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THE RISK ARCHITECTURE OF THE *RESTATEMENT*  
(*THIRD*) OF TORTS

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INTRODUCTION

A central aim of a restatement is to clarify the law. Since it is primarily intended for the Bench and the Bar, a restatement will be self-defeating if it uses obscure or unnecessarily complex terms, if it deploys the same term in inconsistent ways, or if it uses synonyms for the same idea without clear acknowledgement. In other words, unless a restatement uses a readily comprehensible and consistent terminology, it will, at best, be avoided by many potential users and, at worst, will itself create further confusion in the law. Dull and unheroic though it may seem, the careful and rigorous use of transparent terminology plays a crucial role in the drafting of a successful restatement.

Tort lawyers do not need to look far for chilling examples of restatement provisions that fell well below this drafting standard. The most notorious is section 402A of the *Restatement (Second) of Torts*, which recognized a liability in relation to a “product in a defective condition unreasonably dangerous.”<sup>1</sup> With hindsight it seems extraordinary that this explosive rule failed to explain clearly by what benchmark defectiveness was to be judged and that, though one comment stated that the rule was one “of strict liability,”<sup>2</sup> other comments were patently inconsistent with this claim.<sup>3</sup> For decades

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1. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). See Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 971 (2001), for a discussion of the confusion and anomalies with respect to causal language in restatements.

2. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1965) (“The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product.”).

3. See, e.g., *id.* § 402A cmt. k (discussing “unavoidably unsafe products” and noting that “[t]here are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use . . . . Such [] product[s], properly prepared, and accompanied by proper directions and warning, [are] not defective, nor [are they] *unreasonably* dangerous. . . . The seller of such products . . . is not to be held to strict liability

this crude drafting, probably a reflection of equally crude underlying conceptualization, bewildered judges who struggled to fix upon a workable and acceptable approach to product claims.<sup>4</sup> The American Law Institute (“ALI”) finally felt obliged to restate the vast resultant case law in 1997.<sup>5</sup>

This Symposium provides an opportunity to assess, from this terminological perspective, the fundamental architecture of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, an architecture that is expressed in terms of risk.<sup>6</sup> In exploring the nature of this fundamental “risk” architecture, we will ask: How easy will it be to navigate the *Restatement (Third)*? How transparent and consistent is the terminology that has been used to communicate this “risk” architecture? Can that communication be improved? And if it is too late, what does this teach us?

### I. DUTY

In the *Restatement (Third)* the Reporters, deploying a concept of “creating a risk,” superficially appear to fix two poles in their architecture delineating when a duty is owed in the tort of negligence. Under section 7 a duty will be presumed if the actor’s conduct creates a risk of physical harm,<sup>7</sup> but under section 37 there will be a presumption of no duty if the actor’s conduct does not create such a risk.<sup>8</sup>

It is not self-evident what it means to say that conduct “creates a risk” of physical harm.<sup>9</sup> It is not a term of art. Yet nowhere in the *Restatement (Third)* is this critical concept defined, nor is there an explicit description of its relation to the concepts of “risk,” which are used in other areas such as those concerning breach<sup>10</sup> and scope of liability for the consequences of breach.<sup>11</sup>

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for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk”).

4. See, e.g., *Buccery v. Gen. Motors Corp.*, 132 Cal. Rptr. 605, 611 (Ct. App. 1976) (“Since the decision of our Supreme Court in *Cronin v. J.B.E. Olson Corp.*, there has been considerable uncertainty as to the definition of a defective product.”) (citation omitted); *McGrath v. White Motor Corp.*, 484 P.2d 838, 842 (Or. 1971) (noting that “the entire field of products liability is in a state of uncertainty”).

5. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. (1998).

6. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 7, 29, 30, 37, 39–41 (Proposed Final Draft No. 1, 2005). Unless otherwise indicated, all references to the *Restatement (Third)* in this Article are references to this 2005 Draft.

7. See *id.* § 7.

8. See *id.* § 37.

9. Clarification of the concept of “creating a risk” will also be critical to the success of other areas of the *Restatement (Third)* such as those dealing with recklessness and abnormally dangerous activities. See *id.* §§ 2(a), 20(b)(1).

10. See *id.* § 3.

11. See *id.* §29.

For example, a trial judge might think that, to use the Reporters' own words from a 2004 draft, "when [an] actor's conduct is a factual cause of physical harm, the actor's conduct necessarily 'created a risk' of harm."<sup>12</sup> Correspondingly, this judge would read section 7 as instructing her<sup>13</sup> to recognize a duty whenever the defendant's conduct was a factual cause of physical harm. Yet such an instruction would be absurd. To understand why, suppose an actor fails to rescue a baby-stranger drowning in a puddle where but for the actor's omission the baby would not have drowned. Most courts would recognize the omission as a factual cause of the baby's death, applying the principle, recognized in section 26, that "[c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct."<sup>14</sup> Yet even though the actor's conduct was a factual cause of the death, there is a virtually universal consensus throughout the common-law world that no duty was owed to the baby in these circumstances.<sup>15</sup>

Although, in response to criticism,<sup>16</sup> the Reporters deleted this statement from post-2004 drafts, the same incoherent idea (that when conduct was a factual cause it necessarily had "created a risk" of harm) persists elsewhere in the current draft *Restatement (Third)*.<sup>17</sup> Yet even if we could ignore this incoherence and be sure that the Reporters now consider that conduct can be a factual cause of physical harm without "creating a risk" for the purposes of section 7, they have still not provided our trial judge with an explicit definition of their concept of "creating a risk" on which the duty architecture of their *Restatement* relies so heavily. All we have are the Reporters' illustrations from which we must indirectly glean the meaning that the Reporters intend to convey by the difficult concept

12. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 7 cmt. a (Tentative Draft No. 4, 2004).

13. Subject to RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(b) (Proposed Final Draft No. 1, 2005)

14. *Id.* § 26; *see, e.g.*, *Gorman v. Costello*, 929 A.2d 1208, 1211 (Pa. Super. Ct. 2007).

15. *See, e.g.*, Morton J. Horwitz, *Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 106 (2004) (stating that under the common law a passerby is under no duty to save a baby "lying face down in a puddle"); Sungeeta Jain, *How Many People Does It Take to Save a Drowning Baby?: A Good Samaritan Statute in Washington State*, 74 WASH. L. REV. 1181, 1182–83 (1999) (stating that even an Olympic swimmer does not have a duty to save a drowning baby because under the common law a bystander has no duty to rescue an imperiled person even when the rescue poses no risk to the rescuer).

16. *See, e.g.*, Jane Stapleton, *Controlling the Future of the Common Law by Restatement*, in *EXPLORING TORT LAW* 262 (M. Stuart Madden ed., 2005).

17. For example, the Reporters' Note to section 7, comment *l* of the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (Proposed Final Draft No. 1, 2005) reads: "One useful characterization of whether an actor has created a risk as distinguished from whether a pure affirmative duty is at issue is to consider whether, if the actor had never existed, the harm would not have occurred."

of “creating a risk.”<sup>18</sup>

In other words, faced with the form of the *Restatement (Third)* as it existed at the time of this Symposium, a user can only confidently pinpoint the meaning of “creating a risk” after a close and labor-intensive trawl of the whole text. This is a regrettable state of affairs. The problem is particularly acute because the Reporters intend a somewhat unusual catchment for their “creating a risk” notion. For example, conduct that increases the chance of another encountering a natural hazard,<sup>19</sup> a third party, or an instrumentality *is* treated as “creating a risk,” but, I am told, the failure of a parent to feed his or her child *does not* “create a risk” that the child will encounter the natural hazard of starvation.<sup>20</sup>

After conducting such a trawl of the *Restatement (Third)* for this Symposium, I conclude that the Reporters intend the elements of the core concept of “conduct creating a risk” to have the following meanings.

