The Community Income Theory of the Charitable Contributions Deduction

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The charitable contributions deduction, a longstanding yet controversial feature of the Internal Revenue Code, has been justified under subsidy theories and tax-base theories. Focusing on the latter, this Article presents and explains a new tax-base theory in support of the charitable contributions deduction—the community income theory. This theory posits that some income, designated as "community income," is properly excluded from the personal income tax base because it is more naturally attributed to the community than to the individual members of the community. Adopting the presumption that the community generally should be treated as a tax-exempt entity, this Article argues that both the charity income tax exemption and the charitable contributions deduction may be defended on the basis that they reflect the theoretically correct taxation of community income.

INTRODUCTION

Since 1917,[1] Congress has permitted taxpayers to deduct gifts to educational, religious, and other charitable organizations in calculating their taxable income for federal income tax purposes.[2] Notwithstanding its longevity, this charitable contributions deduction has been a controversial feature of federal income tax statutory law for decades. The deduction has been criticized as inequitable,[3] inefficient,[4]

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1. *See* War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917). None of the numerous revenue acts enacted by Congress prior to 1917 provided for a charitable contributions deduction. *See* Edward H. Rabin, *Charitable Trusts and Charitable Deductions*, 41 N.Y.U. L. REV. 912, 912 (1966).

2. *See* I.R.C. § 170(a)(1) (2003) (authorizing a deduction in computing an individual taxpayer's income for contributions or gifts to entities described in subsection (c)); *id.* § 170(c) (describing donees to which deductible contributions may be made).

3. *See, e.g.*, Paul R. McDaniel, *Federal Matching Grants for Charitable Contributions: A Substitute for the Income Tax Deduction*, 27 TAX L. REV. 377, 394–95 (1972); R.A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44, 56–57 (1967).

4. *See, e.g.*, McDaniel, *supra* note 3, at 383–89; Rabin, *supra* note 1, at 918–20. One argument based on efficiency is that the government's foregone tax revenue exceeds the increase (if any) in charitable contributions resulting from the deduction. *See* McDaniel, *supra* note 3, at 383–89. However, some studies indicate that the charitable contributions deduction is actually efficient in the sense that contributions induced by the deduction exceed revenue losses. *See, e.g.*, Martin Feldstein, *The Income Tax and Charitable Contributions: Part I—Aggregate and Distributional Effects*, 28 NAT'L TAX J. 81 (1975). The numerous studies that have been

politically suspect as a tax expenditure,[5] and, in general, fundamentally inconsistent with a comprehensive income tax base.[6] Yet, even as academicians have frontally assaulted the deduction, it has seldom been forced to retreat.[7] Indeed, recently proposed legislation would permit a charitable contributions deduction by taxpayers who do not itemize[8] deductions.[9] Such a change in existing law would plainly expand the deduction. One wonders how the deduction has fared so well in the face of its objectors.

The tenacity of the deduction is not attributable to any rhetorical deficiencies in its critics. Each of the major objections to the charitable contributions deduction has persuasive appeal, and each is easily illustrated and comprehended. Consider Taxpayer A, who is in a 40% marginal income tax bracket and who earns $500,000 annually. Taxpayer A donates $100,000 to the symphony. She lives next door to Taxpayer B, who is in a 10% income tax bracket and who earns $20,000 annually. Taxpayer B

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conducted to date apparently have not decisively resolved the issue of the absolute dollar efficiency of the charitable contributions deduction. *See generally* CHARLES T. CLOTFELTER, FEDERAL TAX POLICY AND CHARITABLE GIVING 49–63 (1985) (summarizing numerous studies and concluding that they generally support a finding that the price elasticity of charitable giving is at least one); John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 683–84 (2001) (briefly discussing various studies).

A separate, and more difficult, question is whether the deduction is economically efficient (i.e., whether the benefits from contributions resulting from the deduction exceed the benefits lost from foregone government revenue). Some have questioned whether the deduction is economically efficient. *See, e.g.*, Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 864–67 (2001). Even if the deduction is efficient in terms of absolute dollars, it may not be economically efficient. *See* Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1404–05 (1988).

5. *See, e.g.*, Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 381–94 (1970). "Tax expenditures" are "those special provisions of the federal income tax system which represent government expenditures made through that system to achieve various social and economic objectives." Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706 (1970) [hereinafter Surrey, *Tax Incentives*].

6. *See infra* text accompanying notes 60–73.

7. For a concise history of the charitable contributions deduction since 1917, see Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1061–71 (2003).

8. "Itemized" deductions are, in general, those which are allowed in computing a taxpayer's taxable income, other than deductions specifically treated as allowable in arriving at "adjusted gross income." *See* I.R.C. § 63(d) (2003). A taxpayer elects to itemize deductions. *See id.* § 63(e)(1). A taxpayer who does not itemize is entitled to claim a statutorily specified "standard deduction." *See id.* § 63(b).

9. *See, e.g.*, Charitable Giving Act of 2003, H.R. 7, 108th Cong. (2003); Charitable Giving Tax Relief Act, H.R. 2229, 108th Cong. (2003); Neighbor to Neighbor Act, H.R. 824, 107th Cong. (2001). President Bush's proposed budget (unveiled in February of 2004) also recommended a charitable contributions deduction for non-itemizers. *See* Tom Herman, *Bush's Budget: What It Means for Your Wallet*, WALL ST. J., Feb. 3, 2004, at D1. For an extended argument questioning the charitable contributions deduction for taxpayers who do not claim itemized deductions, see Aprill, *supra* note 4, at 854–73.

donates $4000 to a local homeless shelter. If we assume that, but for the charitable contributions deduction, the federal government would be entitled to tax revenues equal to the sum of the product of each taxpayer's income (for the relevant income tax brackets) and the applicable tax rates,[10] the deduction has an obvious (and unpalatable) effect. It results in the economic equivalent of a $40,000 government grant[11] to the symphony[12] and a $400 grant to the homeless shelter.[13]

Viewed in this manner, the deduction is objectionable on numerous grounds. First, the government has economically extended financial support to the symphony that is one hundred times greater than that extended to the homeless shelter. Yet there is no compelling reason to believe that society is bettered to a greater degree by granting subsidies to the fine arts in excess of those extended to organizations providing basic human services. We know only that the "rich" Taxpayer A has effectively allocated one hundred times more of society's resources to his favorite charity than has the relatively "poor" Taxpayer B.[14] Additionally, if people of similar incomes tend to support similar charitable causes, the expectation is that the class of high-income earners will disproportionately (relative to the total number of taxpayers) influence the allocation of charitable dollars.[15] One may rightly question whether society's resources

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10. A taxpayer's total income tax liability is the sum of (1) the products of the rate of tax applicable to each statutory range of taxable income reportable by the taxpayer, and (2) the taxpayer's income within that range. For example, assume that there are two income tax rates in effect in the case of Taxpayers A and B: 10% for income up to $20,000, and 40% for income in excess of $20,000. Tax receipts attributable to Taxpayer A = 10% x $20,000 + 40% x $480,000 = $194,000. Tax receipts attributable to Taxpayer B = 10% x 20,000 = $2000.

11. *See* Rabin, *supra* note 1, at 920 ("In essence, the present system is a type of matching program under which the Government agrees to spend a certain amount (depending on the taxpayer's top tax bracket) for each dollar contributed to charity.").

