
INTERVENING WRONGDOING IN TORT: THE
RESTATEMENT (THIRD)'S UNFORTUNATE EMBRACE
OF NEGLIGENT ENABLING

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Judges have long struggled to articulate rules and principles governing the responsibility, in tort, of a remote actor whose wrong consists of setting the stage for a second wrongdoer who inflicts injury on a victim.¹ The *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* reflects an aggressive strategy for dealing with this problem—it denies the problem's existence. Specifically, it maintains that negligence claims against remote actors require no different treatment than negligence claims against those whose carelessness causes injury without intervening wrongdoing.

As the Reporters all but concede, the thesis that negligence law does not treat remote actors distinctively contradicts case law and shunts aside some of negligence law's most basic concepts. It is, in effect, a recommendation of how negligence law *should* treat such actors, not a description of how it *does* treat them. The Reporters nonetheless defend their approach as a necessary prophylactic against judicial usurpation of the jury's province. In their view, to accept prevailing doctrine—which recognizes special rules that allow

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1. The analysis presented here on the issue of remote-wrongdoer liability concerns the particular form of responsibility embodied in tort law. The scope of actors' *moral* duties to take steps to avoid enabling wrongful and injurious conduct by others is a distinct question. Likewise, we say nothing directly as to the desirability of having government respond to recurring instances of "negligent enabling" by adopting safety regulations or criminal prohibitions. Our concern is the circumstances under which a person who suffers injury at the hands of another can identify a background actor as having committed a tort against her, such that she is entitled to civil recourse against that actor.

for, but also limit, remote-wrongdoer liability—is to provide judges with an irresistible invitation to overstate those limits and thereby to take jury questions for themselves.

It is in our view inappropriate for a “restatement” of the law to discard basic tort concepts rather than, for example, to acknowledge them and criticize them in commentary. It is doubly problematic when the stated justification for departing from doctrine is to solve a practical problem—judicial usurpation of the jury’s role—that has never been systematically studied. And it is more troubling still when a significant change is made to the law without any consideration of the costs and problems that stand to flow from that change. On the topic of intervening wrongdoing, we therefore offer courts two items for their careful consideration: (1) a warning that the *Restatement (Third)* does not accurately state the law regarding negligence actions against remote tortfeasors; and (2) a cogent alternative framework, based in established tort doctrine, for analyzing remote-tortfeasor liability.

Part I explains the Reporters’ approach to remote-tortfeasor liability, connecting it with Professor Robert Rabin’s notion of “enabling torts.” It shows how three sections of the *Restatement (Third)*—19, 34, and 37—together articulate a strategy for dealing with remote-tortfeasor liability, which aims to finesse what courts today regard as duty and causation issues, in part by reducing questions of responsibility to questions of apportionment of damages. Parts II and III show that case law does not support this approach: Part II demonstrates that there are vast domains of negligence law—including many the Reporters purport to be describing—that disconfirm their characterization. Part III shows that lines of decision that impose negligence liability on remote actors do *not* do so on the “all-negligence-is-negligence” rationale adopted by the Reporters. Instead, they do so on a limited set of grounds that authorize but also limit the occasions for the imposition of such liability. In our Conclusion, we pull together the strands of Part III so as to provide judges with a practical framework for decision that better tracks prevailing doctrine.

I. 19 + 34 + 37 = NEGLIGENT ENABLING LIABILITY

Section 19 of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* is so understated as to seem undeserving of being a section. It says, “The conduct of a defendant *can lack reasonable care* insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.”² Does anyone dissent? Owen hands his car keys to Duncan, whom he knows to be heavily intoxicated; Duncan drunkenly runs down

2. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 19 (Proposed Final Draft No. 1, 2005) (emphasis added).

Petra. Would any court hold that Owen has not acted carelessly toward Petra just because his conduct “combine[d] with” and “permit[ted]” Duncan’s? The Reporters tell us that section 19 exists to highlight “a special case” of the general concept of fault or breach.³ But like instructions for a word-processing program stating that the program “can be used to write poems,” section 19 seems anxious to convey a thought that nobody was prepared to doubt.

And yet section 19 is neither banal nor innocent. Seeing why requires reading it in light of two other sections of the *Restatement (Third)*’s physical-harm component—sections 34 and 37—as well as principles of apportionment.

Section 34 reads, “When a force of nature or an independent act is also a factual cause of physical harm, an actor’s liability is limited to those harms that result from the risks that made the actor’s conduct tortious.”⁴ Like section 19, it states a particular application of a general proposition. The general proposition is contained in the “scope-of-liability” (that is, proximate cause) provisions of section 29.⁵ Sections 29 and 34 both provide that a careless act that causes physical harm to another will subject the actor to liability only if the risk of that harm is one of the risks that rendered the act careless.⁶ So again we confront the question of why the Reporters have bothered to set out in a separate section an idea already articulated elsewhere.

For section 34 the explanation is this: although it is presented as a limit on liability, the section’s primary aim is to create space for liability by replacing a narrower limitation left over from days when judges were (supposedly) in the grips of formalist nonsense. Specifically, we are told, premodern judges once falsely imagined that each injury-producing event had a “final” cause and that liability could attach only to a wrongdoer whose wrong operated as such a cause.⁷

Suppose a train being driven by engineer *E* approaches a point at which the tracks are traversed by a road and that *E* neglects his obligation to sound the train’s horn. Now imagine two scenarios following from *E*’s misconduct: In Scenario 1, driver *P*, who is not paying attention, carelessly drives his car onto the tracks just as the train is approaching, leaving *E* with no chance to stop before running *P* down. Under the final cause framework, even if due care required *E* to blow the horn, and even if the noise would have induced *P* to stay off of the tracks, *P*’s estate would not be able to

3. *Id.* § 19 cmt. d.

4. *Id.* § 34.

5. *See id.* § 29 (“An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.”).

6. *See id.* §§ 29, 34; *see also id.* § 34 cmt. a (“The rule stated in this Section is functionally the same as § 29 . . .”).

7. *Id.* § 34 cmt. a.

recover from *E* (or *E*'s employer), because *P* would be deemed "the" cause of his own death—an idea given expression through the all-or-nothing doctrine of contributory negligence.⁸

In Scenario 2, *P* does not carelessly drive onto the tracks. Instead, his stopped car is pushed into the path of the train by a second car driven by careless intervening actor *I*. Even if *P* could later prove that he would have escaped injury had *E* sounded the whistle before *I*'s careless act,⁹ *E* would again be spared from liability under the final cause framework.¹⁰ Of course this conclusion would not be expressed in terms of contributory negligence. Rather, the claim against *E* would fail because *I*'s carelessness would be deemed a superseding cause in relation to *E*'s carelessness.¹¹

Section 34 stands first and foremost for the rejection of the final cause framework. It aims to make room for liability by rejecting the idea that the intervening infliction of injury by an autonomous responsible agent—whether the victim or a third party—provides a sufficient ground to spare from liability an actor whose more remote wrongful acts also contributed to that injury. By identifying section 29's scope-of-the-risk test as the relevant limit in cases of intervening wrongdoing, section 34 supplants a relatively narrow liability rule with one under which *E* would be subject to liability in both Scenarios 1 and 2 as one of two careless causers of a foreseeable, injury-producing accident.

In authorizing *P*'s estate to look past intervening wrongdoers to remote actor *E*, section 34 does *not* contemplate the exoneration of the immediate injurer. Rather, damages are to be apportioned on a percentage basis among any at-fault actor whose faulty conduct causes a given injury.¹² Thus, in Scenario 1 the fact finder would be instructed to assign a percentage of fault to *P*, while in Scenario 2 it would be told to apportion liability as between defendants *E* and *I*. In this way, the legal-fictional bludgeon of final cause analysis—one which armed judges with a relatively broad power to dismiss tort cases—has been replaced by the finely wrought scalpel of apportionment, an instrument ordinarily to be wielded by jurors.

Still, it would be inaccurate to say that section 34 entirely collapses the issue of intervening wrongdoing into the question of apportionment, although it comes close to doing so. This is because

8. See generally *id.* § 34 cmts. a–c & reporters' note cmt. a (discussing the final cause framework and its history).

9. For example, the sounding of the horn might have made *P* especially attentive to the risk of collision, which in turn would have induced him to set his emergency brake, which in turn would have prevented him from being forced onto the tracks when bumped by *I*.

10. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 34 cmt. b & reporters' note cmt. a. (Proposed Final Draft No. 1, 2005).

11. See *id.* § 34 cmts. b–c.

12. See *id.* § 34 cmts. a, c.

it allows that the intervening wrongdoing of an independent actor can still entirely defeat the imposition of liability on a more remote actor if the wrongdoing falls outside the “scope of the risk.”¹³ Framing the problem of intervening wrongdoing within scope-of-the-risk analysis accomplishes three goals for the Reporters. First, as already explained, it eliminates final cause analysis and expands liability.¹⁴ Second, it provides a nonmetaphysical rationale for the few cases in which intervening misconduct should be deemed to “exonerate” a remote wrongdoer. The justification for the exoneration does not reside merely in the fact of another autonomous actor’s intervening wrongful act. (There is no sense that the injuring of the victim was exclusively the intervener’s doing and not the doing of the defendant.) Instead, the intervention defeats liability only by virtue of a rule stating that careless actors cannot be liable if they cause injuries in particularly serendipitous ways.¹⁵

For example, consider a variation of the *E* and *P* situation that introduces a new defendant *M* and generates two more liability scenarios. Suppose *P*’s car has been carelessly manufactured by *M*, such that it can stall without warning. Because of the defect, *P*’s car for the first time stalls on train tracks. In Scenario 3, engineer *E* has plenty of time to stop his train, but because *E* is in a monstrous mood, he not only refrains from sounding the train’s horn but deliberately runs over *P*’s car, killing *P*. In Scenario 4, *P*’s car, while stalled on the tracks because of the manufacturing defect, is swallowed by a sinkhole that opens up without warning, killing *P*. According to section 34, on the issue of *M*’s liability to *P*’s estate, Scenarios 3 and 4 are identical, and not merely in result. The feature of *E*’s malicious intervening wrongdoing that renders it a reason to spare *M* from liability in Scenario 3 is exactly its quality of being as odd or unpredictable as the opening of the sinkhole in Scenario 4. That Scenario 3’s intervening act took the form of another’s heinous wrong is irrelevant. What matters is that, because it was not reasonably foreseeable, it cannot be deemed to have been a risk that rendered *M*’s conduct careless.

The third and final aspiration behind the reframing of intervening-wrongdoing issues by reference to section 29’s scope-of-the-risk test is in some ways the most fundamental. It concerns not the content of the relevant rule but the identity of the decision maker who applies it. According to the Reporters, old-style final cause analysis was not just nonsense, but pernicious nonsense, because it armed judges with a mechanism by which to toss out

13. See *id.* § 34 & cmt. g.

14. See *supra* notes 7–12 and accompanying text.

15. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 34 cmts. e, g & reporters’ note cmt. e (Proposed Final Draft No. 1, 2005).

negligence claims on matter-of-law grounds.¹⁶ By changing the question being asked about the significance of intervening misconduct into the scope-of-the-risk question, section 34 directs the issue away from judges to jurors, who under section 29 are charged with the task of answering that question.¹⁷

We are almost to the point of fully appreciating section 19's significance. But first we must briefly attend to section 37.¹⁸ It is concerned with drawing the line between misfeasance and nonfeasance—that is, between those situations governed by section 7's default general duty to exercise reasonable care¹⁹ and those governed by the opposite default rule of no duty. This line is defined in terms of risk creation. If an actor is being sued for an injury that consists of the realization of a risk that was generated at least in part by an act of the actor, we are in the domain of section 7. If an actor is being sued for an injury that consists of the realization of risks generated only by the acts of others, we are in the domain of the no-duty-to-rescue rule.²⁰

Section 37's expansive definition of misfeasance²¹ is critical because it allows the Reporters to evade a basic black-letter principle of which sections 19 and 34 would otherwise blatantly run afoul. This is the principle that “[g]enerally, a person has no duty to prevent a third person from causing harm to another.”²² Rather than denying this principle's validity, the Reporters concede that it is valid as far it goes, but they then insist that it does not go very far at all. It applies only in the realm of “nonfeasance,” defined narrowly as the realm in which an actor plays no role whatsoever in creating the risk of another acting wrongfully.²³

Taken together then, sections 19, 34, and 37—as read against the backdrop of apportionment principles—assert a set of propositions that is more substantial than any one of them might seem to be. It can be stated as follows:

- (1) An actor *A* is under a general duty to take reasonable care against increasing the risk that an independent actor *IA* will wrongfully cause physical harm to a victim *V*.