First, at the time of the conduct that is the subject of the allegation of breach, there were certain prospects, a set of “risks,” of physical harm presented by the facts.<sup>21</sup> Such “risks” include natural perils,<sup>22</sup> in other words, the prospect that “nature will take its course,” as when an avalanche crashes down, a person dies of starvation, a wound becomes infected, or a genetic predisposition is triggered by an environmental factor.

Secondly, an actor’s conduct “creates” a risk of physical harm when it is an *affirmative act*<sup>23</sup> that increases the total physical risks confronted by others relative to how things would be if the actor had not engaged in that affirmative act.<sup>24</sup> This definition allows us to accommodate the case where “conduct” does not “create a risk” for

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18. See, e.g., *id.* § 7 cmt. b, illus. 1; *id.* § 37 cmt. c, illus. 1–2; *id.* § 38 cmt. c, illus. 1–2; *id.* § 41 cmt. g, illus. 1–4; *id.* § 42 cmts. c, f–h, illus. 1–6; *id.* § 43 cmts. e–g, illus. 1–2.

19. See *id.* § 37 cmt. d. When an actor’s conduct creates risks of its own and thereby increases the risk of another encountering a natural hazard, the actor’s conduct falls under section 7. *Id.* Examples of an actor’s conduct creating risks of its own for the purposes of section 7 include inciting a swimmer to swim despite a dangerous riptide or providing an assaulter with a weapon or alcohol. *Id.*; see also *id.* § 37 reporters’ note cmt. b.

20. I received this information during a private conversation with the Reporters at the Wake Forest University School of Law Symposium on the Third Restatement of Torts on April 2, 2009.

21. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 cmt. d (Proposed Final Draft No. 1, 2005).

22. See *id.*

23. See, e.g., *id.* § 6 cmt. f (“The conduct that creates the risk must be some affirmative act . . .”).

24. Here and throughout this Article I am ignoring the possibility that a factor is a factual cause even though it fails the but-for test. On the most convenient meaning of factual “causation” in the law, see Jane Stapleton, *Choosing What We Mean by “Causation” in the Law*, 73 MO. L. REV. 433 *passim* (2008).

the purposes of section 7 but is nevertheless a factual cause of physical harm.<sup>25</sup> For example, the parent's failure-to-feed may be a factual cause of the infant's death by the natural hazard of starvation (because we assess causation relative to a hypothetical world in which the parent fulfills her legal obligation to feed), but the parent's conduct does not fit into the *Restatement (Third)*'s concept of "conduct creating a risk" because the parent's conduct was not an affirmative act.

Regrettably, neither section 7 nor its comments spell out that the core requirement of the "conduct creating a risk" concept is that the conduct must be an affirmative act. We find the point touched on tangentially a full thirty sections later when, in a comment, the Reporters mention that it is the *entirety* of the conduct that is in issue when we ask the "create a risk" question.<sup>26</sup> Thus, it is irrelevant if the specific allegation of breach is an omission (such as failing to apply the brakes of a car)—so long as the omission is "embedded" in a course of conduct that is an affirmative act (such as driving a car), the conduct may be characterized as "creating a risk."

The examples given of such affirmative acts described as "creating a risk" include situations in which the defendant drove a car;<sup>27</sup> supplied a product;<sup>28</sup> entrusted her car to another;<sup>29</sup> prescribed medication for a patient;<sup>30</sup> served alcohol to his guests as a social or commercial host;<sup>31</sup> gave a weapon to another person;<sup>32</sup> stored chemicals;<sup>33</sup> hit a golf ball;<sup>34</sup> jumped off a bridge;<sup>35</sup> installed building material;<sup>36</sup> chose the location of a picnic area,<sup>37</sup> utility pole,<sup>38</sup> or

25. See *supra* text accompanying note 14.

26. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 cmt. c (Proposed Final Draft No. 1, 2005) ("The proper question is not whether an actor's specific failure to exercise reasonable care is an error of commission or omission. Instead, it is whether the actor's *entire conduct* created a risk of physical harm.") (emphasis added).

27. See *id.* §§ 37 cmt. c, 39 cmt. c.

28. See *id.* Whether commercially (section 37, comment c) or noncommercially (section 39, comment d).

29. See *id.* § 19 cmt. a, illus. 1.

30. See *id.* § 41 cmt. h.

31. See *id.* §§ 7 cmts. a, c, 41 cmt. d.

32. See *id.* § 37 cmt. d.

33. See *id.* § 20 cmt. k, illus. 2.

34. See *id.* § 39 cmt. c, illus. 1.

35. See *id.* § 39 cmt. c, illus. 3.

36. See *id.* § 39 cmt. c (building material); *id.* § 42 cmt. c, illus. 2 (furnace).

37. See, e.g., *id.* § 19 reporters' note cmt. e (describing a case in which "defendant located its picnic area right next to its parking lot, thereby creating risks insofar as motorists might drive badly").

38. See, e.g., *id.* § 19 reporters' note cmt. g (stating that "a public utility that locates a utility pole close . . . to a public highway . . . create[s] a risk of injury for occupants of cars that lurch off the highway"); see also *id.* § 39 cmt. d (discussing "[a] company that uses overhead power lines in an area where someone might come into contact with the line").

business operations;<sup>39</sup> leased premises;<sup>40</sup> participated in a game of Russian roulette;<sup>41</sup> and hired employees.<sup>42</sup>

Some of these examples confirm that the way in which an affirmative act may “create a risk” for the purposes of the *Restatement (Third)* extends well beyond cases where the immediate agent of risk is the relevant actor. These examples confirm that this concept extends to cases where the actor’s affirmative act increased the physical risks of another by increasing the chance that the other will encounter some natural hazard such as an avalanche, a third party such as a drunk driver, or an instrumentality such as a dog. It catches a physician who persuades his patient to go skiing to exercise his arthritic knees, a bar that serves alcohol to a drunk patron, or a landlord who leases premises to a tenant who owns a vicious dog. That the Reporters have swept such cases into the presumed-duty class of section 7<sup>43</sup> is an important and controversial move. Therefore, it is particularly regrettable that there is no signal in the comments to section 7 that the concept of “conduct creating a risk” has given that section such a wide catchment.<sup>44</sup>

A third question is at what level of specificity is the “conduct” to be spelled out. Does the section 7 notion of “conduct creating a risk”<sup>45</sup> refer to the generic form of the actor’s conduct such as driving an automobile or to the actor’s *specific* conduct such as driving on Main Street at noon on April 1, 2009, at forty miles per hour? Once again no guidance is given in section 7, its comments, or its illustrations. The *Restatement (Third)* user is left to forage elsewhere. Such a forager will eventually find, in comment *c* to section 37, the following example:

[A] retail store that operates in a dangerous and isolated neighborhood might be characterized as creating a risk of criminal activity to patrons. . . . [W]hether the retail store has created a risk of criminal activity requires consideration of what would have happened if the store had not been in operation. Perhaps the patron would have been subject to an equivalent risk of attack at some other location, or perhaps the patron would have foregone late-night shopping if the store had not been there.<sup>46</sup>

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39. *See id.* § 37 cmt. d (“[A]n actor’s business operations might provide a fertile location for natural risks or third-party misconduct that otherwise would not occur.”).

40. *Id.* § 41 reporters’ note cmt. m.

41. *Id.* § 37 reporters’ note cmt. b.

42. *Id.* § 41 reporters’ note cmt. m.

43. *Id.* § 7(a).

44. Instead we have to glean this from miscellaneous examples set out in comments thirty sections later. *See, e.g., id.* § 37 cmt. d.