12. After the $100,000 deduction, Taxpayer A's taxable income is reduced from $500,000 to $400,000. If Taxpayer A's marginal rate of income tax (i.e., the tax rate applicable to the last dollar of income of the taxpayer) is 40%, the $100,000 reduction in the government's tax base results in a decrease in tax revenues attributable to the deduction in an amount equal to 40% of $100,000, or $40,000. Thus, by allowing the deduction, the government is economically positioned as though it had taxed all of *A*'s $500,000 earnings and then distributed a $40,000 grant to the symphony.

13. After the $4000 deduction, Taxpayer B's taxable income is reduced from $20,000 to $16,000, which gives rise to a tax liability of 10% x $16,000, or $1600. The difference between this income tax liability and that which would exist in the absence of a deduction ($2000, see *supra* note 10) is $400. Thus, by allowing the deduction, the government is economically positioned as though it had taxed all of *B*'s $20,000 earnings and then distributed a $400 grant to the homeless shelter.

14. *Cf.* McDaniel, *supra* note 3, at 383 (illustrating that the charitable contributions deduction effectively requires government to expend more funds to induce charitable gifts from high-income taxpayers).

15. *See* Aprill, *supra* note 4, at 868 (stating that the charitable contributions deduction "favors the charitable activities favored by the wealthy"); Charles T. Clotfelter, *Tax-Induced Distortions in the Voluntary Sector*, 39 CASE W. RES. L. REV. 663, 685 (1989) ("Charities favored by the rich simply receive more favorable rates of subsidy through the itemized deduction than those favored by the poor."); Todd Izzo, Comment, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371, 2373–75 (1993) (arguing that the charitable contributions deduction allows high-income taxpayers to decide

should be allocated by means of the preferences of those with high incomes, rather than through normal political processes. Moreover, even if the rich as a class proportionately contribute to the same charitable donees as the less well-to-do (a counterfactual assumption),[16] the "indirect federal grants" to charities resulting from the charitable contributions deduction are not overseen by congressional committees with special expertise in the fields of import to charitable organizations (such as education, social services, science, health care, and the arts).[17] Furthermore, even apart from these considerations, in a progressive system of tax rates, the value of the charitable contributions deduction is greater (in nominal dollars) to high-income taxpayers than to low-income taxpayers. Accordingly, some argue that the distribution of the benefit of the deduction is regressive.[18]

Additional objections may be raised against the charitable contributions deduction if Taxpayer A is compared not with Taxpayer B but with Taxpayer C, who earns the same amount of gross income as Taxpayer A and who expends $100,000 in nondeductible outlays (for items such as personal travel and entertainment, extravagant meals at five-star restaurants, and numerous hand-tailored suits). Presumably, the argument goes, Taxpayer C is neither better nor worse off than Taxpayer A. When Taxpayer A donated her $100,000 to the symphony, she must have received at least $100,000 worth of satisfaction from the donation; otherwise, she would not have donated the sum. Further, prior to the outlays, both *A* and *C* plainly had the same income, and therefore the same taxpaying capacity. Accordingly, to tax *A* more favorably than *C* (by permitting a charitable contributions deduction) violates the principle of horizontal equity.[19]

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which charities are subsidized most heavily by the federal government); Rabin, *supra* note 1, at 922 (summarizing arguments that the present system favors charities which appeal to wealthy taxpayers).

16. *See* Aprill, *supra* note 4, at 846, 868–69 (reporting differences in charitable giving patterns between high- and low-income taxpayers); McDaniel, *supra* note 3, at 391 ("[T]he data show that high income individuals and low income individuals do not give to the same charities.").

17. *Cf.* Surrey, *Tax Incentives*, *supra* note 5, at 728 (explaining that tax incentives effectively impose upon the House Ways and Means Committee and the Senate Finance Committee the burden of "acting on substantive matters outside their fields of responsibility simply because the program uses the tax system").

18. *See, e.g.*, McDaniel, *supra* note 3, at 395; *cf.* Clotfelter, *supra* note 15, at 683–84 (referring to the "upside-down" subsidy effected by the charitable contributions deduction). This assertion is problematic. One argument in favor of a progressive rate structure is based on the theory of the diminishing marginal utility of the dollar. Under this theory, taxing high-income taxpayers at higher marginal rates is arguably appropriate because they value marginal dollars less than low-income taxpayers value them. *See* JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY 267–71 (2d ed. 1999) (discussing utilitarian justifications for progressive income taxation based on the theory of the declining marginal utility of the dollar). But if this theory is true, high-income taxpayers should also value deductions based on nominal dollars less than low-income taxpayers value them at the margin.

19. *See* McDaniel, *supra* note 3, at 395. Horizontal equity is the familiar principle that equally positioned taxpayers should be taxed equally. *See* RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 242–43 (3d ed. 1980). For a discussion of various concepts of horizontal equity, see A.B. Atkinson, *Horizontal Equity and the Distribution of the Tax Burden*, *in* THE ECONOMICS OF TAXATION 13-18 (Henry J. Aaron & Michael J. Boskin eds., 1980).

Finally, when all taxpayers (*A*, *B*, and *C*) are considered together, the existence of the charitable contributions deduction has a notable effect on the aggregate allocation of the income tax burden. When budgeting its revenue needs, the federal government must account for the decrease in revenue resulting from the charitable contributions deduction. Thus, if all else is held constant, the availability of the charitable contributions deduction means that tax rates must be increased to compensate for the diminished income tax base. For example, let us assume that the government in our three-person economy needs $390,000 in tax revenues annually. In the absence of the charitable contributions deduction, the government could impose a 10% rate of tax on income up to $20,000 and a tax rate of 40% on all income above $20,000.[20] However, with the charitable contributions deduction, these same rates would yield total governmental revenues of only $349,600.[21] In order to raise the additional revenue, tax rates must be increased. To simplify matters, let us assume that our lowest tax bracket (10%) remains the same. In order to raise the total federal budget to the desired $390,000, the 40% income tax bracket must be increased to nearly 44.70%.[22] Under the resulting income tax burden, Taxpayer C has an income tax liability that is $44,700 greater than that of Taxpayer A,[23] and which is $22,560 greater than the income tax

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20. The tax burden would be distributed as follows:

Income	Taxpayer B	Taxpayer A	Taxpayer C	Total
First $20,000 (taxed at 10%)	$2000	$2000	$2000	$6000
Next $480,000 (taxed at 40%)	$0	$192,000	$194,000	$382,000
Total Tax Liability	$2000	$194,000	$194,000	$390,000

21. The tax burden would be distributed as follows:

Income	Taxpayer B	Taxpayer A	Taxpayer C	Total
First $20,000 (taxed at 10%)	10% x ($20000 - $4000) = $1600	10% x $20000 = $2000	10% x $20000 = $2000	$5600
Next 480,000 (taxed at 40%)	$0	40% x ($480,000 - $100,000) = $152,000	40% x $480,000 = $192,000	$344,000
Total Tax Liability	$1600	$154,000	$194,000	$349,600

22. This rate is rounded to the nearest hundredth of a percent. The tax burden would be distributed as follows:

Income	Taxpayer B	Taxpayer A	Taxpayer C	Total
First $20,000 (taxed at 10%)	10% x ($20000 - $4000) = $1600	10% x $20000 = $2000	10% x $20000 = $2000	$5600
Next 480,000 (taxed at 44.70%)	$0	44.70% x ($480,000 - $100,000) = $169,860	44.70% x $480,000 = $214,560	$384,420
Total Tax Liability	$1600	$171,860	$216,560	$390,020

23. The difference between Taxpayer C's $216,560 income tax liability and Taxpayer A's $171,860 income tax liability is $44,700.

liability that Taxpayer C would have had in a world without the charitable contributions deduction.[24] Stated simply, if all else is constant,[25] the deduction for charitable contributions increases the tax burdens of those who choose not to contribute to charity.