16. *See id.* § 34 cmt. c.

17. *Id.* § 29 cmt. q.

18. *Id.* § 37 (“An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38–44 is applicable.”).

19. *Id.* § 7(a) (“An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.”).

20. *Id.* § 37 cmt. b.

21. We will argue in a separate paper that the core of the tort concept of misfeasance is closer to the idea of “doing unto another” than it is to the idea of mere risk creation.

22. *Fiala v. Rains*, 519 N.W.2d 386, 389 (Iowa 1994).

23. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 cmts. c–d (Proposed Final Draft No. 1, 2005).

- (2) If A unreasonably creates such a risk and if that risk is realized—both questions for the fact finder—A is subject to liability to V.
- (3) If A and IA are subject to liability to V, the fact finder shall apportion damages among A, IA, and V.

Perhaps these propositions seem no more striking than any of the sections from which they emanate. Some examples may alter that impression: A person cosigns a friend's application for a car loan, knowing that the friend has the propensity to be overcome by "road rage." Under sections 19, 34, and 37, he is subject to liability to a person whom the friend carelessly runs into during a bout of rage.²⁴ A fertilizer manufacturer is aware that its product can be converted into a powerful bomb by determined terrorists. If its failure to take steps to reduce the risk of such misuse functions as a cause of the bombing, it is subject to liability to all bombing victims.²⁵ A woman is aware of her ex-boyfriend's violent jealousy, as well as his occasional appearances at a bar located in their small town. She nonetheless agrees to meet a date for a drink at the bar. If her ex-boyfriend shows up and proceeds to pummel her date, she is subject to liability.²⁶ A website permits users to create individual accounts and to post messages offering and seeking goods and services, but it declines to monitor the type of transactions being consummated. One account holder maintains a posting offering "full body massage therapy." Another takes up the offer, agreeing to pay for a hotel room in which they will meet. The buyer, in fact, uses the occasion to assault and rob the masseuse. By the terms of the *Restatement (Third)*, the website could be subject to liability to the victim.²⁷

In sum, the liability regime envisioned in this part of the

24. *Cf. Zedella v. Gibson*, 650 N.E.2d 1000, 1003–04 (Ill. 1995) (refusing to recognize a negligent entrustment claim against a loan cosigner even assuming that the cosigner was aware that the driver was prone to careless driving).

25. *Cf. Port Auth. v. Arcadian Corp.*, 189 F.3d 305, 309 (3d Cir. 1999) (dismissing, on no-duty and proximate cause grounds, a suit against a fertilizer manufacturer brought by the owner of buildings that were damaged by a terrorist bombing).

26. *Cf. Fiala*, 519 N.W.2d at 389 (ruling for the defendant as a matter of law on similar facts).

27. This example is based on recent events that have resulted in calls for greater regulation of websites such as Craigslist. See Christopher D. Kirkpatrick & Andrew Dunn, *Craigslist Criticized and Under Scrutiny After Rape Charge*, CHARLOTTE OBSERVER, June 5, 2009, at 1A, available at <http://www.charlotteobserver.com/local/story/763833.html>. As noted above, our argument is exclusively concerned with the imposition of liability in tort, rather than the question of whether activities that increase the risk of misconduct by others are appropriately subject to regulation. The federal Communications Decency Act has, of course, set limits on the liability of persons and entities that transmit others' communications via the Internet. See 47 U.S.C. § 230(c) (2006).

Restatement (Third) attempts to solve the problem of intervening wrongdoing by embracing what Professor Rabin memorably described as “enabling torts.”²⁸ On this view, the negligent enabling of the wrongful infliction of injury by another is analytically indistinct from directly causing harm through carelessness of one’s own—it is garden-variety negligence. Finally, we have an explanation of why section 19 is so understated. If courts in the past had not been in the grips of nonsense about final causes, there would be no point in identifying negligent enabling as a distinct form of negligence. But they were once so gripped, and therefore there is a need for provisions that state the “obvious”—that judges should not take cases away from juries on the basis of supposedly distinct rules governing liability for conduct that is careless because it increases the risk that another actor will wrongfully injure a victim.

II. DISCONFIRMING DATA

Section 19, read in conjunction with sections 34 and 37, treats negligent enabling as an unremarkable application of general principles governing liability for negligent misfeasance causing physical harm. In other words, the intervention of tortious conduct as to the victim by a third party is just like the intervention of any other natural event or human action that lies between a defendant’s conduct and the injuring of the plaintiff, except that this sort of event might later call for the fact finder to apportion liability. This is unfortunate. Doctrinally, the concept of negligent enabling runs afoul of numerous well-established lines of decision (and statutes) that reject it. Analytically, it muddles distinct grounds for liability. Pragmatically, it makes the adjudication of cases that involve intervening wrongdoing more difficult. Theoretically, it threatens to reduce the concept of a tort—conduct that is wrongful toward and injurious of another—to the distinct and broader concept of antisocial conduct that causes harm.

We will focus here on the doctrinal and analytic inadequacies of the negligent enabling idea. These inadequacies can in turn be divided into “disconfirming data” (Part II) and “false positives” (Part III). Disconfirming data primarily consist of judicial decisions that, as a matter of law, reject the imposition of liability for negligent enabling. False positives are instances in which courts appear to allow for the imposition of liability for negligent enabling but in fact impose liability on different, narrower terms. Because *Enabling Torts*²⁹—the essay in which Professor Rabin coined the phrase—is a

28. See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

29. *Id.* We recognize that *Enabling Torts* was written as an essay for a symposium on “Judges as Tort Lawmakers” and that it was intended as an exercise in doctrinal trend-spotting. We question below whether there was much evidence of a trend even when the essay was written. In any event, the

source of many of the arguments to which we are responding, we will make frequent reference to it as we pursue our criticisms of the *Restatement (Third)*.

The presentation of sections 19 and 34 as restatements of current doctrine conflicts with several prominent and related features of current tort law, including (1) decisions declining to expand the concept of negligent entrustment, (2) decisions rejecting social host liability, and (3) the dominance of “modified” forms of comparative fault.

A. *Holding the Line on Negligent Entrustment*

The novel idea that negligent enabling provides a general ground for tort liability vaguely resembles the established idea of liability for negligent entrustment. Indeed, some would say that negligent enabling is just negligent entrustment doctrine worked pure—carried through to its logical endpoint. This is probably why *Vince v. Wilson*³⁰ features prominently in Rabin’s *Enabling Torts* essay.³¹ In *Vince*, a great-aunt provided funds to her grandnephew for the purchase of a car even though she knew him to be a substance abuser who was unlicensed and had failed several driving tests. (Apparently she also told the car dealer that he was unlicensed.) When the nephew drove the car recklessly and injured his passenger, the passenger sued the great-aunt and the dealer.³² The Vermont Supreme Court permitted both claims to go forward on the theory that the careless provision of funds for the purchase of a car and the sale of a car are no different from the act of carelessly handing over one’s own car to an incompetent driver.³³

Then and now, *Vince* stands at (or outside) the fringes of negligent entrustment law. At its core, the doctrine recognizes duties that attend the possession of certain types of property. Specifically, the possessor³⁴ of a dangerous instrumentality—almost always a car or gun—is obligated to others who might foreseeably be harmed by the property’s misuse not to permit its use by someone whom the possessor knows (or, in some jurisdictions, has reason to

concept of “enabling torts” is now a part of academic parlance and therefore worthy of critical attention.

30. 561 A.2d 103 (Vt. 1989).

31. See Rabin, *supra* note 28, at 438–40.

32. *Vince*, 561 A.2d at 104, 106.

33. *Id.* at 104–06.

34. Some states seem to limit entrustment liability to legal owners of the dangerous instrumentality. See, e.g., *Hill v. West*, 189 N.C. App. 189, 193, 657 S.E.2d 694, 697 (Ct. App. 2008) (citing *Coble v. Knight*, 130 N.C. App. 652, 654, 503 S.E.2d 703, 705 (Ct. App. 1998)). However, most states in principle allow entrustment claims against anyone who, as a matter of right, exercises control over the instrumentality. See, e.g., *Neary v. McDonald*, 956 P.2d 1205, 1209 (Alaska 1998); *Tissicino v. Peterson*, 121 P.3d 1286, 1289 (Ariz. Ct. App. 2005); *Savage v. LaGrange*, 815 So. 2d 485, 492 (Miss. Ct. App. 2002); *Green v. Harris*, 70 P.3d 866, 868 (Okla. 2003).

know) is incompetent to handle it.³⁵ The lynchpin of liability is the possessor's continuing dominion over the property: his power to *permit or prohibit* use of the dangerous item. With the benefits of the right of control comes an attendant responsibility to be prudent in granting others access to the item.³⁶ This is why the vast majority of states that have considered the question have concluded that an outright sale or donation of a car—a relinquishment of ownership and control—cannot count as an entrustment, regardless of what the seller or donor knows about the fitness of the would-be driver.³⁷ True, a few court decisions other than *Vince* have indicated

35. Compare *Estate of O'Loughlin v. Hunger*, Civ. Action No. 07-1860, 2009 WL 1084198, at *5 (E.D. Pa. Apr. 21, 2009) (applying New Jersey and Pennsylvania law and holding that a defendant-mother who left her car keys on a table in her home, such that her son was able to steal them, did not "entrust" her car to her son), with *Edwards v. Valentine*, 926 So. 2d 315, 321 (Ala. 2005) (holding that where the defendant's brother-in-law had in the past borrowed the defendant's car, and where the car keys were readily available to the brother-in-law, the defendant could be found to have entrusted his car to his brother-in-law).

36. See *Neary*, 956 P.2d at 1209–11; *Tissicino*, 121 P.3d at 1289–90; *Mills v. Crone*, 973 S.W.2d 828, 831–32 (Ark. Ct. App. 1998); *McCart v. Muir*, 641 P.2d 384, 388 (Kan. 1982); *Snodgrass v. Baumgart*, 974 P.2d 604, 607–08 (Kan. Ct. App. 1999); *Broadwater v. Dorsey*, 688 A.2d 436, 441 (Md. 1997); *Green*, 70 P.3d at 870–71; *Wittrien v. Burkholder*, 965 A.2d 1229, 1232–33 (Pa. Super. Ct. 2009); cf. *State v. Lead Indus. Ass'n*, 951 A.2d 428, 449–50 (R.I. 2008) (noting that a defendant's right to control an injury-producing article is a necessary predicate to the imposition of liability under a nuisance theory, and observing that the sale of the article prior to the causation of injury is a disavowal of control and therefore ordinarily a bar to liability).