45. *Id.* § 7(a).

46. *Id.* § 37 cmt. c.

In other words, the relevant way to specify the “conduct” is operating the store at *this* particular time and place, and the “creating a risk” question is the simple factual one of whether such operation causes an increase in criminal activity in the area (relative to the level of criminal activity were the store not in operation) so that a risk of physical harm to patrons is created.<sup>47</sup>

A related aspect of the *Restatement (Third)*'s architecture is that, though not spelled out in section 7, its comments, or its illustrations, the “conduct” must be specified as the entire course of conduct rather than that aspect of the conduct that allegedly made it tortious.<sup>48</sup> For example, the determination of whether the operation of the store creates a risk to patrons (and therefore attracts a section 7 duty) is made completely independently of and without reference to the breach issue, namely, whether creating such risks is reasonable. Similarly, we determine whether driving on Main Street at noon on April 1, 2009, at forty miles per hour increases the risk of physical harm to others without reference to the breach issue of whether the creation of this level of risk is reasonable.

A fourth key feature of the section 7 notion of “conduct creating a risk” is that it is independent of knowledge, discoverability, or foreseeability. The affirmative act of one person lightly touching hands with another at noon on April 1, 1609, would not, at that date, have been judged to “create a risk” of physical harm in our sense of increasing the risks confronted by others. Yet today we know that such conduct might transmit infection, so it was indeed conduct that “created a risk” even though this was not known or reasonably discoverable at the time. Again, it is regrettable that the fact that an actor can “create a risk” unwittingly is nowhere acknowledged in section 7. Rather, it is noted more than thirty sections later.<sup>49</sup>

A fifth feature of the section 7 notion of “conduct creating a risk” that could have been more explicit is that it covers situations where

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47. What this means is that, even if it is possible to engage in the generic type of conduct of the defendant without increasing the risks confronting any person (for example, if one drove slowly on a flat empty plain this would not increase the risks to anyone), once an actor engages in a form of such affirmative action at a specific time and place where it does increase the risk of physical harm to others, that actor “ordinarily” has a duty to exercise reasonable care according to section 7(a). *See id.* § 7(a).

48. Of course, this must be so: if “conduct” in section 7 meant the specific allegation of breach this would produce the absurd arrangement that it is only unreasonable acts that attract a section 7 duty; it would then be impossible to conceive of a person satisfying a section 7 duty by reasonable care. *See id.* § 7(a).

49. *See id.* § 39 cmt. d. (“An actor need not know that his or her conduct has created a risk of harm for the duty provided in this Section to exist. Before a *breach* of the duty occurs, however, an objectively foreseeable risk of harm must exist.”).

the actor's affirmative act increased the chance that another would face a peril sometime in the future long after the risk-creating act had occurred.<sup>50</sup> For example, suppose a friend gives a tin of dangerously adulterated food to a neighbor. For the purposes of section 7, the act of giving "creates a risk" because it increases the chance the neighbor will suffer food poisoning, and it is irrelevant that such poisoning could happen long after the act of giving has been completed.<sup>51</sup>

A sixth and, in my view, especially important question on which the catchment of section 7 hinges is whether its notion of an "affirmative act" creating a risk of harm covers cases where the defendant's "conduct" might more commonly be characterized as just passively permitting access to an instrumentality (or premises) under his control.<sup>52</sup> The *Restatement (Third)* is far from clear on the matter, though there seems to be at least one indirect suggestion that such cases might come within the section 7 notion of an "affirmative act" creating a risk.<sup>53</sup>

This uncertain state of affairs is very problematic. Take the case of a shopkeeper's storage of his firearm where another can gain access to it. Because a section 7 duty attaches only to the affirmative act, we need to break the notion of "storage" into two temporal periods: the affirmative placing of the gun on a high shelf in a locked box, in say, 2001, and the period thereafter during which the shopkeeper does absolutely nothing in relation to the gun. There will be a consensus that during the physical act of placement in 2001, the shopkeeper is under a section 7 duty. But if the shopkeeper takes all care when he places the gun, is he to have no duty in relation to the gun thereafter? There is, in my view, no doubt that the shopkeeper will be held to owe a duty throughout this

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50. *See id.*

51. *See id.* A separate point is that, on one reading of section 7, if the act is completed with care (e.g., the friend did not know and could not reasonably have known of the adulterated state of the food), the duty is satisfied and vanishes, so if the friend later discovers the food is adulterated, any affirmative duty to warn the neighbor must be found elsewhere than section 7. *See id.* § 7 cmt. k; *see also infra* note 54 (criticizing section 39 and suggesting a reformulation).

52. Consider the following hypotheticals: *D1* stores his bicycle unlocked in his driveway, *X1* steals the bicycle and due to his erratic driving there is a traffic accident in which *V1* is injured; *D2* stores his gun in the top drawer of his desk, *X2* steals it and shoots *V2*; *D3* peels an orange in a park and falls asleep, then *X3*, a child, picks up *D3*'s fruit peeler and injures *V3*; and *X4* gains entry to the premises of *D4* (who is dozing on her front porch) through her front door, which has no lock, then, over the low backyard fence *X4* gains entry to the neighboring property of *V4*, which he vandalizes.

53. *See, e.g., id.* § 10 cmt. f ("[A] person who turns over a firearm to a child who lacks special training and experience is subject to tort liability under the rules relating to negligent entrustment. *Even leaving a firearm at a location where an inexperienced child can gain access to it can expose the person to tort liability . . .*") (emphasis added).

period of passive control. Yet the Reporters are unable coherently to locate such a “passive control of instrumentality” duty in their current architecture concerning the duty issue.<sup>54</sup>

A. *Chapter 7 Duties: Better Seen as Duties “Regardless of Whether the Actor Creates a Risk”*

In practice, the empirical question of whether, for section 7 purposes, the affirmative act of the defendant increases the physical risks of another may be hard to answer.<sup>55</sup> For example, in the case of the operation of the retail store,<sup>56</sup> how can we confidently tell whether “the patron would have been subject to an equivalent risk of attack at some other location”?<sup>57</sup> But, as the Reporters point out, if the case involves one of the contexts enumerated in Chapter 7 (sections 38–44), a duty is owed *regardless* of whether empirically it could be shown that the actor’s conduct creates a risk of physical harm.<sup>58</sup> In these contexts there will be no need to establish the empirical fact of risk creation.

Moreover, setting aside section 39 for the moment because it is *sui generis* and conceptually problematic,<sup>59</sup> if we were to see Chapter 7 duties<sup>60</sup> as arising *regardless* of whether the actor’s conduct creates a risk, this would also avoid questions that some might find conceptually awkward, such as whether we should characterize a store owner’s conduct in granting the public entry to the store as an affirmative act creating a risk by virtue of the potential hazard that the conduct of a third party might injure the

54. Their attempt to do so with the “continuing risk” duty in section 39 is incoherent. *See id.* § 39. That section should have been rethought and narrowed to a family of duties triggered by the “special relationship” of control over an instrumentality akin to the families of duties that arise from control over animate things such as other persons and animals. Such a revised section 39 should have been drawn widely enough to locate both duties in relation to the control and management of the instrumentality (e.g., use, storage, entrustment) and a duty of affirmative action if that control is lost.

55. This is quite apart from controversies about how to frame the question: How wide should the neighborhood be drawn? How specifically should the risk be framed? Should the fact that conduct reduced the risk of one peril (while increasing the risk of another) be taken into account, and if so, how?

56. *See supra* notes 46–47 and accompanying text.

57. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 cmt. c (Proposed Final Draft No. 1, 2005).

58. *See id.* §§ 37 cmt. c, 40 cmts. c, h, 41 reporters’ note cmt. e.

