this argument, I mostly have in mind Michael Moore’s corrective justice view here.

contributed to plaintiff's loss.²⁷ Rather, one would argue that we should look at how costs are being allocated to society. As one lawyer-economist puts it, the law is concerned with whether defendants "ought to engage in their activity and, if so, what their level of care should be. ... The first-best level of care is determined by the cost of taking care and the degree to which lack of care is a *cause of expected losses*."²⁸ So, in *Shortsighted Driver**, the law would inquire into the probability of harms occurring from not using a turn signal and whether the cost to Manny of using a signal (investing time into avoiding the accident) would have been less than the cost of not using it. (As part of the analysis, the law would also examine the costs of holding Manny liable, e.g., if such a decision would create additional costs to society by over-detering drivers from acting quickly if a passenger needs medical attention.) Such inquiry into care *stands in* for cause-in-fact on the economic efficiency view, but it is still empirical and non-normative. The kinds of empirical facts being inquired into differ on the corrective justice and economic efficiency approaches given the normative theories that purportedly ground the causal inquiry.

I give corrective justice and economic efficiency as *examples* of how the notion of normativity tends to work in discussions and debates about causation in the law. For my purposes in this chapter, it does not matter whether corrective justice or efficiency or some other

²⁷ I say "not necessarily" because economically-oriented jurists tend to be equivocal about whether an actual causal link is required for liability. Guido Calabresi, for example, is explicit that "[g]enerally a causal link between an activity and an injury would be required" for liability and he glosses causality in probabilistic terms, describing it as the idea that the defendant's actions will "increase the chances that the injury will occur" (Calabresi, "Concerning Cause and the Law of Torts," 84). However, compare this to William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Cambridge, Mass., Harvard University Press, 1987), 229. Landes and Posner claim that legal economists can altogether dispense with causal terms and "approach a case in which causation is an issue by asking how the case should be decided consistently with the Hand formula."

²⁸ Steven Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts," *The Journal of Legal Studies* 9, no. 3 (1980): 472-75.

justification is superior. My point here was to illustrate that each type of theorist may give a normative reason for why the cause-in-fact requirement should be non-normative. Also, I was imparting that normativity in the context of causation is protean. Sometimes “normative” simply refers to aspects of the causal inquiry whose answers contain words like “ought/ought not,” “should/should not,” and “right/wrong”; but other times “normative” refers to the theoretical justification for deploying a certain non-normative, factual notion of causation in legal cases.

Being mindful of the protean nature of normativity and doing one’s best to track its guises is crucial for criticizing causal divisionism along the lines I wish to pursue. I am targeting causal divisionism’s meta-level, theoretical justification for treating the two elements as having *distinct natures*. I specify this in part because many of the scholarly debates about causation are narrowly conceptual, focusing on the adequacy of various legal-causal concepts to accommodate puzzle cases. I am not in this chapter pursuing this kind of question. I am asking *why* it is correct, as many theorists have asserted, to sharply divide cause-in-fact and proximate cause. I am questioning how these theorists have been operating at what I have termed the theorist level of analysis. In so inquiring, I desire a theoretical justification of a sharp cause-in-fact/proximate cause distinction itself.

Even at the lawyer level though, it is probably impossible to conduct a “purely” factual analysis. Intuitively, cause-in-fact questions are *prima facie* non-normative. Consider again *Shortsighted Driver*. Whether Manny’s failure to signal is what *caused* Rich to crash is not a question about whether Manny’s conduct was blameworthy. However, it is a requirement of negligence that plaintiff’s injuries be caused by defendant’s breach. Earlier I reiterated that a finding of negligence is normative and value-laden *because* it consists in evaluating a defendant’s conduct against a reasonableness standard. (Did the defendant act unreasonably? = *Should* the defendant have acted differently?) It is here, where breach and causation meet, that empirical and

non-empirical matters become entangled. Disputes subsequently emerge. Consider a new example:

Falling Electrocution: Mike is walking home after a night at the bar. He is inebriated. Mike has to use a bridge to get to his street. Mike loses his balance and falls off the bridge. While he is falling, in an effort to save himself, Mike grabs an electrical wire that is hanging along the bridge's side. The wire is live, having been negligently left exposed by workers from Can-duit Electric earlier that day. Mike dies upon being electrocuted, leaving behind a wife and two children.²⁹

If Mrs. Mike wants to sue Can-duit for wrongful death, questions will arise for her case that go well beyond matters of empirical fact. Did Mike cause his own death through his own negligent behavior (using a bridge while inebriated) or did Can-duit cause Mike's death through its employees' negligent behavior? Does the fact that Mike might have been killed or maimed regardless of Can-duit's negligence make a difference to who is held responsible? Indeed, how do we explain one party being more or less causally responsible than the other? What's more, if assigning responsibility for Mike's death is what we are most *interested* in, then are non-causal principles ultimately determining what event we select as "*the cause*" of Mike's death?

Regarding causation, it seems like Mrs. Mike's lawyer is faced with normativity at every turn.

Are Jury Findings "Normatively Neutral"?

To complete my brief sketch of the fact-value (non-normative/normative) dichotomy in law, I want to say a few quick words about the role of the jury. Typically, cause-in-fact and proximate cause are both questions for the jury to decide. Courts are aware of and sensitive to the fact that normative ideas bear heavily on jury deliberations. General principles and definitions of legal concepts, as promulgated in jury instructions, seek to assist jurors in identifying the legally and morally relevant causal factors. How the court instructs the jury on these points is critically

²⁹ This example is inspired by the facts in *Dillon v. Twin State Gas and Electric Co.*, 85 N.H. 449, 163 A. 111 (1932).

important, especially in cases containing complicated fact patterns that involve multiple causal contributors and an attenuated (factual) causal relationship between defendant's act and plaintiff's injury.³⁰ To illustrate, consider this hypothetical:

Improbable Kitchen Fire: Neil sets his oven timer to begin baking a pasta dish at 4:30 p.m. so that it is hot when he arrives home from his workday at 5:00 p.m. Neil works in an office building on the 12th floor. At 4:40 p.m., a half-mile down the road, Bart is golfing at the West Pines Golf Range. Bart and his buddies are enjoying a bucket of fried chicken while hitting balls. As Bart raises his club to hit his next shot, due to a combination of greasy hands and swinging too aggressively, the club flies out of his hands. It sails high in the air and lands on Ronnie, a West Pines employee who was sitting on the ball picker vehicle preparing it for its next run. The force of the club knocks Ronnie unconscious. Ronnie falls forward, which puts the picker in motion. The picker crashes hard into a nearby utility pole, knocking it down. While Neil is in the elevator to go home, a power outage occurs because of the picker hitting the pole, which held a large transformer. The outage leaves Neil stuck in the elevator. Power is not able to be restored until 7:00 p.m. Neil arrives home at 7:30 to discover that his kitchen has been badly damaged by fire from his oven, because the pasta overcooked and dried out and started a blaze. Thanks to a fast-acting neighbor, the fire department arrived quickly enough to prevent the blaze from spreading beyond the kitchen area.

Suppose that Neil sues West Pines for damages and the court's instruction to the jury on proximate cause is this: a proximate cause is defined as "a cause that results in a reasonably foreseeable type of injury to a reasonably foreseeable plaintiff."³¹ Under this definition the jury

³⁰ David A. Lagnado and Tobas Gerstenberg, "Causation in Legal and Moral Reasoning," in Michael R. Waldmann, ed., *The Oxford Handbook of Causal Reasoning* (Oxford: Oxford University Press, 2017), 568. In simpler cases—e.g., straightforward facts, no technical or scientific evidence about causal relationships—courts typically instruct juries to rely on commonsense notions of causation.

³¹ This definition is based on the rule from *Overseas Tankship (U.K) Ltd. v. Morts Dock and Engineering Co., Ltd.*, [1961] UKPC 2, [1961] AC 388 (commonly known as *Wagon Mound No. 1*): defendant's liability is limited only to losses that were reasonably foreseeable. If one thought that *Improbable Kitchen Fire* is similar in structure to the facts of *Palsgraf*, I would point out that it is different in one crucial respect. Whereas the risk of damage to the plaintiff was unknowable in *Palsgraf*, the risk of people being affected by damage to surrounding utilities from customers from acting recklessly was not unknowable to West Pines. Therefore, the problems that Cardozo was concerned with in the *Palsgraf* breach analysis are not present in *Improbable Kitchen Fire*. Assuming breach has been established, Cardozo would endorse the court proceeding to the proximate cause and foreseeability questions.

would likely relieve West Pines of liability because, even though West Pines's negligence (its failure to prevent its customers from behaving unreasonably) played a factual causal role in the production of Neil's injury, it was not foreseeable that a kitchen would be destroyed by fire. On the other hand, suppose that the court's instruction to the jury uses the definition of proximate cause from *Stalhecker*: a proximate cause is a cause "which, in a natural and continuous sequence, without any efficient, intervening cause, produces the injury, and without which the injury would not have occurred."³² Whether a jury would relieve West Pines under this definition is a more difficult question given how remote Neil's injury was from their negligent act. However, as the sequence unfolds in a natural and continuous way, and there is no obvious candidate for an "efficient, intervening cause" that breaks the chain of causation, it is not implausible to think that a jury could find West Pines to be the proximate cause of Neil's injury.

A jury's finding as to proximate cause, then, is not normatively neutral. But the reason for this is not the cynical one that jurors cannot avoid conflating fact and value questions or deciding issues according to their own subjective prejudices or preferred moral theory. Rather, the jury's proximate cause findings are not normatively neutral because the proximate cause concept *is* normative. The discussion of *Improbable Kitchen Fire* suggests that defendant's responsibility for causing plaintiff's injury depends on the nature of the relationship between defendant's act and plaintiff's harm as described in the rule. Both the foreseeability and *Stalhecker* rules distinguish responsible actors from those who are not, and each one in a completely different way (naturalness v. foreseeability of the victim). Moreover, a court's *choice* of proximate cause rule also rests on normative considerations, e.g., respect for prior case law, a

³² *Stalhecker v. Ford Motor Company*, 266 Neb. 601, 609 (2003).

rule's overall effectiveness; perhaps also if a judge thought, like Andrews in *Palsgraf*, that proximate cause determinations should track moral blameworthiness.

But one should not infer from the proximate cause concept being normative that it is *exclusively* or *distinctly* normative. Similarly, one should not conclude that cause-in-fact is *all* normative simply because cause-in-fact analyses at both the theorist and lawyer levels have normative aspects. Causal divisionists would say that, just because we decide to select *the* responsible causes of injury from among the causally relevant factors, it does not follow that the relevant questions of causation in a case are ultimately normative; the fact of an event being *a* causal contributor is empirical and non-normative.³³ However, if causal divisionism is true, and cause-in-fact is truly normatively neutral, it follows that cause-in-fact questions can be answered solely in terms of events in the physical world. In the next section, I will argue that this cannot be the case. I will carefully examine tort law's two central tests for cause-in-fact—the but-for test, and NESS (Necessary Element of a Set of Sufficient conditions)—and show that both tests leave room for value judgments to influence the determination of what counts as an empirical, factual cause. Indeed, the *structures* of the but-for and NESS tests afford this possibility. Although the law's concepts of factual causation do refer to the physical world, *contra* causal divisionism, they are actually permeated with normative considerations.

2. The Normative Aspects of Cause-in-Fact Tests

The But-For Test: Counterfactual, Hypothetical and Predictive

As I mentioned at the outset, the but-for test is the law's conventional test for proving cause-in-fact. It presumes a counterfactual model of causation and seeks to establish whether the defendant's negligent act was a necessary condition of the plaintiff's injury occurring: would the

³³ Wright, "Once More into the Bramble Bush," 1074.

plaintiff's injury have occurred absent the defendant's negligence?³⁴ If no, then the defendant's action is a but-for cause and therefore a factual cause of the injury. If the injury would have come about regardless of the action, then the defendant is not a but-for cause.³⁵ Thus, having identified the asserted injury and wrongful conduct in a case, the but-for test poses to jurors the question whether the injury would have occurred had the wrongful conduct not taken place. As David Robertson elaborates, "[T]he [jury's] answers are characterized as opinion rather than certain knowledge because the but-for question is always asking about what *would have* happened had things been different than they in fact were."³⁶ Robertson's point is that the but-for test does not involve a mere a historical inquiry as to what did in fact happen. The counterfactual structure of the but-for test reveals that it also has hypothetical and predictive aspects. The juror, also known as the finder of fact, must "notionally place herself at a time just before the breach occurred and inquire hypothetically how things would have turned out had the defendant complied with his duty."³⁷ This requires jurors to engage in a thought experiment, constructing a fictional world (from the evidence) and making a *prediction* about how events would unfold if things had been different.

Immediately, one observes a tension between the but-for test's hypothetical-predictive aspects and it being a test for establishing *fact*. One might think, as Robert Strassfeld does, that we are not actually talking about facts on the but-for test because factual propositions are about

³⁴ See W. Page Keeton, et al., *Prosser and Keeton on Torts*, 5th ed. (Minnesota: West Publishing Group, 1984), § 41, 265.

³⁵ *Ibid.*, 265-66.

³⁶ David W. Robertson, "The Common Sense of Cause in Fact," *Texas Law Review* 75, no. 7 (1997): 1769.

³⁷ Hamer, "'Factual Causation' and 'Scope of Liability'", 161.

what we know, not what we don't know (prediction) or imagine (hypothetical).³⁸ However, a few points can be made to ease this tension. For one thing, facts are not always concrete or verifiable. Courts may have to answer historical questions about what happened with limited evidence. In such cases factual historical findings may appear to be more or less speculative, but the law's standards of proof purport to resolve any degree of uncertainty. For another thing, sometimes hypothetical predictions can help crystallize facts. Suppose a farmer sues a nearby tannery, alleging that his cows died because they drank from a stream that had been affected by the tannery dumping toxic chemicals. While we may not have strong evidence that the tannery caused the stream to become poisonous, we may be sure that *some* agency in the vicinity of the farm had to compromise the stream for the cows to die. Our general understanding of the world informs us that cows do not just die from drinking water.³⁹

Still, there can be no trace (i.e., retrospective) evidence for events that happen hypothetically or in the actual future, so in reality the law's hypothetical predictions will be more speculative than less.⁴⁰ This seems especially true in light of the fact that hypothetical predictions involve a different kind of uncertainty than scientific, "real-world" predictions. Scientific

³⁸ Robert N. Strassfeld, "If . . . : Counterfactuals and the Law," *The George Washington Law Review* 60, no. 2 (1992): 340-41: "Facts are "hard," "solid," and "substantial like physical matter." . . . They are verifiable, or amenable to empirical testing. Might-have-beens, on the other hand, are "pure conjecture," "mere guess and speculation," "fanc[i]ful suppositions," "fictional constructs," . . . It is simply impossible for a singular statement to be both counterfactual and factual at the same." (Strassfeld cites numerous legal and scholarly sources in this passage. See his article for the references.)

³⁹ Here my remarks echo Larry Wright, *Practical Reasoning* (New York: Harcourt Brace Jovanovich, 1988), 97-98. See also Keeton, et al., *Prosser and Keeton on Torts*, 5th ed., § 41, 269-70: "[P]roof of what we call the relation of cause and effect . . . can be nothing more than the projection of our habit of expecting certain consequences to follow certain antecedents merely because we had observed these sequences on previous occasions."

⁴⁰ Larry Wright, *Practical Reasoning*, 108-10.

predictions will contain to a large degree definitive, verifiable evidence in order to provide the strongest support that the present predictive statement will be true in the future; the prediction can later be confirmed by states of the objective world. Hypothetical predictions, of course, do not have this feature: they cannot be confirmed by reference to the objective world because they persist in imaginary space.

Naturally causal divisionists will be concerned to eliminate any suggestion that cause-in-fact determinations involve hypothetical reasoning, for they want cause-in-fact to be “purely factual.” Thus, Richard Wright insists that:

...the analysis is (or should be) a real-world “covering law” matching of actual conditions against the required elements of the relevant causal generalizations rather than a counterfactual “possible worlds” exploration of what might have occurred in the absence of the condition at issue.⁴¹

For Wright, any question of what would have occurred *is* factual to the extent that the relevant causal generalizations can be discovered and applied. If we want to know what would have happened to the cows had the water not been poisoned, we should not appeal to a hypothetical world where the water was fine, but we should find the relevant causal generalization (e.g., “Cows cannot survive drinking poison”) and compare it with what actually happened. The comparison would be purely factual in that the relevant causal law is based solely on empirical facts about the world.

In my view, Wright is overconfident about the effectiveness of causal laws here. Even if we supposed that all the relevant causal laws can be discovered and applied, how can we be sure that the causal laws will provide complete certainty about what would have happened in a case? Suppose that Sam has contracted lung cancer. Sam worked on coke ovens in a steel mill for 30 years, and for 10 of those years he was also a pack-a-day smoker. Sam tries to sue the steel mill

⁴¹ Wright, “The NESS Account of Natural Causation,” 287, n. 14.

for damages, claiming that exposure to harmful emissions caused his cancer.⁴² Following Wright, the relevant causal law for ascertaining what would have happened would be something like this: Exposure to trace amounts of benzene of long periods of time can cause cancer. If Sam had not been exposed, would he have contracted cancer? Maybe; maybe not. After all, Sam did smoke heavily for a period of time. Perhaps he was genetically predisposed to contract lung cancer.⁴³ We just don't know. Sam *might* have contracted cancer, but a causal generalization cannot resolve our uncertainty. A court might think that Sam has a legitimate tort cause of action, though—legitimate enough to allow a jury to hear it and decide. Because there is factual uncertainty as to whether the exposure caused Sam's cancer, a court may need to introduce non-factual, policy considerations to resolve the controversy.⁴⁴ For example, several courts have demonstrated in a willingness to resolve (within reason) any doubts about factual causation in plaintiff's favor if negligence has been established.⁴⁵ Such policy may be preferred because proving causation would place too much of an onus on injured plaintiffs, or perhaps out of plain sympathy for victims of negligence.⁴⁶ There are defendant-friendly policy considerations as well.⁴⁷ Both plaintiff-friendly and defendant-friendly policy considerations pose the same

⁴² Cf. *McAllister v. Workmen's Compensation Appeals Board*, 445 P.2d 313 (1968).

⁴³ Madiha Kanwal, et al., "Familial Risk for Lung Cancer," *Oncol Lett* 13, no. 2 (2017): 535, <https://doi.org/10.3892/ol.2016.5518>. This is an NIH article which mentions that numerous studies have demonstrated that genetic factors contribute to the development of lung cancer.

⁴⁴ Here I follow Malone, "Ruminations on Cause-in-Fact," 67.

⁴⁵ See the alternative liability approaches endorsed in *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980) and *Summers v. Tice*, 33 Cal. 2d 80 (1948), and see especially *Ybarra v. Spangard*, 25 Cal.2d 486 (1944). See also Malone, "Ruminations on Cause-in-Fact," 72ff.

⁴⁶ Keeton, et al., *Prosser and Keeton on Torts*, 5th ed., § 41, 270.

⁴⁷ I mentioned one such consideration in my discussion of *Palsgraf*: namely, "crushing liability." See fn. 65 in Chapter 1 above.

problem for causal divisionism: namely, that factual causal issues are ultimately being resolved on a legal, *non-factual* basis. Consequently, Wright's argument that counterfactual notions can be assimilated to the factual is unpersuasive.

Causal divisionists have also argued that where such policy considerations exist, they have more to do with the rules of proof than with what has to be proved. In other words, while a court may be prompted by normative concerns to shift or change the burden of proof on causation in favor of one litigant or the other, that does make the inquiry into cause-in-fact any less factual (non-normative) in nature.⁴⁸ This argument seems to me irrelevant as a response to the issue at hand. The present issue is uncertain or incomplete factual information. Let's suppose for the moment that causation is non-normative in nature. Courts still cannot access what would have happened had the defendant not acted negligently. Therefore, courts' main recourse is to use policy-based rules and hypothetical predictions because *they are needed to make factual findings*.⁴⁹ Factual questions are ultimately being resolved on the basis of values instead of the factual content the courts are interested in *which is inaccessible*. A causal divisionist might attempt to point out that hypothetical predictions regarding causation are "in principle true or false," and so the hypothetical inquiry is non-normative in that respect.⁵⁰ However, it is not clear how the in-principle nature of a hypothetical inquiry would alter the observation that courts appear to be relying on normative reasons to make factual findings. (Actually, it seems to me that

⁴⁸ See Wright, "Causation in the Law," 1812. Cf. also Stapleton, "Choosing What We Mean by 'Causation' in the Law," 446.

⁴⁹ See Justice Kennedy's statement in *Paroline v. United States*, 572 U.S. 434, 452 (2014): "[T]ort law teaches that alternative and less demanding causal standards are necessary in certain circumstances to vindicate the law's purposes."