37. See, e.g., *Day v. Williams*, 670 So. 2d 914, 916 (Ala. 1995); *Vic Potamkin Chevrolet, Inc. v. Horne*, 505 So. 2d 560, 561–63 (Fla. Dist. Ct. App. 1987) (en banc), approved, 533 So. 2d 261 (Fla. 1988); *Lopez v. Langer*, 761 P.2d 1225, 1227–29 (Idaho 1988); *Kirk v. Miller*, 644 P.2d 486, 490 (Kan. Ct. App. 1982); *Graham v. Rogers*, 277 S.W.3d 251, 253 (Ky. Ct. App. 2008), *discretionary review denied*, (Ky. 2009); *Broadwater*, 688 A.2d at 441–42; *Kinder v. Caplan*, No. CA 00-1554, 2002 WL 31958961, at *1 (Mass. Super. Ct. Dec. 26, 2002); *Woods v. Alken Auto Sales Ltd.*, 525 N.W.2d 511, 512 (Mich. Ct. App. 1994) (per curiam); *Laurel Yamaha, Inc. v. Freeman*, 956 So. 2d 897, 903–04 (Miss. 2007); *Sansonetti v. City of St. Joseph*, 976 S.W.2d 572, 579 (Mo. Ct. App. 1998); *Sikora v. Wade*, 342 A.2d 580, 582–83 (N.J. Super. Ct. Law Div. 1975); *Rush v. Smitherman*, 294 S.W.2d 873, 875–78 (Tex. Civ. App. 1956).

Decisions from a few states have declined to rule out the possibility that a certain kind of sale or donation might count as an entrustment. *Evans v. Sanchez Rubio*, Civ. Action No. 2:06-0995, 2007 WL 712291, at *4 (S.D. W. Va. Mar. 6, 2007) (noting the lack of West Virginia decisions on point, but opining that West Virginia law might permit a negligent entrustment claim based on a sale); *Pugmire Lincoln Mercury, Inc. v. Sorrells*, 236 S.E.2d 113, 114–15 (Ga. Ct. App. 1977) (declining to hold that a sale can never be an entrustment, but ruling for the defendant-seller on the ground that, as a matter of law, it had insufficient knowledge of the buyer's incompetence); *Johnson v. Johnson*, 611 N.W.2d 823, 826–27 (Minn. Ct. App. 2000) (noting decisions rejecting negligent entrustment claims against sellers, but deeming it unnecessary to adopt such a rule given that the defendant-seller had no basis for knowing of the driver's incompetence); cf. *Cook v. Schapiro*, 871 N.Y.S.2d 714, 715–16 (App. Div. 2009)

a willingness to apply the doctrine to outright sales or donations. However, two of these decisions are counterbalanced by contrary decisions in the same jurisdiction,³⁸ another has been called into question by a later decision,³⁹ and a fourth has been limited in a way that suggests that it rests upon an alternative theory of liability.⁴⁰

Even when it is construed broadly, the negligent entrustment doctrine neither entails nor points toward a regime of liability for negligent enabling. There is no general duty to refrain from selling or giving goods to persons just because the seller can or should foresee that the recipient might misuse the good. The owner of a

(granting summary judgment for the defendant–automobile seller for lack of any evidence that the seller had reason to believe that the buyer would be an incompetent driver, perhaps implying that a seller who had such reason could be subject to liability), *appeal denied*, 908 N.E.2d 927 (N.Y. 2009).

38. *Dodge Center v. Superior Court*, 244 Cal. Rptr. 789, 793–94 (Ct. App. 1988), ruled that the sale of a car cannot provide the basis for a negligent entrustment claim. That same year, however, *Talbott v. Csakany*, 245 Cal. Rptr. 136, 138–39 (Ct. App. 1988), declined to adopt a similar blanket rule with respect to donors. Notably, *Talbott* still held for the donor as a matter of law by placing on the plaintiff a very demanding burden of proof on the issue of causation. *See id.* at 140 (holding that the plaintiff's claim failed for lack of evidence that the donee would have been unable to secure a car from some source other than the donor).

Tosh v. Scott, 472 N.E.2d 591, 592 (Ill. App. Ct. 1984), held that a seller of a vehicle who does not retain control over it cannot be held liable for negligent entrustment. However, *Small v. St. Francis Hospital*, 581 N.E.2d 154, 157–58 (Ill. App. Ct. 1991), ruled that negligent entrustment theory could apply to a used-car dealer who sold a car to a 15-year-old buyer who lacked a driver's license. In a subsequent decision barring a negligent entrustment claim against a defendant alleged only to have assisted the driver by helping to finance the driver's purchase of the car, the Illinois Supreme Court noted this split without resolving it. *See Zedella v. Gibson*, 650 N.E.2d 1000, 1004 (Ill. 1995).

39. *Flieger v. Barcia*, 674 P.2d 299, 301 (Alaska 1983), cavalierly deemed the question whether the defendants owned the car at the time of the accident “irrelevant” to the issue of liability for negligent entrustment. *Flieger's* complete failure to explain or support this conclusion was noted in a subsequent decision from the same court, which rejected application of the negligent entrustment doctrine to a mother who was at most a co-owner of a car that had been driven badly by its other owner, her adult son. *See Neary*, 956 P.2d at 1208.

40. *Kahlenberg v. Goldstein*, 431 A.2d 76, 83–84 (Md. 1981), held that a parent who had donated a car to his son could be held liable for negligent entrustment. As later explained by the Maryland Court of Appeals, *Kahlenberg* turned on the fact that the son was a minor living with and under the control of his father. *Broadwater*, 688 A.2d at 442. In this sense, *Kahlenberg* is better understood as either a case that looked behind the purported “gift” and concluded that it really was not one or a case that treated the claim as resting on a negligent supervision rather than a negligent entrustment theory. Another decision that seems to better fit the model of negligent supervision rather than negligent entrustment is *Green*, 70 P.3d at 871 (holding that, given the parents' control over their son's use of what was nominally his car, the parents might be subject to liability for negligent entrustment).

lawn-and-garden store, for example, is not required to refrain from selling a hedge trimmer or lawn mower to a person whom she happens to know is generally prone to irresponsible behavior, notwithstanding that such a person's use of that equipment may pose risks of harm to others.⁴¹ Likewise, courts have rebuffed the tellingly few instances in which car-crash victims have sued cell phone manufacturers on the theory that the manufacturers could have foreseen that their products would induce careless driving. In the words of one such court, the imposition of liability in such circumstances would be a misattribution of responsibility: "It is the driver's responsibility to drive with due care."⁴²

Even with respect to allegations of carelessly permitting access to cars, there are clear and categorical instances of nonactionable enabling. A car manufacturer might know that a certain percentage of its cars will be sold by franchise dealers to incompetent drivers. Yet it has no duty to take care to instruct those dealers to refrain from selling to such drivers.⁴³ Insurers are not liable for issuing policies to persons with bad driving records, even if the issuance of a policy is a necessary condition of injurious careless driving.⁴⁴ Banks

41. *Cf.* *Brown v. Sears, Roebuck & Co.*, 328 F.3d 1274, 1283 (10th Cir. 2003) (applying Utah law and declining to impose a duty on a seller of lawn mowers to protect small children in the vicinity who may be injured when the mowers are operated in reverse).

42. *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004); *see also* *Silber v. Motorola, Inc.*, 711 N.Y.S.2d 475, 475–76 (App. Div. 2000) (affirming summary judgment for the manufacturer of cell phone products in a suit alleging that defects in the products distracted the driver who crossed over the median and struck the plaintiffs); *cf.* *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (dictum) (suggesting that it would be inappropriate to deem cell phones a nuisance only because they foreseeably contribute to poor driving).

It is open to adherents of the "enabling torts" view to suggest that decisions such as these turn not on special duty and proximate cause rules pertaining to cases of intervening wrongdoing, but instead on implicit and perhaps appropriate matter-of-law rulings in favor of these defendants on the issue of breach. Such a reconstruction is unsatisfactory for at least three reasons: First, it is not the basis actually provided by the courts that have rendered these decisions. *See, e.g., Williams*, 809 N.E.2d at 476–79 (focusing on duty); *Silber*, 711 N.Y.S.2d at 476 (focusing on proximate cause and superseding cause). Second, one would need to explain why as a categorical matter this application of negligence law would warrant judicial removal of a question (breach) that is normally reserved for the jury. Third, one can imagine evidence of carelessness that should be sufficient to get these cases to juries on the issue of breach. For example, if there were a legal duty on the part of cell phone manufacturers to take care against enabling bad driving, one might imagine that due care would require them always to sell mobile phones in packaging that also includes hands-free adapter kits for cars.

43. *See Salinas v. Gen. Motors Corp.*, 857 S.W.2d 944, 947–51 (Tex. App. 1993).

44. *See Syah v. Johnson*, 55 Cal. Rptr. 741, 748 (Ct. App. 1966) (interpreting the prior decision of *Vice v. Auto. Club of S. Cal.*, 50 Cal. Rptr. 837 (Dist. Ct. App. 1966), as holding that an insurer does not entrust a vehicle to an

and relatives that make car loans to persons known to be bad drivers, or that otherwise support another's ownership of a car, are likewise not subject to liability for negligent entrustment.⁴⁵

On this last point, it is worth quoting a 2004 Illinois appellate decision that not only rejects a negligent entrustment claim against a bank for issuing a loan to a driver (Chapman) with a history of moving violations, but does so while referring to a prior Illinois Supreme Court decision that rejected a negligent entrustment claim against a parent (Robert) for having cosigned a car loan for his son (Daniel):

Just as Robert *enabled* Daniel to finance his car, the bank in this case *enabled* Chapman to finance the purchase of the Ford Escort. Robert knew that Daniel was going to use the proceeds of the loan he was cosigning to buy a car, just as the bank in this case knew that Chapman was going to buy a car. Our supreme court was not willing to hold that the cosigner who *enabled* the purchase of a dangerous article could be liable under a negligent-entrustment theory. We are similarly unwilling to apply that theory when a lending institution

incompetent driver simply by issuing a liability policy without which the driver would not have driven).

45. See *Mills v. Crone*, 973 S.W.2d 828, 832 (Ark. Ct. App. 1998) (holding that the fact that parents helped to pay for their son's car and carried the car on their auto-insurance policy is insufficient as a matter of law to subject them to liability for negligent entrustment); *Drake v. Morris Plan Co. of Cal.*, 125 Cal. Rptr. 667, 670 (Ct. App. 1975) (holding that the mere loan of funds to enable the purchase of a car is insufficient to count as an entrustment of the car to the driver); *Peterson v. Halsted*, 829 P.2d 373, 378 (Colo. 1992) (holding that a parent who cosigns a child's application for a car loan has not thereby entrusted the car to the child); *Zedella v. Gibson*, 650 N.E.2d 1000, 1003-04 (Ill. 1995) (holding that a father who cosigns a loan for his son's purchase of a car and who provides help with payments is not subject to liability for negligent entrustment); *Polizzotti v. Gomes*, 2006 Mass. App. Div. 40, 41 (Dist. Ct. 2006) (holding that a parent who helped finance the purchase of a son's motorcycle is not subject to negligent entrustment liability); *Sligh v. First Nat'l Bank of Holmes County*, 735 So. 2d 963, 974-75 (Miss. 1999) (holding that a lender is not subject to liability for negligent entrustment); *Connell v. Carl's Air Conditioning*, 634 P.2d 673, 675 (Nev. 1981) (holding that an employer who assists an employee in making payments on the employee's car has not entrusted the car to the employee); *Nichols v. Atnip*, 844 S.W.2d 655, 660-61 (Tenn. Ct. App. 1992) (holding that parents who help their adult son pay some car-related expenses are not subject to liability for negligent entrustment); *Mejia v. Erwin*, 726 P.2d 1032, 1034 (Wash. Ct. App. 1986) (holding that a father who pays for his son's rental car with his credit card has not entrusted the car to his son).