These objections to the charitable contributions deduction pose a formidable challenge to its proponents. How, then, has the deduction managed to survive for so long? There seems to be a deeply held conviction in this country that taxpayers who donate to charity generally should not be subject to the same income tax liability as similarly situated taxpayers who do not. [26] But why? Part of the cxplanation may lie in the basic intuition tbat charities "deserve" extra support because they do "good work" or, more technically, because they provide goods and services that would be undersupplied by the private market and the government. This notion is the core of the so-called subsidy theories.[27] Another explanation is that the charitable contributions deduction is necessary to ensure that the income tax base is properly calculated. Under this second view, the deduction is allowed precisely because we have cnacted a tax on "income," and the concept of income demands (or at least permits) a deduction for charitable contributions. Theories of this second type may be called "tax-base" theories.

This paper argues that the charitable contributions deduction may be defended under one plausible conception of income.[28] My argument has certain elements in common with theories that have been advanced previously, but relies heavily on a theory not yet precisely articulated by advocates of the deduction. Specifically, I argue that this country has appropriately chosen to exempt from taxation what will be termed "community ineome" in a variety of contexts, and that the charitable contributions deduction may be viewed as one species of several federal income tax exemptions or exclusions of "community income" from taxation.

Part Il discusses the meaning and significance of the concept of "income" when analyzing the theoretical justifications for the charitable contributions deduction. It

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24. The difference between Taxpayer C's $216,560 income tax liability (after adjusting tax rates to reflect the revenue effect of thc charitable contributions deduction) and the $194,000 income tax liability that Taxpayer C would have incurred if there were no charitable contributions deduction allowed is $22,560. Compare the columns for Taxpayer C in tbe tables set forth in *supra* notes 20 and 22.

25. Of course, perhaps not all factors should be assumed to be constant under this analysis. One of the primary arguments in favor of the charitable contributions deduction is that donations provide major community benefits. If these benefits relieve the federal government of some of the burdens that it otherwise would be required to bear (such as expenditures for education, scientific research, public improvements, public health, and the relief of poverty), the deduction may reduce the amount of revenues that government must raise in order to provide for the common welfare. Still, it is far from clear that the net public gains attributable to the deduction would exceed the revenue loss from the deduction if tax rates are held constant. One of the most obvious reasons is that the deduction is available for transfers that government would never make (e.g., contributions to churches, other religious organizations, and private foundations), and quantifying the community benefit from these contributions is impossible.

26. A powerful charitable lobby undoubtedly also solidifies the deduction.

27. *See, e.g.*, Colombo, *supra* note 4, at 682–701 (discussing subsidy theories justifying the charitable contributions deduction and the charity income tax exemption).

28. Accordingly, my theory is a tax-base theory.

explores the uncertain meaning of income, and concludes that existing tax-base theories for and against the deduction fail to resolve the issue of whether the deduction is proper. Part III introduces the concept of community income, and argues that community income is properly excluded from the personal income tax base. Adopting the tentative conclusions of Part III as a working theory (the "community income theory"), Part IV explains how the theory justifies the federal income tax exemption of charitable entities, and arguably justifies the charitable contributions deduction. Part IV also responds briefly to anticipated objections to the community income theory.

I. THE MEANING AND SIGNIFICANCE OF INCOME

A. The Importance of Defining Income

As Professors William Andrews[29] and Stanley Koppelman[30] have convincingly argued elsewhere, a proper conception of "income" is of utmost importance to the debate on the legitimacy of the charitable contributions deduction. Although not everyone has agreed with this proposition,[31] a moment's reflection should resolve any doubt about the matter. Consider the argument that the charitable contributions deduction violates the principle of horizontal equity because two people with equivalent receipts are taxed differently if one chooses to donate liberally to charity (and thereby receive a deduction for doing so), whereas the other, a profligate, chooses to spend every last dollar obtaining nondeductible retail goods and services. The principle of horizontal equity is violated only if the two taxpayers are similarly situated. If a proper concept of income dictates that the taxpayer making charitable contributions has much less income than the profligate, horizontal equity is not violated by taxing the two persons quite differently.

Or consider the argument that the charitable contributions deduction effectively enables upper-income taxpayers to allocate a disproportionately large quantum of public resources to their favorite charities. If the deduction is necessary to reflect income properly, and if the federal government's claim is limited to a percentage of each taxpayer's "income," then donations by the rich do not involve an indirect allocation of "public" money to their pet charitable causes. Public money would be indirectly allocated by taxpayers only if the government has a prior claim on the funds; such is not the case if governmental claims are based solely on taxpayers' income and if charitable donations are not properly included in the income tax base. Similarly, if the charitable contributions deduction reflects the proper computation of income, then it is not a tax expenditure that inappropriately removes indirect federal grants from the normal legislative process. Instead, the deduction, like the deduction for business

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29. William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972). For a summary of Andrews' concept of income and the role of personal deductions, see Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 366–77 (1989).

30. Stanley A. Koppelman, *Personal Deductions under an Ideal Income Tax*, 43 TAX L. REV. 679 (1988).

31. *See, e.g.*, Joseph A. Pechman, *Comprehensive Income Taxation: A Comment*, 81 HARV. L. REV. 63, 65–66 (1967) (asserting that the concept of income is neutral regarding "the personal deductions that might be allowed for income tax purposes").

expenses, merely reduces gross receipts to arrive at the tax base the country has chosen—income.[32] Finally, although the deduction very likely results in an allocation of the tax burden that differs from the allocation that would exist in the absence of the deduction, this is hardly any objection if the deduction inheres in the concept of income. If the resulting allocation of the tax burden is considered undesirable, the solution is to find an alternative (or additional) federal tax base, not to pretend that charitable contributions should be included in the *income* tax base.

In observing the importance of the concept of income, I am not implicitly rejecting subsidy theories supporting the charitable contributions deduction. Even if the deduction is unnecessary to reflect income properly, it arguably may be justified under one or more subsidy theories. However, I believe that subsidy theories bring unique, problematic inquiries to the table, and that many of these inquiries are unnecessary if the deduction can be justified on alternative grounds. Moreover, like Professor Andrews, I expressly utilize certain (though not all) elements of traditional subsidy theories, but I do not believe that tax-base theories that rely in part upon elements of subsidy theories are merely nuanced versions of the latter. Subsidy theories ultimately justify the charitable contributions deduction on the grounds that, on balance, it benefits society. Tax-base theories ultimately justify the charitable contributions deduction on the grounds that it properly reflects the political choice to tax income, regardless of whether this political choice is wise. In so characterizing the two approaches, I am not suggesting that income is self-defining, or that decisions about what constitutes income must be dissociated from tax policy (including judgments of equity and efficiency). I do embrace the notion, however, that income means something, and that analyzing what we do and do not mean by income sheds light upon the justification for the charitable contributions deduction.