⁵⁰ See Tony Honoré, "Necessary and Sufficient Conditions in Tort Law," in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995), 374.

the in-principle truth or falsity of hypothetical predictions could be construed along normative lines, in the following way: we (the courts) do not have complete factual information, so let's use hypothetical predictions because they are the next best thing: they would be like the facts we seek if we had complete information.⁵¹)

Degrees of Normativity in Other Parts of the But-For Test

Having explained that the but-for test has unavoidably hypothetical and predictive characteristics, the normative aspects of the but-for test can be articulated more precisely. To that end, let us turn to our attention to the structure of the but-for test specifically. David Hamer provides an excellent, meticulous description of the but-for test:

There are three steps in determining but-for causation. First, the fact-finder places herself at a point in time just before the defendant's breach and constructs a variation of the real world – a possible world – where the breach does not take place. Second, the fact-finder plays time forward in this possible world to predict how things would have occurred had the defendant not been in breach. Finally, the fact-finder compares what occurred in the actual world with what would have occurred in the possible and determines whether the difference is sufficient to attribute the injury to the defendant's breach.⁵²

Whereas most descriptions of the but-for test are compact and formulaic, Hamer's more subtle account is most helpful for identifying the exact areas in which the but-for test is normative. I

⁵¹ This would suggest that courts aim for bivalence in legal factfinding, i.e., that ideally, the facts of a case should be propositions established by evidence which are either completely true or completely false. Kevin Clermont has recently argued that courts can, should, and do accept multivalent logic for factfinding (i.e., degrees of truth or falsity), and he has constructed an impressive model for the normative claim. See Kevin M. Clermont, "Factfinding Deconstructed." *Cornell Law School Legal Studies Research Paper* No. 19-31 (June 2019): 1-50. Draft available at SSRN: <http://dx.doi.org/10.2139/ssrn.3411623>. The details of Clermont's model are somewhat tangential to this discussion and too technical to go into here. Clermont does not explicitly account for counterfactual reasoning, but my intuition is that a multivalent logic would fit nicely with the but-for test. Because of the hypothetical worlds all claims of but-for causation will contain some degree of uncertainty, and multivalent logic does not eliminate epistemic uncertainties from truth claims. Thanks to John Cioffi for directing me to Clermont's paper.

⁵² Hamer, "'Factual Causation' and 'Scope of Liability'", 164.

have already discussed how the second step of the but-for test is normative in that questions about prediction may present problems of proof which can be resolved by appealing to non-factual, policy considerations. Arguably, the other two steps also involve normativity. To strengthen my case against causal divisionism, I want to argue that evaluative assessments are necessary at the first step for fact-finders to execute the but-for test successfully. Let me explain.

In the first step, the fact-finder is asked to construct a possible world in which the defendant's breach does not occur. Aside from that detail, no part of the first step specifies just how different the possible world under consideration must be from the real world for the purposes of the test. One might then worry: How can we be confident that fact-finders will construct the right contrast—the possible world that the law is actually interested in? As we are relying on the fact-finders' imaginations, can the possible world they construct be something out of their wildest dreams, just so long as the defendant's breach does not occur in it? Stapleton has labeled this question a "concern of philosophers that the law can ignore," saying that "the defendant's behavior [in the constructed world] is altered *just* enough to bring it into conformity with his duty as mandated by Law."⁵³ So the idea is that the courts instruct fact-finders to apply the but-for test directly to the *tortious aspect* of the defendant's conduct. In order to evaluate (to the extent possible) a singular, clear picture of what the world would have been like without the defendant's breach, the constructed hypothetical world should resemble the real world in every respect except for how the defendant acts. This is the conventional wisdom in the legal scholarship—that the constructed, hypothetical world should "minimally depart" from the actual world. We restrict our

⁵³ Stapleton, "Choosing What We Mean by 'Causation' in the Law," 447 and 451. Emphasis original. It is not necessary to discuss here any concerns about "butterfly effects," i.e., the idea that worlds and event-sequences would change radically if an historical event is altered even slightly. Although butterfly effects are the stuff of some great science fiction, they are not relevant to the present discussion.

focus to the defendant's breach and how it actually contributed to plaintiff's injury, and then compare it with a hypothetical scenario in which the "defendant acts lawfully with respect to the duty at issue."⁵⁴ In some cases, ascertaining the possible world in which the defendant acts lawfully will be relatively easy and intuitive. In *Shortsighted Driver** for instance, the relevant hypothetical scenario would be one in which Manny uses his turn signal.

In other cases, however, the clarity does not come easy.⁵⁵ Richard Wright agrees that the cause-in-fact inquiry should target the tortious aspect of the defendant's conduct. But disagreements about what the tortious aspect of defendant's conduct *is* can lead to difficulties in pinpointing the nearest relevant possible world. Consider the following illustration from § 29 of the *Restatement Third of Torts*:

Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard is negligent for giving Kim his shotgun, the risk that makes Richard negligent is that Kim might shoot someone with the gun, not that she might drop it and hurt herself (the gun was neither heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm.⁵⁶

⁵⁴ Jonathan Schaffer, "Contrastive Causation in the Law," *Legal Theory* 16, no. 4 (2010): 271. Schaffer's gloss is helpful because, as he rightly points out, if the relevant hypothetical scenario is simply one in which "the actual breach of duty did not occur," it may well be that in the hypothetical scenario the plaintiff's harm would have occurred because the defendant committed some alternative breach instead.

⁵⁵ There has been considerable debate about how to construct counterfactuals in the speeding cases—i.e., cases where the tortious aspect of defendant's conduct consists in failing to drive the speed limit. The speed discussions can get quite complicated, and explaining their finer points is not necessary for developing my argument that value judgments affect the first step of the but-for test. For more on speed, see Schaffer, "Contrastive Causation in the Law," 274-76; Stapleton, "Choosing What We Mean by 'Causation' in the Law," 450-51; and H. L. A. Hart and Tony Honoré, *Causation in the Law*, 2nd ed. (Oxford: Clarendon Press, 1985), lx and 121-22.

⁵⁶ *Restatement Third*, § 29, illustration 3.

The *Restatement Third* says that Richard is not the proximate cause of Kim's harm but accepts that Richard is a factual cause, apparently in terms of the but-for test: had it not been for Richard negligently giving Kim the shotgun, she would not have suffered a broken toe. Per Stapleton's formula in the previous paragraph, we would arrive at that proposition by imagining the hypothetical scenario in which Richard does not create an unreasonable risk of harm to others—so he doesn't give Kim the gun—and hence she does not get harmed. What the *Restatement Third* considers to be the tortious aspect is clear: namely, Richard's giving *Kim* the shotgun. Wright analyzes the case differently: "The defendant handed a *loaded* gun to the child."⁵⁷ For Wright, the gun's being loaded is the tortious aspect of Richard's conduct; but the gun's being loaded did not contribute to Kim's injury, so the tortious aspect of Richard's conduct was not a cause of the injury.⁵⁸ As we know from the previous subsection, Wright rejects "possible worlds" talk, but what's going on here is that Wright constructs a different contrast than the *Restatement Third*. For Wright, the nearest counterfactual scenario is one in which Richard's gun is *unloaded*, not one in which he does not hand Kim the gun. If Wright's counterfactual is the correct one, then Richard is not a factual cause of Kim's injury: absent Richard's breach, Kim's injury would have happened anyway. Consequently, a problematic emerges. Because the *Restatement Third's* analysis and Wright's analysis each take a different aspect of the fact pattern to be tortious, we get different causal judgments. The *Restatement Third* says that Richard is a cause-in-fact of Kim's injury, while Wright says that Richard is not.

How does a court go about constraining a fact-finder's choice of counterfactual worlds to avoid such difficulties? The question is apt because both the *Restatement Third* analysis and

⁵⁷ Wright, "Causation in the Law," 1771.

⁵⁸ *Ibid.*

Wright's analysis have an intuitive appeal. However, it is a question that would make causal divisionists uneasy. To be clear, Wright is not a proponent of the but-for test. But as causal divisionism asserts that cause-in-fact inquiries are genuinely factual and non-normative, Wright would be wary of any suggestion that courts have choices about how to constrain fact-finders' construction of counterfactual scenarios. For, that would imply that there is the potential for normative, policy-based reasons to influence courts' factual findings. The causal divisionist wants for the construction of counterfactual worlds to be predicated on empirical, non-normative principles.

Unfortunately, Wright himself cannot provide any satisfactory empirical, non-normative principles. In fact, Wright's position on this point—how a court is supposed to constrain the causal inquiry to only certain counterfactuals—is confusing. To illustrate, consider first this statement:

The significance of the causal inquiry in tort law varies dramatically depending on how it is linked to the tortious-conduct inquiry. There are two principal options. The first is to apply the causal inquiry to the defendant's conduct as a whole. ... The second is to focus the causal inquiry on the tortious aspect of the defendant's conduct. ... *The choice between these two approaches is a decision of policy or principle.* This, however, does not make the causal inquiry itself any less factual. ... It is clear from the cases that the courts follow the tortious-aspect approach.⁵⁹

Then, in a different article, Wright elaborates why courts have followed the tortious-aspect approach:

[T]he courts require that the plaintiff prove ... the aspect of the [defendant's] conduct that made it tortious, ... The [tortious-aspect] requirement is motivated by [this] principle ...: ensuring that the reasons for making a person subject to liability govern and limit the extent of her liability. However, unlike the limitations on the extent of legal responsibility [i.e., proximate cause limitations], the tortious aspect causation requirement is *meant to ensure* that a causal connection existed between the tortious aspect of defendant's conduct and the plaintiff's injury...⁶⁰

⁵⁹ Wright, "Causation in Tort Law," 1759. Emphasis added.

⁶⁰ Richard W. Wright, "The Grounds and Extent of Legal Responsibility," *San Diego Law Review* 40, issue 5 (2003): 1495. Emphasis added.

A quick comparison of these two passages exposes the confusion. In the first passage, we see that Wright admits that *how* courts conduct the cause-in-fact inquiry is a matter of policy. In the second passage, Wright says that the courts have chosen a “tortious aspect” approach to the cause-in-fact inquiry and he specifies the policy reason: namely, to ensure “that the reasons for making a person subject to liability *govern and limit the extent of her liability.*” Yet, near the end of the first passage, he says that none of this makes the causal inquiry any less factual or non-normative. How can Wright maintain all these claims consistently? If a court take a “tortious aspect” approach because it does a better job of ensuring that certain relations between plaintiff and defendant obtain, and they have an interest that tort liability be underwritten by these relations, then the court’s approach to causation *is* based on a policy preference.⁶¹ It has nothing to do with the “factual nature” of causation. Moreover, it is questionable whether the approach Wright identifies even leads to acceptable counterfactual contrasts. From Wright’s description in the first passage, we know that on the “tortious aspect” approach, the relevant hypothetical worlds will be those in which the tortious aspect of defendant’s conduct does not exist. But notice that, in Wright’s analysis of the Richard and Kim example, we have to *supplement* the actual scenario with factual information. Hamer correctly points out that the sequence begins with Richard handing Kim the loaded gun.⁶² If Wright is correct that the right hypothetical scenario is the one

⁶¹ It may help to add that Wright worries that “[a]doption of the first (overall-conduct) approach makes ... the causal inquiry ... [play] a relatively minor role in the determination of liability. Instead, liability turns primarily on policies related to deterrence of tortious behavior, allocation of losses to a tortious defendant when the losses are “within the risk” created by the tortious behavior, ... providing incentives for wealth-maximizing behavior, and so forth” (“Causation in the Law,” 1759). So, somewhat incredibly, Wright is expressing a preference for “tortious-aspect” causal inquiries on policy grounds to limit the role of policy in influencing liability outcomes. Yet somehow the causal inquiry is still supposed to be non-normative.

⁶² Hamer, “‘Factual Causation’ and ‘Scope of Liability’”, 165.

where the gun is unloaded, we would have to add an event to the sequence—Richard’s unloading the gun before he gives it Kim. But on the *Restatement Third* analysis, there is no such adding: we simply leave out that Richard gives Kim the gun. Which variation is more acceptable from the law’s point of view? According to the conventional wisdom that Stapleton described earlier, the *Restatement Third* is more acceptable, for it can be argued that adding information to construct the right hypothetical scenario involves a greater departure from the actual world than merely excluding information does. Ultimately, then, the *normative* reasons that courts have for preferring a “tortious aspect” constraint on counterfactual worlds may lead to conflicts with other principles; that is the thrust of Wright’s position. Surely, the courts will want to avoid such conflicts for additional normative reasons.

I do not know how Wright would respond to these criticisms, but the difficulties in his position reveals a more general issue with the first-step of the but-for test. To recap, in the first step, fact-finders are asked to construct a hypothetical world in which the defendant’s breach does not occur. Fact-finders have a range of choices about how to construct this hypothetical world because they can analyze the actual breach scenario in different ways. Courts impose constraints on how fact-finders construct hypothetical worlds—e.g., the hypothetical world should depart from the actual world only to the extent that the defendant does not breach a duty in the hypothetical world; also, the tortious aspect of defendant’s conduct (as opposed to the defendant’s entire act) is what differs in the hypothetical world. These constraints are imposed for *normative* reasons: if the courts do not impose them, they cannot ensure that the facts of a case will be constructed and analyzed in ways most suitable for judgments of liability. So, once again, values are at play with respect to the hypothetical-predictive aspect of factual causal determinations. As the construction of a hypothetical world is essential to the but-for test, if this is subject to normative constraints, then the first step of the but-for inquiry is not “purely factual.”

The NESS Test

While the but-for test is the law's favored concept for proving causation, particularly in tort law, it is well known that the but-for test fails in situations that involve *multiple sufficient causes*—i.e., cases in which “two causes concur to bring about an event, and either one of them, operating alone would have been sufficient to cause the identical result.”⁶³ To illustrate the failure, consider the following situation:

Emergent Conflagration: Joe's farm sits adjacent to the railroad tracks. A forest fire breaks out in the wooded area between Joe's farm and the tracks. The fire was found to have started because of a negligently maintained locomotive engine. However, one of Joe's sons was in the woods playing with matches and started a separate fire which, due to unusually dry conditions, quickly blazed out of control. The two fires merged together to create one big fire, which burned down Joe's barn. Either fire alone would have been sufficient to destroy the barn.⁶⁴

Intuitively, the railway company's negligence was a necessary condition of the barn burning down. However, applying the but-for test to *Emergent Conflagration*, Joe could not claim that “but for” the railway company's negligence the barn would have been destroyed, because the other fire alone would have caused the same result. Consequently, the railway company can claim no responsibility for lack of causation. Yet such a result is contrary to our common sense intuitions regarding causation. As Wex Malone puts it, “Our senses have told us that [the defendant] *did* participate. ... In the language of the layman, the defendant's fire ‘had’ something to do with’ the burning of plaintiff's property.”⁶⁵ Clearly it would be unsatisfactory for the railway company to avoid evade liability for the reason that there are conceptual limits on the but-for test's application.

⁶³ Keeton, et al., *Prosser and Keeton on Torts*, 5th ed., § 41, 266.

⁶⁴ This example is a modified version of the facts in *Anderson v. St. Paul and Sault Ste. Marie Railway Co.*, 146 Minn. 430 (1920).

⁶⁵ Malone, “Ruminations on Cause-in-Fact,” 89.

Because the but-for test fails in multiple sufficient cause situations, both the courts and the legal scholarship have worked to develop alternative cause-in-fact tests. For many years the popular alternative was the “substantial factor” test. On the substantial factor test, causation is treated as a matter of degree: the defendant’s conduct is a factual cause of an event if it “materially contributed” to the event.⁶⁶ So in *Emergent Conflagration*, although either fire alone would have caused the damage, if the jury finds that the railway company’s negligent fire was a “substantial factor” or “material contributor” to the blaze that engulfed the barn, the railway company is factual cause of the damage. Over time, the substantial factor test proved to be ambiguous and confusing in the case law. Subsequently, in 2010 the *Restatement Third* abandoned the substantial factor test and adopted a new alternative: “If multiple acts occur, each of which ... alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.”⁶⁷ This test is called *NESS*, which is an acronym for “Necessary Element of a Sufficient Set”—the set of causally relevant conditions for the occurrence of an event. As summarized by Richard Wright: “A condition contributed to some consequence if and only if it was necessary for the sufficiency of a set of existing antecedent conditions that was sufficient for the occurrence of the consequence.”⁶⁸ While many courts still opt for the substantial factor test in situations where the but-for test fails, the *NESS* test has become the popular supplement to the but-for test in the legal scholarship.⁶⁹ The momentum in favor of *NESS* is due largely to Wright, who has devoted a large part of his career to developing the *NESS* concept.

⁶⁶ Cf. Keeton, et al., *Prosser and Keeton on Torts*, 5th ed., § 41, 267.

⁶⁷ *Restatement Third*, § 27.

⁶⁸ Wright, “The Grounds and Extent of Legal Responsibility,” 1441.

⁶⁹ Bavli, “Counterfactual Causation,” 12.

Conceptually the but-for and NESS tests are connected, inasmuch as both tests emphasize the notion of necessity. In the previous two subsections I argued that that the structure of the but-for test is such that it allows normative considerations to influence what counts as a factual cause in the law. Therefore, it is appropriate to ask whether a similar argument can be made about NESS. Is NESS a “purely factual” concept or is it also open to normative influences? The question is doubly appropriate considering that Wright, our main causal divisionist, is the NESS test’s foremost proponent. I will argue that the NESS test does leave room for normative influences. Specifically, normative considerations may affect the NESS theorist’s construction of sufficient sets. To develop this argument, I must first say more about how the NESS test works generally and how precisely the NESS and but-for concepts are related.

To understand how the NESS test works, it may be helpful to begin with a few illustrations and work backwards, for the NESS test’s machinery is more intricate than in the but-for test. Fumerton and Kress give a nice example:

An illustration of a NESS can be found in the anecdote in which Babe Ruth promised to hit a home run for a hospitalized young boy. In what was likely to be his last at-bat of the game, Ruth pointed into the stands and, after a few bad swings, connected. In typical Ruth style, it was a powerful home run. As soon as Ruth’s bat connected, then, given other conditions—such as the lack of a brisk counter wind, or a tornado, or the fact that no lightning was going to strike the ball—given the weight of the ball and the resistance of air, it followed that the power with which Ruth hit the ball was a NESS of its being a home run.⁷⁰

The first thing to notice is how the notion of necessity operates in the NESS test. Some have described the but-for test as involving a notion of *strong* necessity—meaning that the but-for test focuses on a single event that “makes the difference” to the occurrence of some effect such that,

⁷⁰ Fumerton and Kress, “Causation and the Law,” 90.

without the difference-maker, the effect would not have occurred.⁷¹ The NESS test may be said to involve a notion of *weak* necessity: we focus on the total set of conditions sufficient for bringing about the occurrence of some effect and inquire into whether some condition was necessary for *completing the set*.⁷² Sufficiency here means “complete instantiation of the applicable causal generalization.”⁷³ Thus, in the Babe Ruth case, the applicable causal generalization is that baseball swings cause home runs. The set of conditions sufficient for an instantiation of this generalization include the lack of bad weather conditions, the batter’s power, the strike of the bat, weight of the ball, the resistance of the air, the distance to the fence, and so forth. Now, was Ruth’s power a necessary element of that set for the causal generalization to be instantiated on that particular occasion? The answer is yes: if Ruth’s power is omitted from the set, the remaining conditions would not be sufficient to bring about a home run in that instance. Therefore, Ruth’s power is a NESS cause.⁷⁴ Here is another example:

...John’s stabbing of Mary in the heart caused her death because it was a necessary element in a set of actual conditions—including her being alive at the time that she was stabbed and the stabbing hitting her heart in a crucial central location, and there having been no hospital nearby where she could receive a blood transfusion or heart surgery—

⁷¹ Wright, “The NESS Account of Natural Causation,” 286. See also Peter Lipton, “Making a Difference,” *Philosophica* 51, no. 1 (1993): 39-54.

⁷² Wright also calls it weak necessity because the NESS test “subordinates” necessity to the notion of sufficiency (“Causation in Tort Law,” 1788). Wright’s initial elaboration of weak necessity was published in 1985. For two influential accounts of weak necessity that precede Wright’s, see Hart and Honoré, *Causation in the Law*, 109-29, and J. L. Mackie, “Causes and Conditions,” *American Philosophical Quarterly* 2, no. 4 (1965): 245-64. Wright acknowledges that he drew on both Hart and Honoré’s and Mackie’s accounts to elaborate the NESS concept. See Wright, “The NESS Account of Natural Causation,” 286.

⁷³ Wright, “The Grounds and Extent of Legal Responsibility,” 1441.

⁷⁴ Strictly speaking, the sun not flickering out and the meteorite not hitting the earth are NESS causes as well, but the NESS test is not this liberal. Contextual principles will prescribe which causal generalizations are applicable.

that together are sufficient in light of physiological and physical laws to entail that Mary would die.⁷⁵

In the Mary case, the applicable causal generalization is heart trauma causes death. The set of conditions sufficient for an instantiation of this include the victim's being alive prior to the stab, the stabbing act itself, the exact location of the stab wound, the availability of medical care, etc. As before, was John's act of stabbing a necessary element for the causal generalization to be instantiated on that particular occasion? The answer again is yes: if John's act of stabbing is omitted from the set, the other conditions together would not be sufficient to bring about Mary's death. Thus, John's stabbing is a NESS cause of Mary's death.

The NESS test asks not whether a condition actually made the difference to the occurrence of the effect, but whether a condition has "the capacity to make a difference."⁷⁶ As far as I can see, the NESS test's emphasis on causal laws and generalizations is motivated by causal divisionism. Wright's project is to develop a test for cause-in-fact that embodies the essence of empirical, scientific understandings of causation—so that, when courts make factual findings about causation, those findings really reflect the structure of causal facts as they exist in the world.

In multiple sufficient cause situations, the NESS test is thought to yield better results than the traditional but-for test. In *Emergent Conflagration*, again, the but-for test would say that the railway company's negligent fire is not a factual cause of the damage (because Joe's barn would have been destroyed by the second fire). By the same token, the second fire is not a "but-for" cause of the damage (because it could have occurred from the railway company's fire). Under the NESS test, "each fire was necessary for the sufficiency of a set of conditions that contained it

⁷⁵ Fumerton and Kress, "Causation and the Law," 90.