59. *See supra* note 54 and accompanying text.

60. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM CHAPTER 7 § 38 (Proposed Final Draft No. 1, 2005) (affirmative duty based on statutory provisions imposing obligations to protect another); *id.* § 39 (duty based on prior conduct creating a risk of physical harm); *id.* § 40 (duty based on special relationship with another); *id.* § 41 (duty to third persons based on special relationship with persons posing risks); *id.* § 42 (duty based on undertaking); *id.* § 43 (duty to third persons based on undertaking to another); *id.* § 44 (duty to another based on taking charge of the other).

entrant. We need not address this tricky question because a duty is clearly recognized in section 40(b)(3) by virtue of the relationship between the member of the public and the store owner.<sup>61</sup>

A bailee's implied acceptance of goods provides another illustration. Where a customer in a store lays aside her garment in the presence of employees before trying on a new one we do not have to trouble ourselves with any empirical or conceptual dilemmas about whether the bailee's conduct constitutes an "affirmative act creating a risk" for the purposes of section 7: we may simply rely on section 42, which recognizes the duty that is attracted by such gratuitous bailments.<sup>62</sup> A final example is where a landlord fails to provide security devices at leased premises. In this situation, we do not have to worry if this can be established to be conduct that facilitates the risk of criminal attack because section 40(b)(6) simply recognizes that the relationship of landlord and tenant is sufficiently "special" to impose a duty on the former.<sup>63</sup>

Once we see that Chapter 7 duties<sup>64</sup> are best described, not as *affirmative* duties, but as duties arising *regardless* of whether the actor's conduct creates a risk, we can see that although the Reporters claim that "what defines the line between duty and no-duty [is] conduct creating risk to another,"<sup>65</sup> this is an awkward and misleading picture of the duty architecture of the *Restatement (Third)*, and of the underlying case law it seeks to restate. That architecture is not best captured by the claim that duty cases are arranged around two poles defined by "creation of risk."<sup>66</sup> Instead, a more accurate representation of the duty architecture of the *Restatement (Third)* is as follows.

### B. Summary of the Duty Architecture

First, section 7 of the *Restatement (Third)* is intended to accommodate the large number of contexts in which the recognition of a duty is *uncontroversial* because they involve an actor who engages in an affirmative act that unequivocally increases the physical risks to others.<sup>67</sup> This simple fact of positively imperiling others is judged sufficient by itself to provide an adequate normative rationale for the duty: if one acts, one must take care in relation to

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61. *Id.* § 40(b)(3) (recognizing that for purposes of the section 40 duty, a special relationship exists between "a business or other possessor of land that holds its premises open to the public [and] those who are lawfully on the premises").

62. *Id.* § 42 cmt. a & reporters' note cmt. a.

63. *Id.* § 40(b)(6).

64. *See supra* note 60.

65. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 reporters' note cmt. c. (Proposed Final Draft No. 1, 2005).

66. *See supra* notes 7–8 and accompanying text.

67. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1, 2005).

any risks to the physical integrity of others that one's conduct creates.

Secondly, chapter 7 adumbrates other contexts in which the recognition of a duty is *uncontroversial* because the type of status or other relationship of the actor to the victim<sup>68</sup> or a third party<sup>69</sup> (or the type of undertaking of the actor to such parties<sup>70</sup>) raises normative concerns that regardless of whether the particular actor's conduct "creates a risk of physical harm," have been judged to weigh in favor of the recognition of a duty.<sup>71</sup> Although we use a shorthand of seeing some feature, be it a relationship or undertaking, as triggering a duty, we should not lose sight of the often complex normative analysis that actually results in the recognition of the duty. Indeed, the notions of "relationship," "undertaking," and "taking charge"<sup>72</sup> are themselves normative constructs, so it would be more accurate for us to see the catchment of chapter 7 duties as what I will call "normative envelopes."

For completeness we should note additional pillars to this duty architecture. A third pillar is that even where a context might otherwise fall within section 7 or a chapter 7 duty, courts may decline to recognize a duty on special grounds.<sup>73</sup> Given the split section 7/chapter 7 design adopted by the Reporters, this feature of tort doctrine must be stated in duplicate: as an exception to section 7(a),<sup>74</sup> and as an exception to chapter 7 duties.<sup>75</sup>

Related to this is a fourth pillar of the duty architecture: that in the future, courts may recognize duties in contexts beyond those explicitly enunciated in section 7 and chapter 7.<sup>76</sup> It is here that a central weakness of the duty architecture is revealed, for what drives the resolution of new duty claims is not a judicial meditation on the meaning to be ascribed to "an affirmative act creating a risk of harm,"<sup>77</sup> "special relationship,"<sup>78</sup> "undertaking,"<sup>79</sup> and so on, but a

68. *See id.* § 40.

69. *See id.* § 41.

70. *See id.* §§ 42–43; *see also id.* § 44 (entitled "Duty to Another Based on Taking Charge of the Other").

71. *See id.* §§ 40–44.

72. *See id.*

73. *See, e.g.,* *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 38 (N.Y. 1985); *Praesel v. Johnson*, 967 S.W.2d 391, 398 (Tex. 1998); *Reynolds v. Hicks*, 951 P.2d 761, 765 (Wash. 1998).

74. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7(b) (Proposed Final Draft No. 1, 2005).

75. *See id.* § 37 cmt. g; *see also id.* § 39 cmt. b. This means that even if an actor's carelessness caused foreseeable physical harm to another, he will not be liable. Well-known contexts where such exceptions are argued for include: public-authority defendants, social host-third party, land possessor-trespasser, physician-third party, a product supplier in relation to recalling products later revealed to be defective, and a prescription-drug manufacturer in relation to warning patient directly.

76. *See, e.g., id.* § 40 cmt. o.; *see also id.* § 37 cmt. b.

77. *See id.* § 7 cmt. l.

determination of complex policy concerns underlying these labels. Although the Reporters acknowledge that something like this balancing process is in operation,<sup>80</sup> they are unable to accommodate it smoothly within their present architecture with its tight focus on risk creation.<sup>81</sup>

## II. BREACH

In Part I we saw that by a careful trawl of the *Restatement (Third)* we can deduce the detailed shape of its duty architecture. We saw that one particular feature of that architecture is that, of the risks of physical harm presented by the facts at the time of an actor's conduct, that part of the *duty architecture* set out in section 7 pivots around the subset of risks that the affirmative act of the actor has "created" relative to how things would be if the actor had not engaged in that affirmative conduct.<sup>82</sup>

But if we now look at the overall *risk architecture* of the *Restatement (Third)*, we see that the key to understanding this architecture is to appreciate that outside the duty context the "risk" focus fundamentally shifts. It does so more broadly in the sense that we take account of risks whether created by the actor or not, and it does so more narrowly in the sense that what drives the analysis in the breach, causation, and scope issues are only what I will call "excess risks," risks that would not be present in a no-breach world. Let me explain.

The breach inquiry<sup>83</sup> must address the total risks present on the facts at the time of conduct (whether created by the actor's conduct or not) and ask whether that total exceeds the risks that would be present in a hypothetical no-breach world where the actor's conduct conformed to his legal obligation. If so, that aspect of the actor's conduct that is "responsible for"<sup>84</sup> these excess risks breaches the obligation and is tortious. Regrettably, the *Restatement (Third)* does not emphasize the crucial point that an actor might be "responsible for" such excess risks *either* because he created them by his

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78. *Id.* § 40–41.

79. *Id.* §§ 42–43.

80. *See id.* §§ 37 cmts. b, g, 39 cmt. b.

81. This is especially evident in the incoherent section 39 and its troublesome place in the "risk" structure of the *Restatement (Third)*. *See supra* note 54.