B. The Uncertain Meaning of Income

Economists,[33] the courts,[34] and legal academies[35] have articulated various concepts of income through the years. Since the movement toward establishing a comprehensive tax base for federal income tax purposes gained national prominence, it can hardly be

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32. *Cf.* CLOTFELTER, *supra* note 4, at 279–80 (explaining that tax-base theories justify the charitable contributions deduction as a matter of principle and do not require an explanation of what form a charitable subsidy should take).

33. *See generally* Richard Goode, *The Economic Definition of Income*, *in* COMPREHENSIVE INCOME TAXATION 1–10 (Joseph A. Pechman ed., 1977) (discussing various concepts of income advanced by economists).

34. *See, e.g.*, Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) (finding income where the taxpayer clearly realizes accessions to wealth over which she has complete dominion); Eisner v. Macomber, 252 U.S. 189, 207 (1920) (defining income as gain derived from capital, labor, or both combined).

35. *See, e.g.*, Alvin Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081, 1085–88 (1980) (arguing that, in designing a personal income tax system, one must consider not only the Haig-Simons concept of a taxpayer's personal income, but also the aggregate tax base; stating that the aggregate tax base should be the product of society's total private capital and labor during the taxable period); *see generally* Koppelman, *supra* note 30, at 687–97 (summarizing three major views of personal income advanced by legal academics).

doubted that the most widely accepted theoretical construct of income in this country is the Haig-Simons concept.[36] The most commonly cited expression of the concept, advanced by Henry Simons, is as follows: "Personal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question."[37]

Mathematically, this expression of income may be depicted as follows, which I will designate as *Equation 1*:

$I_p = (W_{ep} - W_{bp}) + C_p$
Where
I_p = Income for the taxable period
W_{ep} = Wealth at the end of the taxable period
W_{bp} = Wealth at the beginning of the taxable period; and
C_p = The amount of consumption for the taxable period

To state the Haig-Simons concept (verbally and mathematically) is simple. To articulate its precise meaning is not. Especially troublesome in the debate over the propriety of the charitable contributions deduction is the meaning of the term "consumption." On the one hand, Professor Simons' oft-cited work explaining the concept of income manifestly emphasizes consumption exercised through the medium of the market. His very definition of income refers to the "market value" of rights "exercised" in consumption. For Simons, consumption refers not simply to the value of rights exercised, but to the value of rights exercised "in a certain way," namely, in "destruction of economic goods."[38] He asserted that both accumulation (i.e., (W_{ep} - W_{bp})) and consumption (C_p) "may be estimated in a common unit by appeal to market prices."[39] Simons also saw "no serious difficulty" in measuring consumption, which is determined by reference to the "prices at the time goods and services are actually acquired or consumed."[40] At first blush, Simons' reliance on market prices would suggest that he understood consumption, in its broadest form, to be limited to a taxpayer's enjoyment of goods and services for which market prices are available.

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36. *See, e.g.*, Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 932 (1967) (observing that commentators advocating a comprehensive tax base state or imply that Congress should strive to enact the Haig-Simons concept of income to the extent possible); Musgrave, *supra* note 3, at 47 (stating that the case for a comprehensive income tax is based upon the definition of income espoused by Henry Simons); Pechman, *supra* note 31, at 64 ("Even a cursory examination of the literature discloses that the basic concept used or implied in discussions of comprehensive income taxation is the Haig-Simons definition."); Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 46 (1990) (stating that the "income concept that is now widely accepted by analysts" is the Haig-Simons concept). Although Henry Simons' concise articulation of income is the one that is most often cited, it is referred to as the "Haig-Simons" concept to acknowledge the prior work of Robert Haig. *See id.*

37. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938).

38. *Id.* at 49–50.

39. *Id.* at 50.

40. *Id.* at 55.

Unfortunately for those who esteem clarity, Simons equivocated in his explanation of consumption. Simons' discussion of gratuitous transfers (primarily gifts between individuals) illumines the flexibility with which he understood consumption. Simons expressly rejected the contention that the value of a gift could not be included in the personal income of both the donor and the donee.[41] He cautioned against the assertion that "giving is not a form of consumption for the giver."[42] More pointedly, Simons acknowledged that gifts may be treated as consumption because they are personal expenditures, rather than investment losses or expenses of acquiring income.[43] Further, he observed the "consumption incidents to charity,"[44] and he questioned whether a philanthropist who uses all of his vast income to support socially worthy endeavors "should be permitted so much power."[45] In summary, although Simons apparently favored a market-oriented approach to valuing the consumption of goods and services that have a market value, he was willing to expand the concept of consumption to include gratuitous transfers that are not made to acquire income.[46]

Simons' inconsistent exposition of the meaning of consumption has spawned differing schools of thought on the proper conception of income, and its implications for the charitable contributions deduction. One school of thought is ably represented by Professor Andrews, who has defended the charitable contributions deduction under income tax theory and policy.[47] In apparent (or at least facial) agreement with the classic formulation of income by Henry Simons, Professor Andrews begins with the premise that, under an ideal income tax, each taxpayer is taxed on his or her "aggregate personal consumption and accumulation of real goods and services and claims thereto."[48] Andrews argues that if income means consumption plus accumulation, a deduction is proper whenever a taxpayer expends money for anything other than personal consumption or accumulation.[49] Andrews, then, essentially deduces the propriety of a charitable contributions deduction by focusing on the right-hand side of *Equation 1*. Thus, if $I_p = (W_{ep} - W_{bp}) + C_p$, because any transfer of funds (whether or not charitable) reduces W_{ep}, charitable contributions will necessarily result in a lower I_p if such contributions are not included in C_p. The key question, of course, is whether charitable contributions should count as consumption.

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41. *See id.* at 57–58.

42. *Id.* at 57.

43. *See id.* at 139–40.

44. *Id.* at 140. It is unclear to what "consumption incidents" Simons was referring. He mentioned that a person who supports needy relatives is better off than the person of modest means who must "endure the spectacle of their distress." *Id.* Perhaps Simons was just referring to the utility of giving.

45. *Id.* at 141.

46. Simons recognized that "some contributions of business firms" are primarily expenses of generating income. *Id.* at 139.

47. *Cf.* Andrews, *supra* note 29, at 312 (stating that the ideal income tax must be "refined to reflect the intrinsic objectives of the tax," and that it is "imperative to consider carefully whether a provision can be defended by reference to intrinsic matters of tax policy before evaluating it as if it were something else").

48. *Id.* at 313.

49. *See id.* at 325.