⁷⁶ Hamer, "'Factual Causation' and 'Scope of Liability'", 171, n. 92.

but not the other fire.”⁷⁷ So we construct two sets—one containing the railway company’s fire, the other containing Joe’s son’s fire. In the first set, we will have the following conditions: oxygen, dry conditions, the presence of inflammable material, no rain, the railway company’s fire, and the barn’s being intact before the fire reaches it. In the second set, the conditions are nearly the same except we substitute the second fire for the railway company’s fire. The relevant causal generalization is that fires destroy buildings. Each fire is a necessary element for the sufficiency of their respective sets, and both sets are fully instantiated on the occasion that Joe’s barn burns down. Therefore, each fire is a NESS cause of the damage. If Joe’s court were to use NESS as its test for cause-in-fact, the railway company could not claim no responsibility for lack of causation: for, the NESS analysis reveals that each fire is an independent, sufficient cause of Joe’s injury.⁷⁸

In Wright’s view, the NESS test is the best alternative to the but-for test partly because the notions of strong and weak necessity are interconnected:

The [but-for] account’s strong-necessity analysis, properly applied, is a corollary of the NESS analysis that gives the correct answer when there was only one set of conditions that was actually or potentially sufficient for the consequence on the particular occasion. ... To determine if some condition was strongly necessary for the occurrence of some consequence that actually occurred, one must “rope off” the condition at issue and then, using the relevant causal generalizations, determine whether the remaining existing conditions were lawfully sufficient for the occurrence of the consequence – that is, whether the relevant causal laws would have been fully instantiated in the absence of the condition at issue.⁷⁹

⁷⁷ Wright, “The Grounds and Extent of Legal Responsibility,” 1442.

⁷⁸ So indeed, if Joe’s son’s fire had been very small compared to the railway company’s fire, the NESS test would nevertheless attribute to Joe’s son a factual causal status. See Wright, “Causation in the Law,” 1794.

⁷⁹ Wright, “The NESS Account of Natural Causation,” 291-92.

Wright is postulating that in the non-controversial cases, where there are not multiple sufficient causes, the strong necessity of the but-for test produces the same results as NESS. This is because, by Wright's lights, the but-for test also relies on causal generalizations to a degree. In the cows example from earlier, I noted that our background knowledge of the world informs us that cows don't die from drinking water. Hence the proposition "but for the tannery contaminating the water, the cows would not have died" makes sense only against one set of background conditions which, taken together, are sufficient for the instantiation of a causal generalization. In Wright-speak, then, if the tannery had not dumped and yet "cows don't die from drinking water" would have been fully instantiated on the occasion that they drank from the stream, then the tannery's dumping was not strongly necessary for their demise (perhaps they ate something bad instead). In multiple sufficient cause situations, "the normal assumption that on any given occasion only one sufficient cause is present [breaks] down."⁸⁰ Strong necessity does not properly resolve the breakdown because it excludes other conditions from being as causally significant as the difference-making condition in the singular instance.

NESS and Values

Like the but-for test, the NESS test involves hypothetical-counterfactual reasoning. Wright denies this.⁸¹ Yet if the NESS analysis inquires into "the matching of actual conditions against the required elements of the relevant causal generalizations," how are we *not* engaging in counterfactual reasoning? When we ask if a set of conditions is sufficient for the occurrence of a given effect, we are ultimately asking if the effect would have occurred absent some condition. In the Babe Ruth example, had Ruth's power been absent from the set, would the remaining

⁸⁰ Hart and Honoré, *Causation in the Law*, 113.

⁸¹ Wright, "The NESS Account of Natural Causation," 304.

conditions be sufficient to produce the home run—i.e., would the home run have happened? Actually, in the NESS analysis, I count (at least) two counterfactuals for a given breach. Consider again *Emergent Conflagration*. When inquiring about the necessity of the railway company's breach to Joe's injury, the relevant set of conditions will be this: {oxygen, presence of inflammables, unburnt barn, railway company's fire, no rain, dry conditions}. Counterfactually, we ask: Assuming this set (and no second fire), would Joe's barn have burned down following the railway company's breach? Yes—but this answer only informs us as to the set's sufficiency. To know about the necessity of the railway company's negligence, we need to compare the above set to a set that excludes the railway company's fire: {oxygen, presence of inflammables, unburnt barn, no rain, dry conditions}. This time we ask, counterfactually: Assuming this set (and no second fire), would Joe's barn have burned down absent the railway company's breach? No—and thus we conclude that the railway company's fire is a NESS cause. Now on the but-for test, there is only one main counterfactual comparison and it entails two contrasts: we examine the nearest possible world in which the tortious aspect of defendant's conduct (cause) is absent and ask whether the injury (effect) would have occurred; in the multiple sufficient cause cases, there will be (at least) two such counterfactual comparisons: one for each defendant's act. However, on the NESS test, as I just illustrated, there will be two main counterfactual comparisons per single act: one for the sufficiency of a set to cause an effect, and one for the necessity of an element (viz., the tortious aspect of defendant's act) to complete the set. In the multiple sufficient cause cases, we will have to do this exercise twice as well—one for each independent act. Doing some quick math, then, two counterfactuals a piece times two acts equals *four* counterfactual comparisons on the NESS test in a multiple sufficient cause case. The NESS test involves *more* counterfactual reasoning than the but-for test does.

I have already explained how counterfactual cause-in-fact tests require fact-finders to engage in hypothetical and predictive reasoning. To ensure that fact-finders reason hypothetically and predictively in the right way (i.e., for liability purposes), courts can and do impose constraints that are grounded in normative principles. I will not repeat those arguments, but suffice it to say, if the implementation of a simple counterfactual test like the but-for test is so influenced by normative considerations, surely a more complex counterfactual test like NESS is subject to the similar normative influences. More counterfactuals imply more hypothetical predictions. This seems especially plausible in light of the fact that, in many cases, fact-finders will have incomplete knowledge of the relevant causal generalizations at issue. In such cases they will have to make up their minds when the set is *sufficiently sufficient*, i.e., adequate or close enough to the true sufficient set for the purposes of inquiring into cause-in-fact and deciding liability.

A proponent of NESS might object that I am making a hasty generalization about the NESS test based on it bearing a mere similarity to the but-for test. More specifically, the objection is that, even if one concedes that the NESS test involves more counterfactual reasoning than the but-for test does, it does not follow that the NESS and but-for tests have similar normative aspects. In my earlier discussion of the but-for test, I stressed that normativity is involved in the construction of hypothetical worlds. For NESS to be similarly normative, we would need to be persuaded that normativity is involved in the consideration of sufficient sets.

The NESS proponent's objection is a fair one. My reply is that I can explain in more detail how normativity is involved in the NESS test. It is well established in the literature that the NESS theorist "has some choice as to how to best construe his theory" to accommodate problematic cases.⁸² To illustrate, consider the following example:

⁸² Moore, *Causation and Responsibility*, 489.

Spotted Bass Tragedy: Carole runs a seafood company and owns a small lake for her business. She drains and cleans the lake regularly and keeps it stocked with Guadalupe spotted bass. One day Carole discovers that all her fish are dead. Carole alleges that the pipe line owned by the Penzel Salt Water Disposal Company, which ran west on the land adjacent to Carole's land, burst and that Penzel negligently allowed tens of thousands of gallons of salt water to flow onto her land and into her lake, killing her fish. Mr. Loyd owns a small oil well located a short distance from Carole's property. He uses a separate pipe line to pump small quantities of oil and large amounts of salt water daily. Carole also alleges that Mr. Loyd's pipeline broke and he negligently allowed oil and salt water to trickle into a spring branch which crossed Carole's property and emptied into her lake, also contributing to the death of her fish.⁸³

How would *Spotted Bass Tragedy* be treated according to the NESS test? It is a little hard to say definitively; the answer depends on how the NESS set is constructed. Michael Moore elaborates:

[On the one hand, the NESS theorist] could limit the conditions (to which some other condition is added to see if it is necessary to the sufficiency of the set so formed) to actually whole, existing conditions.⁸⁴

According to this strategy a NESS theorist could say that, given the facts of *Spotted Bass Tragedy*, we ought to limit our consideration to actual, whole sets that contain the salt water as an element. Accordingly, Penzel's discharge is a NESS cause of Carole's fish dying but Mr. Loyd's discharge is not. For there are no actually whole, existing sets in the example to which one could add Mr. Loyd's oil discharge to make it sufficient for the fish dying.⁸⁵ Indeed, if one added Mr. Loyd's discharge to the whole set that contained salt water, Mr. Loyd's discharge would not be a necessary element for the sufficiency of the set; if one added Mr. Loyd's discharge to any other actually existing set, the resulting set would not be sufficient for the death of Carole's fish. If a NESS theorist is unsatisfied with this result, he may adopt a different strategy in complex

⁸³ This example is adapted from the facts in *Landers v. East Texas Salt Water Disposal Co. et al.*, 248 S.W.2d 731, 731-32 (1952).

⁸⁴ Moore, *Causation and Responsibility*, 489.

⁸⁵ Of course, if Mr. Loyd's salt-water discharge and oil discharge were treated as separate elements of the set, then he would be a NESS cause of the fish dying.

causation cases like *Spotted Bass Tragedy*. Wright himself endorses a strategy that some have termed “disaggregation.”⁸⁶ Moore again elaborates:

[On the disaggregation strategy], some condition is a cause if it is a necessary set of either actual, whole conditions *or* artificially separated parts of such conditions, that together would be sufficient for the harm.⁸⁷

The idea behind the disaggregation is to break down largish sufficient conditions into smaller portions that are “at least large enough” to be sufficient for the result.⁸⁸ The NESS test can then attribute a factual causal status to an event which, although minorly contributing to the plaintiff’s injury, nevertheless objectively, causally contributed. For example, in *Spotted Bass Tragedy*, the disaggregation strategy could yield the result that Mr. Loyd’s discharge was a NESS cause of the fish dying. Consider a set of actual antecedent conditions in which Penzel’s salt-water discharge is not massive but “at least large enough” to be sufficient for the death of Carole’s fish if it merged with an oil-and-salt-water discharge the size of Mr. Loyd’s.⁸⁹ Even if Penzel’s salt-water discharge by itself was sufficiently large to cause the death of Carole’s fish, this makes no difference to the sufficiency of the *set* under consideration; for the current set contains only Loyd’s discharge and enough of Penzel’s salt-water discharge to bring about the fish’s demise. Thus, although it merged with Penzel’s much larger discharge, Mr. Loyd’s discharge is a factual cause on disaggregated NESS. According to Wright, whether Mr. Loyd “should be held liable for

⁸⁶ See Stapleton, “Choosing What We Mean by ‘Causation’ in the Law,” 474.

⁸⁷ Moore, *Causation and Responsibility*, 489. See also John Martin Fischer and Mark Ravizza, *Responsibility and Control* (Cambridge, U.K.: Cambridge University Press, 1998), 92-122. Fischer and Ravizza defend a related, but different kind of disaggregation strategy for cases of causal overdetermination. To see if some sufficient set caused (in the relevant sense) the outcome, Fischer and Ravizza suggest “bracketing off” all the sufficient sets that actually took place and then doing the but-for test.

⁸⁸ Wright, “Causation in Tort Law,” 1793.

⁸⁹ *Ibid.*

any or all of the resulting injury is an issue of policy or principle that comes under the heading of damages”—which is just to say that Mr. Loyd’s responsibility for factually causally contributing to Carole’s harm would be a proximate cause issue.⁹⁰

Whatever the merits or demerits of the disaggregation strategy, the above excerpts from Moore make plain that NESS proponents have at least two strategies for how they go about constructing their sufficient sets to test for cause-in-fact. If the NESS theorist chooses one strategy over the other, say, disaggregation over the “whole conditions” approach, an obvious question arises: *For what reasons are we opting to use disaggregation?* Undoubtedly there is room for the answer to be normative, and it is plausible to think that the answer *will* be normative. Suppose the NESS theorist answers that the “whole conditions” approach is unworkable in *Spotted Bass Tragedy* because the situation is subtle and calls for, as Wright puts it, a more “accurate and comprehensive” concept: our cause-in-fact test should not say that Mr. Loyd’s discharge was not a factual cause when clearly it *was* one.⁹¹ What does “accurate and comprehensive” mean here? Accurate and comprehensive *for whom?* The obvious response is the courts but particularly the finders of fact, for they are the ones who execute the cause-in-fact inquiry ultimately. A cause-in-fact test which said that Loyd’s discharge was not a factual cause would not comport with our observations about the relations between events in the physical world, much less our intuitions about responsibility. Loyd cannot be liable to *any* degree unless he is proved to be a factual cause. But Loyd clearly had *some* hand in bringing about Carole’s injury, so shouldn’t he get be liable to some degree? Notice that these are virtually the same reasons that courts have accepted for adopting alternatives to the but-for test in multiple-cause

⁹⁰ Ibid., 1794.

⁹¹ Ibid., 1792.

situations, and on policy grounds! The NESS theorist who gives such an answer is effectively giving the same reasons but using a different vocabulary: the “whole conditions” approach gives us a wrong answer vis-à-vis causation, but the disaggregation approach, if permitted, gives us the right one. The “right” answer here amounts to the parties’ being able to resolve the cause-in-fact element of the case in a way congenial to achieving the broader value objectives of tort law. Of course, as I stressed in Section 1, what those broader value objectives are exactly is debatable, but the fact that the NESS theorist can even proffer an answer like the one I just considered shows that the NESS test is open to policy considerations influencing its outcomes. Hence the NESS test is not a “closed” factual inquiry despite its reliance on causal generalizations. At the level of application, the NESS test is subservient to policy just the same as the but-for test.

To briefly summarize: In this section I have argued that there is latitude in the law’s two main tests for cause-in-fact—the but-for test and the NESS test—for values and normativity to influence what counts as a factual cause at law. In the but-for test, this latitude appears in two main areas: (1) the part of the test where the fact-finder tries to predict how things would have gone had the defendant not breached the duty at issue, and (2) the part of the test where the fact-finder constructs a hypothetical world to compare with the actual world to make this prediction. In both these areas what fact-finders can ultimately do is subject to constraints that are grounded in policy considerations. In the NESS test, although similar hypothetical and predictive concerns arise, the normative latitude appears primarily in one main area: namely, in the choice of how to construct sufficient sets of conditions. There may be a strong policy ground for favoring one approach to constructing sets over another, as in the multiple sufficient cause cases. Because the but-for and NESS tests have these normative features, there is good reason to believe that cause-in-fact is not a normatively neutral element of liability and causal divisionism is therefore incorrect.

3. The Non-Normative Aspects of Proximate Cause Tests

Remember that causal divisionism has two prongs. The first prong says that the cause-in-fact inquiry is non-normative and purely factual, dealing exclusively with the causal status of events. The second prong says that proximate cause or “scope of liability” inquiries are completely normative. More exactly, the second prong says that proximate cause inquiries do not look at the *causal* statuses of things at all. Rather, they involve normative assessments of causal facts: should legal responsibility be assigned to this event for factually, tortiously caused consequences?⁹² Criticizing the first prong as I did in Section 3 (arguing that cause-in-fact is not purely factual because it has normative aspects) would have been enough to cast doubt upon causal divisionism’s defensibility. But what’s interesting about causal divisionism is that the second prong is susceptible to a similar criticism as the first. In my view, it is not the case that proximate cause assessments are *entirely* normative and have nothing to do with causality. Quite the contrary, the acceptability of the normative proximate cause claim—that this defendant ought or ought not to be relieved of liability for consequences—rests on our view of the causal relationship: *how*, and *to what degree*, are the defendant’s breach and the plaintiff’s injury causally connected? This is a question about causal properties, and the possible answers to it are a decisive factor in the normative judgment involved in the proximate cause assessment. Which means that proximate cause assessments have a non-normative aspect after all. If that is correct, then again, causal divisionism is false.

I propose to demonstrate the non-normativity of proximate cause by employing a strategy similar to the one I employed in Section 3. I will analyze two standard proximate cause tests—*novus actus interveniens* for abnormal coincidences, and the “risk rule” from the famous “Wagon

⁹² Cf. Wright, “Once More into the Bramble Bush,” 1074.

Mound No. 1” case. I want to suggest that the possible normative grounds for limiting liability via these tests may “correspond ... to some natural feature of the [causal] mechanisms concerned.”⁹³ My discussion will draw somewhat from work that David Hamer has recently done in this area (which I mentioned at the outset), but I must make two additional qualifications.⁹⁴ First, I want to be clear that my proposal in this section aims to be modest. I am not suggesting that it is in any way easy to show that all proximate cause tests are ultimately causal in nature. I am simply pointing out that, if one can plausibly find affinities between normative and non-normative explanations for proximate cause tests, then it becomes harder to see how causal divisionism could be correct. Second, because my proposal aims to be modest, I have picked only two proximate cause tests to discuss—two that seem to me to reflect potential causal and normative interaction. Many other proximate cause tests could have been incorporated into the discussion. However, the proximate cause case law is infamously messy, and taxonomizing the tests—what they are, how many there are—is a matter of ongoing debate and developing law.⁹⁵ I suppose one could attempt to outline all the proximate cause principles together with their normative rationales and precise boundaries or exceptions. It is neither practical nor necessary that I undertake a task that large to illustrate the more modest point I want to make.

Novus Actus Interveniens (Abnormal Coincidences)

A defendant’s initially negligent act starts a chain of consequences that results in plaintiff’s injury. Within that chain, subsequent events may intervene that also significantly

⁹³ Roderick Bagshaw, “Causing the Behavior of Others and Other Causal Mixtures,” in Richard Goldberg, ed., *Perspectives on Causation* (Oxford: Hart Publishing, 2011), 378.

⁹⁴ See fn. 9 above.

⁹⁵ Although Michael Moore, in his inimitable ambitious fashion, has reduced the total number of proximate cause tests to nine. See Moore, *Causation and Responsibility*, 96-104 and 107.

causally contribute to plaintiff's injury. When an intervening event is particularly causally significant, the question is whether the intervention cuts the defendant off from liability, even if it can be proved that the defendant's negligence was necessary for initiating the sequence that led to plaintiff's injury. *Novus actus interveniens* (literally "new act intervening") is the doctrine that certain types of events can intervene and "break the chain of causation" as it were.⁹⁶ If there is an intervening event that occurs between the defendant's act and the plaintiff's injury which is particularly causally significant, and the intervention itself occurs independently of (i.e., is not caused by) the defendant's action, the defendant may be relieved of liability; for the causal connection that would have otherwise existed between defendant's act and plaintiff's harm has been sufficiently disrupted.⁹⁷ Intervening events that satisfy all of these conditions are often called "superseding causes."⁹⁸ If a superseding cause is found to exist, then defendant's negligence is not the proximate cause of the injury. The standard normative rationale for this doctrine is that, while negligent defendants are blameworthy for undertaking unlawful risks, they should be responsible only for the harms issuing from their risks that were reasonably foreseeable; a defendant is not to be blamed for an unforeseeable injury that results from an unforeseeable event.⁹⁹ (If the intervening event *was* reasonably foreseeable, the negligent defendant would not be relieved of liability.)

Subtle nuances in causally complex situations can make all the difference to whether an intervening event is a superseding cause. Consequently, the process of separating liability under

⁹⁶ Hart and Honoré, *Causation in the Law*, 5.

⁹⁷ Cf. Moore, *Causation and Responsibility*, 234-36.

⁹⁸ Hart and Honoré, *Causation in the Law*, 4.

⁹⁹ See *Watson v. Kentucky & Indiana Bridge & Railroad Co.*, 137 Ky. 619, 126 S.W. 146 (1910).

the novus actus interveniens doctrine can get very complicated and the scholarly discussions reflect this. In the interest of simple presentation, I want to focus on a single type of intervention case. Hart and Honoré have noted, based on their rigorous study of the case law, that one common type of superseding cause is an “abnormal” natural event.¹⁰⁰ There are two relevant senses of “abnormality” in this connection. On the one hand, an event could be considered abnormal because it is “extraordinary whatever the context,” e.g., a meteorite falling, an unprecedented weather event.¹⁰¹ On the other hand, an event could be considered abnormal if it occurs “contrary to general expectation, in certain specific spatial and temporal relations to other events”; Hart and Honoré dub these events “coincidences.”¹⁰² As an example, consider Hart and Honoré’s discussion of the following case:

[A] man ... is run over [through defendant’s negligence] and suffers injuries. He is taken to hospital but on the way is struck by a falling tree and killed. We say intuitively that this is a coincidence, that defendant caused the injuries but not the death. ... [The conjunction of the passing of the victim under the tree and the fall of the tree] was causally significant, it was not consciously contrived and by ordinary standards it was very unlikely that, in an interval of time so short as that during which the victim passed under the tree, the tree would fall on him.¹⁰³

A tree falling is not an extraordinary event. What is extraordinary is that a tree should fall at the exact moment the victim’s ambulance passed under it; this event could not have happened as it did if it had not been for the defendant’s negligence in the first place. However, the defendant would not be held liable for the victim’s death under novus actus interveniens because, when he

¹⁰⁰ Hart and Honoré, *Causation in the Law*, 162ff.

¹⁰¹ *Ibid.*, 163.

¹⁰² *Ibid.*, 164.