In *Arkansas Bank & Trust Co. v. Erwin*, 781 S.W.2d 21, 23 (Ark. 1989), the court concluded that the plaintiff-crash victim could assert a negligent entrustment claim against a bank that financed the negligent driver's purchase of the car. However, the bank had been appointed the legal guardian of the driver, who had been declared legally incompetent because of a severe mental illness. *Id.* at 22-23. Needless to say, the role of bank qua guardian is quite distinct from its role in a standard arm's-length loan transaction.

enables such a purchase.⁴⁶

It is difficult to imagine a more forthright rejection of the idea that negligent entrustment naturally leads to the endorsement of liability for mere negligent enabling.⁴⁷

Perhaps the most prominent contemporary refusal to endorse the slide from negligent entrustment to negligent enabling is the rejection by courts of negligent marketing claims by shooting victims against gun manufacturers. At the time *Enabling Torts* was published, Professor Rabin could point to Judge Weinstein's characteristically aggressive recognition of negligent marketing claims in *Hamilton v. Accu-Tek*.⁴⁸ But that decision proved to be a false portent—the New York Court of Appeals promptly rejected its reading of New York law.⁴⁹ Another leading decision, *Young v.*

46. *Northcutt v. Chapman*, 819 N.E.2d 1180, 1184–85 (Ill. App. Ct. 2004) (emphasis added) (referencing *Zedella*, 650 N.E.2d 1000).

47. Another category of cases said to illustrate the movement of doctrine toward the “enabling torts” view are those in which a person injured by a car thief's bad driving is permitted to sue the owner of the car for carelessly leaving her keys in the ignition, thereby enabling the theft and the bad driving. *See, e.g., Davis v. Thornton*, 180 N.W.2d 11 (Mich. 1970). Yet even the Reporters acknowledge that the jurisdictions that bar such claims outright outnumber jurisdictions that permit them “in the typical key-in-the-car case” by roughly two to one and that many other jurisdictions allow such claims only upon a showing that the defendant ignored an identifiable and heightened risk of theft such that his conduct involved gross negligence or recklessness. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 19 reporters' note cmt. c (Proposed Final Draft No. 1, 2005); *see also* William H. Danne, Jr., Annotation, *Liability of Motorist Who Left Key in Ignition for Damage or Injury Caused by Stranger Operating the Vehicle*, 45 A.L.R.3d 787 § 2(a) (1972) (summarizing the existing “key-in-the-ignition” case law).

That courts continue to distinguish key-in-the-ignition cases from cases of negligent entrustment is itself a clear indication that they regard negligent entrustment as a discrete form of negligence liability rather than an instantiation of the broader idea of liability for negligent enabling. *See, e.g., Mackey v. Dorsey*, 655 A.2d 1333, 1338 (Md. Ct. Spec. App. 1995) (holding that an owner who momentarily exits the car with the keys still in the ignition, thus enabling a passenger to take the car without permission, is not liable on a negligent entrustment theory). Whatever disputes there may be as to what constitutes “entrustment,” the concept quite clearly refers to something more robust than a careless act that makes possible another's foreseeable misuse of personal property.

48. 62 F. Supp. 2d 802 (E.D.N.Y. 1999), *vacated sub nom. Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d 21 (2d Cir. 2001); *see* Rabin, *supra* note 28, at 436–37 & n.13. Our criticism of this aspect of Professor Rabin's analysis is of course made with the benefit of hindsight. Yet anyone who would hitch an exercise in doctrinal prognostication to an as-yet unratified decision from the fantastically thoughtful and innovative Judge Weinstein is surely assuming a risk.

49. *See Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001) (“A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control.” (quoting *D'Amico v. Christie*, 518 N.E.2d 896, 901 (N.Y. 1987))); *see also Patterson v. Rohm Gesellschaft*, 608 F.

Bryco Arms,⁵⁰ issued by the Illinois Supreme Court in 2004, similarly rejected shooting victims' claims against manufacturers, there raised in the form of a public nuisance suit asserting that the manufacturers' marketing of guns had rendered the Chicago streets so unsafe as to interfere unreasonably with the victims' right to use public spaces. *Young* rejected the nuisance theory on several grounds, including that the intervening criminal acts between the initial sale of the gun and the shooting rendered the former not a proximate cause of the latter.⁵¹ Further judicial development in this area was forestalled by Congress's passage in 2005 of the Protection of Lawful Commerce in Arms Act,⁵² itself justified in part as being necessary to prevent the imposition of tort liability on terms flouting ordinary notions of personal responsibility. Yet a significant criticism of this statutory intervention was its superfluousness, given that no state high court had yet shown interest in endorsing the application of a negligent marketing or public nuisance theory to claims by shooting victims against gun manufacturers.⁵³

In sum, courts continue to resist the dilution of the circumscribed concept of negligent entrustment into the much broader concept of negligent enabling. That they have done so even in the face of substantial pressure from the plaintiff's bar, even in cases brought by sympathetic claimants, and even where policy goals such as compensation and deterrence might well be advanced demonstrates that they reject the composite assertion of sections 19, 34, and 37 that carelessness increasing the risk of misconduct by another calls for the application of generic negligence principles.

B. *The Widespread Rejection of Social Host Liability*

The scourge of drunk driving has given rise to understandable efforts by plaintiffs to extend liability beyond drunk drivers to others who have enabled drunk driving. One source of liability is dram shop acts, which allow a suit by a victim of drunk driving against the commercial establishment that overserved the driver.⁵⁴ Tempting as it might be to cite these statutes as evidence of a legislative embrace of negligent enabling, they are of no help. In

Supp. 1206, 1215 (N.D. Tex. 1985) (noting that, under Texas law, a manufacturer of a handgun is deemed not to have proximately caused injuries stemming from criminal misuse of the gun).

50. 821 N.E.2d 1078 (Ill. 2004).

51. *Id.* at 1090-91; *see also id.* at 1088 (citing similar rulings issued by other courts).

52. 15 U.S.C. §§ 7901-7903 (2006).

53. *See* Anthony J. Sebok & Timothy D. Lytton, *The New Bill to Protect the Gun Industry from Lawsuits: How It Strikes at the Heart of Age-Old Tort Law Principles*, FINDLAW'S WRIT, Feb. 23, 2004, http://writ.news.findlaw.com/commentary/20040223_lytton.html.

54. *See, e.g.*, 235 ILL. COMP. STAT. ANN. 5/6-21 (West 2005); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2001).

fact, they mark self-conscious departures from, rather than applications of, common law tort principles.⁵⁵

When first enacted, these laws were conceived not as tort-reform statutes, but as sin taxes and poor-relief laws designed primarily to discourage the sale of alcohol and to shift to purveyors the cost of supporting families thrown into poverty by “drunkards” whose “enslavement” to alcohol had rendered them less than fully competent adults.⁵⁶ This is why many dram shop acts initially contained no requirement of fault or wrongdoing on the part of the purveyor and took pains to emphasize that family members of the drunkard were entitled to recover for loss of support.⁵⁷ Later these statutes came to be conceived in a more regulatory spirit, focusing particularly on traffic safety.⁵⁸ In this incarnation, they have tended to require as a condition of liability that the commercial establishment serve alcohol to a minor or a visibly intoxicated customer who proceeds to injure a third party.⁵⁹ Regardless, dram shop acts have formed part of longstanding schemes by which states have heavily regulated the commercial sale of alcohol. Their terms represent conditions historically and legitimately placed by governments on a particularly dangerous form of business, one for which an official license has always been required, and which the government retains the power to ban outright.⁶⁰

Seemingly more promising for the cause of the Reporters are judicial decisions recognizing so-called social host liability. The wrong alleged in this sort of case is that the host of an ordinary social event failed adequately to monitor his or her guests’ intake of alcohol (or to take steps to determine if a departing guest was competent to drive, or to try to dissuade or prevent a mildly intoxicated guest from driving), and that a guest drove away from the party intoxicated and thereby injured the victim. In light of the

55. 1 JAMES F. MOSHER, *LIQUOR LIABILITY LAW* § 2.01[2], at 2-4 to 2-5 (1991) (noting that dram shop acts “worked a drastic change from the common law” by treating intoxicated adults as incompetents and thereby enabling victims of their actions to sue other persons).

56. See ELAINE FRANTZ PARSONS, *MANHOOD LOST: FALLEN DRUNKARDS AND REDEEMING WOMEN IN THE NINETEENTH-CENTURY UNITED STATES* 36-37 (2003) (noting that by 1890, twenty-one states had adopted “civil damage laws”—another name for dram shop acts—and that their enactment was tied to the temperance movement’s efforts to ban alcohol as well as concern for the plight of dependents of inveterate drunks).

57. See, e.g., Harry C. Burgess, Note, *Liability Under the New York Dram Shop Act*, 8 SYRACUSE L. REV. 252, 253 & n.6 (1957) (noting that New York’s initial 1873 act specifically empowered, among others, a “husband, wife, child, [or] parent” to recover for loss of “means of support,” and that the statute extended not merely to sellers of alcohol but even to landlords who leased their properties to sellers of alcohol).

58. 1 MOSHER, *supra* note 55, § 2.01[2], at 2-6.

59. *Id.* § 2.01[1], at 2-3.

60. See *id.* §5.01, at 5-2 to 5-3.

heightened and salutary attention to drunk driving generated by groups such as Mothers Against Drunk Driving, there was a time at which social host liability looked as if it would become a prominent new frontier of negligence law: decisions from the California and New Jersey Supreme Courts certainly seemed to suggest as much.⁶¹ And yet common law courts have overwhelmingly rejected claims against social hosts for drunk driving by their adult guests.

Representative of the ongoing resistance is *Childs v. Desormeaux*,⁶² a 2006 decision of the Supreme Court of Canada. Desmond Desormeaux, an adult, consumed alcohol at a bring-your-own-beer (“BYOB”) New Year’s party hosted by Dwight Courier and Julie Zimmerman. The hosts were aware that Desormeaux was prone to drink to excess, and one of them asked him as he was leaving whether he was fit to drive. Desormeaux said that he was. In fact, his blood-alcohol level at the time was probably three times the legal limit. While driving home drunk, Desormeaux collided with another car, killing one person and severely injuring three others, including Zoe Childs.⁶³ Childs brought negligence claims against Desormeaux and the hosts. A unanimous Supreme Court of Canada rejected the claim against the hosts on the ground that they owed no duty to Childs.⁶⁴ This was so, the court reasoned, even if the hosts were in a position to foresee that one of their guests might drive poorly because of intoxication and thus injure a person such as Childs.⁶⁵

According to the court, Childs’s suit faced a dilemma that could not be overcome: it failed to make out a claim either for misfeasance or for actionable nonfeasance. Her lawyers had argued that the hosts should be held liable for misfeasance because they “*facilitated* [Desormeaux’s] consumption of alcohol by organizing a social event where alcohol was consumed on their premises.”⁶⁶ The court nonetheless insisted that this was an inapt description of the alleged wrong. Of course it could not deny that the hosts had in some sense

61. See *Coulter v. Superior Court*, 577 P.2d 669, 670 (Cal. 1978), *superseded by statute*, Act of Sept. 19, 1978, ch. 929, 1978 Cal. Stat. 2903 (codified at CAL. BUS. & PROF. CODE § 25602 (Deering 2007); CAL. CIV. CODE § 1714 (Deering 2005)), *as recognized in* *Cory v. Shierloh*, 629 P.2d 8, 10–11 (Cal. 1981); *Kelly v. Gwinnell*, 476 A.2d 1219, 1224 (N.J. 1984).

62. [2006] 1 S.C.R. 643 (Can.).

63. *Id.* at paras. 2–4. Desormeaux later pleaded guilty to criminal charges and was sentenced to ten years in prison. *Id.* at para. 3.

64. *Id.* at para. 47. The opinion indicates that its rule is meant to apply not only to hosts of BYOB parties, but also to hosts of any other standard social occasion at which alcohol is consumed or served. See *id.* at para. 44.