Andrews asserts that taxable personal consumption (C_p) means only the consumption of "divisible, private goods and services," the consumption of which "by one household precludes enjoyment by others."[50] Taxable personal consumption therefore does not include a taxpayer's consumption of "collective goods whose enjoyment is non-preclusive," nor does it include the "nonmaterial satisfactions" derived from a taxpayer's mere act of charitable giving.[51] This definition of consumption is reminiscent of that portion of Simons' description of consumption that focuses on the procurement of goods and services with a market value. "Nonmaterial satisfactions" from giving (i.e., the utility that one receives from donating to charity)[52] are not priced in the market. Moreover, the "collective goods" to which Andrews refers are in the nature of "public" (or "social") goods familiar to students of economics. Under economic theory, the market cannot be expected to produce an efficient quantity of public goods because their benefits are too widely dispersed to be reflected in a unit price that any one consumer is willing to pay.[53] For present purposes, the relevant point is that public goods have no market price. Thus, if we take seriously Simon's initial emphasis on consumption as the market price of goods and services enjoyed by a taxpayer, we can see some justification for Andrews's understanding of the meaning of consumption, and why the charitable contributions deduction is proper.[54]

Professor Andrews does not advance his case exclusively in these terms, however. He also invokes more commonly cited norms of tax policy to support his view. He does so in the context of discussing two types of charitable entities. First, in the case of contributions to a donee that redistributes donations to the poor, consumption made possible by the funds, or accumulation resulting from receipt of the funds, is shifted from the donor to the impoverished recipients of funds donated to charity. The ultimate distributees should not be taxed at the presumably higher rates of tax to which donors are subject.[55] Further, allowing a charitable contributions deduction places the donor in the same position as a similarly situated taxpayer who donates services to a charitable donee; although the volunteer receives no deduction for the value of her contributed services, no taxable income attributable to her services is imputed to her.[56]

Andrews further justifies a deduction for contributions made to charitable donees that do not necessarily redistribute wealth to the poor (including institutions which, to

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50. *Id.* at 314–15; *cf.* Warren, *supra* note 35, at 1084 ("As used in this Article, 'consumption' means the ultimate use or destruction of economic resources . . . and 'accumulation,' the retention or saving of such resources.").

51. Andrews, *supra* note 29, at 315.

52. For a discussion of the several forms of utility that may be generated from charitable giving, see Thomas R. Ireland, *The Calculus of Philanthropy*, *in* THE ECONOMICS OF CHARITY: ESSAYS ON THE COMPARATIVE ECONOMICS AND ETHICS OF GIVING AND SELLING, WITH APPLICATIONS TO BLOOD 65, 67–75 (1973).

53. *See* MUSGRAVE & MUSGRAVE, *supra* note 19, at 54–76 (explaining the theory of social goods).

54. *Cf.* William J. Turnier, *Personal Deductions and Tax Reform: The High Road and the Low Road*, 31 VILL. L. REV. 1703, 1726 (1986) (stating that if one adopts the view that consumption refers to the destruction of property or services for personal benefit, a charitable donor is not the consumer of her donation).

55. *See* Andrews, *supra* note 29, at 347.

56. *See id.* at 347–48.

some degree, benefit donors).[57] For Andrews, a deduction is proper for contributions to such organizations because they generally produce public goods that are not enjoyed by contributors in proportion to their contributions. Even those who have contributed nothing to the donee may enjoy the organization's services financed through donations.[58] Andrews reasons that a deduction for a true donation (in contrast to an amount specifically paid in purchase of a good or service) is proper because the value of the benefits provided by the charitable donee to a particular recipient of a common benefit is indeterminate.[59]

Not all students of Henry Simons embrace the justification for the charitable contributions deduction advanced by Professor Andrews. Chief among Andrews's critics are Professors Mark Kelman[60] and Stanley Koppelman.[61] Kelman understands income to consist "tautologically" of consumption plus savings. Hence, all money that a taxpayer controls or voluntarily disposes of is, by definition, income (unless it is a cost of generating receipts).[62] Similarly, Professor Koppelman understands income to be "[the] power to consume that is reduced to economic rights and is capable of valuation."[63] Under this concept of income, what really matters is accretion, which represents the power to consume.[64] Although Professor Simons formulated income as consumption plus accumulation, Professor Koppelman (like Professor Kelman) argues that those two elements should be viewed merely as "the two possible uses of accretions to wealth during the accounting period," not as "terms to be defined independently."[65] What distinguishes nondeductible personal consumption from deductible expenditures is the "current personal benefit" derived by a taxpayer from the transaction.[66] Hence, like Kelman, Koppelman argues that all voluntary expenditures unrelated to income-producing activities constitute taxable consumption.[67] Charitable contributions should not be deductible, according to Koppelman, because "[t]he expenditure of cash or property represents a clear personal benefit to the donor."[68]

The views of Kelman and Koppelman are consistent with that portion of Simons's work which treats all outlays unrelated to the production of income as nondeductible consumption. Their understanding of income can also be illustrated mathematically, given certain assumptions. Recall *Equation 1*: $I_p = (W_{ep} - W_{bp}) + C_p$. Consider the

57. *See id.* at 356–70.

58. *See id.* at 357–61.

59. *See id.* at 358–59.

60. Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 831–58 (1979).

61. *See* Koppelman, *supra* note 30, at 688–90. Professors Gergen and Colombo are also critical of Andrews's analysis in several respects. *See* Colombo, *supra* note 4, at 679–82; Gergen, *supra* note 4, at 1414–26.

62. *See* Kelman, *supra* note 60, at 834.

63. Koppelman, *supra* note 30, at 694. *See generally* SIMONS, *supra* note 37, at 49 (conceptualizing income as the value of rights that may be exercised in consumption).

64. *See* Koppelman, *supra* note 30, at 694.

65. *Id.* at 694.

66. *Id.* at 705.

67. *See id.* at 706.

68. *Id.* at 707.

expression representing the taxpayer's change in wealth: (W_{ep} - W_{bp}). What causes a taxpayer's wealth at the beginning of the period to differ from that at the end of the period? In general, her wealth can increase because of (i) appreciation in the value of her existing assets (i.e., assets held at the beginning of the period), and (ii) her acquisition of new assets—such as money received as compensation for services. Similarly, wealth may decrease either because the value of the taxpayer's assets has declined, or because the taxpayer has expended some of her wealth.

Thus, a taxpayer's change in wealth may be expressed mathematically as follows:

> (W_{ep} - W_{bp}) = Net Increase (or Net Decrease) in Value of Existing Assets + Receipts - Outlays

A taxpayer can make numerous types of outlays. There are strictly personal consumption expenditures, such as amounts spent on popcorn and soda consumed in front of one's home television set. Mathematically, such outlays are depicted herein as C_p. There are also various types of business and investment outlays. I will designate business and investment outlays that have been made primarily to generate income in the current taxable period as B_p.[69] In other words, if it is assumed that all outlays must be either of a business (or investment) nature or in the nature of consumption, such outlays may be described as ($B_p + C_p$).[70] Hence, a taxpayer's change in wealth for a particular taxable year may be depicted mathematically as follows:

> (W_{ep} - W_{bp}) = Net Increase (or Net Decrease) in Value of Existing Assets + Receipts - ($B_p + C_p$)

Through simple mathematical operations,[71] this equation may be reduced to the following, which I will designate as *Equation 2*:

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69. It is unnecessary to designate business and investment expenditures for assets expected to produce benefits over many years, because when such an asset with long-term value is acquired, the purchase of the asset does not initially change the taxpayer's wealth (if it is assumed that the asset was purchased at fair market value).