¹⁰³ *Ibid.*, 164-65. I do not know which legal case Hart and Honoré have in mind, as they cite three cases for the falling tree example all of which have distinctly different fact patterns. It may well be that the falling tree case is a hypothetical that gets frequently discussed in connection with novus actus interveniens cases.

risked hitting the man, the defendant could not have reasonably foreseen that the man would be killed by a falling tree. Let us call this version of *novus actus interveniens* the “abnormal circumstances test.”

How does the law justify relieving the defendant of liability on the abnormal circumstances test? It is not difficult to come up with some possible normative-policy rationales. For example, on the economic efficiency view, tort liability is an instrument for reducing the costs of accidents. In the falling tree scenario, it would be irrational to hold the driver responsible because his negligent act did not increase the risk of accidents from falling trees: the latter risk was beyond his control. If the law were to hold people liable for coincidences such as this, it could over-deter behavior, which may lead to a net increase in costs to society (the cost of falling tree accidents not reduced, *and* less potentially productive behavior). Therefore, the defendant’s liability is limited to reasonably foreseeable events. Also, obviously, a fairness rationale is possible. If one claimed that tort law is interested in the *fair* (as opposed to efficient) allocation of costs, the damages owed by defendant should hinge on what aspect of his act was wrongful. To hold the driver liable for a coincidental harm that was unforeseeable would be disproportionate with the degree to which he acted negligently (wrongly).¹⁰⁴ Causal divisionists would point out that these proposed normative-policy rationales for the abnormal coincidences test make no use of causal language, nor do they appear to involve causation in any way.

But does it follow that the proximate cause inquiry is *entirely* normative like causal divisionism says? I say no. For one thing, if proximate cause was wholly normative, it should mean that the policy rationales for limiting liability do not allow for talk of causality whatsoever.

¹⁰⁴ Cf. Jane Stapleton, “Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences,” *Vanderbilt Law Review* 54, no. 3 (2001): 985.

Yet it is entirely possible to articulate policy rationales for the abnormal coincidences test using causal terms. Consider again the economic efficiency rationale. Surely one could say that it is inefficient to hold defendants liable for coincidental harms that they did not cause.¹⁰⁵ In the falling tree example, the defendant did not cause the harm (the falling tree did), and the defendant did not directly cause the tree to fall. Liability is limited to harms that defendants *cause* because, otherwise, the same overdeterrence effects and increased social costs could occur. Now this is an *exclusively* causal account of a policy rationale for the abnormal coincidences test: the test is being justified entirely in terms of causal concepts. The same can be done with the fairness rationale: the defendant should only pay damages to the degree of harm he can be said to have wrongfully caused. Perhaps the causal divisionist would accept these causal explanations but say that the causal language is still not “purely” causal, meaning that it is actually loaded with policy talk. But the fact is, proximate cause assessments *need not be* entirely normative like causal divisionism asserts.

Moreover, there are additional reasons to think that proximate cause assessments *are not* entirely normative. In the discussions of *Palsgraf* and *Stahlecker* in Chapter 1, we saw that the *character* of the causal connection matters at the proximate cause stage. The *Palsgraf* and *Stahlecker* courts both demand that the sequence from defendant’s act to plaintiff’s harm be “natural,” “continuous,” “flowing.” The novus actus interveniens doctrine makes a similar demand in that the causal sequence from defendant’s act to plaintiff’s harm becomes *discontinuous* if another event sufficiently intervenes. Explicit concern that the causal connection should have a certain nature suggests to me that causal principles *are guiding* the normative assessments. Notwithstanding the but-for test’s practical advantages, perhaps the law

¹⁰⁵ Recall Calabresi’s remark about “cause” in fn. 27 above.

does not think of the concept of cause in an entirely egalitarian, “either-something-is-a-cause-or-it-isn’t” thing.¹⁰⁶ Maybe the law accepts that causation “can vary along a smooth continuum,” and that “one event can be more of a cause of some harm than another event, even if both events causally contribute to the harm.”¹⁰⁷ If that’s right, it would certainly help explain why the abnormal coincidences test is acceptable from a normative point of view. Hence in *Stahlecker*, while both Ford and Firestone’s negligence and Cook’s intervention causally contributed to Amy’s death, the court “draws the line” with Cook’s act because his act *causally contributed to her death more*—so much more that it *should* eliminate Ford’s act from being a liable cause. I stress the “should” because part of the assessment is clearly normative, but the point is that it appears to be well supported by a rational evaluation of each party’s relative *causal contribution*. There is no intuitive reason to accept causal divisionism’s claim that causal analysis is exclusive to cause-in-fact inquiries while proximate cause assessments are entirely normative and non-causal.

The Risk Rule (Wagon Mound No. 1)

To lend support to my claim that proximate cause has non-normative aspects, I want to discuss another well-established proximate cause test. This test is known as “the risk rule” (sometimes called “the risk principle”), and it is most frequently associated with the English case *Overseas Tankship (U.K) Ltd. v. Morts Dock and Engineering Co., Ltd.*, commonly known as “Wagon Mound No. 1.”¹⁰⁸ I already touched on the risk rule in passing when I discussed

¹⁰⁶ Here I follow Christopher Hitchcock and Joshua Knobe, “Cause and Norm,” *Journal of Philosophy* 106, no. 11 (2009): 593: “If the concept of actual causation were entirely egalitarian, we find it hard to see how it could be helpful for people even to have the concept at all.”

¹⁰⁷ Moore, *Causation and Responsibility*, 275.

¹⁰⁸ *Overseas Tankship (U.K) Ltd. v. Morts Dock and Engineering Co., Ltd.*, [1961] UKPC 2, [1961] AC 388. There is a sequel known as “Wagon Mound No. 2” which deals with a

Improbable Kitchen Fire in Section 1. Let me crystallize the risk rule by situating it in the facts of the *Wagon Mound No. 1* case:

[I]n the harbor of Sydney, Australia, ... an oil-burning vessel called the *Wagon Mound* moored at a dock for repairs. Before commencement of the work, seamen aboard the ship carelessly discharged a large quantity of bunkering oil, which oozed over an extensive area of the harbor. The captain of the ship made no effort to do anything about the spill, and headed out to sea soon thereafter. Some time later, having been assured that there was no danger that they might ignite the now-ubiquitous oil, welders at a wharf six hundred feet away from where the *Wagon Mound* had berthed caused some debris under the wharf to catch fire. ... The burning debris set the oil aflame, and the resulting [fire] caused substantial damage throughout the harbor...¹⁰⁹

The court in *Wagon Mound No. 1* held that a defendant is liable only for consequences of harmful risks that were reasonably foreseeable. This statement describes the risk rule. Applied to the case, the risk rule works as follows: before the accident occurred, what types of harms would a reasonable person have foreseen from negligently spilling oil on the dock? Liability is cut off if the type of harm that plaintiff suffered was not reasonably foreseeable. Thus, the defendant in *Wagon Mound No. 1* would not be culpable if the seamen who let the oil spill could not have reasonably anticipated the damage for which the plaintiff sought recovery—destruction of the wharf by fire.¹¹⁰ The Privy Council determined that, even though the oil was innately flammable, the defendant was not liable because the only risk that was reasonably foreseeable was the oil sullyng the dock: a reasonable person would not expect that the oil would catch fire on the water and burn the dock. Notice that the risk rule is not like a hindsight test like the kind that Andrews endorses in *Palsgraf*: the risk rule does not look backward from the plaintiff's harm to the

different claim against the same vessel company and a slightly different issue (whether a defendant in negligence has a duty of care to protect from harm that was foreseeable but very unlikely). The caption and docket number for *Wagon Mound No. 2* is *Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co.*, [1966] UKPC 10, [1967] AC 617.

¹⁰⁹ Joseph Page, *Torts: Proximate Cause* (New York: Foundation Press, 2002), 66-67.

¹¹⁰ *Ibid.*, 69.

defendant's negligent act to determine the remoteness of the latter in the sequence. On the risk rule, the concept of remoteness is *replaced* by foreseeability: the analysis *looks ahead* "from the point of view of a reasonable person in the position of the defendant at the time of the breach" and asks whether the plaintiff's injury was foreseeable, remote or not.¹¹¹ If the plaintiff's injury was reasonably foreseeable, then the defendant should have exercised more care. In the Kim and Richard case from Section 2, the risk rule would say that Richard is not liable for Kim's injury: when Richard handed her the gun, the risk of someone being shot was reasonably foreseeable but the risk of a broken toe was not.

Viscount Simonds, delivering the judgment of the Council in *Wagon Mound No. 1*, articulates a fairness rationale for the risk rule:

It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that [civilized] order requires the observance of a minimum standard of behavior... Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done.¹¹²

Wagon Mound No. 1 overturned the infamous proximate cause rule from *In Re Polemis* which said that a defendant is responsible for all the consequences that their breach "directly" causes, no matter how unforeseeable they were.¹¹³ The *Polemis* rule is "too harsh" because a simple act of

¹¹¹ Jenny Steele, *Tort Law: Text, Cases, and Materials*, 3rd ed. (Oxford: Oxford University Press, 2014), 191.

¹¹² Judgment of *Wagon Mound No. 1*, https://www.bailii.org/uk/cases/UKPC/1961/1961_2.pdf, accessed July 31, 2019, 7-10.

¹¹³ *In Re Arbitration between Polemis and Furness, Withy & Co., Limited*, [1921] 3 K.B. 560 (C.A. 1921).

negligence by a defendant could set in motion a freakish chain of causes and effects that are unlikely to happen the same way ever again. If defendants are held responsible for *all* the consequences of their negligent acts, then this simply negligent defendant would be treated the same as the grossly negligent defendant whose conduct results in a bizarre sequence. Such a result is not consistent with our moral intuitions about blame: blameworthiness is measured by the degree to which an actor failed to exercise due care, and so it seems like the grossly negligent actor is more blameworthy than the simply negligent actor. Yet the *Polemis* rule implies that they are equally blameworthy. The risk rule is fairer and less harsh because it analyzes liability in terms of what people can expect relative to the type and degree of negligence involved. Simonds is also clearly skeptical of analyzing a defendant's liability in terms of a "direct" or "natural" causal relationship to plaintiff's harm. For Simonds, any limitation of a defendant's liability for consequences should be reasonably connected to the *wrongfulness* of their act. How a causal sequence unfolds ("directly," "naturally") has nothing to do with wrongfulness. It might have been plain bad luck that the unpredictable chain of events set in motion by the simply negligent actor happened in a direct way. Why should a defendant's responsibility for loss hinge on that? The notions of "direct" and "natural" causation are also ambiguous and beget philosophical controversies that obfuscate the legal issues.¹¹⁴

At the time it was adjudicated *Wagon Mound No. 1* was seen as a landmark case in torts analysis.¹¹⁵ It was, and still is, controversial in that the risk rule is in tension with other accepted

¹¹⁴ Judgment of *Wagon Mound No. 1*, https://www.bailii.org/uk/cases/UKPC/1961/1961_2.pdf, accessed July 31, 2019, 8.

¹¹⁵ See, for example, the discussions in Glanville Williams, "Causation in the Law," *The Cambridge Law Journal*, 19, no. 1 (1961): 62-85, and Hart and Honoré, *Causation in the Law*, lxvi-lxvii.

rules of tort law, notably the “eggshell skull” version of the novus actus interveniens doctrine.¹¹⁶

Wagon Mound No. 1 also endorsed an ambitious new approach to liability according to which the breach element and the remoteness (proximate cause) element could both be satisfied by a single foreseeability test.¹¹⁷ And as a proximate cause test, the risk rule is prima facie incompatible with some of the lessons about proximate cause that I attributed to *Palsgraf* in Chapter 1, Section 4.¹¹⁸ Let us put those issues to the side for the moment and focus solely on the fact that the risk rule is a proximate cause test whose purported normative rationale is fairness. To develop the criticism of causal divisionism I started in this section, we need to know whether the risk rule is *entirely* normative. Does the risk rule have any causal aspects?

It is an interesting question because one might have thought it odd to call the risk rule a *proximate cause* rule in the first place. The limitation the risk rule places on liability is not based on an analysis of causation but an analysis of the defendant’s culpability. In Chapter 1, I said that

¹¹⁶ For more on the aftermath of Wagon Mound No. 1, see Vivienne Harpwood, *Modern Tort Law*, 6th ed. (London: Cavendish Publishing, 2005), 174-79.

¹¹⁷ Steele, *Tort Law*, 190.

¹¹⁸ In general, I think the *holding* of Wagon Mound No. 1 is compatible with my interpretation of *Palsgraf* in that Wagon Mound No. 1 may also be interpreted as case of “no breach.” One could argue that the defendant did not breach a duty to the plaintiffs in Wagon Mound No. 1 because the risk of burning the wharf was unforeseeable: the seamen merely created a risk of defiling the wharf. The main incompatibility concerns my claim that *Palsgraf* teaches us that risk analysis is not central to proximate cause. Obviously, the risk rule would reject this claim because it takes risk analysis to be the only determinant of proximate cause. To alleviate any worries, I would like to reiterate that my claim is that risk analysis *is not central* to proximate cause. I do not say that risk analysis is irrelevant to, or cannot have anything to do with, proximate cause. Some approaches to proximate cause reserve a large role for risk while other approaches do not (e.g., Andrews’s hindsight approach). The view I attributed to Cardozo was that risk analysis is central to negligence determinations, and in a case like *Palsgraf* where the defendant’s culpability has not been clearly established, it would be wrong to decide the case in terms of causation. However, if the defendant’s culpability *has* been established, a court may proceed to deal with proximate cause issues in terms of risk analysis as it sees fit. Cardozo would clearly accept this, seeing that he thinks proximate cause depends on foreseeability of the harm.

limitations on liability of the latter sort were *not* proximate cause limitations. It would seem that causation pertains *only* to cause-in-fact questions in cases where the risk rule is used.

Nevertheless, I think it is possible to construe the risk rule as being guided by causal ideas.

The Council in *Wagon Mound No. 1* says, “It is not the act but the consequences on which tortious liability is founded.”¹¹⁹ This remark reflects a different analysis of culpability than in *Palsgraf*. Cardozo theorized that the wrongfulness of the defendant’s act depends on their relationship to the risk, *not* the consequences; this is precisely why the riskiness of the defendant’s behavior has to be analyzed before we inquire into their relationship to the harm they caused. The Council does not separate the two issues: if the defendant does X and Y is not a foreseeable risk of doing X, yet Y happens, then the defendant has not acted wrongly, *and* they are not liable for the plaintiff’s harm. The risk rule simply looks at one relation—the relation between defendant’s act and the plaintiff’s harm—and analyzes it through the lens of foreseeability.

It seems to me that any judgment regarding the foreseeability of a type of harm, and subsequently any limitation on liability concerning the foreseeability of a type of harm, in order to be coherent, must rest on some background knowledge about causation—particularly, knowledge about general causal laws. When we inquire into the foreseeability of a risk, we are effectively asking, “In this set of circumstances, if a reasonable person were to do X, what risks would we expect them to predict would happen?” This is not a question about intellectual capacity as much as it is a question about what a reasonable person *knows*. If the prediction is to be an actual guiding principle for human behavior and not a mere whimsical guess about what

¹¹⁹ Judgment of *Wagon Mound No. 1*, https://www.bailii.org/uk/cases/UKPC/1961/1961_2.pdf, accessed July 31, 2019, 9.

will happen, it has to be based upon some kind of knowledge. Prosser reminds us that the reasonable person does know some things:

[T]here are certain things which every adult with a minimum of intelligence must necessarily have learned: the law of gravity, the fact that fire burns and water will drown, that inflammable objects will catch fire, that a loose board will tip when it is trod on, the ordinary features of the weather to which he is accustomed, and similar phenomena in nature. ... the amount of space he occupies, the principles of balance and leverage as applied to his own body, the effects of his weight, ... some elementary rules of health. Beyond this, ... the traits of common animals, the normal habits, capacities and reactions of other human beings, ..., the danger involved in explosives, inflammable liquids, electricity, moving machinery, slippery surfaces and firearms, that worn tires will blow out, ... [T]here is a minimum standard of knowledge based upon what is common to the community.¹²⁰

Prosser's detailed description shows that the reasonable person has knowledge of general causal laws. If inflammable material is ignited, it will burn; if a person is submerged in water, they will drown; if a worn tire is punctured, it will blow out; and more. Part of the reason the *Polemis* directness test seems unfair, I think, is that it indirectly holds actors to standards that go well beyond what they are reasonably expected to know about causal generalizations. In *Improbable Kitchen Fire*, the *Polemis* test would say that West Pines should be responsible for Neil's burned kitchen: although Neil's harm was utterly unpredictable, it happened as a direct consequence of West Pines's negligence. Holding West Pines responsible seems unfair because responsibility in negligence implies that the defendant failed to take some risk into proper consideration. Yet nothing in experience would inform West Pines that there was a risk because there is no causal law which says greasy hands using golf clubs cause accidents which in turn cause distant house fires. If there is no such general tendency, how can West Pines be expected to protect against the risk? The risk rule does a better job of holding actors to a reasonable standard of what actors can

¹²⁰ William Prosser, "[From] *The Law of Torts*," in Patricia Smith (ed.), *The Nature and Process of Law: An Introduction to Legal Philosophy* (Oxford: Oxford University Press, 1993), 452.

be expected to know about causality and risks, and this explains why the risk rule is acceptable from a normative point of view. Hence in *Wagon Mound No. 1*, the Council held that the defendant was not liable because while damage to the dock from oil was reasonably foreseeable, defendant could not reasonably foresee that the oil would burn on the water. The holding can be explained in terms of knowledge of causal relationships. Oil is both an inflammable and a contained substance: it is not found regularly out in open spaces in the world because it tends to foul whatever it contacts. Because the works manager had taken precaution to ensure that the welders could safely do their work without igniting the oil, the main type of harm that the spilled oil risked causing was dirtying the dock. Water on the other hand is not ignitable, and ordinary people know that wet material does not ignite. Though the ignited debris fell in *oily* water, one's normal experience of causality would suggest that the water would put the flame out. Consequently, the defendant could not have reasonably anticipated that the dock was at risk of being burned down.

If this explanation is good, we can see that even though the risk rule makes no overt reference to causation, nonetheless it involves general causal ideas.¹²¹ In fact, I think we can say that the risk rule *must* involve general causal ideas: without the guidance of knowledge about causal generalities claims of reasonable foreseeability would not have any substance. Tort law does not punish defendants for failing to be clairvoyant. Rather, it holds defendants accountable for not acting in accordance with ordinary standards of careful behavior. Defendants cannot be fairly held at fault for failing to protect against unreasonable risks unless we presume that they do, and should, know something about risks based on their ordinary experience of things

¹²¹ Cf. also Glanville Williams's suggestive end remark in his article "Causation in the Law," 85: "The opinion of the Privy Council rightly points out that a test of normality or probability is, in the last analysis, merely a way of expressing the test of foreseeability which is at the root of negligence."

interacting in the world. This causal aspect of the risk rule is problematic for causal divisionism. For again, causal divisionism claims that proximate cause assessments are entirely normative and non-causal. It is no objection to say that the risk rule is non-causal because it involves no evaluation of the actual causal connection between defendant's act and plaintiff's harm. If proximate cause was wholly normative, one should not be able to appeal to causal considerations to explain the normative rationales for proximate cause tests. In the case of the risk rule, the relevant causal consideration is knowledge of general causal relationships. Such knowledge about causality makes the normative rationale more comprehensible (although disagreements can still emerge about exactly what people can be expected to know). To that extent, the risk rule is non-normative, which casts further doubt on causal divisionism's claim that proximate cause assessments have no non-normative aspects.

4. Conclusion: Anticipating Causal Selection

In this chapter I have argued against causal divisionism. There is not a division but an interplay, an entanglement between norms of fact and norms of value at both stages of the law's causation requirement. I attempted to show this by first arguing that the but-for and NESS tests for cause-in-fact may both call for value/policy judgment at various points in the cause-in-fact inquiry. Then I argued that the proximate cause element incorporates norms about causal facts to some degree. I attempted to show this by analyzing two popular proximate cause tests—the abnormal coincidences test, and the risk rule. The abnormal coincidences test is supported by an evaluation of each party's relative causal contribution to justify limiting liability. The risk rule relies on actors' knowledge of general causal relationships to justify limiting liability on foreseeability grounds. For these reasons, causal divisionism's core claim—that norms of fact are exclusive to cause-in-fact, while norms of value are exclusive to proximate cause—is implausible.

In the end, I think causal divisionism might be best considered a sort of ideal analysis. That is, in an optimal legal system, the law would be able to neatly separate factual and normative issues with respect to causation, so as to eliminate any uncertainty about which issue is being litigated or analyzed. Causal divisionists think the separation is achievable in part because of how they think of causality. On Wright's view for example, something either is a "cause" of some effect or it isn't, and anything we label "cause" is an objective, substantial factor to the occurrence of the effect.¹²² But this is a counterintuitive proposition for which Wright does not give much of an argument. In practice, both in law and in ordinary life, we discriminate between causes in a more fine-grained way. Some events strike us as more causally significant than other events. Thus, when we inquire into the cause of some effect, often our custom is to *select* from among the causally relevant conditions and call the one (or ones, jointly) we deem most causally salient "*the* cause," even though the effect has several causes. To philosophers, this is known as the phenomenon of causal selection. Philosophers have been interested in our causal selection practices, wondering whether they are merely arbitrary or if they have some metaphysical or epistemological basis. The most influential philosopher to pursue these topics is probably John Stuart Mill, who, in *A System of Logic*, concluded that from a scientific point of view, "we have, philosophically speaking, no right to give the name of cause to one of them, exclusively of the others."¹²³ In other words, Mill believes that our selection practices are logically arbitrary: they are not indicative of the true nature of causation, which is somehow independent of our selection practices.¹²⁴ Causal divisionists like Wright are working within a framework like Mill's. They

¹²² Wright, "Causation in Tort Law," 1783.