65. *Id.* at para. 26. As a separate ground for its holding, the court also maintained that, absent any evidence indicating that hosts such as Courier and Zimmerman knew or should have known that their guest was driving away from the party in an impaired condition, they could not be expected to foresee dangerous drunk driving by a guest. *Id.* at paras. 28–30.

66. *Id.* at para. 33.

acted. Rather it insisted that, insofar as her claim alleged careless acts by the hosts, Childs was required to demonstrate why the seemingly “autonom[ous]” wrong of Desormeaux (the intervening injurer) could be attributed to them—why what happened to Childs was properly described as something that the hosts had done to her.⁶⁷ The mere hosting of the party did not connect the hosts to the drunk driving this way. Whatever they may have done wrong, the hosts were not guilty of having injured Childs by aiding and abetting Desormeaux’s drunk driving, by soliciting it, or by otherwise participating in it. It was *his* drunk driving, not theirs.⁶⁸

It followed that Childs’s complaint had to be understood as arguing for liability on the basis of an “alleged failure to act” on the part of the hosts.⁶⁹ In essence, “[t]he case put against them is that they should have interfered with the autonomy of Mr. Desormeaux by preventing him from drinking and driving.”⁷⁰ But, for this theory to fly, there would need to be grounds for recognizing an exception to the default rule of no duty to rescue or protect.⁷¹ The court concluded that extant doctrine afforded no such grounds. In particular, it insisted that the relationship of host to adult guest is not the sort of asymmetric relationship in which the former is expected to look after or control the latter: “A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct.”⁷²

Childs, like many of the other decisions described above and below, is not the progeny of a rabidly pro-defendant court. Nor is its holding an outlier. Like the Canadian Supreme Court, U.S. courts have tended to identify the adult guest’s status as an autonomous actor as the reason that the social host ought not to be held even partly responsible for injuries caused by the guest’s drunk driving.⁷³ Here again we see courts declining to recognize negligent enabling

67. *See id.* at paras. 32–33.

68. *See id.*

69. *Id.* at para. 32.

70. *Id.*

71. *See id.* at paras. 34–37 (listing exceptions to the no-affirmative-duty rule).

72. *Id.* at para. 45.

73. *See* Graff v. Beard, 858 S.W.2d 918, 919 (Tex. 1993) (noting that, at that time, the high courts of only four states had indicated a willingness to impose social host liability, and that in two of those states, legislation had superseded or modified those decisions); 1 JAMES F. MOSHER, LIQUOR LIABILITY LAW § 12.06[2], at 12-99 (2007) (“Most courts are unwilling to impose liability on social hosts for injuries caused by intoxicated adult guests.”). In *Enabling Torts*, Professor Rabin suggested that social host liability has been accepted by courts “with less than a consensus.” Rabin, *supra* note 28, at 441. This is akin to asserting that American courts have accepted market-share liability “with less than a consensus.” As noted below, there are importantly distinct variants on the standard social host allegation that might well warrant the imposition of liability on a host for injuries caused most immediately by the drunk driving of a guest. *See infra* pp.1234–35, 1242–43.

claims even when brought by sympathetic plaintiffs, even where the intervening wrongdoing is foreseeable, even where there is a plausible argument that liability imposition will advance a desirable policy goal (the deterrence of drunk driving), and even where there is broad political support for other efforts to change the law to “crack down” on the problem at hand (for example, by increasing criminal penalties for drunk driving).

C. The Significance of Modified Comparative Fault

There are other lines of cases to which one might point for evidence of the courts’ continued commitment to the idea that even foreseeable intervening injurious wrongdoing will “cut off” the imposition of liability on a remote actor whose carelessness also contributes to the injuring of the victim.⁷⁴ Rather than focus on these, however, we wish to note briefly a different sort of disconfirming datum.

Recall from Part I that the Reporters hold out judicial reliance on contributory negligence as a central instance of old-school, final cause thinking. Conversely, they see in the adoption of comparative fault a compelling piece of evidence that tort has left this nonsense behind as it has worked itself toward “the fault principle,” that is, a default rule of liability for any careless risk creation that is later realized in physical harm, with the jury left free to assess the key issues of fault, actual cause, scope of liability, damages, and apportionment.⁷⁵

One puzzling and unsatisfactory feature of this narrative is its

74. *See, e.g.*, *Port Auth. v. Arcadian Corp.*, 189 F.3d 305, 313, 319 (3d Cir. 1999) (affirming the dismissal of the suit on no-duty and proximate cause grounds where the owner of a building damaged by a terrorist bombing sued the manufacturer of the fertilizer that was used to make the bomb); *Wade v. City of Chi.*, 847 N.E.2d 631, 641–42 (Ill. App. Ct. 2006) (holding that a police officer who followed a suspect through the city at a low speed was not liable to a pedestrian where the suspect drove his car onto the sidewalk and injured the pedestrian, since the suspect’s actions blocked the attribution of responsibility to the police officer, even granting that he acted wantonly in instigating a needless “pursuit”); *Kohn v. Laidlaw Transit, Inc.*, 808 N.E.2d 564, 571–73 (Ill. App. Ct. 2004) (finding no basis for holding a school-bus driver liable to the plaintiff where the driver carelessly failed to indicate that the bus was letting off passengers, where the plaintiff’s car struck a small child who had exited the bus, and where several adults who had witnessed the incident then attacked the plaintiff); *Fast Eddie’s v. Hall*, 688 N.E.2d 1270, 1272–75 (Ind. Ct. App. 1997) (granting summary judgment for a tavern on no-duty and proximate cause grounds where the bar allegedly served alcohol to two visibly intoxicated patrons, one of whom later tracked the other down and sexually assaulted and killed her).

75. *See supra* notes 7–12 and accompanying text; *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 34 cmts. a, c & reporters’ note cmt. c (Proposed Final Draft No. 1, 2005) (discussing contributory negligence and comparative fault and their relationship to the theories behind the *Restatement (Third)*’s approach to intervening acts and superseding causes).

failure to mention that, in roughly two-thirds of the states, the rejection of contributory negligence has gone hand in hand with the adoption of a particular form of comparative fault—namely, “modified” systems.⁷⁶ These regimes leave plenty of room for no-liability rulings based on the plaintiff’s fault amounting to a qualitatively distinct source of the plaintiff’s injury.⁷⁷ In this sense, a form of final cause analysis still applies to plaintiff’s fault, resting not on dubious metaphysics but on normative judgments about appropriate allocations of responsibility. That these judgments are given effect in the domain of plaintiff fault weakens the case for the recognition of negligent enabling in cases of intervening wrongdoing.

Suppose ski-resort operator *O* carelessly marks an expert-level ski run as suitable for beginners. Now suppose that two adult novice skiers *S* and *T* follow the signage but quickly discover that the run promises to exceed their basic skills. Fortunately, *T* spots a very manageable trail that will take *S* and *T* back to safe terrain. *T* points it out and makes her way to safety. However, *S* does not follow. Instead, he shouts out to *T*, “Life is too short not to take chances. I know this is the wrong trail for me, and I’ll probably hurt myself, but I’m going for it!” *S* breaks his legs on the expert slope and sues *O* for negligence in mislabeling the trail.

Presumably in most courts *S*’s negligence claim against *O* would fail. Following traditional tort parlance, some judges would invoke (or instruct jurors to consider invoking) the doctrine of implied assumption of risk. Under this doctrine, a plaintiff who knowingly and voluntarily chooses to expose himself to a clear and present danger associated with a defendant’s carelessness forfeits what would ordinarily be his entitlement to insist that the defendant heed the duty of care owed to him.⁷⁸ Today, however, many courts treat plaintiff-assumed risks as a form of comparative fault.⁷⁹ In a modified comparative-fault jurisdiction, either they would grant

76. Paul T. Hayden, *Butterfield Rides Again: Plaintiff’s Negligence as Superseding or Sole Proximate Cause in Systems of Pure Comparative Responsibility*, 33 LOY. L.A. L. REV. 887, 892 (2000). According to Professor Hayden, a dozen states adopted pure comparative-fault systems from 1973 to 1984, but no state adopted a pure scheme between 1984 and 2000, while three states shifted from pure to modified systems. *Id.* at 891–92.

77. *See id.* at 892 n.22 (“Under a ‘modified’ form of comparative responsibility, a plaintiff’s claim is barred only if plaintiff’s responsibility or fault exceeds a certain level in comparison to defendant’s.”).

78. DAN B. DOBBS, *THE LAW OF TORTS* § 214, at 543 (2000).

79. *See, e.g., Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992) (plurality opinion) (“In cases involving ‘secondary assumption of risk’—where the defendant [owes] a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant’s breach of duty—the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties.”), *cited with approval in Shin v. Ahn*, 165 P.3d 581, 590–91 (Cal. 2007).

judgment for the defendant as a matter of law on a finding that *S*'s fault exceeded *O*'s, or they would instruct the jury to reject the plaintiff's claim if it were to so find.⁸⁰

Framed either way, *S*'s intervening conduct probably will (and probably should) provide a reason for blocking entirely the imposition of liability on *O* notwithstanding that *O*'s carelessness was a cause of *S*'s injury. And it would do so not because the plaintiff's foolhardy conduct was unforeseeable, but because the plaintiff's contribution to his injury—much like the drunk-driving guest's contribution in *Childs*⁸¹—so overshadows the defendant's as to render the injury not the defendant's doing. Perhaps the Reporters would be tempted to treat this as a case in which the plaintiff's injury falls outside the scope of the risks that rendered the defendant's conduct careless.⁸² But this response is question-begging. If *S*'s injury does fall outside the scope, it is precisely because it involves the intervention of his decision to take the chance of injury.

As the Reporters would have it, the adoption of comparative fault signals that modern tort law is never willing to give dispositive legal effect to a plaintiff's intervening carelessness, as such. But if that were so, then comparative fault ought to be pure, not modified. That it usually is not—and that the trend in U.S. jurisdictions for the last twenty-five years has exclusively favored modified schemes⁸³—tells us that modern tort law still gives effect to the idea that certain kinds of intervening actions undermine attributions of responsibility to more remote actors. And this is not because the only instances in which the plaintiff's fault exceeds the defendant's fault are those in which the plaintiff's fault is unforeseeable.

III. FALSE POSITIVES

A comprehensive canvas of decisions that block the imposition of liability that should attach under a regime in which negligent enabling is treated as plain-vanilla negligence would capture only half of what is wrong with sections 19 and 34. This is because decisions that *permit* the imposition of liability on remote defendants overwhelmingly do so on grounds other than negligent enabling. Indeed, in these cases, liability is typically imposed on one of three distinct grounds: (1) attribution, (2) concurrent negligence,

80. See generally *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783, 784 (S.C. 1991) (adopting a modified comparative-fault system under which “a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant”); *McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992) (“In the ‘modified’ form [of comparative fault], plaintiffs recover . . . only if the plaintiff’s negligence either (1) does not exceed (‘50 percent’ jurisdictions) or (2) is less than (‘49 percent’ jurisdictions) the defendant’s negligence.”).