82. *See supra* notes 23–24 and accompanying text.

83. The breach black letter is as follows: "A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005).

84. I thank Professor Ken Simons for suggesting this term.

affirmative act where a reasonable person would not have created them (e.g., by driving at forty miles per hour when the highest reasonable speed was thirty miles per hour) or because the actor failed to eliminate risks when a reasonable person would have done so (e.g., by a parent failing to feed his or her own child or a restaurant failing to assist a patron who is having a heart attack).

To repeat: the breach inquiry into whether the total risks presented by the facts are in excess of what they should be *does not depend on whether the actor's conduct created any of them*. Unfortunately the *Restatement (Third)* does not merely fail to spell this out to the user. Rather, it endangers the coherence of its own risk architecture by describing this core notion of breach, namely, that an aspect of the actor's conduct was responsible for excess risks, in terms of risks "created" by the breach. When the *Restatement (Third)* confronts its user with a characterization of breach as "conduct [that] creates a risk of harm,"<sup>85</sup> that user will be bewildered: if "create" retains the narrow meaning that it has in section 7,<sup>86</sup> how can an actor under an affirmative duty, such as the parent or the restaurant, be in breach of that duty when he has not created a risk?<sup>87</sup>

A separate subtle but nevertheless significant problem with the *Restatement (Third)*'s handling of the notion of "risk" is that it fails to spell out clearly the relevance to the breach question of the "normative envelope" recognized by the courts relating to the relevant duty.<sup>88</sup> Yet it is vitally important for the *Restatement* user

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85. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 3 cmt. b (Proposed Final Draft No. 1, 2005) ("A defendant is held liable for negligent conduct primarily because that conduct creates a risk of harm . . ."); see also *id.* § 3 cmt. e ("Insofar as this Section identifies primary factors for ascertaining negligence, it can be said to suggest a 'risk-benefit test' for negligence, where the 'risk' is the overall level of the foreseeable risk created by the actor's conduct . . ."). More incoherence is introduced by section 3, comment *c*, which contemplates cases where the breach did not create the risk: "The fact that the actor's conduct did not create the risk is a relevant circumstance in determining unreasonableness." *Id.* Yet more confusion flows from section 18, which confines its discussion of breach in negligent failure-to-warn cases to where the conduct of the defendant "creates a risk of physical harm," *id.* § 18(a), thereby failing to cover the many situations where the breach consists simply in failing to warn another of the risk posed by an existing peril, as when a mental-health professional fails to warn others of the risks posed by the patient, on which see *id.* § 41 cmt. g.

86. Namely, that an affirmative act increased the total physical risks of others relative to how things would be if the actor had not engaged in that affirmative conduct.

87. The user's bewilderment can only be compounded by the *Restatement (Third)*'s bald assertions, in direct contradiction to its duty architecture, that omissions can "create" risks. See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 34 cmt. d (Proposed Final Draft No. 1, 2005) (envisaging a "risk of harm created by another's . . . omissions").

88. See *supra* text following note 72.

to appreciate clearly that these “normative envelopes,” such as the “special relationship” in sections 40 and 41,<sup>89</sup> the relevant “undertaking” in sections 42 and 43,<sup>90</sup> and the “taking charge” in section 44,<sup>91</sup> confine and structure the breach question.

For example, it is the normative conception of what makes, say, the dentist-patient relationship “special” that defines the breach question, not just in terms of the characterization of the “reasonable person” (i.e., a “reasonable dentist” qua “dentist”) but also in terms of the *risks* in relation to which that person’s response is taken into consideration. Suppose that while on vacation at a ski resort, a dentist sees Amy, who is his patient, in imminent danger of an avalanche and fails to shout a warning even though, given that this was an easy and safe thing to do in the circumstances, it was something a reasonable citizen would have done. This failure to act reasonably is not a breach of the duty the dentist owes Amy by virtue of his “special” dentist-patient relationship with her: though the risk of avalanche was in excess of the risks that would be present had the dentist acted reasonably, it does not engage the policy concerns that prompted the law of negligence to designate the dentist-patient relationship to be “special.” Thus, the unreasonable failure to warn is no breach of the duty owed by virtue of the special relationship. (Of course, another way of presenting this result would be to say that, in relation to such risks, there was *no duty* generated by the relationship.)

### III. FACTUAL CAUSE

As the *Restatement (Third)* user moves on to the other elements of a negligence cause of action, he will need to grasp further features of its risk architecture. We have seen that while the *duty* architecture is expressed in terms of a subset of the total risks presented by the actual facts at the time of an actor’s conduct (namely, any that were created by the actor’s affirmative act<sup>92</sup>), the *breach* analysis starts from that total set of risks and asks whether this total was in excess of the risks that would have been present in a hypothetical world in which the actor’s conduct had conformed to his legal obligation.<sup>93</sup>

But when we move to the factual-cause and scope issues, the focus again shifts from the disembodied conduct of the actor to the harm. More specifically, the focus shifts to the existence of the connection between the tortious aspect of the actor’s conduct and the physical harm of which legal complaint is made (factual cause) and

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89. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM §§ 40–41 (Proposed Final Draft No. 1, 2005).

90. *Id.* §§ 42–43.

91. *Id.* § 44.

92. *See id.* § 7; *supra* notes 18–24 and accompanying text.

93. *See id.* § 3.

the normative character of this connection (scope of liability). But again, as in the breach issue, in both factual cause and scope of liability, we are concerned *only* with those of the total risks presented by the facts that were in *excess* of what would exist in a “no-breach” world.

A vital corollary of this first point lets us identify the appropriate factual-causation inquiry. Only after the breach analysis has shown that an aspect of the actor's conduct is tortious because it was “responsible for” an excess *risk* can we then ask the factual-cause question: did that tortious aspect contribute to the occurrence of the relevant *harm*?<sup>94</sup> If so, we say the breach was a cause of the harm. This point is vital to the *Restatement (Third)* user's understanding of how tort law works: to be meaningful in the context of ascribing liability for wrongful conduct, the subject matter of the factual-cause inquiry must be the tortious aspect of the actor's conduct and not simply the actor's conduct. This can be easily demonstrated.

Suppose an actor is driving at forty miles per hour, which is ten miles per hour above what is reasonable in the circumstances, when a child darts out and, being unable to stop in time, the actor collides with the child. Consider the but-for route to establishing factual causation set out in *Restatement (Third)* section 26<sup>95</sup>: What should the subject matter of this inquiry be? Should it be the tortious aspect of the conduct, which is the increment of speed above what was reasonable? Or should it simply be the actor's conduct, namely, his driving? Clearly, the latter inquiry is of no value to the law when it is ascribing liability for the results of the *wrongful* conduct: it is obvious that the child would not have been injured had the actor not been driving. To be of value to the law the factual-cause question under section 26 must be whether the child would have been injured but for the *tortious aspect* of the actor's conduct, that is, whether the child would have been injured if the driver had been driving at thirty miles per hour, the closest reasonable speed to that of the actor.

Unfortunately, the *Restatement (Third)* does not provide clear signals as to the different types of risk that are in focus in the different elements of the cause of action. Indeed, the *Restatement (Third)* itself contains at least one example of the confusion that this will sow at the factual-cause stage. Illustration 3 to section 29 reads:

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94. Notice that the reason for that excess risk may be the actor's culpable omission. In such cases we can now see why an actor's conduct may be a factual cause of an outcome without creating a risk of that outcome. See *supra* notes 9–15, 24–25 and accompanying text.

95. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 26 (Proposed Final Draft No. 1, 2005).