70. Some expenditures are actually mixed personal and business (or personal and investment) expenditures. Such expenditures must either be allocated in part to consumption and in part to business or investment, or they must be treated de jure as but one type.

71. The equation in the text may be mathematically expressed equivalently as follows: (W_{ep} - W_{bp}) = Net Increase (or Net Decrease) in Value of Existing Assets +Receipts - B_p - C_p. What does the Haig-Simons concept of income look like mathematically if we express it in a long form equation? All that is necessary is to substitute the right-hand side of the above equation for (W_{ep} - W_{bp}) in *Equation 1*. Thus, *Equation 1*, which is I_p = (W_{ep} - W_{bp}) + C_p, is mathematically equivalent to the following: $I_p = C_p + (W_{ep} - W_{bp})$. Substituting for ($W_{ep}$ - W_{bp}), we have the following: I_p = C_p + Net Increase (or Net Decrease) in Value of Existing Assets + Receipts - B_p - C_p. Rearranging terms, we have $I_p = C_p - C_p$ + Net Increase (or Net Decrease) in Value of Existing Assets + Receipts - B_p. Because (C_p - C_p) is zero, we have I_p = Net Increase (or Net Decrease) in Value of Existing Assets + Receipts - B_p. Mathematically, of course, (+ C_p) and a (- C_p) cancel each other out to zero only if each term is identical. This equation (for the sake of simplicity) ignores consumption received in kind. Many items of consumption received in kind are often thought to be properly included in a comprehensive income tax base.

I_p = Net Increase (or Net Decrease) in Value of Existing Assets + Receipts - B_p.

Observe that in *Equation 2*, a deduction for outlays is allowable only for those that are in the nature of business and investment expenses.[72] No deduction is allowed for any other type of payment or transfer. The equation, therefore, generally describes the conception of income advanced by Professors Kelman and Koppelman.[73] At first glance, it also appears to make for a more administratively "tidy" equation; because personal consumption (C_p) does not appear in the equation, there is no need to define it. However, *Equation 2* is not quite so simple as it appears, nor is it complete. Many proponents of a comprehensive income tax base (including Simons himself) recognized that various forms of consumption received in kind (but not purchased in a market transaction) should be included in income.[74] Moreover, economic income includes the value of (1) self-provided services and (2) the personal use of taxpayer-owned assets.[75] These are both elements of the consumption component of income. The tax system must determine to what extent such consumption is taxable, notwithstanding that *Equation 2* does not on its face depict consumption. Further, defining B_p in *Equation 2* is not always easy. The tax system must decide whether expenses of a mixed character (i.e., expenses which serve business or investment purposes and also confer direct personal benefits on taxpayers) are, to some extent, deductible.[76]

Most important for present purposes, the conception of income described in *Equation 2* is only as good as its underlying assumptions. As will be recalled, *Equation 2* assumes that all outlays must be either of a business (or investment) nature or in the nature of consumption. In other words, the equation reflects an underlying assumption that a taxpayer's inflows and other enhancements to wealth can be used only for three purposes: accumulation, personal consumption, and the production of more income. If wealth augmentations have been neither saved nor expended in the production of additional income, they must have been "consumed." This assumption, of course, is the foundation of the arguments of both Kelman and Koppelman, who believe that any transfer (or at least any voluntary transfer) of funds must be treated as consumption.[77]

In analyzing the propriety of the charitable contributions deduction, choosing between the views of Andrews (on the one hand) and Kelman and Koppelman (on the other hand), or choosing yet another view, is no simple enterprise. The cornerstone of

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72. *Equation 2* is actually somewhat simplified. A more detailed equation would account for increases (or decreases) in the value of assets (other than money) acquired during the period (such as reinvestments of proceeds from the sale of assets held by the taxpayer at the beginning of the period, and changes in the value of assets received in kind during the period).

73. Professor Koppelman appears willing in some circumstances to allow a deduction for state and local taxes, because they are non-voluntary. However, he appears unwilling to allow such a deduction if the benefits received by the taxpayer from the governmental bodies collecting the taxes correspond to the amount of the tax payments. *See* Koppelman, *supra* note 30, at 710.

74. *See, e.g.*, SIMONS, *supra* note 37, at 53.

75. *See id.* at 110–24.

76. *See id.* at 54.

77. *See* Kelman, *supra* note 60, at 834 ("All money the taxpayer controls or 'voluntarily' disposes of must go to either consumption or savings.") (citation omitted); Koppelman, *supra* note 30, at 706 ("All voluntary expenditures unrelated to a profit-seeking activity should be considered taxable consumption . . . .").

Andrews' analysis—that personal consumption includes only private preclusive appropriation of goods and services—is supported not by any overarching theory, but by numerous considerations under income tax theory and policy. Kelman's contrary view—that income tautologically consists of consumption and accumulation—is advanced in similar fashion. Only Professor Koppelman emphasizes and attempts to develop at length an underlying justification for taxing income (individual welfare) as the central rationale for his concept of income. To weigh the various arguments advanced to date for and against the charitable contributions deduction, it is helpful to focus precisely upon what we do, and do not, believe to be the essence of personal income. I turn to this inquiry in the following section.

C. What Income Is (Not?)

An appropriate place to begin an exploration of what is, and is not, the essence of income is the theoretical position of Professor Koppelman. Koppelman finds support for his concept of income—the power to consume that is reduced to economic rights and is capable of valuation—in theories of social welfare, which focus on the welfare of the individual, or on the aggregation of individual welfare.[78] He argues, "Taxation intended to promote individualistic conceptions of welfare should also be based upon individual measures of welfare."[79] If income is selected as the tax base because it is the best measure of economic well being, "it should be interpreted in an individualistic way."[80] An individual taxpayer's "power to consume" is, according to Koppelman, the only major concept of income that "adopts an individualistic measure of welfare."[81] Although not articulated precisely in these terms, Professor Kelman's various arguments appear to be consistent with this position.

Koppelman's linchpin for income (the power to consume as a benchmark of individual welfare) is not without its difficulties. First, income has meaning only as a function of time.[82] The very concept of gain assumes at least two points in time. Koppelman's analysis therefore presents an obvious question: At what time do we determine whether the taxpayer has the power to consume? In the case of a taxpayer whose paycheck is stolen, Koppelman would allow a deduction because of the taxpayer's "economic loss."[83] I agree with Koppelman, but my agreement assumes that the relevant point in time for looking at the taxpayer's power to consume is *after* the paycheck has been stolen. If we look at the moment that the payment is received, there would be a clear increase in the power to consume. Similarly, consider a taxpayer who begins the taxable period with one asset and ends the period with that same asset. Assume that halfway through the period, the asset doubles in value; however, by the end of the period, the value of the asset declines to its initial value. Has there been income for the period? The Haig-Simons definition of income would answer this

78. *See* Koppelman, *supra* note 30, at 697–705.

79. *Id.* at 703 (citation omitted).

80. *Id.*

81. *Id.* at 705.

82. *See* SIMONS, *supra* note 37, at 50 ("The relation of the income concept to the specified time interval is fundamental. . . . The measurement of income implies allocation of consumption and accumulation to specified periods.").