¹²³ John Stuart Mill, *A System of Logic*, 8th ed. (New York: Harper & Brothers, 1882), 402. In different editions, the relevant section is Book III, chap. 5, § 3.

¹²⁴ Cf. Hitchcock and Knobe, "Cause and Norm," 593.

think that when we pick out an event as “*the cause*” of an injury, i.e., the proximate or “responsible” cause, we are making a non-causal, normative judgment that is different from our judgment of what is “a *cause*.”¹²⁵ Given the arguments of this chapter, it is not clear that there is strong support for causal divisionism’s characterization of cause-in-fact and proximate cause, which now appears artificial. Selection occurs at the cause-in-fact stage, and normative-policy considerations affect our selection of defendant’s negligence as a factual cause of plaintiff’s injury (in different ways depending on which test we are using). Selection also occurs at the proximate cause stage; causal considerations inform our selection of defendant’s negligence as “*the cause*” of plaintiff’s injury according to the criteria of the test. For these reasons causal divisionism should be abandoned in favor of an approach that is more sensitive to our causal selection practices in all their subtlety. Unfortunately, a selection-based approach is far messier than causal divisionists would prefer. However, if courts are more aware of the rich fact-value interplay involved in the causation requirement, and how both cause-in-fact and proximate cause implicate causal selection, they will have a more realistic basis for deciding which kinds of cases a cause-in-fact or proximate cause test handles best. In the next chapter I will build the case for a selection-oriented picture of causation in the law.

¹²⁵ See Wright, “Causation in Tort Law,” 1744.

Causation in the Law and Taking Causal Selection Seriously

Chapter 3

The core defect of causal divisionism is that it wrongly and artificially separates questions of fact and questions of value in the law's causation requirement. A more accurate analysis of causation in the law—descriptively accurate, at any rate—would be one that captures the fact-value interplay that occurs at both the cause-in-fact and proximate cause stages.

Tony Honoré has remarked that “[b]oth inside the law and outside the law, ... the purpose of the inquiry determines how we should frame the hypothesis to be tested.”¹ The purpose of the law's causal inquiry is to serve human needs—the administration of justice, and resolving disputes about legal responsibility. We saw in Chapter 2 that, to achieve these goals, the law uses causal criteria (in conjunction with other legal concepts) that are designed to “pick out” the defendant's conduct as the legally liable cause. This is true of both proximate cause and cause-in-fact tests. The but-for test, with its counterfactual procedure, isolates the defendant's conduct as the most relevant necessary condition against other necessary conditions; the NESS test singles out the defendant's conduct as the missing piece that can make a complex set of conditions yield the plaintiff's injury. Where these criteria fail, the hypothesis is rejected: that is, the law opts for different criteria or relaxed standards of proof to guide our choice of what we pick out as the cause of the plaintiff's injury. While courts do investigate empirically verifiable, factual phenomena, the fact that the law can choose how it picks out causes suggests that ““cause-in-fact”..., like proximate cause, is in the end a functional concept”—indeed, a function of the policy goals the law is *interested* to achieve.² Causal inquiries outside the law work similarly:

¹ Tony Honoré, “Necessary and Sufficient Conditions in Tort Law,” in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995), 373.

² Guido Calabresi, “Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.,” *The University of Chicago Law Review* 43, no. 1 (1975): 107. See also Mike C. Materni,

commonly we distinguish causes from other conditions relative to our backgrounds and motivations. For example, a man with an ulcer suffers from indigestion. His wife may identify his eating parsnips as the cause of his indigestion, while the doctor may say that a stomach ulcer was the cause.³ The wife puts the term “cause” to the parsnips because of her interest in his usual routine. The doctor approaches the case differently, being professionally concerned with diseases and deviations from normal human functioning. The doctor does not make different assumptions: the factual conditions are the same in both his and the wife’s judgments. But their respective interests ultimately determine the condition each one selects as “cause.”

The indigestion case is an example of *causal selection*—the idea that among all the factors necessary for the occurrence of some effect, only some are selected and labeled as causes. The factor that we take to be most causally salient—the “true” cause, as it were—is generally an outcome of interest. Of course, interests and purposes are evaluative—normative. This is not to suggest that “factual” causal judgments are little more than value judgments in disguise, but it is to say that values are very much involved in the determination and identification of what is a causal fact. Values inform the process and methodology of fact discovery.⁴ At the simplest level,

“Rebooting the Discourse on Causation in Criminal Law: A Pragmatic (and Imperfect) Approach,” *Criminal Law Bulletin* 50, issue 6 (2014): 8. Draft available at <https://ssrn.com/abstract=2537056>.

³ This example is from H. L. A. Hart and Tony Honoré, *Causation in the Law*, 2nd ed. (Oxford: Clarendon Press, 1985), 35-36.

⁴ Here I have in mind practical and epistemic values more than moral or political values. By “epistemic values” I mean values that shape how we define what knowledge is—i.e., certain beliefs about knowledge, e.g., the necessary and sufficient conditions for knowledge; the “coherence” of beliefs, when a knowledge “gap” has been filled in; beliefs about facts and their origin, identification and confirmation; the “simplicity” of explanation; “plausibility” judgments. For more, see Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge, Mass.: Harvard University Press, 2002), 30ff. It is rarer that moral and political values determine what counts as a fact, although it is becoming far more common in America these days.

values influence which information we seek out; and in a “harder” scientific inquiry, which experiments will be done or not done. At the same time, philosophers studying causal selection have debated whether there is more to our causal selection practices than just our interests. Various accounts of normative and non-normative selection criteria have been proposed that are easily tailored to our interests. The emerging picture of causal selection in philosophy is that our causal selection practices actually involve a complex, wide-ranging network of normative and non-normative phenomena. What’s more, several of the philosophical accounts of causal selection criteria are reflected in the law’s treatment of causation.

Given the parallels between causal selections inside the law and outside the law (that both are interest-relative), the putative interaction between normative and non-normative phenomena in causal selections, and the fact that causal divisionism’s core defect is its failure to capture the fact-value interplay in both stages of the causation requirement, in this chapter I want to put forward a suggestion. I propose that causation in the law should be thought of as an instance of the more basic philosophical issue of causal selection—the issue of how, in ordinary judgment, one selects only some of the causal conditions as “causes” of an effect while ignoring the many other conditions that were also causally necessary for the effect. More specifically, I propose that *both* the cause-in-fact and proximate cause elements should be thought of along these lines.

To claim that proximate cause judgments are an instance of causal selection is fairly uncontroversial. Many courts and legal scholars would accept that claim, likely with qualification.⁵ But it is controversial to claim that cause-in-fact judgments are an instance of

⁵ Hart and Honoré, for example, would discourage us from thinking of proximate cause exclusively in terms of being “*the* cause” because sometimes a defendant can be responsible simply for being *a* cause, as in comparative negligence cases. See Hart and Honoré, *Causation in the Law*, 49-50 and 87. But legal scholars have been thinking of proximate cause in terms of selection since at least 1909, when Joseph Bingham famously theorized that proximate cause questions are about whether defendant’s conduct was a “legally blamable” cause, where legal

causal selection like I have described it above, for selection implies interests and interests imply values. The two most prominent defenders of selection-oriented analyses of cause-in-fact have been Hart and Honoré, and legal scholar Wex Malone. Hart and Honoré argue that the law and ordinary life share the same “commonsense” concept of causation, according to which causes are viewed as “difference makers” to outcomes; in practice, Hart and Honoré explain, the causes we deem as “making the difference” are very much a product of our interests.⁶ However, Hart and Honoré say nothing about the evaluative character of interests. They treat interests as a sort of constraint on what sorts of abnormal conditions (which they say are objective) get selected as causes.⁷ Malone largely focuses on interests’ evaluative features. He views all cause-in-fact judges as requiring “evaluative sifting”—i.e., a process in which *what we are care about* is the mechanism for separating the cause that *keeps* our interest from the rest of the background field.⁸ For Malone, it is impossible to discover facts at law by cleansing cause-in-fact of evaluative content because at all stages of a tort case fact and value are conjoined.

I do not think Malone’s vision has been given its due. While many scholars have singled out (ironically) Malone’s approach for its novelty, few have taken it seriously as a viable theoretical analysis of causation much less a source of guidance for courts. In what follows I will defend Malone’s view. My hope is that Malone’s thesis may serve as a starting point for a

blame is analyzed in terms of the scope of defendant’s legal duties. See Joseph Bingham, “Some Suggestions Concerning “Legal Cause” at Common Law,” *Columbia Law Review* 9, no. 1 (1909): 16-37.

⁶ Hart and Honoré, *Causation in the Law*, 28-33.

⁷ Cf. Peter Lipton, “Causation outside the Law,” in Hyman Gross and Ross Harrison, eds., *Jurisprudence: Cambridge Essays* (Oxford: Clarendon Press, 1992), 130f.

⁸ James E. Viator, “When Cause-in-Fact Is More Than a Fact: The Malone-Green Debate on the Role of Policy in Determining Factual Causation in Tort Law,” *Louisiana Law Review* 44, no. 5 (1984): 1542.

pragmatic theory of causation in the law. In Section 1 I provide more detail on causal selection by discussing some of the different selection criteria that philosophers have proposed. In Section 2, I argue that cause-in-fact inquiries ultimately involve causal selection, which necessarily has an evaluative component. I develop my argument by expounding Malone's view and defending it against Richard Wright's causal divisionist criticisms. In Section 3 I explain briefly how proximate cause assessments involve causal selection. Then finally in Section 4, I outline a few implications that follow from the selection-oriented approach. For legal scholarship, the key implication is that the causal divisionist framework must be abandoned: because evaluative judgments affect causal judgments, the difference between them cannot be drawn in terms of a sharp dividing line. For the courts the implications are less clear, but one is that a selection-oriented picture should prompt judges to reflect more carefully on the types of evaluative factors that influence causal reasoning. Such reflection will put judges in a better position to ascertain the relevance of evaluative factors to legal decisions, and to develop reasons for either muting or intensifying their impact.

One last word about strategy. I will not take up the mechanistic question of *how* different interests yield different causal judgments. That is a separate, empirical question which is beyond the scope of this chapter. My proposal here aims to be general, philosophical, and realistic – “realistic” not in the sense of Legal Realism, but in the sense that it points toward the reality of what's going on in tort causation. I grant that in its current form my proposal will leave open many questions about how to handle the more complicated causation cases, and thus it may strike readers as so broad as to be totally impractical. At the same time, the proposal's broadness may prove to be one of its virtues. If a court is presented with a truly baffling causation issue, having a lot of flexibility to determine the proper rules for the case at hand relative to tort law's goals (whatever the court's examination of those goals reveals) will likely be beneficial.

1. The Causal Selection Question

Causes Abound

Let me begin by introducing the idea of causal selection in greater detail. Frequently in ordinary life we seek *explanations* of things—regularities, trends, outcomes, departures from regularities (e.g., non-occurrences of conditions), actions, properties, events, states of affairs. Causation plays a vital role in our explanatory practices.⁹ When we seek an explanation, typically we undertake to discover the causes, conditions, and circumstances that combine to bring about the thing we want to be explained. However, most objects of explanation have infinitely many causes—i.e., for any event E, an analysis of the causes of E will reveal that an infinite number of conditions and circumstances combined and were necessary for E to occur. To illustrate, consider this simple example from Germund Hesslow:

[Take] the event of my lifting a cup of coffee to my lips. Immediately preceding this there are several important conditions, such as the weight of the cup, its position in my hand, the position of my hand and arm, the contraction of the appropriate muscles etc., all of which are necessary conditions for the final event's taking place. If we attempt to trace the causal chain backwards, ... there will be causes of the cup's having the position it has and causes of my arm's having the position it does. The muscular contraction will be preceded by calcium ions flowing into the muscle cells, because of the cell's being [depolarized], because of the binding of acetylcholine to the receptors on the muscle cell membrane, because of transmitter release from nerve endings, [neural events and intentions], etc.¹⁰

All of the events that Hesslow cites are causally relevant to his sipping from the cup. Yet generally, we only mention a few, and usually just one, of the causally relevant conditions when

⁹ Many philosophers of science think that causation is not just vital but *essential* to our explanatory practices, yet some philosophers have postulated that there are non-causal explanations. For a discussion of these issues which denies non-causal explanations, see Bradford Skow, "Are There Non-Causal Explanations (of Particular Events)?", *The British Journal for the Philosophy of Science* 65, issue 3 (2014): 445-67.

¹⁰ Here I follow Hesslow, "The Problem of Causal Selection," <http://www.hesslow.com/germund/philosophy/Problemselection.htm>, accessed December 20, 2018, § 1.

we explain an event's happening. Suppose someone were to ask, "Why did Hesslow sip from the cup?" No one would attempt to explain his sipping by the weight of the cup and the position of his hand. A more likely answer would be, "Because he was thirsty." Most people would consider this a satisfactory explanation; but as the example shows, there are numerous causal antecedents that are necessary for a normal event—here, a simple act of sipping—that do not, and would not, get cited in its explanation. How is this possible? Why do we selectively attend to only some causes, and on what basis do we select the most significant condition(s) from the complete set of causal conditions? Let us call this the causal selection question.

Of course, not all notions of causation are explanatory. Causal ascriptions are explanatory in two main contexts.¹¹ One is when we want to explain some regular recurring feature of ordinary events, e.g., why the sun rises in the East, how a seed turns into a plant. The other is when something unusual occurs, e.g., a railway accident, a rain happening during dry season. In the former case, recipes that contain diverse states of affairs and processes that invoke laws of nature are given in the explanation. In the latter context, the explanatory inquiry targets, usually, some singular event or altered condition that departs from the normal expected course of events. Joel Feinberg identifies these two types of causal inquiry by what he calls the "*lantern criterion*," so called because "[t]hey are simply designed to remove puzzlement by citing the causal factor that sheds the most light."¹² However, some causal ascriptions are non-explanatory or at least explanation is not their main function. Carl Cranor elaborates:

Sometimes we use causal explanations to identify features of complex events that we wish to control: Of the factors that cause rivers to overflow their banks, which can we

¹¹ Here I follow Carl F. Cranor, "Genetic Causation," in Carl F. Cranor, ed., *Are Genes Us?: The Social Consequences of the New Genetics* (New Brunswick, N.J.: Rutgers University Press, 1994), 128.

¹² Joel Feinberg, "Sua Culpa," in *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, N.J.: Princeton University Press, 1970), 204.

control and engineer so that towns and people are not harmed in the future? Of the many factors that contribute to cancer, which do we pick out that we can most easily control and manipulate in order to prevent the development of cancer in others? Finally, for legal or moral purposes, ...we sometimes pick out certain causes to *blame* for untoward results.¹³

One cannot be sure of the exact degree to which easily manipulable causal factors will facilitate causal understanding and vice versa.¹⁴ For the moment, let us focus our attention on how causal ascriptions can be non-explanatory. In the river case, an engineer might cite the lack of a flood bypass as a major cause of river overflow: by designing and erecting a bypass we can prevent the effect of flooding, though the lack of a bypass does not explain flooding. “Cause” in this sense refers to the factor(s) that people can most easily get a “handle” on and manipulate.¹⁵ In blaming contexts, we use causal language to inquire into whether some “suspect” human behavior—e.g., an illegal act, some moral shortcoming on an actor’s part—is so connected with the occasion of some harm that the behavior should be blamed for the result.¹⁶ (Feinberg calls this the “stain” criterion because “the cause” in this sense is “stained” with fault.¹⁷) We are familiar with this blaming notion of cause from the discussions of proximate cause in Chapters 1 and 2.

I mention non-explanatory causal ascriptions to make clear that causal selection is not exclusive to causal explanations. Sometimes we select and cite a factor as a “cause” for purposes that are not primarily concerned with explanation. With respect to blame, often it will turn out

¹³ Cranor, “Genetic Causation,” 127.

¹⁴ *Ibid.*, 129.

¹⁵ Feinberg, “Sua Culpa,” 205. Cf. also R. G. Collingwood, *An Essay on Metaphysics* (Oxford: Clarendon Press, 1940), 296-312.

¹⁶ Cranor, “Genetic Causation,” 130.

¹⁷ Feinberg, “Sua Culpa,” 205. See also Hart and Honoré, *Causation in the Law*, 24-25. The distinction between explanatory and attributive uses of causal notions on which Cranor and Feinberg rely comes from Hart and Honoré.

that the lantern and stain criteria overlap—that is, the cause we cite as blameworthy also happens to *explain* the occurrence of a harm. This is especially true in the tort law setting. Although a sub-element in the law’s scheme for tort liability, cause-in-fact effectively performs an explanatory function: the plaintiff’s lawyer tries to make clear to the jury (or judge) how the plaintiff’s injury occurred by revealing with evidence a causal connection between the injury and the tortious aspect of defendant’s conduct. If the lawyer’s factual causal explanation is satisfactory, we move to the proximate cause stage at which point blame is assigned and the defendant’s conduct is more clearly picked out as “*the* cause” of the injury. (And “*the*” here just means “the legally liable cause.”) As all proximate causes must also be factual causes, the law is obviously concerned that its selections for attributing responsibility are underwritten by a corresponding causal explanation. (I’ll have more to say about that in Section 2 below.) Where such correspondence is weak, the case can be viewed as controversial.¹⁸

Philosophers’ Various Attempts to Answer the Causal Selection Question

Whether a cause is explanatory or non-explanatory, it seems correct to say our practice of distinguishing “causes” from sets of mere conditions involves attaching weights to conditions

¹⁸ For example, in tort cases where the plaintiff claims that they were injured from negligent exposure to asbestos. Because asbestos-related diseases like mesothelioma have long latency periods before symptoms begin to appear, it is practically impossible for plaintiff to pinpoint the exact moment when *the* ultimately harmful exposure occurred. Hence courts have relaxed the but-for test such that the plaintiff in these cases only has to show that the defendant’s negligence “materially increased the *risk*” of harm. Defendants in such a case may complain that a material increase in risk does not actually explain the plaintiff’s injury because it asserts no *causal* connection. See *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2003] 1 AC 32. Alternatively, Jeremy Waldron worries that transferring causal explanations to attributive contexts can lead to untoward results. A person who is normally quite vigilant might have had a rare moment of carelessness that leads to an extremely costly injury. While this instance of carelessness may explain the injury, the defendant may be saddled with massive losses that seem disproportionate to what they deserve. For Waldron’s discussion of this issue, see Jeremy Waldron, “Moments of Carelessness and Massive Loss,” in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995), 387-408.

relative to their causal importance. This strikes me as uncontroversial and intuitive, though to say it definitively we would need empirical evidence.¹⁹ Much of our ordinary cause talk fits this description of weighting. If a quarterback's touchdown-to-interception ratio is very low, one might say it is due to the team losing its best skill position players (e.g., wide receivers) to injury, while another person might concede that other factors, such as the quarterback's own injury history and age, play a contributory role. The implication is that one causal factor is more important than the other conditions; the more causally salient a condition is according to some selection criterion, the more likely it will be called "cause."²⁰ Also, by and large the "weightings" concerned in causal selection will be about *singular* causal relations, i.e., why this condition (or subset of conditions) in this particular case is "*the cause*" (or causes) of this effect.

Several philosophers have undertaken to locate metaphysical or epistemological principles that would ground our causal selection practices. To my eye, the project usually takes one of two forms. One is to articulate causal selection in terms of necessity and sufficiency; these attempts have been mostly unsuccessful.²¹ I shall not therefore discuss them. The other is to articulate *properties* which appear in our causal selections that we frequently attach to those

¹⁹ Shortly before the final draft of this chapter, I learned that a large body of experimental research on causal selection has emerged over the past three decades. For an inventory, see the footnotes in § 3A of Andrew Summers, "Common-Sense Causation in the Law," *Oxford Journal of Legal Studies* 38, no. 4 (2018): 804-07.

²⁰ This description can accommodate cases of joint causation, i.e., where one selects not "*the cause*" but multiple causes that act together. For example, "four movers collectively lug the piano up the stairs, it would be natural to select each individual mover's efforts as a real cause of the piano reaching the second floor (thereby selecting four causes), all the while demoting various factors ... to the status of being background conditions." (Jonathan Schaffer, "The Metaphysics of Causation," *Stanford Encyclopedia of Philosophy*, § 2.3, published July 5, 2016, accessed August 7, 2019, <https://plato.stanford.edu/causation-metaphysics>.)

²¹ Alex Broadbent, "The Difference between Cause and Condition," *Proceedings of the Aristotelian Society* 108, issue 1 (2008): 357.

conditions that we call “causes.” In the interest of thoroughness, let us go over a few of the more influential properties-based accounts of causal selection.