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Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard was negligent for giving Kim his shotgun, the risk that made Richard negligent was that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, *even though Richard's tortious conduct was a factual cause of Kim's harm.*<sup>96</sup>

If by "Richard's tortious conduct" the Reporters mean "the tortious aspect of Richard's conduct," their assertion that it "was a factual cause of Kim's harm" is simply wrong.

What was wrongful about Richard's conduct was that the gun was loaded. The risk in excess of what would have been present had he conducted himself with care was the risk "that Kim might shoot someone." The tortious aspect of Richard's conduct is the loadedness of the gun. But for that loadedness, Kim would still have broken her toe, so the tortious conduct could not qualify as a factual cause of that injury under section 26.<sup>97</sup>

Of course, if by "Richard's tortious conduct" the Reporters simply mean "Richard's conduct" in handing an object to Kim, then of course had he not done so she would not have been injured. But, in relation to the tort of negligence the law is no more interested in this inquiry than it is in what would have happened had our speeding driver not been driving at all.

#### IV. SCOPE OF LIABILITY FOR CONSEQUENCES

##### A. *Excess Risks That Made the Conduct Tortious*

Once the breach analysis has shown that an aspect of the actor's conduct was tortious because it was responsible for excess risks and the factual-cause analysis has shown that this tortious aspect contributed to the occurrence of the relevant harm, the scope analysis must, *inter alia*, address the possibility that not all of the excess risks for which the tortious aspect of the actor's conduct was responsible are ones that "made the actor's conduct tortious"<sup>98</sup>—some are "innocent" excess risks. What should the law do if the

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96. *Id.* § 29 cmt. d, illus. 3 (emphasis added).

97. See Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1771 (1985) (discussing the scenario where "[t]he defendant handed a loaded gun to a child, who dropped the gun on his foot" and noting that while "the italicized condition was a necessary condition of the tort[i]ous aspect of the defendant's . . . conduct . . . the condition did not contribute to the injury, so the tortious aspect was not a cause of the injury").

98. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 (Proposed Final Draft No. 1, 2005).

harm that the breach goes on to cause results from one of these “innocent” excess risks and not from one of the excess risks that “made the conduct tortious”? The answer given by modern courts, at least for the tort of negligence, is that harm resulting from such an excessive but “innocent” risk should not give rise to liability.<sup>99</sup>

The *Restatement (Third)*, therefore, needed to spell out for the user how to distinguish between excess risks that “made the conduct tortious” and excess risks that were “innocent,” and then state the “perimeter” rule that for a consequence of breach to come within the appropriate scope of the actor’s liability in the tort of negligence it must at least be the fruition of an excess risk that made the conduct tortious.<sup>100</sup>

My following example illustrates how we distinguish between excess risks that “made the conduct tortious” and “innocent” excess risks. The way we distinguish is that we apply the concerns that drive the recognition of the obligation’s “normative envelope” (which is, of course, yet another reason to encourage appellate courts to enunciate fully the reasoning behind their recognition of a duty relationship in the circumstances).

Suppose Dave asks his physician for advice as to how to reduce the arthritis pain in his knees and, in response, his physician persuades him to go skiing on the local mountain. From what we saw in the example of Amy’s dentist, we know that the normative conception of what makes the physician-patient relationship “special” will not only define the catchment of when an affirmative duty based on that special relationship is owed, but will also define the breach question both in terms of the characterization of the “reasonable person” (namely, a reasonable party in the relevant “special relationship”) and in terms of the circumstances relevant to the evaluation of the reasonableness of the actor’s conduct (namely, only circumstances relevant to the law’s concept of what makes the physician-patient relationship “special”).

Clearly, it is relevant to this normative concept that skiing dangerously increases the risk of arthritic inflammation and, since a reasonable physician would not have encouraged Dave to ski in these circumstances, this aspect of the conduct of Dave’s physician was tortious: it was responsible for Dave facing risks in excess of

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99. Contrast the earlier perimeter rule (of directness) for the scope of liability in the tort of negligence. See *In re Polemis & Furness, Withy & Co.*, (1921), 3 K.B. 560 (U.K.), which was the rule in New York at the time of *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928). See also Jerry J. Phillips, *Thinking*, 72 TENN. L. REV. 697 (2005).

100. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 reporters’ note cmt. d (Proposed Final Draft No. 1, 2005). I call this rule a “perimeter” rule because even if a consequence comes within it, it may lie outside the appropriate scope of liability because, for example, it is so attenuated. See Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 993–95 (2001).

those he would have faced had his physician given careful advice. But notice that the excess risks that Dave faces include not only the risk of exacerbating his arthritis, but also any risks that are especially present on the mountain, such as the risk of avalanche injuries.

Assume that the risk of an avalanche was not one relevant to the law's concept of what makes the physician-patient relationship "special": that in relation to this risk the physician is in no more special a relationship to Dave than a stranger. This would mean that Dave's physician's failure to warn Dave about the risk of avalanche would not engage the policy concerns that prompted the law of negligence to designate the physician-patient relationship to be "special": this aspect of the physician's conduct would be no breach of the duty owed by virtue of the special relationship. Therefore, although a tortious aspect of the physician's conduct led to Dave being exposed to the risk of an avalanche, this excess risk was an "innocent" by-product of the breach.

Suppose that what happens to Dave on the mountain is that, before he even gets his skis on, he is injured by an avalanche. When he sues his physician in the tort of negligence, he will have no difficulty establishing that a duty was owed, or that the tortious aspect of the medical advice (concerning his arthritic leg) is a factual cause of the avalanche injury (because, but for the advice, he would not have been on the snowfields). But what about scope and the fact that the reason why we judge an aspect of the physician's conduct (the advice in relation to the advisability of Dave skiing with arthritic knees) to have been tortious has nothing to do with the risk of an avalanche?

When harm results from such an excess but "innocent" risk the law has a choice as to whether the tortfeasor should be liable for it. As earlier noted, the modern law of negligence chooses against liability in such circumstances: only harm that results from risks that made the conduct tortious comes within the appropriate scope of liability.<sup>101</sup> It is because Dave cannot bring his avalanche-injury claim within this scope rule that he will fail.

So how well does the *Restatement (Third)* convey this scope rule and its place within the overall risk architecture? The relevant provision is section 29, which reads:

An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious.<sup>102</sup>

This provision has only limited potential to convey clearly the rule that harm resulting from an innocent excess risk lies outside

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101. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 (Proposed Final Draft No. 1, 2005); *supra* text accompanying note 99.

102. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 (Proposed Final Draft No. 1, 2005).

the appropriate scope of liability for the consequences of a breach of a duty of care. This is because section 29 is not accompanied by clear instructions as to how a *Restatement (Third)* user is to distinguish between excess risks that “made the conduct tortious” and excess risks that are “innocent.” There is no account of how, as we have just seen, this distinction depends on what is the tortious aspect of the actor’s conduct, which in turn depends on the nature of the duty owed, specifically the concerns that drive the recognition of that obligation’s “normative envelope.”

Section 29 tries to cover too much and in so doing generates incoherence. This incoherence is illustrated by the Reporters’ troubling attempt to elaborate the point: “[A]ctors should not be held liable when the risk-producing aspects of their conduct cause harm other than that that was risked by the conduct.”<sup>103</sup> This provides no explanation for why the avalanche injury is outside the scope of the physician’s liability because avalanche injuries *were* obviously “risked by the [physician’s] conduct”: but for that conduct Dave would not have been on the mountain and would therefore not have been subject to the risk of such injuries.<sup>104</sup> Only by an explicit link back to the complex normative reasons courts give (or should be giving) to explain the contours, the “normative envelope,” of the relevant “special relationship” giving rise to the duty will the *Restatement (Third)* user understand which are the risks that made the actor’s conduct tortious and therefore how to apply the perimeter scope rule.