83. *See* Koppelman, *supra* note 30, at 710.

question in the negative ((W_{ep} - W_{bp}) is zero), and both Professor Koppelman (I presume) and I would agree with this result. But notice that during the middle of the period, the taxpayer plainly experienced an increase in the power to consume. Had the taxpayer sold the asset and purchased personal items with the sales proceeds, no one would question that the taxpayer's income was enhanced. Only by looking to the taxpayer's wealth at the end of the period can we conclude that the taxpayer's "power to consume" did not increase. Likewise, in the case of a taxpayer who makes a charitable contribution during the year, her wealth has obviously decreased by the amount of the contribution. Stated another way, she has no "power to consume" the amount of the contribution as of the end of the taxable period. Only if we look at her "power to consume" prior to making the contribution do we find income.

This much of the analysis is elementary. It is nonetheless an important step because it accentuates that a mere change in the power to consume is not the hallmark of income. Something more is required to render as income a change in the power to consume. What is it? One tempting candidate is the exercise of "control" by a taxpayer. Thus, it could be argued that a taxpayer who makes a charitable contribution exercises "control" over her accretion, and therefore must be treated as having consumed her wealth. The argument would distinguish such a taxpayer from the taxpayer whose wealth fluctuates in value over the taxable period; the latter just "does nothing," rather than exercise control over her wealth.

This "exertion-of-control" test is assuredly *not*, by itself, a determinant of income. Consider a taxpayer who sells one investment asset and purchases another of equivalent market value. Such a taxpayer has exercised control over her wealth. But if there is no accretion (i.e., if the new asset at the end of the period is valued the same as the original asset as of the beginning of the taxable period), all disciples of Simons would concede that there is no income.[84] On the other hand, if a taxpayer merely "holds" a single asset that increases in value by the end of the period, there is income in the Haig-Simons sense of the term. This is so even if holding an asset is deemed not to constitute the exercise of "control." Even more fundamentally, it is quite sensible to view the mere retention of an asset as a species of control. A taxpayer who "does nothing" is actually doing something—holding the asset. And this is so for every minute of every hour of every day of the taxable period. Thus, a taxpayer who decides to hold his asset that has doubled in value as of the middle of the period has exercised control over the asset at that point in time. Nonetheless, if at the end of the period the asset is once again worth only its value at the beginning of the period, the taxpayer has no income. Finally, consider a taxpayer who sells assets during the middle of the taxable period at a gain, and then incurs a business expense in an amount equal to the gain. The taxpayer has certainly exercised control over his accretion,[85] but all followers of Simons would concede that a deduction for the business expense is proper.

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84. The result of (W_{ep} - W_{bp}) is zero, and so, if there is no consumption, income for the period is zero.

85. *Cf.* Andrews, *supra* note 29, at 363 ("[P]eople exercise power over the allocation of resources by making or controlling the making of deductible business expenditures, and the income tax does not reach these acts."); Jeffrey H. Kahn, *Personal Deductions—A Tax "Ideal" or Just Another "Deal"?*, 2002 L. REV. MICH. ST. U. DET. C.L. 1, 30 (arguing that a taxpayer's control over business expenses does not negate their deductibility).

All that this discussion means is that "control" is not alone a sufficient test of income.[86] It has also been demonstrated that the mere "power to consume" at some point during the period does not necessarily imply the existence of income. What, then, is the essence of income to Kelman and Koppelman? It must be the presence of what Koppelman simply calls "personal benefit." He refers more than once to the securing of "personal benefit" as consumption,[87] although he does not identify plainly the nature of the personal benefit derived by a donor from her contribution.[88] Professor Kelman is much more explicit on this point. After equating consumption with "using money to obtain satisfaction,"[89] Kelman observes that charitable donors "may obtain utility, some feeling of pleasure or power equal to the utility that other people get from ordinary consumptive spending."[90] Donors may receive deference or respect from charitable donees, the ultimate individual beneficiaries of charitable operations, or other members of the community.[91] Donors may also receive nothing more than personal gratification from having improved another's condition.[92] At the other extreme, donors may actually receive the services provided by charitable donees in the normal course of their charitable activities.[93] Kelman believes that "there is no principle which logically distinguishes charitable spending from other forms of spending."[94]

Thus, there are really three major types of "personal benefit" that donors may receive when donating to charity. One form of benefit is just that "warm, fuzzy feeling" that people receive when they donate. This utility is largely self-generated. Another form of benefit is the expression of gratitude, admiration, and attention that donors receive from any number of people as a result of being generous. A final type of benefit is more concrete; donors benefit from donations to charity (including their own, presumably) when they are members of the class of persons who partake of services

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86. Accordingly, the argument that charitable contributions necessarily constitute personal consumption because they are "discretionary," see, for example, Aprill, *supra* note 4, at 870, is unconvincing.

87. *See, e.g.*, Koppelman, *supra* note 30, at 705 ("[T]he consumption component of income involves the exercise of economic consumption power in a manner intended to produce a current personal benefit. This current personal benefit is what distinguishes nondeductible taxable consumption from deductible expenditures."); *id.* at 707 ("The expenditure of cash or property represents a clear personal benefit to the donor."); *id.* at 708 ("The principle of consumption as a current personal benefit has been helpful in determining the extent to which mixed personal and profit-seeking items should be taxable."); *id.* at 709 ("The principle that taxable consumption arises from an economic expenditure producing a current personal benefit is also useful in evaluating the role of involuntariness."); *id.* at 710 ("The very nature of a loss suggests that no personal benefit has been derived.").

88. Although Koppelman does not precisely identify this purported "clear personal benefit" received by the donor, he does refer to "the personal satisfaction resulting from voluntary expenditures" as a form of personal benefit. *Id.* at 705. Thus, the benefit presumably is the utility from giving.

89. *See* Kelman, *supra* note 60, at 834.

90. *Id.* at 844.

91. *See id.* at 845 & n.46.

92. *See id.*

93. *See id.* at 857 & n.78.

94. *Id.* at 857 n.78.

provided by charitable donees. Examples include donors who are patrons of museums, patients in nonprofit hospitals, parents of students in private universities, aficionados of the symphony, and church members. The question is whether the donor who secures one or more of these benefits has received income.[95]

Let us first consider the utility[96] that is largely self-generated. Although I am willing to grant that the typical charitable donor probably receives a sense of satisfaction from giving, I am unconvinced that this form of utility necessarily gives rise to income. Numerous activities generate utility, and it is both wholly impractical and theoretically objectionable to tax utility as such. To impose greater tax liabilities on the "happy" than on the "disgruntled," to take an extreme example, would be absurd, even if we could ascertain degrees of happiness.[97] Moreover, mere utility generated from wealth and dealings in wealth is not income. Thus, it is surely the case that the miser who hoards his wealth, year after year, receives utility from the mere possession of wealth,[98] and yet he has no income (under the Haig-Simons concept) if the value of his wealth is static over time. Similarly, the baroness who takes pleasure in amassing holdings in land may very well experience utility when she uses money to acquire more real estate, but she has no income if the land does not appreciate in value. Even business expenses that are fully deductible very likely generate utility analogous to that arising from charitable contributions. Examples include the expenses of the following: compensating a competent worker who says he really needs the job, offering a Christmas bonus that is not part of the agreed-upon salary package, providing bottled water and tasty coffee to employees, purchasing office supplies from a family-owned business that is struggling, buying recyclable paper and plastic products, performing services for which a "discounted" fee is charged because the recipient is of modest means, and advertising in a charitable organization's newsletter.