81. See *supra* notes 66–68 and accompanying text.

82. See *supra* note 13 and accompanying text.

83. See *supra* note 76.

or (3) affirmative duty.⁸⁴

A. *Attribution (Fusion of Agency)*

A premise for the application of the negligent enabling concept is that the intervening wrongdoer has acted independently of the enabler. Yet in many instances in which a remote actor is subject to liability notwithstanding the intervention of another's wrongful act, it is because there are grounds for *attributing* the intervener's wrong to the careless actor. In these instances, tort law is not imposing liability simply because one person acted so as to increase the risk that another would wrongfully injure someone. It is instead permitting the victim to treat two actors as a *single, fused agent*.⁸⁵

The civil corollaries to crimes such as solicitation and abetting are familiar examples of this sort of rule. If *X* hires *Y* to attack *Z*, *Y*'s attack on *Z* is as much *X*'s battery as it is *Y*'s.⁸⁶ Even granted that *X* and *Y* are autonomous agents, the arrangement between them justifies regarding them as a single agent for purposes of determining who injured *Z*. Likewise, if *X* knowingly and substantially assists *Y*'s commission of a crime that involves an attack on *Z*, *X* is treated as a principal wrongdoer by virtue of aiding and abetting *Y*'s attack.⁸⁷

Another attribution doctrine (or set of doctrines) covers certain kinds of closely coordinated activity. Consider a scenario involving *D1* and *D2*, two drug manufacturers who collaborate on research to save costs. They determine on the basis of internal studies that a new drug is inefficacious in treating the illness it is meant to treat and will pose a risk of liver damage to users. Nonetheless, they suppress the studies and bring the drug to market. *P* uses a version of the drug manufactured by *D1*, suffers liver damage, and sues *D1*. When the fact of the suppressed studies is later revealed, *P* adds a claim against *D2*. *P* might well have a viable claim against both defendants. If so, it will be because the latter's collaboration with the former renders the former's wrongful injuring of the victim also attributable to the latter. The two are treated as a single actor because of the "civil conspiracy" or "joint enterprise" of which they are both a part. The same holds in the textbook example of a drag

84. Although in Part II we treated the refusal of courts to expand the concept of negligent entrustment to the broader concept of negligent enabling as disconfirming data, we could just as easily have presented negligent entrustment decisions as false positives. They might seem to impose liability on the theory of negligent enabling, but they actually rest on the narrower grounds described above.

85. For a careful and illuminating treatment of different forms of attribution in British tort law, see ROBERT STEVENS, TORTS AND RIGHTS 244–74 (2007).

86. DOBBS, *supra* note 78, § 31, at 62 (noting that a person who procures or aids an attack by another can be held liable to the victim for battery).

87. Halberstam v. Welch, 705 F.2d 472, 477–78 (D.C. Cir. 1983).

race.⁸⁸ Both drivers are subject to liability even if only one's car hits and hurts the victim because both were engaged in the same enterprise—they coordinated their activities in a way and to an extent that warrants deeming each driver's act as an expression of the agency of the other.⁸⁹

Another recognized instance of joint agency in tort occurs by virtue of the doctrine of vicarious liability, the most significant instantiation of which is, of course, the rule of respondeat superior.⁹⁰ If a doctor employed by a practice group commits malpractice in the course of his employment, the group will be liable qua employer. The practice group constitutes a separate "person" in the eyes of the law, and we may assume that its managers did not command, plan, or abet the doctor's malpractice. So in what sense, if any, is the doctor's malpractice a "doing" of *the practice group*? The answer is that, so long as the doctor is acting within the scope of his employment, his act is not only his own but also an act of the group. In the eyes of the law, entities such as practice groups, partnerships, and corporations count as persons: they can be located in space,⁹¹ they enjoy the benefits of rights and powers and bear the burdens of duties,⁹² and they act. Yet they act in the world only by virtue of the acts of natural persons. Thus, when a natural person's acts are undertaken as part of the business of the entity, those acts are acts of the entity, as well as of the natural person.⁹³

Rules and principles of attribution surely admit of difficult boundary cases. The most remarkable feature of the California Supreme Court's famous decision in *Ybarra v. Spangard*⁹⁴ is not its

88. See *Bierczynski v. Rogers*, 239 A.2d 218, 221 (Del. 1968); see also *Schneider v. Midtown Motor Co.*, 854 P.2d 1322, 1326–27 (Colo. App. 1992) (holding that a car dealer who, by means of sham sales, provides cars to a driver whom the dealer knows to be very dangerous can be held jointly liable for the driver's careless injuring of a third party as the driver's coconspirator).

89. See *Bierczynski*, 239 A.2d at 221.

90. See generally J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 410 (4th ed. 2002) (dating the emergence of the doctrine in English law to the late 1600s, though noting that before then a master could be held liable for a careless act committed by a servant at his command).

91. But see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810–11 (1935) (ridiculing the idea that one can determine where a corporation is located). Perhaps Professor Cohen is best read as properly (if hyperbolically) cautioning against treating the normative inquiry into entity location as if it could be answered simply by observing the location in physical space of objects such as desks and chairs.

92. For example, corporate speech enjoys First Amendment protection. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776–77 (1978). Corporations also possess the power to sue in their own right. See, e.g., DEL. CODE ANN. tit. 8, § 122(2) (2001).

93. See *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 171 (2d Cir. 1968) (“[A] business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.”).

94. 154 P.2d 687 (Cal. 1944).

application of *res ipsa loquitur* to an injury resulting from a surgical procedure, but its willingness to treat a cluster of medical personnel who were formally independent as a single agent.⁹⁵ And although market-share liability, at least in the forms recognized in *Sindell v. Abbott Laboratories*⁹⁶ and *Hymowitz v. Eli Lilly & Co.*,⁹⁷ does not involve the sort of attribution under discussion here, judges have toyed with treating, or have in fact treated, entire industries—including manufacturers of explosives and lead paint—as a single agent responsible for the injuries inflicted by the products of individual manufacturers within the industry.⁹⁸

Still, there is no reason to infer from these difficult cases that one's acts can always be attributed to another. Whatever one might think of the plausibility of holding a gun manufacturer liable for carelessly allowing its gun to be put to an illegal use by another so as to injure a victim, it would be erroneous to suppose that the manufacturer solicited or abetted the shooting, or that the shooter and manufacturer were engaged in a joint enterprise, or that the shooter was acting on behalf of the manufacturer such that vicarious liability should apply. The sale of the gun through a chain of one or more dealers and buyers is an arm's-length transaction. Unless the law is prepared to treat every such transaction as a conspiracy or joint enterprise, there is no basis for treating the shooting of the victim as the manufacturer's "doing."

The same goes for a standard claim of social host liability, in which the victim of an adult drunk driver seeks redress against the host on the basis of the host's holding of an event at which alcohol was available to the driver. Indeed, as the Canadian Supreme Court emphasized in *Childs*, it is precisely the independence of the adult guest from the host that takes this scenario outside the realm of fusion of agency.⁹⁹ The guest's drunk driving in the standard scenario is not solicited by the host, part of a self-consciously coordinated joint project, or an instance of actual or apparent agency. Rather, the host has at best furnished the conditions that permit the guest to drink and then drive. And so the fusion-of-agency idea cannot explain why the host ought to be held liable for the wrong of the adult drunk driver, a conclusion that is typically expressed by courts in terms of a holding that the defendant owed no duty of care to the victim of the drunk driver.

At the same time, attention to fusion of agency could explain how certain variants on standard social host claims might warrant a finding of liability. Imagine a situation in which *L*, a soon-to-be law

95. *See id.* at 690.

96. 607 P.2d 924, 936–37 (Cal. 1980).

97. 539 N.E.2d 1069, 1077–78 (N.Y. 1989).

98. *See, e.g.*, *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 373–74 (E.D.N.Y. 1972).

99. *See supra* notes 66–72 and accompanying text.

graduate, purchases several beer kegs and invites his classmates to his cabin in the woods to attend a graduation-eve “beer blast,” the express point of which is to “get ourselves so wasted that the Dean will smell the alcohol on our breath when he hands us our diplomas.” Given the stated purpose of the enterprise, its location, and *L*’s knowledge that his guests will have to drive considerable distances to get to and from it, a judge and jury would perhaps be entitled to treat *L*’s agency as fused with that of a guest who drives away from the party drunk and injures someone.

Something like this rationale appears to have been at work in the well-known decision in *Weirum v. RKO General, Inc.*¹⁰⁰ An urban radio station catering to a youth audience ran a promotion that awarded prizes to the listeners who first located a station employee as he drove to different locations in the city. As the employee traveled around town, an on-air DJ apprised listeners of his location and encouraged drivers to find him.¹⁰¹ Two teenagers who had located the employee’s car at its previous stop pursued it as it traveled to its next stop, jockeying with each other as they weaved around other cars. One of the teenagers cut off another car, causing the death of the plaintiff’s decedent.¹⁰²

In an admittedly broadly worded opinion, the California Supreme Court held that the radio station was subject to liability to the victim because a crash caused by prize seekers’ careless driving was a readily foreseeable consequence of the promotion.¹⁰³ However, the rationale for the decision was better captured by Justice Files, who dissented from the intermediate appellate court’s decision to overturn the jury’s verdict in favor of the plaintiff:

Nothing could be more normal than that enthusiastic youngsters, who had missed the prize at one location, would race to be first at the next. The youths following the red Buick became performers in a show being broadcast live for an audience which included the participants. The messages which came to them over the air reinforced the excitement of the chase and the suspense of the contest.¹⁰⁴

As noted, the California Supreme Court embraced a facially broader rationale that could be read to embrace an “enabling” rationale. Yet the court’s opinion in fact disavows such a reading by taking pains to deny that a business might be held liable for injuries caused by careless driving foreseeably induced by a while-supplies-last promotion. As did Justice Files, the California Supreme Court

100. 539 P.2d 36 (Cal. 1975).

101. *Id.* at 38.

102. *Id.* at 38–39.

103. *Id.* at 39–41.

104. *Weirum v. RKO Gen., Inc.*, 119 Cal. Rptr. 151, 157 (Ct. App. 1975) (Files, J., dissenting), *vacated*, 539 P.2d 36 (Cal. 1975).

emphasized the extent to which the radio station took steps “to generate a competitive pursuit on public streets, accelerated by repeated importuning by radio to be the very first to arrive at a particular destination.”¹⁰⁵ In this respect, *Weirum* is barely distinguishable from a drag-racing case.¹⁰⁶

B. Concurrent Negligence (Synergistic Risks)

We began Part I with consideration of a hypothetical in which engineer *E* carelessly neglected to sound his train’s horn shortly before car driver *P* carelessly crossed in front of the train.¹⁰⁷ Now imagine a case in which *sequential* careless acts by two careless actors function as actual causes of an innocent victim’s injury. For example, negligent driver *ND1* speeds, loses control of her car, and crashes into a telephone pole, such that her car is mostly on the sidewalk but extends a few feet out into the road. A minute later, driver *ND2*, who could quite easily have navigated around *ND1*’s car, carelessly fails to notice the wreck, such that he crashes into the stopped car and deflects off of it into innocent pedestrian *P*. *P* stands to recover from *ND1 and ND2*: *ND1* will not be able to point to *ND2*’s subsequent carelessness as a reason for blocking the imposition of liability on *ND1*.¹⁰⁸

The Reporters seem to suppose that these sorts of standard negligence cases attest to the propriety of treating negligent enabling as a generic form of negligence. After all, in each scenario the “remote” actor (*E* or *ND1*) seemingly is subject to liability on the ground that his or her conduct has created a risk of wrongful conduct by another, which risk is later realized in an injury. Yet this inference is mistaken. For in *neither* of these cases is liability predicated on the theory that a more remote actor acted carelessly *by virtue of creating a risk of wrongful conduct by another*. Rather, the remote actor’s conduct was careless in that it posed unacceptable risks to the victim *quite apart from the prospect of any wrongful conduct by another*. Driving a train toward a crossing without sounding its horn is wrongful toward those located in and around the crossing because it can cause a collision with a car regardless of whether anyone else drives carelessly. Driving a car carelessly is wrongful as to other users of the roads because it unduly risks physical injury to them irrespective of carelessness on the part of anyone else. When harm occurs in these cases, the harm is a realization of aspects of the defendant’s conduct that render it already wrongful toward the victim: the intervention of another’s

105. *Weirum*, 539 P.2d at 41.

106. *See supra* notes 88–89 and accompanying text.

107. *See supra* note 8 and accompanying text.