We must be careful here. It is true that sometimes it will be virtually unarguable that the relevant risk from which the harm resulted was not a risk that made the actor’s conduct tortious. For example, it seems pretty clear that failure to warn about the avalanche risk in the above case could not plausibly constitute a tortious aspect of the physician’s conduct: why would the concept of the delivery of health care extend to avalanche advice? More generally, whenever it can *unequivocally* be said that a reasonable person in the actor’s position would have taken no greater precautions against a risk than this actor did, harm resulting from that risk will fall outside the scope of the actor’s liability. Risks that are unforeseeable, such as the risk of a coincidental consequence,<sup>105</sup> are such unequivocally “innocent” risks because, by definition, a

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103. *Id.* § 29 reporters’ note cmt. b.

104. *Id.*

105. If we define the harm as a “coincidental” consequence of the tortious aspect of the actor’s conduct when the general type of tortious conduct engaged in by the actor (e.g., speeding) does not generally increase the risk of the harm suffered (e.g., a tree falling onto the vehicle), then here again, a reasonable person would not be prompted to take precautions against the risk of that consequence. The Reporters carve out space to address this particular application of section 29 in section 30. *See id.* § 30 cmt. a, illus. 1; *accord Berry v. Sugar Notch Borough*, 43 A. 240 (Penn. 1899).

reasonable person would not have anticipated any need to take precautions.

But often reasonable minds will not agree on whether the relevant risk was one that made an aspect of the actor's conduct tortious. First, there may be controversy about where the balance of concerns lies that led to the recognition of the duty and therefore to the precise edges of that obligation's "normative envelope." Suppose we all agree that the nature of a dentist's relationship to his patient is sufficiently "special" that the dentist should have an affirmative duty to render reasonable assistance to the patient if she suffers a severe asthma attack while in the waiting room.<sup>106</sup> We may, nevertheless, disagree about why and how exactly the relationship is special and therefore when and where, for the purposes of the tort of negligence, it ceases to have that special quality. If, instead of the attack happening in the waiting room, it happens just after the patient steps out over the dentist's threshold, has the special relationship ceased? The law might choose, for normative reasons, to define the "relationship" as no longer "special" once the patient stepped outside, and so no duty to assist will arise—the fact that a reasonable person would have rendered assistance would be irrelevant.<sup>107</sup> If so, the risk that the patient's condition would deteriorate unless she received medical assistance could not be characterized as one that made an aspect of the dentist's conduct tortious. Alternatively, the law might choose to see the special relationship as persisting at this time and place.

While the *Restatement (Third)* notes that a duty only applies to "dangers that arise within the confines of the relationship and does not extend to other risks,"<sup>108</sup> it fails to provide an explicit link back to the often controversial "normative envelopes" that are given the labels of "special relationship," "undertaking," and so on. The *Restatement (Third)* says, as if it were uncontroversial, that in a parallel asthma-attack case involving the patron of a restaurant the special relationship ceases at the threshold of the premises.<sup>109</sup> This would mean that the risk that the victim would deteriorate unless he received medical assistance could not be characterized as one that made an aspect of the restaurant's conduct tortious, even though its waiter callously watched the patron writhe in agony on the sidewalk in front of the restaurant.

Secondly, even in a section 7(a) case where the duty is owed to the whole world and is not confined to any relationship (and where, therefore, no type of foreseeable risk can be ignored merely by virtue

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106. Cf. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 40 cmt. f, illus. 1 (Proposed Final Draft No. 1, 2005) (patron suffers severe asthma attack inside restaurant).

107. Cf. *id.* § 40 cmt. f, illus. 2 (patron suffers severe asthma attack after exiting restaurant).

108. *Id.* § 40 cmt. f.

109. See *id.* § 40 cmt. f, illus. 2.

of its falling outside the confines of some relationship<sup>110</sup>), there may be controversy about which of the vast range of foreseeable risks created by the affirmative act of the actor were “risks that made the actor’s conduct tort[i]ous.”<sup>111</sup> For example, is one of the reasons why speeding in a built-up area is unreasonable because it creates a foreseeable risk that a pedestrian who gets knocked down by that car will be treated badly by the ambulance staff called to the accident? Is one of those reasons the foreseeable risk that the pedestrian might infect the ambulance worker with HIV or chicken pox? Statements that the law of negligence seeks to “limit liability to the reasons for imposing liability in the first place”<sup>112</sup> and requires that the harm result “from a risk that made the conduct unreasonable”<sup>113</sup> or was one “that led us to say [the] conduct was negligent”<sup>114</sup> sketch, but cannot resolve, these normative questions. This explains why the *Restatement (Third)*’s separate sections in relation to harms by<sup>115</sup> and to<sup>116</sup> those who render aid to the first victim can only refer vaguely to “harm [that] arises from a risk that inheres in the effort to provide aid.”<sup>117</sup>

#### B. Terminological Disarray

The second problem in how the *Restatement (Third)* attempts to convey the perimeter scope rule is that it uses terminology that directly threatens the coherence of the overall risk architecture of the *Restatement (Third)*.<sup>118</sup> Astonishingly, the section 29 rule is repeatedly described as limiting liability to “harms that result from risks *created* by the actor’s wrongful conduct, but for no others.”<sup>119</sup> But once again we are led to ask the question of intended scope: if “create” retains the narrow meaning that it has in section 7, how can the consequence of an actor’s breach of his affirmative duty (such as in the example of the restaurant) ever come within the scope of his liability?

At the outset we saw some of the problems a user faces as a result of the *Restatement (Third)*’s failure to explicitly define the key

110. *Id.* § 40 cmt. f.

111. *Id.* § 29.

112. DAN B. DOBBS, THE LAW OF TORTS § 181, at 446 (2000).

113. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. i (Proposed Final Draft No. 1, 2005).

114. DOBBS, *supra* note 112, § 181, at 446.

115. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 35 (Proposed Final Draft No. 1, 2005).

116. *See id.* § 32.

117. *Id.*; *accord id.* § 35.

118. *Compare id.* § 29 (“An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tort[i]ous.”) *with id.* § 7(a) (“An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.”).

119. *Id.* § 29 cmt. e (emphasis added); *see also id.* §§ 29 cmt. o, 29 reporters’ note cmt. e, 29 reporters’ note cmt. n, 30 cmt. a, 32 cmt. b, 33 cmt. a.

section 7(a) notion of “conduct [that] creates a risk of physical harm.”<sup>120</sup> Here we see another problem: without such a definition to lock in the meaning of that expression, we find it being used by the Reporters in a completely different and inconsistent way in their discussion of section 29.

What the Reporters presumably intended to capture in section 29 is the following broad notion: that even though an aspect of the actor’s conduct was *responsible for* risks in excess of what would be present in a no-breach world, the actor’s liability is limited to only harm that results from those excess risks that made the aspect of the actor’s conduct tortious.<sup>121</sup> As we saw earlier, it is absolutely crucial to emphasize to the *Restatement (Third)* user that an actor might be responsible for such excess risks either because he created them by his affirmative act where a reasonable person would not have created them or because the actor failed to eliminate risks when a reasonable person would have done so.<sup>122</sup>

Not only is this concept of section 29 not captured by “conduct [that] creates a risk of physical harm” terminology, it cannot be conveyed by any shortcut phrase such as the “risk standard” or the “scope of the risk” rule.<sup>123</sup> Unless we have a more integrated discussion of the section 29 rule and how it relates to the “normative envelope” governing the duty and breach issues, it may not be clear to the user how to reach the appropriate result in the case of Dave’s avalanche injuries and in the cases of the dentist failing to assist his patient when she suffers an asthma attack.