John Stuart Mill: Unexpectedness

As I mentioned in the concluding section (§ 4) of Chapter 2, Mill did not think that there was any systematic organizing principle behind our causal selections. Quite the contrary, Mill argued that our selections are *capricious*. That is to say, of all the causal antecedents required to bring about an effect, we simply single out the one that stands out to us the most.²² Subjective considerations govern causal selections according to Mill; there is nothing in nature that accounts for our differentiating between causes and conditions. Mill discusses causal selection while answering a criticism of “regularity” theories of causation, of which Mill’s own theory of causation is a version. According to regularity theories, generically, a statement of the form “*x* caused *y*” amounts to the following: there was an event *x* and an event *y*, *y* does not precede *x* temporally, *x* in an instantiation of the kind *X* and *y* is an instantiation of the kind *Y*, *X* and *Y* are connected by a causal law, and the causal law is nothing more than the regular following of events *X* by events of type *Y*.²³ The criticism is that many causal explanations do not appeal to causal regularities. For example, when Chase errantly slides into second base he causes Rubén’s leg to break, but broken legs do not ordinarily follow errant baseball slides. Mill claims that explanations which appear to depart from regularities are due to our causal selection practices, which are ultimately arbitrary.²⁴ Mill suggests that certain conditions stand out to us as “causes” because they are *unexpected* against other conditions:

²² John Stuart Mill, *A System of Logic*, 8th ed. (New York: Harper & Brothers, 1882), 404.

²³ Cf. Michael S. Moore, *Causation and Responsibility* (Oxford: Oxford University Press, 2009), 263.

²⁴ Mill, *A System of Logic*, 402.

If we do not, when aiming at accuracy, enumerate all the conditions, it is only because some of them will in most cases be understood without being expressed, or because for the purpose in view they may without detriment be overlooked. For example, when we say, the cause of man's death was that his foot slipped in climbing a ladder, we omit as a thing unnecessary to be stated the circumstance of his weight, though quite as indispensable a condition of the effect which took place.²⁵

Climbing a ladder is a risky activity. Thus, when someone climbs one, we normally expect the ladder to be in good condition and the climber to exercise good care and good motor control to reach the top. These things do not get cited in the explanation of the man's fall because they are assumed to be known according to Mill. The slip, however, contravenes our normal expectations. Consequently, the slip gets selected as the cause of the fall; we designate unexpected events as "causes." Moreover, Mill points out that typically we cite the event that last noteworthy condition immediately preceding the effect as a "cause."²⁶ Let's say that the man on the ladder took seven steps up before slipping and falling. All his steps, in combination with many other conditions, led up to and causally contributed to his fall, but we only cite the last slippery step as "the cause" of his death. These last causes need not always be contemporaneous with unexpected conditions because the last event preceding an effect may be something we normally expect.

Hart and Honoré: Abnormal Conditions and Voluntary Acts

In their great book *Causation in the Law*, Hart and Honoré propound an account of causal selection that is closely related to Mill's. In developing their argument that causal judgments in the law are based on ordinary, "commonsense" notions of causation, Hart and Honoré propose that causal selections at the level of common sense are generally of two kinds.²⁷ The first is what

²⁵ Ibid., 403.

²⁶ Ibid., 404.

²⁷ Hart and Honoré, *Causation in the Law*, lv. Hart and Honoré's full account of the ordinary notion of causation is developed over several hundred pages between Part I and the lengthy Preface to the 2nd edition. For an excellent distillation of Hart and Honoré's account, see

they call an “abnormal” condition, which they elaborate with the example of a railway accident. If a bent rail leads to an accident, the background conditions will be factors such as “the normal speed and load and weight of the train and the routine stopping and acceleration.”²⁸ Even though these conditions were necessary for the accident they will not get cited in the explanation because they would be present in the normal case. We cite as “causes” those conditions that “make the difference” between the accident and things going on as usual because “to cite factors which are present both in the case of disaster and normal functioning would explain nothing.”²⁹ Consequently, we select the bent rail as “the cause” of the accident.

Hesslow correctly points out that the main difference between Mill and Hart and Honoré is that Mill’s unexpectedness criterion concerns a person’s *own perception* of conditions.³⁰ From the point of view of the inquirer, relative to what they know, the “cause” is the condition that surprises them—that is Mill’s story. Hart and Honoré’s abnormality criterion, by contrast, refers to an objective feature of the world: conditions are normal or abnormal independently of how we perceive them. A combination of certain conditions is necessary for a railway train to move *in any case*, and an alteration to one of these normal conditions would affect the movement of the train such that a different effect occurs *ceteris paribus*. So causal selections are not capricious by Hart and Honoré’s lights. Another difference is that Hart and Honoré stress that our causal

Jane Stapleton, “Law, Causation and Common Sense,” *Oxford Journal of Legal Studies* 8, issue 1 (1988): 111-31. See also Judith Jarvis Thomson, “Some Reflections on Hart and Honoré, *Causation in the Law*,” in Matthew H. Kramer, et al., *The Legacy of H. L. A. Hart: Legal, Political, and Moral Philosophy* (Oxford: Oxford University Press, 2008), 143-64.

²⁸ Hart and Honoré, *Causation in the Law*, 34.

²⁹ *Ibid.*

³⁰ Hesslow, “The Problem of Causal Selection,” <http://www.hesslow.com/germund/philosophy/Problemselection.htm>, accessed December 20, 2018, § 3.

selections are motivated by a concern to *explain* things. For Mill, the train's speed would go unmentioned in the explanation of the accident because the inquirer is assumed to know of its necessity; for Hart and Honoré, the speed goes unmentioned because it does not explain the difference between the normal case and the accident.

Voluntary human acts are the second kind of condition that people tend to select as a "cause" of an effect, according to Hart and Honoré. Not all voluntary acts are causes for Hart and Honoré, but that we select them as causes is most clear in intervention cases, where one actor initiates a causal sequence and a subsequent actor intentionally intervenes and causally contributes to the effect. Thus, suppose that Chris throws a lit cigarette into the forest and ignites some bracken. As the fire flickers out, along comes Julio, who pours gasoline on the fire. The gas sets off a huge blaze that burns the forest down. Julio was not acting in concert with Chris. According to Hart and Honoré, Julio's act was the cause of the fire, not Chris's.³¹ If Chris had intended to burn down the forest, we might have taken his act to be a stronger causal contributor, but in this case Julio's voluntary act overrides Chris's in terms of causal significance. In general, Hart and Honoré say that, in order to be the kind of intervention that gets selected as the "cause," a voluntary act (or omission) must be a free, informed, deliberate act that is "intended to bring about what in fact happens, in the manner in which it happens."³² An intervention is not voluntary (and hence not a cause) if it is the result of ignorance, coercion, a mistake, or some pressure on the actor such as the choice being the lesser of two evils.³³

³¹ Hart and Honoré, *Causation in the Law*, 74.

³² *Ibid.*, 42.

³³ *Ibid.*, 41-42 and 75-77. See also Richard W. Wright, "Causation in Tort Law," *California Law Review* 73, issue 6 (1985): 1746.

Abnormal “coincidences” can also be causal interventions. Hart and Honoré’s discussion of this shows that they accept at least to some degree Mill’s idea that our causal inquiries are usually satisfied by “the cause” that is nearest to the effect.³⁴ The last noteworthy condition usually will explain an effect to our satisfaction such that we do not have to trace beyond it for more explanatory information. Suppose that A intentionally punches B, who falls on the ground from the force of a punch. At the very moment that B falls a tree lands on him, killing him instantly. A’s punch was voluntary and explains how the *circumstance* of B’s death was created, but the tree falling is the cause of B’s death.³⁵

Hans Kelsen; Causes as Disharmonies

Hans Kelsen’s sociological analysis of causation suggests that causal selections may be largely evaluative. In his 1941 paper “Causality and Retribution,” Kelsen explains that the early Greeks looked to the social order as a model for the concept of causation.³⁶ Carnap nicely summarizes Kelsen’s explanation:

When the Greeks began their systematic observations of nature and noticed various causal regularities, they felt a certain necessity was behind the phenomena. They looked on this as a moral necessity analogous to the moral necessity in relations between persons. Just as an evil deed demands punishment and a good deed demands reward, so a certain event A demands a consequent B to restore a harmonious state of things, to restore justice. ... When nature moves too far away from a balanced, harmonious state of affairs, analogous to the harmonious society, the balance must be restored by an opposite trend.³⁷

³⁴ See Hart and Honoré, *Causation in the Law*, 171-72. The hurricane example shows that Hart and Honoré would not fully endorse Mill’s view because in some cases the nearest abnormal event or voluntary act intervention is not deemed the cause.

³⁵ *Ibid.*, 77.

³⁶ Hans Kelsen, “Causality and Retribution,” *Philosophy of Science* 8, no. 4 (1941): 533-56.

³⁷ Rudolf Carnap, *The Philosophical Foundations of Physics* (New York: Basic Books, 1966), 205.

On Kelsen's picture of Greek history, a cause is an event which brings about disturbance or disharmony in the order of things. Because harmony and order are associated with goodness, we might extrapolate from Kelsen's account the following picture of causal selection: a "cause" is an event or action that departs from some standard of goodness. Such departures are obviously implied in blaming contexts, but they also appear in other contexts. Recall the engineer from our earlier discussion of the "handle" criterion. Suppose that the city does not act on his recommendation to build a flood bypass. Now suppose that the river floods and destroys several farms in the town. When the citizens say that the city's failure to build a bypass is what caused the accident, they are not saying that the city's negligence was abnormal or unexpected; they are also not denying that heavy rains or the river's depth were causally relevant. Rather, they are specifying that what went wrong—i.e., the most causally salient event that explains the present disorder. The lack of a bypass has become their lantern.³⁸

The Inquirer's Interests

A common view is that causal selections are dependent upon context and people's interests.³⁹ What is one's purpose when selecting a cause from a set of conditions? What are they seeking to understand or explain? Given people's background and interests, a "cause" in one context may not be a cause in another. Moreover, people may single out different conditions as "the cause" of an effect in the *same* context. Here is a famous example from Hart and Honoré: "The cause of a great famine in India may be identified by the Indian [farmer] as the drought, but

³⁸ It is plausible to think that the citizens will even say something like, "The lack of bypass was responsible for the flooding." This is a double meaning of the word "responsible." While they may be assigning blame to the city managers indirectly, the citizens mean that the bad effect of flooding *owes to* the physical condition that no bypass was in place.

³⁹ Here I follow J. L. Mackie, *The Cement of the Universe: A Study of Causation* (Oxford: Clarendon Press, 1974), 120. See also Feinberg, "Sua Culpa," 202-03.

the World Food authority may identify the Indian government's failure to build up reserves as the cause and the drought as a mere condition."⁴⁰ The farmer and the World Food authority have the same question in mind: what caused the famine? Each one seeks an explanation. Drawing upon his own background and current situation (low crop yield), the farmer singles out the drought as the "cause": from his point of view the drought is abnormal. For the World Food authority, the weather is a normal part of life, while this particular government's negligence is what distinguishes India from other countries. The World Food authority sees the government's failure as abnormal because it appraises the situation in light of its interest in sustainable food policy.⁴¹

Most accounts of causal selection criteria reserve an important place for people's interests. It does not follow however that causal selections are necessarily capricious *because* they depend on people's interests. Certainly it is possible to argue that our purposes and interests influence causal selection so much that our selections are ultimately arbitrary; Mill appears to hold this view even though he traces the pattern of "unexpectedness" across our causal judgments.⁴² Of course our interests do determine what we take to be satisfying by way of an explanation. To borrow an example from Carl Cranor, suppose we discover a broken window.⁴³ If I want to simply know why the glass broke, the slam of the door may be a perfectly good causal explanation. However, if I want to know why one of the panes of glass broke while the

⁴⁰ Hart and Honoré, *Causation in the Law*, 35.

⁴¹ For other similar examples, see Malone, "Ruminations on Cause-in-Fact," 62, Carnap, *The Philosophical Foundations of Physics*, 191-92, and Nicholas St. John Green, "Proximate and Remote Cause," *American Law Review* 4, no. 2 (1870): 212.

⁴² Mill, *A System of Logic*, 405.

⁴³ Carl F. Cranor, "Assessing Genes as Causes of Human Disease in a Multicausal World," in Sheldon Krimsky and Jeremy Gruber, eds., *Genetic Explanations: Sense and Nonsense* (Cambridge, Mass.: Harvard University Press, 2013), 111.

others did not, my inquiry will target other conditions and contrasts, e.g., the fragility of that pane compared to the others. How far and how deep we go into the causal history of an event will depend on what we are interested in. Still, there are good reasons to think that our causal selections are not merely subjective caprice. For one thing, many of our selections are predictable. “Virtually everyone selects the short circuit as the cause [of a fire], and not the oxygen.”⁴⁴ If causal selections were truly arbitrary, why does virtually everyone single out the same event as the cause? For another thing, although policy interests may influence the shape of the causal inquiry in a legal case (see Chapter 2 above), the law treats cause-in-fact and proximate cause issues as objective matters to be settled by *evidence* and *argument*, not by caprice. Proximate cause assessments in particular are sometimes appraised in terms of distinguishing defendant’s conduct as “*the cause*” of a plaintiff’s injury and not a mere condition. In *Commonwealth v. Root* for instance, a criminal case, a man was killed in a drag race that was instigated by the defendant, who was charged with involuntary manslaughter.⁴⁵ The accident occurred when the two-lane road on which they were racing narrowed into one lane, at which juncture the victim accelerated and swerved in front of the defendant’s vehicle to overtake him, only to crash head on into a truck. Was the defendant guilty of causing the victim’s death, having instigated the race? Or was the causal connection superseded by the victim’s own reckless decision to swerve? If the trial court’s finding that the victim’s conduct did not supersede and defendant was the proximate cause were really based on caprice, the prosecutor need not have *proved* anything. His argument would amount to *merely* presenting to the court the events that took place.

⁴⁴ Schaffer, “Contrastive Causation,” 313.

⁴⁵ *Commonwealth v. Root*, 403 Pa. 571, 170 A.2d 310 (1961).

Transition to the Next Section and Return to Causal Divisionism

There are other proposals for causal selection criteria in addition to the ones I summarized above. I pass on outlining them because it is not my object to review causal selection criteria for accuracy.⁴⁶ Nor is it my object to resolve controversies about the subjectivity or objectivity of causal selection. Whatever one wishes to say about the strengths or weaknesses about the above accounts (are they exhaustive or are they suggestive?), the foregoing discussion reveals that our causal selection practices seem to involve a complex, wide-ranging network of factual and evaluative phenomena.⁴⁷ Mill's, Hart and Honoré's, Kelsen's, and the interest-oriented accounts all seem to touch on some correct aspect of that network. We do, for example, frequently single out as "causes" events that surprise us as well as departures from what's normal or appropriate. We also do not rely solely on factual norms about causal relationships to identify a condition as "the cause" of something. In a sentence: All causal selections have a purposive or evaluative aspect in that our interest—what we *care* about in seeking out a cause—directs our inquiry, which is *informed by* our past experience and knowledge of the interactions among causal concepts.⁴⁸ Turning to the law, we will see that this feature of causal selection can potentially help remedy the core defect of causal divisionism: namely, that the contrast it postulates between factual judgment and evaluative judgment in the law's causation requirement is a false dichotomy.⁴⁹

⁴⁶ Plus, some of them seem almost exclusive to historical and scientific contexts. For a rigorous discussion, see William H. Dray, *Laws and Explanations in History* (Oxford: Oxford University Press, 1957), 97-104.

⁴⁷ I give a more focused argument for the *interconnectedness* of fact and value norms in Section 2—in the subsection titled "Causal Selection and Causal Divisionism."

⁴⁸ Cf. Thomson, "Some Reflections on Hart and Honoré, *Causation in the Law*, 164.

⁴⁹ A dichotomy is different than a distinction. A distinction implies some mark or characteristic that differentiates two things, whereas a dichotomy implies a distinction that results

2. Causal Selection and the Cause-in-Fact Inquiry

The main aim of this section is to argue that cause-in-fact inquiries ultimately involve causal selection, which necessarily has an evaluative component; causal selection is not exclusive to proximate cause assessments. First however I must briefly touch on a philosophical issue which, in my view, is central to the confusion that I have identified in causal divisionism.

The Inseparability of Causal Connection and Causal Selection

Within the philosophical literature on causation authors commonly draw a distinction between causal *connection* and causal *selection*. Causal connection, it is said, concerns the existence of a causal relation between events in the world, and what it is to be *a* cause of an effect. By what processes or mechanisms do we determine that some condition is, or some conditions are, necessary for an effect? Causal selection, on the other hand, takes up a different question: having ascertained the causal relevance of certain conditions for some effect, how do we determine which of those conditions was, in a specific instance, the most important condition for the occurrence of the effect?⁵⁰ David Lewis draws the connection-selection distinction in a memorable passage from his early counterfactual account of causation:

We sometimes single out one among all the causes of some event and single it out as “the” cause, as if there were no others. Or we single out a few as “the causes,” calling the rest mere “causal factors” or “causal conditions.” Or we speak of the “real” or “decisive” or “principal” cause. We may select the abnormal or extraordinary causes, or those under human control, or those we deem good or bad, or just those we want to talk about. I have nothing to say about these principles of invidious discrimination. I am concerned with

in a division of something into two separate parts. One can reject a dichotomy between X and Y while accepting that there is a distinction between X and Y; that is the essence of my view about facts and values with respect to cause-in-fact and proximate cause. For more on why these conceptual mechanics are acceptable for facts and values in particular, see Putnam, *The Collapse of the Fact/Value Dichotomy*, 9-19.

⁵⁰ Cf. Hesslow, “The Problem of Causal Selection,” <http://www.hesslow.com/germund/philosophy/Problemselection.htm>, accessed December 20, 2018, § 2.

the prior question of what it is to be one of the causes (unselectively speaking). My analysis is meant to capture a broad and nondiscriminatory concept of causation.⁵¹

That causal connection is thought to be “nondiscriminatory” can be illustrated by a simple example. A building burns. We know that, among other things, oxygen had to be present for the fire: for in every case of fire, some oxygen content is required to sustain the chemical processes necessary for the fire to keep burning. Thus, we say there is a causal connection between fire and oxygen. However, when the fire marshal investigates, he will not say that the fire was caused by oxygen. The marshal will likely pick out another causally relevant but more salient, likely abnormal, event, e.g., a faulty electrical socket. In a different case, the marshal may well say that oxygen was the cause of the fire—say, if the building was a laboratory where, prior to the fire, special care was being taken to exclude oxygen from a space for an experiment.⁵² Causal judgments are context-sensitive. Contextual differences compel us to discriminate “invidiously” about the causal relevance of oxygen to the two fires, but Lewis would point out that the objective causal necessity of oxygen to fire does not vary with context and is exactly the same in both cases.

Despite Frederick Pollock’s edict that “[t]he lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause,” academic lawyers draw a similar distinction as Lewis between causal connection and causal selection.⁵³ We saw this in the discussion of causal divisionism in Chapter 2. Causal divisionists maintain that the empirical issue of whether an event is *a* cause is independent of the normative issue of whether the defendant’s conduct is “the” cause of the plaintiff’s injury. For causal

⁵¹ David Lewis, “Causation,” *Journal of Philosophy* 70, no. 17 (1973): 558-59.

⁵² Hart and Honoré, *Causation in the Law*, 35.

⁵³ Sir Frederick Pollock, *The Law of Torts*, 11th ed. (London: Stevens, 1920), 36.

divisionists, the cause-in-fact inquiry is precisely an inquiry into the causal *connection* between the tortious aspect of defendant's conduct and plaintiff's harm; normative, policy-laden, allegedly non-causal proximate cause tests guide our *selection* of defendant's conduct as the event to which legal liability should be attached.⁵⁴ Wright's arguments in favor of the NESS test, it seems to me, are as much about the law capturing the nature of causal *connection* (so that the law's "factual" determinations are really *factual*) as they are about explaining how the law can best resolve legal disputes about factual causation. On those bases, let us assume that on causal divisionism, there exists a correlation: cause-in-fact corresponds to causal connection, and proximate cause corresponds to the phenomenon of causal selection.

Clearly Lewis accepts Mill's line that causal selection is capricious: there is no principled basis for the distinction between causes and background conditions, and causation itself is egalitarian and uninformed by our selection practices.⁵⁵ Causal divisionism cannot, and would not, go that far. Proximate cause judgments being an instance of causal selection, the causal divisionist would deny that the law's selection criteria—the proximate cause tests—are capricious. Quite the contrary, there are deliberate policy reasons for proximate cause tests, which can be plausibly justified by some broader normative theory. Consider again the risk rule from *Wagon Mound No. 1*: if the plaintiff's injury, which the defendant in fact caused, was reasonably foreseeable at the time the defendant acted, the defendant is the proximate cause. Two different policy reasons may be given for selecting the defendant's conduct according to the

⁵⁴ Wright, "Causation in Tort Law," 1743.

⁵⁵ See Jonathan Schaffer, "The Metaphysics of Causation," *Stanford Encyclopedia of Philosophy*, § 2.3, published July 5, 2016, accessed August 7, 2019, <https://plato.stanford.edu/causation-metaphysics>. Lewis would later change his view on causation and subsequently he relaxed his claim that causal selection principles were totally invidious. See David Lewis, "Causation as Influence," *Journal of Philosophy* 97, no. 4 (2000): 182-97.

risk rule's foreseeability criterion: first, it would be too severe to punish negligent defendants for harms they could not foresee; and second, holding defendants liable for unforeseeable consequences does not create the law's desired deterrence effect (because unforeseeably harmful conduct cannot be deterred, and holding actors liable for unforeseeable harms might over-deter).⁵⁶ Of course in chapter 2 I argued that the risk rule involves both policy ideas and causal ideas, but in some cases a proximate cause test is adopted for a pure policy reason. For example, consider the "first-house" rule from the old tort cases involving property damage from railroads. According to this rule, "a railroad whose negligently emitted sparks burned an entire town was only liable for the house or houses directly ignited by its sparks, not for other houses ignited by the burning of those first burnt houses."⁵⁷ Courts explicitly adopted this rule so that the burgeoning railroad industry would not be too impaired by damages awards.⁵⁸

Causal divisionism would deny, then, that causal selection (at least in the legal setting) is capricious. But by sharply distinguishing cause-in-fact and proximate cause as non-normative and normative issues respectively, we see that causal divisionism accepts Lewis's *separation* between causal connection and causal selection. The defendant's conduct being a factual causal contributor is nondiscriminatory in that it purports to be "normatively neutral." The implication is that causal selection is irrelevant to causal connection: understanding how a total set of conditions must relate to bring about a certain effect does not involve selection because causal

⁵⁶ Here I follow Michael S. Moore, *Causation and Responsibility*, 98.