108. *See, e.g.*, *G. & R. Waterproofing Co. v. Brogdon*, 121 S.E.2d 77, 79–80 (Ga. Ct. App. 1961) (citing *Atl. Coast Line R.R. Co. v. Coxwell*, 91 S.E.2d 135, 138 (Ga. Ct. App. 1955)); *McDonald v. Robinson*, 224 N.W. 820, 821 (Iowa 1929).

wrongful act is not any part of what makes the defendant's conduct careless as to the plaintiff. In short, these are cases of concurrent negligence. In them, the fact that another's wrongful conduct intervenes between the remote actor's carelessness and the plaintiff's injury does not undermine the case for treating the injury as a realization of the risk that the careless remote actor created. Rather, the accident was produced by a synergistic reaction between two independent risks.

Just to be clear, our claim with respect to cases of concurrent wrongdoing is that the intervention of another actor's wrongful conduct is *normatively* irrelevant, *not causally* irrelevant. In these cases, the intervener's misconduct is presumed to function as a necessary condition of the victim's injury. The point is that the risks wrongfully posed to the victim by the remote actor's conduct can be fully described without reference to any such intervention.

The concurrent-negligence concept is also distinct from the scope-of-the-risk idea. The gist of the latter is that a careless actor will not be held liable for an injury caused by his carelessness if the injury is not the realization of one of the risks that rendered the defendant's conduct careless. Synergistic risk creation also concerns the quality or nature of the connection between the creation of a risk and its ultimate realization in an injury to another. And one could even describe the idea of concurrent negligence as a special application of the scope-of-the-risk idea. Yet doing so would not somehow collapse the former into the latter. Instead it would merely identify concurrent negligence as a member of a family of concepts housed within the umbrella category of proximate cause. In these cases, a careless actor is deemed negligent toward a victim if the risk that is realized in the plaintiff's injury is among the risks that rendered his conduct careless *and* if that risk is of a sort that could have been realized in an injury even if there had not been intervening tortious conduct.

We can now see more clearly why negligent enabling claims of the sort made by plaintiffs pressing social host and negligent marketing claims are fundamentally different from claims based on concurrent negligence. The risk that renders the conduct of a careless marketer of guns careless is *by definition* the risk that an injury will result when an intervening actor acts tortiously or wrongfully—there can be no actualization of the risk except through the wrongful conduct of another. To the extent that a manufacturer's selling of guns is careless, it is because of the risk that others will wrongfully sell or procure a gun and misuse it. Likewise, the wrongfulness of careless social hosting resides in the risk that it will allow a guest to act negligently and criminally by driving drunk. Neither of these cases involves a synergy between independent risks. Each involves the realization of a risk that was all along a risk that another would behave badly.

C. *Affirmative Duties*

In *Enabling Torts*, Professor Rabin cited *Hines v. Garrett*, a 1921 Virginia decision, as an early instance of liability for negligent enabling.¹⁰⁹ *Hines* held that the operator of a train was subject to liability to a female passenger who was discharged by a conductor at an unsafe location between stops, then raped by third parties as she walked to a station.¹¹⁰ According to Rabin, the following passage—offered by the court as an explanation as to why the assailants' wrongdoing did not undermine the victim's claim against the railroad—stands as a prescient early endorsement of negligent enabling:

We do not wish to be understood as questioning the general proposition that no responsibility for a wrong attaches whenever an independent act of a third person intervenes between the negligence complained of and the injury. But . . . this proposition does not apply where the very negligence alleged consists of exposing the injured party to the act causing the injury.¹¹¹

The first sentence of the passage already ought to make a reader wary of Rabin's reading of *Hines*. Confirmation for this concern can be found by adding to this passage the very next sentence of the *Hines* opinion, omitted in Rabin's presentation:

But . . . this proposition does not apply where the very *negligence* alleged consists of exposing the injured party to the act causing the injury. *It is perfectly well settled . . . that, wherever a carrier has reason to anticipate the danger of an assault upon one of its passengers, it rests under the duty of protecting such passenger against the same.*¹¹²

Rabin treats the italicized word "negligence" in the first sentence above as meaning carelessness in the abstract: antisocial conduct.¹¹³ Only then can the sentence in which it appears be understood to suggest that an actor can be subject to liability whenever its conduct is careless in creating a risk of injurious misconduct by another. However, it is clear from the italicized second sentence that the court is using the term "negligence" to refer to carelessness in the specific tort sense of conduct that is a breach of a duty of reasonable care owed to a person such as the victim—not carelessness in the abstract, but *carelessness where there is a duty of care owed to the victim*. The railroad in *Hines* was not held liable because its

109. Rabin, *supra* note 28, at 439–40 (citing *Hines v. Garrett*, 108 S.E. 690 (Va. 1921)).

110. *Hines*, 108 S.E. at 691, 693–95.

111. Rabin, *supra* note 28, at 439 (quoting *Hines*, 108 S.E. at 695).

112. *Hines*, 108 S.E. at 695 (emphasis added).

113. See Rabin, *supra* note 28, at 439–40.

employee acted so as to increase the risk of attack by others. It was held liable because it acted in breach of an affirmative duty to protect the plaintiff, qua passenger, from dangers that might be encountered in transit. Had the plaintiff not been a passenger, there would have been no liability even if there had been careless enabling.¹¹⁴

Much the same can be said of another line of decisions invoked by Rabin, namely, those that permit victims of attacks occurring in unguarded, poorly lit structures to hold liable the owner of the structure for carelessness in failing to prevent the attack.¹¹⁵ Typically, when owners are held liable in this context it is not merely because they have generated a risk of wrongful conduct by another, but because, as in *Hines*, they have breached an affirmative duty to protect certain potential victims from harm at the hands of third parties. This is why courts usually require a preexisting relationship between victim and owner: overwhelmingly, successful claimants are customers and other invitees.¹¹⁶ It is also why the trigger for the duty—when a duty is recognized—is the sort of “heightened foreseeability” that puts or should put the owner on alert that its enclosed space “invites” physical attacks on persons who occupy the space with permission.¹¹⁷

To be sure, tort law sometimes recognizes affirmative duties owed to strangers.¹¹⁸ While such cases might seem to lay the groundwork for recognition of negligent enabling as a generic ground of liability, they fall well short of doing so. For the most part, affirmative duties of this sort rest on the existence of a custodial or quasi-custodial role being played by the remote actor in relation to the more immediate injurer. A familiar example is the obligation that law-enforcement officers, prisons, and parole boards owe to members of the public to take care to ensure that the latter are not harmed by violent persons inappropriately released from

114. That *Hines* is rightly read not as an “enabling torts” decision but as a breach-of-an-affirmative-duty-to-protect decision is readily confirmed by several subsequent Virginia Supreme Court decisions that portray it in these terms. See, e.g., *Taboada v. Daly Seven, Inc.*, 626 S.E.2d 428, 435 (Va. 2006); *Wright v. Webb*, 362 S.E.2d 919, 922 (Va. 1987); *Gulf Reston, Inc. v. Rogers*, 207 S.E.2d 841, 844 (Va. 1974).

115. See Rabin, *supra* note 28, at 443–46.

116. See, e.g., *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654 (Tex. 1999) (denying liability of a parking-garage owner to a victim who was brought onto the premises against her will and without the permission of the owner).

117. See, e.g., *Sharon P. v. Arman, Ltd.*, 989 P.2d 121, 125–30 (Cal. 1999). Insofar as this form of liability hinges on responsibilities that attend ownership, it closely resembles the doctrine of negligent entrustment. See *infra* text accompanying and following note 134 (suggesting that negligent entrustment liability can be understood as resting on a special kind of affirmative duty).

118. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 37–44 (Proposed Final Draft No. 1, 2005) (articulating affirmative duty rules).

custody or confinement.¹¹⁹ A modern and more controversial extension of this same idea is found in the famous decision *Tarasoff v. Regents of the University of California*,¹²⁰ in which the California Supreme Court held that a psychotherapist owes a duty to take steps to warn a person who he knows or should know has been targeted by his patient for attack.¹²¹

An extension of the duty-to-control idea arises with respect to claims by a victim of a car accident against the physician of an adult patient whose poor driving precipitated the crash. Perhaps the most common allegation of this sort is that the physician failed to inform the patient that her medication might cause her to fall asleep while driving.¹²² Some state courts have deemed allegations such as these insufficient as a matter of law,¹²³ while others have allowed them to go to the jury on the issues of breach and cause.¹²⁴ In the latter group, the theory of breach is almost always an unreasonable *failure to warn* the patient of a risk of unexpected, uncontrollable somnolence.¹²⁵ That is, few if any courts suppose that a treating physician is under an obligation to attempt to control the comings and goings of a mentally competent adult patient (for example, by physically detaining him or by taking his car keys). Instead, the theory is that the doctor is in a position to inform the patient as to possible side effects of medication of which the patient might well be unaware. The doctor's affirmative duty is predicated on her greater expertise and the corresponding reliance of the patient on that expertise.¹²⁶

In providing rules that allow for liability only on particular terms, affirmative duty doctrines necessarily set liability limitations. To see this, we can again return to claims against gun

119. DOBBS, *supra* note 78, § 331, at 894–95.

120. 551 P.2d 334 (Cal. 1976).

121. *Id.* at 340. Although the defendant-therapists in *Tarasoff* did not have custody over the dangerous patient, they had previously ordered his confinement and in any event enjoyed the authority under state law to order confinement of persons posing a danger to themselves or others. *See id.* at 341.

122. *See, e.g.*, *Coombes v. Florio*, 877 N.E.2d 567, 572 (Mass. 2007) (Ireland, J., concurring) (concluding, for three of the court's six justices, that "a physician owes a duty of reasonable care to everyone foreseeably put at risk by his failure to warn of the side effects of his treatment of a patient," and citing other cases that have done the same). In these cases, courts have routinely declined invitations to invoke the idea that a doctor has a duty physically to control her patients. *See, e.g., id.* at 575.

123. *See, e.g.*, *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 397–99 (Ill. 1987).

124. *See, e.g.*, *Coombes*, 877 N.E.2d at 574 (Ireland, J., concurring); *id.* at 579–80 (Greaney, J., concurring in part and dissenting in part).

125. *See, e.g., id.* at 573–74 (Ireland, J., concurring).

126. Thus where the enhanced danger of bad driving does not arise from the administration of medication, but instead from a preexisting medical condition of which the patient is aware, such as epilepsy, the physician often is not held liable. *See, e.g.*, *Praesel v. Johnson*, 967 S.W.2d 391, 398 (Tex. 1998).

manufacturers for negligent marketing by victims of criminal shootings. It is quite apparent that, in the standard case, the requisite special relationship between manufacturer and victim, or between manufacturer and shooter, is missing. The manufacturer has not undertaken to provide protective services to the victim and exercises nothing like the sort of control that a jailer has over a prisoner or a therapist has over his patient.

Likewise, the relationship of social host to adult guest is not custodial in the requisite sense. *Tarasoff*, which was already pushing the edge of the envelope, turned on the authority and responsibility of a treating psychiatrist to control the comings and goings of a potentially dangerous psychotic patient.¹²⁷ No comparable expertise or relationship exists between a social host and a competent adult guest. A host is no more expert than the mildly inebriated guest, or other guests, in assessing whether the inebriated guest presents a heightened risk of injury to other users of the roads, and a host has no legal authority to detain a mildly impaired guest against the guest's will. And the typical guest of course bears no resemblance to a mentally ill patient who confesses to his psychiatrist an intent to murder or harm an identifiable third party.

Nor is the social host properly equated with the doctor who fails to inform her patient of possible soporific side effects of medication. The doctor's affirmative duty is predicated on her greater expertise and the corresponding reliance of the patient on the doctor.¹²⁸ In the standard case, the social host does not stand in this sort of position relative to her inebriated guest. While it is certainly possible that inebriation might render the guest's self-control or judgment less acute, such that he is less risk-averse than he might otherwise be, he will not have become somehow unaware of the obvious risks that attend driving while intoxicated, such that it would be enlightening to him to learn from the host about the dangers of drunk driving.