Finally, besides the problem of inconsistent and conflated terms, the *Restatement (Third)* user is confronted by an inexplicable variety of terms. We not only have “conduct [that] creates a risk” but also “conduct that . . . poses a risk of . . . harm.”<sup>124</sup> What does “pose” mean? We are told that “transmission of electricity poses . . . risks.”<sup>125</sup> Is this the same thing as “creates”? We are told that there may be a danger “posed” by a chair<sup>126</sup> or conditions on land.<sup>127</sup> Does a parent’s failure to feed a child “pose” a risk? Again, where does the notion of “pose” fit in?

Risks are also said to “arise” from conduct<sup>128</sup> and harm to “arise”

120. *See id.* § 7(a).

121. *See id.* § 29 cmt. d (“Central to the limitation on liability of [section 29] is the idea that an actor should be held liable only for harm that was among the potential harms—the risks—that made the actor’s conduct tort[i]ous.”).

122. *See supra* text accompanying and following note 84.

123. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 29 cmt. d (Proposed Final Draft No. 1, 2005) (“risk standard”); *id.* § 29 cmt. c (“scope of the risk”).

124. *E.g., id.* § 4 reporters’ note cmt. d (emphasis added).

125. *Id.* § 3 cmt. j.

126. *See id.* § 3 reporters’ note cmt. g.

127. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 (Tentative Draft No. 6, 2009).

128. *See, e.g., id.* § 51 cmt. g.

from risks.<sup>129</sup> We are left to speculate as to what “arise” means and in particular whether it is intended that this notion is to be limited to cases of risk “creation” or whether it is also applicable to omissions. For example, is it appropriate to say that the risk that the child would starve “arose” from the parent’s failure to feed it and that the child’s death “arose” from that omission? That the Reporters contemplate risks “arising” from conditions on land<sup>130</sup> might suggest that they regard the notions of “pose” and “arise” as coextensive, but even this is in no way clear.

Even more obscure are references in the 2009 Tentative Draft Number 6 to risks that “result” from conduct<sup>131</sup> or conditions.<sup>132</sup> But perhaps most disturbing is the attempt in the 2009 Draft to introduce a “halfway house” between conduct that “creates” a risk (in the section 7 affirmative-act sense) and omissions.<sup>133</sup> This halfway house is said to be conduct that “played a role in the risk.”<sup>134</sup> In explaining the duty a land possessor might owe to entrants onto his land, we are told that with respect to natural conditions, “[t]hese risks are not a result of the conduct of . . . [the land possessor] . . . and, hence, are not subject to § 7. Yet . . . [e]ven if not negligent, the landowner has played a role, by inviting or permitting others to be on the land.”<sup>135</sup> As for inherited artificial conditions, we are told that “although the possessor has not created the risk [of inherited artificial conditions], by inviting or permitting persons to enter the land, the land possessor has played a role in the risk confronted by those entrants.”<sup>136</sup>

But this attempt at a halfway house fails because on their very face these statements simply cannot stand with the clear section 7 extension of the notion of “creating a risk” to cases where the actor’s

129. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 42 cmt. c (Proposed Final Draft No. 1, 2005) (“[Section 42], by contrast [to section 7], addresses an actor’s liability for harm arising from other risks when the actor undertakes to ameliorate or eliminate those risks.”). We even have the phrase “harms arising from the risks created by . . .” appearing in section 29 cmt. e and section 29 cmt. i. *Id.* § 29 cmts. e, i.

130. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. f (Tentative Draft No. 6, 2009).

131. *See, e.g., id.* ch. 9 scope note, § 51 cmt. i.

132. *See, e.g., id.* § 51 cmt. i.

133. Which, as we have seen, may nevertheless be responsible for risks in excess of those that would be present in a no-breach world. *See supra* text accompanying and following note 84.

134. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. e (Tentative Draft No. 6, 2009).

135. *Id.* ch. 9 scope note (citation omitted); *see also id.* § 52 cmt. d (“Although [the duty of reasonable care for natural conditions] has overtones of an affirmative duty, the land possessor does play some role in exposing those invited or permitted onto the land to the risks posed by natural conditions. By contrast, the land possessor plays no role in exposing trespassers to those risks.”).

136. *Id.* § 51 cmt. e.

affirmative act increased the physical risks of another by increasing the chance that the other will encounter some natural hazard.<sup>137</sup> Granting lawful entry onto one's property where such a natural hazard is located must clearly qualify as "creating" a risk for the purposes of section 7.

#### CONCLUSION

The value of a restatement is in direct proportion to its user-friendliness, which in turn is in direct proportion to how coherently it is able to set out its conceptual architecture. Risk is the most important structural element of the *Restatement (Third) of Torts* because it links all four analytical issues: duty, breach, factual cause, and scope of liability for consequences of breach.

Yet the "risk architecture" of the *Restatement (Third)* could have been presented with far greater clarity. Key "risk" notions have not been explicitly defined. Terminology has not been deployed consistently. Obfuscating synonyms have been used with no attempt made to explain their relation to other risk notions in the *Restatement (Third)*. All this threatens to undermine the user-friendliness of the end product.

Of course, securing terminological clarity in a task as gargantuan as this *Restatement (Third)* is a great challenge for the American Law Institute. Nevertheless, the current procedures of the Institute do not, in my view, provide reporters with as much support in this area as they should. Under those procedures, large chunks of draft are, effectively, "put to bed" by approval at an annual meeting years before sophisticated academic evaluations appear and before later sections are even drafted. For example, many papers delivered at the April 2009 Symposium on the Restatement Third of Torts at the Wake Forest University School of Law were sophisticated analyses of provisions in the Proposed Final Draft Number 1 adopted by the ALI during its Eighty-Second Annual Meeting in May 2005. Although it is technically possible for the Reporters to have responded to these analyses by making major adjustments to their draft, this would have required going back to an annual meeting for a fresh approval, something that rarely, if ever, seems to be contemplated on this scale. This latter point was given dramatic confirmation at the Wake Forest Symposium when, in a side remark, an ALI official mentioned to us that the first six chapters of the Proposed Final Draft Number 1 were already on their way to the printers.<sup>138</sup>

The Institute's current arrangements and practices rest, in

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137. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37 cmt. d (Proposed Final Draft No. 1, 2005). In general, see *supra* note 19.

138. Elena A. Cappella, Deputy Dir., Am. Law. Inst., Comment at the Wake Forest University School of Law Symposium on the Third Restatement of Torts (Apr. 3, 2009).

effect, on the presupposition that reporters will be able, at the outset of their project, to envisage the project's conceptual architecture as a coherent whole and to choose terminology that clearly and appropriately conveys that architecture. But this presupposition clearly asks too much of even the most gifted reporters, which the Torts Reporters most clearly are. Similarly, it is simply not feasible under those arrangements and practices for advisers and other ALI members to scrutinize the incremental reporters' drafts from these vital macroconceptual and terminological perspectives. By the time of the April 2009 Symposium on the *Restatement (Third)*, problems at this level were becoming apparent; indeed the holding of this Symposium was an excellent stimulus for reviewing the *Restatement (Third)* from these perspectives. In any event, the opportunity to improve the draft, at least the first six chapters, seems to have been lost.

In the future, reporters should have better support. First, reporters should be provided with concerted ongoing input from those experienced in legislative drafting. Second, the ALI should not, in effect, freeze provisions chunk by chunk once "approved" by the annual meeting but rather should operate a "running draft" that would facilitate terminological and conceptual review and reformulation throughout the restatement process.<sup>139</sup> Third, resources should be directed to meetings or conferences held well before the end of the restatement cycle where discussion should explicitly address questions of conceptual architecture and terminological rigor.

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139. It is very regrettable that no consolidated current draft is available for consultation.