⁵⁷ *Ibid.*, 97.

⁵⁸ See *Ryan v. New York Central Railroad*, 35 N.Y. 210 (1866), 216-17. See also Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Touchstone, 2005), 350-51.

relations happen as they do whether we select one or some subset of conditions as “causes” in an individual case or not.

It is not clear, however, that causal connection and causal selection are neatly separable. For arguably, we would have no concept of causal connection *without* causal selection.⁵⁹ To really persuade us that causal connection is unselective, one should be able “to demonstrate the causal efficacy of permanent conditions,” i.e., to show the causal relevance of some condition in every case.⁶⁰ In the fire example, generally speaking most people would not pick out oxygen as “the” cause of a fire because they tacitly know that oxygen is a necessary condition of all fires; it therefore looms in the background. But it is impossible to demonstrate the causal necessity of oxygen to fire without contrast cases, and contrast cases necessarily involve selection. Suppose we have Sam who does not know that the presence of oxygen is necessary for fire. I light a candle. Thirty seconds later, I put a jar over the candle and the flame burns out. How is Sam to establish the *causal* connection between the oxygen and the fire? The only answer can be by *discriminating* and *selecting* differences between the two instances. Some condition that was present prior to the jar’s placement must have changed; the jar did not touch the flame or the candle; the jar prevents outside air from blending with the flame; therefore, Sam concludes, the flame must need air to continue to burn. Sam had to *select* the absence of air as the cause of the flame going out in order to establish the causal *connection* between oxygen and fire. Most all

⁵⁹ Here I follow Hart and Honoré, *Causation in the Law*, 12: “[T]he contrast of cause with mere conditions is an inseparable feature of all causal thinking, and constitutes as much of the meaning of causal expressions as implicit reference to generalizations does.” See also Jonathan Schaffer, “Contrastive Causation,” *The Philosophical Review* 114, no. 3 (2005): 314, although I am making a slightly different point than Schaffer.

⁶⁰ Hesslow, “The Problem of Causal Selection,” <http://www.hesslow.com/germund/philosophy/Problemselection.htm>, accessed December 20, 2018, § 4.

causal thinking is like this. Even if Sam had a very strong intuition that it was the absence of air before working out his logic, this would not show that causation is the “broad and nondiscriminatory concept” that Lewis says it is. Causal selection, it would appear, is actually most relevant to establishing causal connection.

Causal Selection and Causal Divisionism

Several objections can be made to the above argument, but as I am not trying to prove the inseparability of causal connection and causal selection generally, I will turn my attention now to cause-in-fact. Some causal divisionists, such as Tony Honoré, seem willing to accept that causal selection is relevant to establishing a factual causation connection at law while *denying* that there is anything normative about cause-in-fact. Let me elaborate the first part of Honoré’s claim before arguing against his denial of normativity:

Tort law lays down what counts as wrongful conduct . . . and so what the plaintiff has to prove. It aims to protect people against wrongful infringement of their rights and exposure to undue danger. So, to ascertain whether an infringement has occurred, the wrongful conduct of the defendant must normally be compared with the notional rightful conduct that the plaintiff was entitled to expect in the circumstances. The question is whether the difference between the wrongful conduct that occurred in the real world and the rightful conduct (together with its likely consequences) that we imagine as occurring would have led to a different result in the hypothetical world that resembles the real world in all other respects.⁶¹

Honoré is describing the but-for test in terms of causal selection. Generally speaking, legal inquiry has three distinct but interrelated phases: “(1) Explanatory: What happened?; (2) Evidential: What is the evidential support or proof?; (3) Attributive: Who or what is responsible?”⁶² The explanatory and evidential phases are obviously influenced by epistemic

⁶¹ Honoré, “Necessary and Sufficient Conditions in Tort Law,” 373.

⁶² David A. Lagnado and Tobias Gerstenberg, “Causation in Legal and Moral Reasoning,” in Michael R. Waldmann, ed., *The Oxford Handbook of Causal Reasoning* (Oxford: Oxford University Press, 2017), 574.

values, and those values are directed by the overarching goal or purpose (interest) of achieving justice. (Put to the side for the moment debates about what kind of justice tort law is trying to achieve.) All three phases involve *causal* reasoning. In the explanatory phase, the litigants construct a causal story of how events transpired. Then in the evidential phase, they use evidence to support their causal stories. Finally, the court assigns responsibility based on a causal understanding of how the parties did what they did. The law requires that the causal story go a certain way to hold the defendant liable. On both the but-for and NESS tests, the causal story needs to be told in a way such that a certain connection holds (necessity of some degree) between the wrongful aspect of the defendant's conduct and plaintiff's harm. The evidence—the *factual* evidence—must be arranged for the jury so that, to the best of their ability and satisfactory to the standard of proof, they can determine what would have happened in a world where the defendant had acted differently. Of course, the law's notion of cause must conform to ordinary understandings of cause for ordinary jurors to determine whether the plaintiff and defendant are related in the right way for purposes of liability: jurors cannot be instructed on the spot to become experts on technical legal notions of causation. But the law has ascertained that, to achieve justice, and in conjunction with other key components of a legal case—e.g., procedural rules, the other essential elements of liability, the functions of judge and jury—a necessary condition test is most preferable for proving the cause-in-fact element of the inquiry. These are all normative-policy reasons that influence what we take to be a causal fact in the legal context.

Yet puzzlingly, Honoré rejects the idea that cause-in-fact inquiries are normative:

Does the fact that in tort law we normally compare wrongful with rightful conduct show that the causal question is a *normative* question in disguise? It does not, for the inquiry into what would have occurred had the defendant obeyed a legal norm is no more normative than the question what would have occurred had the Prime Minister been someone other than Churchill. The answer to these causal inquiries has no normative component. It remains the same even if we suppose that it would have been

better for Britain to make peace in 1940, or that it would be better, in order to combat over-population, for those who drive automobiles to drive blindfold⁶³

I interpret Honoré to be saying that just because we compare putatively wrong conduct in the real world with putatively right conduct in a hypothetical world, it does not mean that we are engaged in a “normative” inquiry. For there are plenty of non-legal inquiries where we can compare differences between real and hypothetical events in their causal aspects to determine how we think things might have gone or might have been. But why does Honoré say that the answer to the causal inquiries has “no normative component”? It seems to me that Honoré is thinking of normativity solely in terms of how people *ought* to act. This is a very narrow notion of normativity. However, if causal divisionism is going to maintain that cause-in-fact is “purely factual,” it must avoid all forms of value judgment. In all of the inquiries that Honoré lists the inquirer’s interest will determine which answer gets accepted. The law accepts “the injury wouldn’t have occurred” because it is concerned to decide liability. The revisionist historian accepts that Britain would have formed an armistice with Hitler, being concerned to achieve a rearranged picture of the world that will contribute to knowledge and which, ideally, might suggest how things might go if a nation does things differently lest history repeat itself. The bad armchair sociologist is concerned to make the world more livable. These *are* all value interests. The answer that each inquirer accepts has everything to do with what they value.

To be clear, I am not suggesting that the causal relation itself *is* normative. I am saying that we employ normative criteria to identify or select the factor we want to identify. In that way the causal relation has an unavoidably normative *aspect*. Honoré might respond by saying that causal connection—the precise nature of the causal relation between events—does not change with our differing interests or inquiries. In that way, the answers as to *causation* have no

⁶³ Honoré, “Necessary and Sufficient Conditions in Tort Law,” 373.

normative component. Such a response is not persuasive. Suppose in the early draft of his work the revisionist historian identifies a single event which, had it been different, would have effected a major outcome. Then in a later draft he changes his mind: he now thinks the same outcome would have been effected if a confluence of two events had been different, but he maintains that one event is a more substantial causal contributor than the other. In the first draft the historian is using a standard necessary condition concept of cause, but as his interest changes between drafts, he shifts to a scalar (degree-oriented) notion of cause. If changes in interest can bring about different causal connections in frameworks acceptable to scholarly historical methodology, there is no reason to think that similar shifts could not occur in frameworks acceptable to law.⁶⁴

The upshot of this subsection is this: It is highly doubtful that one can analyze factual causation in terms of causal selection while excluding normativity from the cause-in-fact inquiry. Analyses that emphasize causal selection must allow for cause-in-fact inquiries to have an evaluative component.

Causal Selection and the Inseparability of Fact and Value: Malone's Cause-in-Fact Analysis

In his well-known article “Ruminations on Cause-in-Fact,” Wex Malone argues that all cause-in-fact determinations at law are causal selections that are underwritten by evaluative policy considerations. For Malone, the entire legal *process* of determining cause-in-fact is permeated with evaluative considerations, both for the jury and the judge. Regarding the jury, Malone emphasizes that the jury’s function of deducing that something is a “cause” is not a self-performing operation. The jurors have to bring to bear a variety of intellectual functions to interpret the evidence in a way that is meaningful to law—such as their past experience and “judging personalities”—and these things play a decisive role in reaching a judgment about cause

⁶⁴ Arguably, such shifts are *precisely* what took place when courts began to use substantial factor tests in place of the but-for test in the fire cases. On a separate note, I am grateful to Sharon Kaye for her feedback on an early version of the argument in this paragraph.

according to Malone.⁶⁵ The context of the case will determine the extent to which the jurors will have to call on these functions:

Very little of a trier's experience background, for example, is required in order to induce him to agree that an automobile tire presented in evidence is "different" from other tires. Somewhat more is required to tell him that the tire is "old," and a goodly amount of his capacity to reach conclusions must be brought into play before he can announce that the tire is "bad," that it is "unfit for use" or that its presence on a vehicle indicates negligence on the part of a car owner. ... [I]t is noteworthy that in passing from one of these determinations to another we have moved almost imperceptibly from matters of "fact" to matters of "judgment" or "evaluation."⁶⁶

Ordinary experience may be enough to inform the juror that a tire is "old." ("I can see that the treads are worn down," "It just *looks* old; I wouldn't see a tire like that at my Goodyear store!") But suppose an expert has to be brought in to explain why the tire is "unfit for use" indicating negligence. Then the jurors have to use their observational and reasoning skills to incorporate new information into what they know, *in order to* make a factual judgment pertaining to liability. Malone labels this judgment "factual" (in scare quotes) because tort law uses a standard of proof—"more likely than not," "50% plus a feather"—that is different than the standards that jurors employ in their ordinary lives for what constitutes a fact, also for the purpose of establishing legal liability. Moreover, to perform their function, jurors will also have to call on their general competence with selecting "causes" based on their interests.⁶⁷ So evaluative phenomena are very subtly disguised by the law's factual inquiry.

Regarding judges, Malone argues that a judge may assess a "cause" differently than other parties involved in the case (e.g., expert witnesses, lawyers) due to having different purposes in mind. Hence the judge's evaluations have an enormous influence on the outcome of a case—

⁶⁵ Malone, "Ruminations on Cause-in-Fact," 61-62.

⁶⁶ *Ibid.*, 62.

⁶⁷ *Ibid.*

including the ability to declare a nonsuit for plaintiff's failure to present sufficient evidence to raise a question of causation.⁶⁸ Malone gives the following workmen's compensation example to support this argument about judges:

An elderly worker with a heart ailment of long standing happens to drop dead while engaged in some trivial task for his employer. A medical expert is likely to testify that with assurance was not *a* cause of the death. He may explain that the heart was spent and that there was nothing about the work being done that could account for the tragedy. He finds that the relationship between the two events is not sufficiently close to justify *him* in characterizing it as a cause and effect relationship.⁶⁹

The medical expert makes his causal judgment based on associations between events that comport with his purposes as medical professional. However, "[w]hat is *a* cause for the judge need not be *a* cause for the physician."⁷⁰ The judge's purposes might lead him to a different conclusion. In the interest of procedural justice, the judge may let the jury decide the causation question; or, if this is a bench trial, considering the compensatory purpose of the statute, the judge might decide that the exertion did cause the man's death.⁷¹ Malone thus concludes, "It is through the process of selecting what is to be regarded as a cause for the purpose of a resolving a legal dispute that considerations of policy exert their influence in deciding an issue of cause-in-fact."⁷²

Some commentators have interpreted Malone to be defending a caprice view like Mill's only for cause-in-fact.⁷³ I grant that some of the preliminary remarks in Malone's article may

⁶⁸ Ibid., 68.

⁶⁹ Ibid., 63. Emphasis added. The liability analysis in a workmen's compensation case proceeds in the same manner as a tort case. See Richard W. Wright, "Causation in the Law," 1743.

⁷⁰ Malone, "Ruminations on Cause-in-Fact," 64. Emphasis original.

⁷¹ Ibid.

⁷² Ibid.

⁷³ See, e.g., Moore, *Causation and Responsibility*, 91.

sound like that, but such an interpretation of Malone is clearly incorrect. In his descriptions of the jury and the medical expert, everyone must call on their background knowledge outside the law to some degree for the law's purposes. Moreover, James E. Viator, a former colleague of Malone's, has explained that "fact and policy, Malone believed, are inextricably involved one with the other in the determination of factual causation in every hard case and even in many, perhaps most, easy cases."⁷⁴ In short, there are positive facts, but in the legal context, normative considerations define cause-in-fact disputes. What normative considerations exactly? Malone does not specify a theoretical aim of tort law like corrective justice or efficiency and loss-spreading. He leaves the question somewhat open-ended, stating that different rules were designed for fairly narrow and definite purposes, while others are designed to provide broad protections.⁷⁵ One case which Malone says clearly illustrates the interdependence of fact and policy is *Reynolds v. Texas and Pac. Ry. Co.*⁷⁶ Plaintiff was a heavysset lady who fell down an unlit stairway after being told to "hurry up" by a railroad employee. The defendant argued that, while the railroad was negligent in failing to light the stairwell, it does not follow that they caused the accident. The court affirmed a judgment for the plaintiff, ruling that "where the negligence of the of the defendant greatly multiplies the chances of accident ...and is of a character naturally

⁷⁴ Viator, "When Cause-in-Fact Is More Than a Fact," 1526, n. 32.

⁷⁵ Malone, "Ruminations on Cause-in-Fact," 73. Malone's remarks on the but-for test (ibid., 67) being open to policy on account of its "conjectural" aspects are consistent with my arguments in Chapter 2. Interestingly, Malone adds that the main defect of the but-for test is not its inapplicability to overdetermination cases (although he *does* think that is a defect), but it "marks an attempt to poise the inquiry on a wholly abstract plane, stripped of all evaluative overtones" (ibid., 66). In other words, jurors do not ordinarily separate factual causation from responsibility. In ordinary life, if one's purpose is to fix responsibility, then the cause and responsibility questions are one and the same. This is a criticism of causal divisionist frameworks more than the but-for test proper, but Malone subsumes the criticism under the but-for test because it is the orthodox cause-in-fact test.

⁷⁶ Ibid., 74.

leading to its occurrence, the mere possibility that it might have happened without the negligence is not sufficient to break the chain of cause and effect.”⁷⁷ This particular rule for establishing a causal connection between defendant’s negligence and plaintiff’s injury is designed to protect plaintiffs in the very predicament as the woman in *Reynolds*. In view of that *purpose*, it is sufficient for defendant’s wrongdoing to increase the risk of plaintiff’s injury to an appreciable degree to be a factual cause.

Malone’s arguments are intuitive and persuasive in light of the arguments of Chapter 2. Malone’s account of cause-in-fact can accommodate the fact-value interplay which I say exists in all cause-in-fact inquiries. Consequently, Malone’s analysis provides a good replacement model for causal divisionism, at least provisionally. How would the causal divisionist respond?

Defending Malone against Wright

For as oft-cited as Malone’s article is, there are not many critical responses to it in the literature. The primary commentator to respond to Malone at length is Richard Wright, our causal divisionist foil from Chapter 2. Wright’s main point against Malone’s causal-selection approach is that it conflates several distinct parts of tort liability analysis. For Wright, tort liability has three parts. In order, they are the “tortious conduct” inquiry (legal wrong), the “causal” inquiry (cause-in-fact), and the proximate cause inquiry.⁷⁸ Using the elderly worker case, Wright argues that purpose, policy, and context extend their influence only to the tortious-conduct and proximate cause inquiries:

At a minimum [in the elderly worker case], ...only work-related activities and conditions are relevant as potential causes. This is a policy decision. [Did the work-related exertion] contribute to the employee's heart [failure]? That is the causal question [which] need not be addressed if it is decided that an injury will not be treated as work-related. ... This also is a policy issue. ... The judge should clarify the causal issue for the medical

⁷⁷ *Reynolds v. Texas and Pac. Ry. Co.*, 37 La. Ann. 694, 698 (1885).

⁷⁸ Wright, “Causation in Tort Law,” 1744.

expert by explaining that the medical controllability of the risk is irrelevant. The question is rather whether the exertion in fact contributed to the employee's death by triggering or accelerating the failure of his heart. Malone's causal-selection argument does not demonstrate that policy considerations do or should play any role in this causal part of the analysis. All Malone's argument shows is that policy considerations determine which causes and consequences will give rise to liability.⁷⁹

For Wright, policy influences the tortious-conduct inquiry in that legal materials help us narrow down which of the causes we select to be potentially liable ones. Obviously we are not interested in all of the causes, just those that the law has identified as tortious. In the elderly worker case, the statute guides our selection of work-related activities for liability consideration. Once the defendant's tortious conduct has been established, we proceed to the question of whether it causally contributed to the plaintiff's injury. Wright thinks this is a pure question of relation: there is no selection going on at the causal stage because the tortious conduct was already selected at the tortious-conduct stage. Once the causal inquiry gets underway it is not necessary for the court to consider all the contributing factors other than defendant's conduct. By Wright's lights, the court will consider only a few other contributing factors: namely, "those which might reduce or eliminate, for reasons of policy or principle, the defendant's legal responsibility for harm that was [factually] caused by his tortious conduct."⁸⁰ However, such factors get taken up at the proximate cause stage. Thus, Wright's analysis of tort liability looks like this:

Tortious-conduct inquiry (policy) → Causal inquiry (no policy) → Proximate cause (policy).

Malone's mistake, then, according to Wright, is that he incorrectly identifies causation as the stage of the liability process at which selection and purpose play a role.

There are three problems with Wright's argument. First, it is not clear that Wright has actually addressed himself to Malone's position. Malone says that policy considerations "exert

⁷⁹ Ibid., 1744-45.

⁸⁰ Ibid., 1745.

their influence in *deciding* issues cause-in-fact.”⁸¹ Wright does little more than flatly deny this in the above passage. Moreover, Wright’s reasons for denying it are problematic. Wright says that clarifying the causal issue, should it arise, involves explaining to the expert that the medical controllability of the risk is irrelevant. This would amount to the judge telling the expert, “How you determine causation as a medical professional is not what we need here. We need you to focus on certain factors because the question of liability rests on certain causal criteria.” If that’s right, then how is policy *not* affecting the causal part of the analysis? The judge would be instructing the expert to alter his understanding of cause for liability *purposes*.

Second, it is extremely difficult to see how Wright can defend the claim that policy and purpose do not affect cause-in-fact inquiries. Malone’s *Reynolds* example is convincing: if the defendant’s risk is of a type that normally leads to injuries like plaintiff’s and the defendant’s negligence sufficiently increased such risk, then the defendant’s negligence is a but-for cause. Wright might try to argue that the *Reynolds* rule is a rule of proof, not a statement of what has to be proved. However, the *Reynolds* rule would still call for triers of fact to engage in hypothetical-predictive reasoning under the but-for test (“But for the defendant’s risky behavior, would the injury have occurred?”). I argued extensively in Chapter 2 that values and policy may influence the hypothetical-predictive aspects of the but-for test. To persuasively argue that factual causal inquiries are divorced from policy it seems to me that one would need a universal test for factual causation—a test that conforms to scientific reality and which can be applied consistently across every case. (Wright believes that the NESS test can do this, by the way.) But there is no universal test for causation and the discovery of such a test will likely continue to elude us for a very long time. Given the law’s policy interests, as well as the challenge of

⁸¹ Malone, “Ruminations on Cause-in-Fact,” 64. Emphasis added.

accommodating the causal complexity of the world, it will remain for courts to decide how cause-in-fact issues are to be resolved and which tests to apply.

Third, causal selection straightforwardly *does* occur at the cause-in-fact stage. Epistemic values affect the cause-in-fact inquiry just as much as policy-oriented values do. One measure of a cause-in-fact test's efficacy is its ability to *explain* the injury. (Neither Wright nor Malone are strong on this point.) Suppose the medical expert understands the judge's instruction that the court is interested in the but-for connection between the defendant's negligence and the plaintiff's injury. Equipped with this understanding of cause, and given the expert's background, the expert may select heart disease (as opposed to the exertion) as the but-for cause because it provides the best explanation: to him, it was the most necessary condition for the man's death. On the other hand, *because* the judge is not a medical professional, he may find it perfectly intuitive to say that the exertion provides the best explanation. It was the last little push needed to make the man's worn heart fail. The practical interest of finding the best explanation will influence the selection of a factual cause according to the criteria articulated by the cause-in-fact test in question.