It is also significant that any duty owed by a physician to users of the road is connected with the physician's duty to treat her patients competently.¹²⁹ Perhaps the word "host" in the phrase "social host" connotes a similarly paternalistic role for the host and his guests. If so, it is misleading. A social host is entitled to treat his adult guests as . . . *adults*. Indeed, we would expect that many guests would find it insulting or offensive to have the host treat them as if they were in need of a chaperone or a warning about the perils of drunk driving. Our point is *not* that the interest of the host

127. See *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 343–44 (Cal. 1976).

128. See, e.g., *McKenzie v. Haw. Permanente Med. Group, Inc.*, 47 P.3d 1209, 1221 (Haw. 2002).

129. See, e.g., *Hardee v. Bio-Med. Applications of S.C., Inc.*, 636 S.E.2d 629, 631–32 (S.C. 2006).

in avoiding potential awkwardness in dealing with guests or hurt feelings on their part is an interest that outweighs the imposition of a duty to monitor. Nor is it to suggest that hosts who aggressively monitor guest's alcohol consumption are doing something wrong—they may be doing the right thing morally. It is rather that the potential for awkwardness and hurt feelings provides evidence that, in ordinary social life, a host does not interact with guests as if they were patrons or patients dependent on the host for certain kinds of supervision. Accordingly, the law recognizes that a social host is not *obligated* to treat his or her adult guests as in need of protection, as incompetent, or as irresponsible: he is entitled to treat them as responsible agents. This is exactly the idea articulated by Chief Justice McLaughlin's opinion rejecting social host liability in *Childs*:

[T]he implication of a duty of care depends on the relationships involved. The relationship between social host and guest at a house party is part of this equation. A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs. The conduct of a hostess who confiscated all guests' car keys and froze them in ice as people arrived at her party, releasing them only as she deemed appropriate, was cited to us as exemplary. This hostess was evidently prepared to make considerable incursions on the autonomy of her guests. The law of tort, however, has not yet gone so far.¹³⁰

By appreciating what is missing from ordinary social host cases, one can in turn identify scenarios involving the provision of alcohol that depart from the ordinary and thus might actually warrant the imposition of liability on a host for nonfeasance. Most obviously, if the host is presiding over an event at which alcohol is being made available to minors, the host is much more appropriately cast in the role of guardian. It is a crime to serve alcohol to minors.¹³¹ Presumably, this conduct has been criminalized in large part out of a concern that minors, as a class, are less able to handle alcohol consumption responsibly. This is why parents of teenage children who are invited to a party are likely to ask the parents of the child throwing the party whether they or someone else will be chaperoning at the event. The expectation, in this situation, is that

130. *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, para. 45 (Can.).

131. *See, e.g.*, N.C. GEN. STAT. § 18B-302(a)-(a1) (2007).

a responsible adult must be present to guard against and deal with irresponsible behavior by teenage guests. In this setting, it makes some sense to suppose that the host owes an affirmative, custodial duty to monitor her guests' behavior for the benefit of third parties who might be injured by them.¹³² The host is quite literally expected to interact with the minor partygoers as a chaperone and supervisor, a notion that is out of place when one describes the hosting of an ordinary social event for adult guests.¹³³

Negligent entrustment liability is doctrinally *sui generis*, but analytically it can also be understood as turning on affirmative duties to potential victims, here grounded in a notion of responsibility for one's things. Just as ownership of wild beasts has traditionally carried with it a demanding form of liability,¹³⁴ so ownership of automobiles and guns—because of their great potentiality for harm—has been treated under negligent entrustment doctrine as a basis for the recognition of an affirmative duty to take care that others do not cause injury through the use of those instrumentalities.

Our emphasis in this subpart on the recognition of affirmative duties as a basis for the imposition of liability on remote actors should resonate with those inclined to see “enabling torts” as the fulfillment of a general and principled broadening of the ambit of negligence law in the modern era. State appellate courts have the power to expand the domain of duty so that an actor who is neither contractually linked to a victim nor an immediate inflictor of injury upon a victim is understood to have a responsibility to anticipate and guard against the harmful conduct of others. Moreover, the principle that one's duties of care extend beyond those whom one directly affects surely runs very deep in negligence law itself. And in this sense, we do not disagree with the platitude contained in section 19 that “[t]he conduct of a defendant *can lack reasonable care* insofar as it foreseeably combines with or permits the improper

132. See, e.g., *Biscan v. Brown*, 160 S.W.3d 462, 480–82 (Tenn. 2005).

133. A closer case might be one in which the host serves alcohol to a visibly intoxicated adult guest whom the host knows will be driving away from the event. See *McGuiggan v. New Eng. Tel. & Tel. Co.*, 496 N.E.2d 141, 146 (Mass. 1986) (dictum); *Langle v. Kurkul*, 510 A.2d 1301, 1306 (Vt. 1986) (dictum). Our inclination is to treat these as examples of a special kind of breach-of-affirmative-duty case.

Space limitations prevent us from addressing section 39 of the *Restatement (Third)*, which asserts that an actor whose conduct has generated a risk of physical harm to another owes a duty to take steps to prevent that harm. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 39 (Proposed Final Draft No. 1, 2005). Suffice it to say we believe this section significantly overextends the sources from which it derives, including sections 321 and 322 of the *Restatement (Second) of Torts*. See RESTATEMENT (SECOND) OF TORTS §§ 321–322 (1965).

134. See RESTATEMENT (SECOND) OF TORTS § 507 (1977); 3B C.J.S. *Animals* § 315 (2003).

conduct of the plaintiff or a third party.”¹³⁵ This is hardly what is needed from a *Restatement* for the twenty-first century, however. For the very core of the larger point is that negligence law contains broad swaths of doctrine that recognize affirmative duties to act in a manner that is vigilant with respect to the risk that the plaintiff will be injured by the wrongful conduct of others. What we need is some structure for understanding when such duties attach and why.

CONCLUSION

One of the Reporters’ animating concerns is to restate tort law so that it has fewer moving parts. Their hope is that by simplifying they will minimize certain errors they regard as afflicting modern tort practice, especially error in the form of judges improvidently granting matter-of-law judgments for defendants. But simplification that runs roughshod over real distinctions is neither appropriate nor helpful. As we have shown, the effort to treat careless injurings that feature intervening wrongdoing as indistinct from careless injurings that do not feature intervening wrongdoing is an exercise in reductionism. Sections 19, 34, and 37 do not restate the law accurately and promise to sow confusion. By running roughshod over standard ways of understanding responsibility, they may even threaten to undermine the particular notion of wrongdoing that forms the core of tort law. A tort is a wrongful injuring of someone,¹³⁶ not (merely) a fragment of antisocial conduct that results in an injury to someone in a manner that is arguably foreseeable. Negligent enabling—that is, careless generation of a risk that someone else will commit a tort, which risk is realized—is not a recognized tort. It is a “fudge” term that, at best, loosely gestures toward areas in which affirmative duties and theories of attribution might justifiably be expanded. To the extent that the *Restatement (Third)*’s unfortunate embrace of negligent enabling is predicated on a genuine need to guide and limit an inclination on the part of judges to take cases away from juries, that concern is better met by attending closely to the grounds of liability already articulated in case law.

Indeed, the account we offer in Part III recognizes that negligence law expanded in the late twentieth century and expanded in ways that render the enabling torts idea superficially plausible. But it is one of the jobs of a restatement to assess whether a concept really captures what the courts are doing. The concept of enabling torts does not.

Understanding the expansion of remote-actor liability requires understanding a number of distinctive ways in which the

135. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 19 (Proposed Final Draft No. 1, 2005) (emphasis added).

136. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 3 (2004).

carelessness of such actors can ground their accountability to injured parties. In Part III, we sketched three different grounds: concurrent negligence, attribution, and affirmative duty. A court faced with a tort claim against a remote actor for an injury inflicted in the first instance by an intervening wrongdoer should first determine if it is dealing with a case of *concurrent negligence* (paradigmatically, in automobile accidents and other collisions). If so—and assuming the standard negligence elements are satisfied—the remote actor and the immediate injurer are both subject to liability.¹³⁷ If the situation is not one of concurrent negligence, the court must next determine if there is any basis for *attributing* the wrong of the intervener to the remote actor (as in the case of joint tortfeasors). Where attribution is appropriate, both defendants are again subject to liability.¹³⁸ Finally, if there is no basis for attribution, it will ordinarily be incumbent on the plaintiff to establish that the remote actor owed her a genuine *affirmative duty* to protect her against the intervener's wrong, either because of a special relationship between the remote actor and the victim or a custodial or quasi-custodial relationship between the remote actor and the intervener; negligent entrustment may be understood as a variant in which the affirmative duty springs from ownership of a dangerous instrumentality.¹³⁹

To be sure, simplification is one of the goals of explanation, and a great deal of the *Restatement (Third)* is simplifying in the best sense of the term. It is not always easy to say when simplification has crossed over into reductionism, just as it is not always easy to see when “capturing the true conceptual complexity” of tort doctrine has crossed over into a kind of labyrinthine formalism rightly derided as Talmudic or Jesuitical. And so one might well ask why the three paradigms we offer are superior to the apparent simplicity of sections 19 + 34 + 37. We conclude by summarizing the answer that we have tried to provide in this Article.

First and foremost, sections 19, 34, and 37 do not accurately restate the law. By contrast, the three-paradigm account of remote-actor liability for injuries inflicted by an intervening wrongdoer is true to extant law, while offering a framework for understanding how it has expanded and how it might still expand. Second, the apparent simplicity of 19 + 34 + 37 is to a great extent illusory. As Professor Jane Stapleton has demonstrated in her elegant contribution to this Symposium¹⁴⁰—and as the Reporters themselves have indicated in their treatment of “scope of liability” and

137. See *supra* Part III.B (discussing concurrent negligence).

138. See *supra* Part III.A (discussing attribution).

139. See *supra* Part III.C (discussing affirmative duties).

140. See Jane Stapleton, *The Risk Architecture of the Restatement (Third) of Torts*, 44 WAKE FOREST L. REV. 1309 (2009) (discussing difficulties with the concept of “creating a risk”).

affirmative duties¹⁴¹—important and difficult issues remain regarding “scope of the risk” and “risk creation,” not to mention the extraordinary degree to which the Reporters’ model relies on the safety valve of apportionment to compensate for its relatively unstructured rendition of the negligence tort.

Finally, we think it critical to take a broader view of what it is to offer an illuminating explanation of the common law of torts. The Reporters aim to sidestep notions of duty, agency, and responsibility in explaining tort law; they rely on concepts of risk creation and apportionment to do the heavy lifting in rendering doctrine coherent. It will come as no surprise to those who have followed our debates with the Reporters that we think this strategy is flawed.¹⁴² That is not only because we are less pessimistic than they about the possibility that richer moral notions are capable of playing a role within cogent accounts of tort. And it is not only because we think that, as it happens, it is impossible to restate the law of torts accurately without these conceptual tools. It is also because we think it clearly the case that tort law functions synergistically with everyday moral notions (be they sound or unsound) of duty, agency, and responsibility, and that judges, lawyers, and jurors incorporate such notions into the law. The Reporters appear to abandon, from the start, the very possibility of understanding the versions of those notions embedded in tort law. Surely, a view that takes duty, agency, and responsibility seriously has a strong claim to explanatory superiority.

141. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. e (Proposed Final Draft No. 1, 2005) (acknowledging “criticism that the risk standard is indeterminate for a significant class of cases”).

142. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 668–69 (2001) (criticizing the Reporters for treating “duty” in negligence as an undefined grant of power to judges to take negligence cases away from juries); John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 333 (2006) (criticizing the Reporters for “collapsing questions of duty into a blunderbuss policy inquiry as to the propriety of permitting juries to impose liability”).