Wright's arguments against Malone do not work. Therefore, Malone's causal-selection analysis remains a live option for a model of cause-in-fact that allows for both factual and evaluative considerations. In this section I have also argued that causal connection and causal selection are inseparable notions, and that causal divisionism cannot accept causal selection while denying the existence of normativity in the cause-in-fact inquiry. In order to have a *thorough* selection-oriented proposal of causation in the law, one must understand how causal selection applies to proximate cause as well.

3. Causal Selection in the Proximate Cause Inquiry

As I mentioned at the outset of this chapter, the claim that proximate cause involves causal selection is uncontroversial, so I shall comment on it only briefly. In Chapters 1 and 2 I

spoke of proximate cause assessments as being about limitations on the defendant's responsibility for culpably causing harmful consequences. Invoking such limits is necessary because "if every causally relevant condition (cause-in-fact) is treated as ground responsibility for the outcomes to which it is causally relevant the extent of legal responsibility will extend almost indefinitely."⁸² Causal selection occurs whenever a proximate cause limit is invoked: a court is *picking out* an event and saying "we are cutting off liability with this event (as opposed to any other) for reasons that have to do with legal responsibility." It is therefore correct to say that causal selection is *essential* aspect of proximate cause.

A large portion of the scholarly debates on proximate cause are about the nature of the reasons for limiting responsibility—whether they are causal or non-causal. The causal accounts vary in their emphasis. Some may stress the metaphysics of causation as the ground for limiting responsibility, as Michael Moore's account does; others may stress the notion of "cause" as it functions in ordinary language (this is Hart and Honoré's approach). The non-causal accounts of proximate cause will say that the limiting factors are the product of legal policy. Many causal divisionists accept a non-causal account of proximate cause, and we know from Chapter 2 that different arguments can be given as to the precise policy reasons for limiting liability. One could make like Richard Posner, for example, and argue that in every case we should ask whether imposing liability on this defendant will maximize the total value of all goods and services.⁸³ Alternatively, one could argue like Ernest Weinrib that "law shapes our conduct according to the normative claims it makes," and that proximate cause rules and limitations should be viewed

⁸² Tony Honoré, "Causation in the Law," *Stanford Encyclopedia of Philosophy*, § 3.2, published November 17, 2010, accessed August 17, 2019, <http://plato.stanford.edu/entries/causation-law>.

⁸³ Richard A. Posner, "Wealth Maximation and Tort Law: A Philosophical Inquiry," in David G. Owen, ed., *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995), 101, n. 4.

along Kantian lines—as making intelligible the connection between “doing and suffering as between free and equal moral persons.”⁸⁴ By way of my criticisms of causal divisionism, I would endorse a hybrid view which says that both causal and non-causal factors play a part in proximate cause assessments. Because I accept Malone’s arguments, perhaps it should come as no surprise that I do not have a theory of whether the law favors any one type of causal or non-causal *content* for proximate cause assessments. It seems to me that context (which includes precedential considerations) and the purpose of the inquiry will determine what limiting factors law finds most acceptable for the case at hand. The grounds for limiting responsibility may differ between areas of law. While my discussion has focused on tort law, Honoré suggests that “the greater the weight attached to considerations of risk distribution the more likely it is that different [proximate cause] limits will be appropriate in, for example, criminal, civil, and public law.”⁸⁵ For example, given the different purposes of criminal and civil law (punishment versus reparation, ostensibly), as well as their different sanctions, criminal law may prefer a less expansive approach to proximate cause than tort law allows. Criminal law might insist that the causal connection between defendant’s act and the plaintiff’s wrong be shorter, more direct, to be warrant criminal responsibility.⁸⁶ Nevertheless, whether the grounds for limiting responsibility are exclusively causal or non-causal, or a hybrid, whatever area of law we are considering, the proximate cause judgment will be an instance of causal selection.

⁸⁴ In this sentence I have combined language from two of Weinrib’s articles. See Ernest J. Weinrib, “Law as a Kantian Idea of Reason,” *Columbia Law Review* 87, no. 3 (1987): 476, and “Causation and Wrongdoing,” *Chicago-Kent Law Review* 63, issue 3 (1987): 449.

⁸⁵ Tony Honoré, “Causation in the Law,” *Stanford Encyclopedia of Philosophy*, § 3.2, published November 17, 2010, accessed August 17, 2019, <http://plato.stanford.edu/entries/causation-law>.

⁸⁶ See the majority opinion in *Commonwealth v. Root*, 403 Pa. 571 (1961), 574-79.

4. Implications of the Selection-Oriented Picture and the Worry of Ad Hoc Adjudication

I have been arguing that the cause-in-fact and proximate cause elements of the law's causation requirement are analyzable in terms of causal selection. Since *all* causal selections have an evaluative component (purpose), a selection-oriented model can accommodate the fact that *both* elements rely on evaluative processes. Causal divisionism is unable to do this. Against causal divisionism, cause-in-fact inquiries comprise "a congeries of physical relations and purposive deductions; the causal determination is not a neutral inquiry but a forensic method of reasoning."⁸⁷ The cause-in-fact concept is pregnant with norms and evaluation, for "value" interests necessarily color our perceptions. A controversial conclusion then follows from the selection-oriented picture: the difference between cause-in-fact and proximate cause is not a difference in kind, *but a difference in degree*.⁸⁸ Which type of inquiry we are considering will depend on the inquiry itself, i.e., which kinds of norms it emphasizes, descriptive factual ones or responsibility-oriented ones, as well as the particular legal tests under consideration. It would be far too simplistic to say that cause-in-fact inquiries will emphasize descriptive norms about causal relationships more than proximate cause inquiries: for especially in the hard cases where the traditional cause-in-fact tests cannot be applied in a straightforward way, concerns of fairness and social policy may rule the day. Drawing on one of the lessons from *Palsgraf* in Chapter 1, I would submit that the language of *limitation* is going to be a prime indicator that we are dealing with a proximate cause question (although not a limitation on liability for finding *no* culpable conduct).

⁸⁷ Viator, "When Cause-in-Fact Is More Than a Fact," 1542.

⁸⁸ Malone, "Ruminations on Cause-in-Fact," 97.

My selection-oriented proposal has implications for both the legal scholarship and the courts. Let us consider them in turn.

Implications for Legal Scholarship

For legal theorists, one clear implication of the selection-oriented picture is that the existing analyses and debates about causation in the law need to be reframed. Causal divisionism needs to be abandoned, lest it perpetuate the myth of “purely factual” causal determinations at law. The selection-oriented picture says that causal selections always incorporate evaluative judgments. If that’s correct, the dividing line between factual and normative judgment is not a sharp one like causal divisionism maintains.

The main question for the new analysis is, how should the dividing line be redrawn? At this time I myself am not sure, and what I do have to say is very speculative. A good pragmatist is reluctant to cast a dividing line too precisely for fear that it will lead to another dualism that ultimately only obfuscates. One way to pursue the redrawing question is to begin again à la Hart and Honoré: undertake a project of determining whether (and to what extent) the same types of evaluative judgments that affect ordinary people’s causal reasoning also affect judges’ legal reasoning.⁸⁹ Judith Thomson says that “[t]he best way for lawyers to acquire general knowledge about causation is to study discussions of cases—actual and hypothetical—in which a perceptive author generalizes.”⁹⁰ Surely this is good advice on the selection-oriented picture, for “intuition can become more sensitive with experience, and intuitions can be organized into general principles by use of which we can predict still further intuitions.”⁹¹ So, we test our selection

⁸⁹ Here I follow Andrew Summers, “Common-Sense Causation in the Law,” 820.

⁹⁰ Thomson, “Some Reflections on Hart and Honoré, *Causation in the Law*,” 164.

⁹¹ *Ibid.*

intuitions by studying the law, paying close attention to the norms we rely on and comparing them with the factors that get incorporated in the rationales of legal cases. (For example, are there selection factors that *only* affect judicial decisions about causation?) Comparative taxonomies of norms will then emerge, and where there is overlap between them, perhaps the dividing line between fact and policy will become slightly less blurry with regard to how they relate to each other in purposive causal determinations.

Implications for the Courts

For the courts, the implications are less clear. One is that courts too will have to abandon the causal divisionist framework for analyzing causation. However, it is not clear that the courts use causal divisionism's "two-step" approach *anyway*. Leonard Hoffmann, a retired Law Lord (British appellate judge), denies that causal divisionism has had any effect on the activities of courts. According to Hoffman, judges settle matters of causation strictly in terms of figuring out which rules (both statutory and case law) of causation apply to the case and *interpreting* them:

[J]udges find it ... difficult to understand why academics claim that the question of whether the causal requirements of some legal rule have been satisfied involves a "two-stage process" in which you first decide whether the putative cause amounted to a "cause in fact" and then, if it passes that test, whether it counted as a cause in law for the purposes of the particular rule. ... It is this concept of something having to be *really* a cause according to criteria lying outside the law which puzzles lawyers. On what basis are academic writers entitled to say that judges should take into account a philosophically privileged form of causation which satisfies criteria not required by the law?⁹²

According to Hoffman, "no judges [have] heard of the NESS test" and causal divisionism has not attracted "any judicial interest" because judges work with a different two steps: "[First] you find the facts and then decide whether they answer to the requirements of the rule, or [what is the same] you decide as a matter of interpretation what are the requirements of the rule, and then

⁹² Lord Leonard Hoffmann, "Causation," in Richard Goldberg, ed., *Perspectives on Causation* (Oxford: Hart Publishing, 2011), 4-5. Emphasis original.

decide whether the facts satisfy those requirements.”⁹³ Hoffmann does not explicitly mention causal selection, but it is interesting to note that where the facts satisfy the rule, the rules effectively perform the operation of selecting the defendant’s conduct as a cause. In the American courts, Viator has suggested that courts since the early-20th century have been working with a Malone-style selection-oriented analysis, not causal divisionism. Discussing *Thompson v. New Orleans Ry. & Light Co.*, a Louisiana case, Viator says this:

[In *Thompson*] the sudden jerking of a streetcar knocked a passenger from his feet, and he landed on the small of his back. Although an autopsy showed that the victim had tuberculosis, chronic nephritis, acute chronic cystitis, acute chronic prostatitis, chronic selenitis, and sacral cancer, the court unblushingly held that “the cause of Mr. Thompson’s suffering, sickness, and death was . . . the existence of a malignant tumor, brought about by the blow which he received on falling on one of defendant’s cars.”⁹⁴

In other words, the Louisiana Supreme Court’s *interest* in liability, as guided by its legal rules, compelled it to bracket off all of Mr. Thompson’s other ailments as conditions and, on that score, interpret the relationship between the defendant’s negligence and his death. So perhaps we should say: *if* a court accepts causal divisionism, the selection-oriented picture implies that it should change its approach to causation.

Another implication of the selection-oriented picture is that it may prompt judges to reflect more carefully on the types of evaluative factors that influence causal reasoning. In a very recent article, Andrew Summers argues that if judges take into account the empirical research on causal selection, they will ask themselves different questions which can lead to them giving more precise reasons for their decisions.⁹⁵ Although I have not incorporated the empirical research, the

⁹³ *Ibid.*, 3-4.

⁹⁴ Viator, “When Cause-in-Fact Is More Than a Fact,” 1543, n. 97. The case citation for the quotation is *Thompson v. New Orleans Ry. & Light Co.*, 145 La. 805, 815 (1919).

⁹⁵ To be clear, Summers’s project is different than mine. Summers analyzes empirical research on causal selection to see if it supports Hart and Honoré’s model of the “commonsense” notion of causation, which they developed entirely out of ordinary language analysis. According

questions Summers recommends for judges are apropos of a selection-oriented picture in the style of Malone:

[J]udges can begin to ask themselves, for example: did the relevant event involve the violation of a norm? Was it a descriptive or a prescriptive norm? Was the prescriptive norm moral or legal (or of another kind)? ... On reflection, judges might hold that some of the factors affecting ordinary people's judgments of causal selection should not be used in the doctrine of legal causation; if so, judges can reject the relevance of those factors, supported by reasons. In this way, the common law can develop...⁹⁶

Summers's last two sentences refer to the fact that the common law, a precedential system, fundamentally grew out of the practice of giving *reasons*; it continues to develop on that basis.⁹⁷

If a judge justifies a decision on causation by baldly asserting that what they are doing is "common sense" without elaborating, that is an unsatisfactory reason because it is an infertile ground for developing law (not to mention it doesn't explain anything). Summers's questions offer *directions* for developing law because they identify different norms that actually guide the selection process. And notice the range of questions that Summers recommends. Questions about descriptive *and* prescriptive norms (both legal and moral) indicate, again, that the judge is not dealing with just policy questions when deciding liability for causing harm, but a subtle interplay of factual and normative considerations.

A Worry: Does the Selection-Oriented Picture Invite Ad Hoc Adjudication?

I want to end my proposal by addressing myself to a potential worry. Malone's causal-selection analysis has been called "pragmatic."⁹⁸ Within the philosophy of law the term

to Summers, the data suggests that Hart and Honoré were correct that people do select abnormal events and voluntary human acts as causes against other condition. Consequently, certain criticisms of Hart and Honoré's original theory should be rethought and reconsidered.

⁹⁶ Summers, "Common-Sense Causation in the Law," 817.

⁹⁷ Ibid. See also Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge, U.K., Cambridge University Press, 2008), 25.

⁹⁸ Again, see Moore, *Causation and Responsibility*, 91.

“pragmatic” has been used to refer to so many different things that it can be hard to know exactly what one means by it without laboring. For example, sometimes “pragmatic” means “in the tradition of classical American pragmatism”; sometimes it means “pragmatic” in the everyday sense of “what works best to achieve our ends”; other times it refers to some abstract idea that is part of a bigger “legal pragmatist” picture of jurisprudence; and there are more meanings than this. As applied to Malone, my sense is that people have in mind something along the lines of Posner’s sense of “pragmatic,” i.e., “the pragmatic judge aims at the decision that is most reasonable, all things considered, where “all things” include both case-specific and systemic consequences.”⁹⁹ That seems to me like it would fit Malone, although surely some will view him as stressing case-specific consequences more given the flexibility of purposes in causal inquiries. A common criticism of pragmatic adjudication is that it invites *ad hoc* decision-making, that is, “for always deciding a case in the way that will have the best immediate consequences without regard for possible future consequences.”¹⁰⁰ The criticism is that pragmatic adjudication is formless: that pragmatic judges do not have due regard for the rule of law or the political and social values of impartiality, continuity, coherence and predictability in the legal system (among other important systemic values) because they are preoccupied with what is the best solution in this case here and now. One might worry that the causal-selection analysis is open to the same criticism. If causal selection is our rubric for understanding the law’s causation requirement, and

⁹⁹ Richard Posner, *Law, Pragmatism, and Democracy* (Cambridge, Mass.: Harvard University Press, 2003), 13. As I mentioned in the Introduction Posner’s full sense of “pragmatic” is somewhat idiosyncratic, but I will not go into that here. For the moment this more general definition will do.

¹⁰⁰ *Ibid.*, 60.

causal selections are a product of interests, then doesn't the causal-selection proposal amount to deciding causal issues too partially or, expressed more cynically, "whatever the judge *likes*"?

There are two distinct but related questions here. First, is the criticism of pragmatic adjudication on point? And second, does it apply to causal-selection proposal? I do not think that there is anything about causal selection itself that creates a danger of judges failing to have due regard for the systemic consequences of their decisions. It is true that Malone is skeptical that present decisions will have much impact on future litigation, mainly because the relevant factual and policy issues are so closely related in ways unique to the particular case.¹⁰¹ Still, he says that judges "must make their decision in each case jibe with what has been authoritatively been said in the past."¹⁰² Judges must also be concerned to interpret legal texts (statutes, precedents) according to the ordinary meaning of the words appearing in those texts—else the jury could not perform its function, nor would the community have a stable understanding of legal obligation.¹⁰³ Earlier I mentioned (in Section 2) that judges' causal selections will not be the stuff of mere caprice: their selections will be guided by legal rules as contained in legal texts because they are the principal materials on which the community relies to figure out how a judge will adjudicate a legal dispute. However, as Posner sums it up,

A good pragmatic judge will try to weigh the good consequences of steady adherence to rule-of-law virtues ... against the bad consequences of failing to innovate when faced with disputes that the canonical texts and precedents are not well adapted to resolve.¹⁰⁴

¹⁰¹ Malone, "Ruminations on Cause-in-Fact," 99.

¹⁰² *Ibid.*

¹⁰³ Compare Posner, *Law, Pragmatism, and Democracy*, 62-63 and Malone, "Ruminations on Cause-in-Fact," 97-98.

¹⁰⁴ Posner, *Law, Pragmatism, and Democracy*, 63-64.

This description is perfectly in keeping with the causal-selection proposal and a legal system *that already adapts to difficult causation cases by innovating alternative tests and proof doctrines*. It remains to be seen whether the pragmatics of causal selection will lead to new problems.

Conclusion: Contributions to Knowledge

Now we must revisit where this all began. Having gone through all my arguments, I will presume that I have answered Doris's "oh yeah"er. That leaves the other critical response, "So what?" In other words, "Why is this project interesting?" This dissertation makes several contributions to knowledge.

1. The project is novel in several respects. First, currently there is no scholarly treatment of causation in the law—either a full treatment or a foundational treatment like this project—that is grounded in pragmatic ideas, in both the legal and philosophical senses. In his more explicitly pragmatic writings Posner says next to nothing about causation, and where Posner has discussed causation his concern has been to analyze it using economic concepts. Second, the connections I draw between major ideas is new. As far as I know, no other writer has constructed a critique of *causal* analysis from the main ideas of *Palsgraf*. Many legal writers, e.g., Weinrib, discuss *Palsgraf* within broader normative theories of tort law.¹
2. Although my analysis of *Palsgraf* overlaps with other authors in certain respects, the account I present in Chapter 1 is original. As far as I know, there is no published material that extracts fundamental ideas about proximate cause from an interpretation of Cardozo's opinion which stresses that defendants' relationship to risk is what matters most for tort liability.
3. Chapter 2 makes important instructive contributions. While the main claim is not new (many others have said the cause-in-fact inquiry is not policy-neutral), I explain

¹ See Ernest J. Weinrib, "Causation and Wrongdoing." *Chicago-Kent Law Review* 63, issue 3 (1987): 439-50, and *The Idea of Private Law: Revised Edition* (Oxford: Oxford University Press, 2012), 158-70.

in more depth than other authors how fact-value interplay occurs in both parts of the law's causation requirement. This is especially true of my discussions of the NESS test, and the proximate cause rules (the abnormal coincidences rule and the risk rule). The influence of descriptive norms on proximate cause assessments is also underemphasized in the literature. Chapter 2, therefore, performs an important teaching function.

4. My proposal in Chapter 3 to reinterpret causation in the law in terms of causal selection clears a path for future research. Malone began excavating that path in 1956. Since that time there have been no major efforts to develop his proposal. The only major writers besides Malone to take causal selection in the law seriously are Hart and Honoré, but it is not a main feature of their project. I have not found any effort in the literature to defend Malone like I have attempted to do here. The closest is James Viator; however, Viator's main article on this is more of an explanation of why Malone argued what he did when he did and a call to arms to defend his vision than an actual proposal in terms of selection. In philosophy Alex Broadbent and Jonathan Schaffer, two writers working in the metaphysics of causation, have argued that their contrastivist theory of causation can account for causal selection in our moral and legal practices and that this is an advantage of their theory.² Their emphasis is metaphysical, however, which is why I have not discussed it here. Possibly, parts of the contrastivist theory can be used to develop my proposal; this is another exciting prospect for future research.

² See Alex Broadbent, "Fact and Law in the Causal Inquiry," *Legal Theory* 15, issue 3 (2009): 173-91; Jonathan Schaffer, "Contrastive Causation," *The Philosophical Review* 114, no. 3 (2005): 343-45, and "Contrastive Causation in the Law," *Legal Theory* 16, no. 4 (2010): 259-97.

5. Finally, a small but valuable contribution. I am the originator of the phrase *causal divisionism*. This phrase can be a useful device for repeated reference to the standard hornbook position on causation, as well as having a compact term that captures the essence of the position instead of vague language (e.g., “the standard approach,” “the conventional analysis”).

Perhaps the main lesson of this dissertation can be summed up in the following quotation from Guido Calabresi, who says it better than I can:

If ... causal concepts came to be too rigidly defined and applied, they would no longer adequately serve the goals we can analyze nor would they permit the introduction of the goals we cannot affirm too openly or have not been able to analyze at all. Furthermore, such rigidity would mean that the ability to respond to changing goals and mixtures of goals, both analyzed and implicit, which characterizes common law adjudication and concepts, would be lost. No longer could new needs be introduced and old ones dropped without tearing the seamless web. This rigidity has not characterized the way in which cause has traditionally been used in torts. ... As in the past, causal concepts seem to be responding to changes in appropriate pressure points, yet doing so without breaking with the past or with any not clearly understood goals the past contains.³

³ Guido Calabresi, “Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.,” *The University of Chicago Law Review* 43, no. 1 (1975): 107.

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