Let us consider the second type of benefit received by donors—gratitude, admiration, and attention. Once again, I am not persuaded that this type of benefit implies the existence of income. It is difficult to refute that, in many cultures (including American subcultures), a wealthy person receives attention, and often admiration.[99] The mere possession of wealth often commands deference, regardless of whether that wealth is increasing. That an opulent person *might* use his money to benefit others may well draw their attention to him, and if he once earned that wealth through hard work or sharp wits, he may be revered for a lifetime. These benefits are frequently enjoyed by the wealthy, regardless of whether their wealth appreciates. Accordingly, if a person's wealth amassed in prior years merely maintains its value, she does not have income during the period, notwithstanding that she continues to enjoy these benefits. Moreover, deductions are allowed for business expenses that produce analogous

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95. For a general critique of egoistic models of giving, see Gergen, *supra* note 4, at 1428–33.

96. In general, I agree with Professor Thuronyi's argument that a taxpayer's utility is of limited value in forming a proper concept of income. *See* Thuronyi, *supra* note 36, at 52–53.

97. *See id.* at 53.

98. Professor Koppelman also observes that the holding of wealth itself generates utility. *See* Koppelman, *supra* note 30, at 701–02.

99. Admittedly, a wealthy person may also be resented for no reason other than that he is rich. But the same may be said of a charitable donor, who may be resented for giving to one cause instead of others.

benefits for payors. Anyone who has practiced law for more than a few months understands that a major client is highly valued by the law firm. Those who pay large bills are accustomed to cordiality, social and professional introductions, and other benefits extended or facilitated by grateful owners of the firm. A businesswoman who hires a large workforce is likely to be esteemed in the community, as is a company that locates in an economically depressed part of town. Indeed, the world of business and commerce is openly lubricated by this second type of benefit. But the presence of this type of benefit does not negate the deductibility of business expenses, nor does it otherwise directly cause businesspersons to realize income under the Haig-Simons concept.

We are therefore left with the final type of benefit identified by Professor Kelman—the benefit that donors receive from the charitable donees' use of donations when donors are members of the class of persons who partake of services provided by charitable donees. For example, a church member who donates funds for a new keyboard receives some benefit when he attends worship service and sings praise and worship songs. The charitable contributions deduction is most difficult to justify in such cases of "charitable spending." It is worth revisiting the contrasting arguments of Professors Andrews and Kelman with respect to this particular case.

As discussed above, Andrews justifies a deduction for contributions made to charitable donees that to some degree benefit donors.[100] His reasons include the following: (1) charitable organizations produce goods and services in the nature of public goods that are not enjoyed by contributors in proportion to their contributions;[101] (2) it is impossible to value the benefits enjoyed by donors as a result of their contributions;[102] (3) even if we could value such benefits, it may be undesirable to tax donors because of the perceived social benefits that flow from the charitable donee's operations;[103] (4) taxing donations as a proxy for taxing the ultimate beneficiaries of the donee's operations is problematic because of differences in the applicable tax rates of donors and ultimate beneficiaries, and because of the resulting burden of the income tax borne by charitable services (as opposed to those goods and services consumed by donors through market purchases);[104] (5) that donors had the ex ante power to consume is an insufficient basis for taxing them because the tax system does not, in general, tax power;[105] (6) that the deduction violates "neutrality" is an unpersuasive objection because of indeterminacy in how the income tax affects the totality of consumer choices and because of the inability of an income tax to be neutral comprehensively;[106] and (7) the public (or quasi-public) goods and services produced by a charitable organization and financed through donations are analogous to goods produced and consumed within a household, which are typically not included in computing income.[107]

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100. *See* Andrews, *supra* note 29, at 356–70.
101. *See id.* at 356–58.
102. *See id.* at 358–59.
103. *See id.* at 359–60.
104. *See id.* at 360–62.
105. *See id.* at 362–66.
106. *See id.* at 366–67.
107. *See id.* at 367–70.

Arguments (4)-(6) are really just responses to potential objections to the charitable contributions deduction, rather than affirmative justifications, and need not be explored further for present purposes. Argument (3) properly belongs to subsidy theories of the deduction, which argue that the externalities of charity justify a tax preference for contributions. I do not reject subsidy theories in this paper, but neither do I rely upon them. For the purposes of this paper, the most important arguments are (1), (2) and (7).

Arguments (1) and (2) must be considered together.[108] Professor Andrews is correct that there is no way to determine precisely the value of charitable activities enjoyed by a donor, and that donations benefit others than the donor. But these observations are not alone sufficient to justify the deduction of donations. As Professor Kelman has argued, "we do not generally assume that spenders get deductions for purchases where price is above cost."[109] If we assume that donations secure some benefits for donors who partake of the charity's services (a reasonable assumption), we could, like Kelman,[110] conclude that the inability of donors to establish the value of what they actually received should result in disallowance of a deduction. True, this approach may be unfair in particular cases. Thus, the churchgoer with an annual income of $100,000 who donates 10% of her income and attends services every other Sunday is treated as having consumed $10,000 worth of "church services," whereas the tight-fisted churchgoer (even one with the same annual income) who attends services every time the door is opened is treated as having consumed nothing. Moreover, it is doubtful that there is frequently (if ever) a perfect correspondence between benefits received and donations made by a specific donor, and perhaps even rarely an approximate correspondence. But this inequity is at least analogous to the treatment of the taxpayer who pays $10,000 for golf gear, and the taxpayer who buys the same gear on special for $1,000. The former is treated as having consumed $10,000, whereas the latter is treated as having consumed one-tenth as much. Yet both enjoy the same product.

Under Arguments (1) and (2), the case for the charitable contributions deduction is neither clearly superior, nor clearly inferior, to the case against it. Does Professor Andrews' argument (7) tip the scales? The gist of his argument is captured in his own words:

> The charitable contribution deduction can be said to rest upon a judgment that certain common goods financed on a voluntary contributory basis for shared use in a community wider than an individual household should be similarly exempted.... The charitable contribution deduction represents a judgment that no tax need be collected on what the clerics, teachers, and musicians have produced insofar as it is distributed or made available as a free good for shared use within a reasonably wide community of persons.[111]

But what is the underlying theory supporting this special treatment of communities? All that Andrews offers is a comparison between charities and government. Government raises tax revenues for the production of public goods that otherwise would not be produced, and therefore "it may well seem counterproductive to lay the

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108. Argument (1) is really a foundational premise upon which argument (2) depends.

109. *See* Kelman, *supra* note 60, at 857 n.78.

110. *See id.*

111. Andrews, *supra* note 29, at 369.

tax on that very kind of activity—production of common goods for shared enjoyment."[112] Andrews so concludes, notwithstanding that the goods produced by charities may differ from those that the government provides.

These observations do not necessarily make Andrews' case. Why is it "counterproductive" to tax public goods produced by charities but not those produced by government? If the argument is simply that charities would not produce such goods (or the same quantity of such goods) but for the charitable contributions deduction, then Andrews is doing little more than offering a spin on traditional subsidy theories. He may be right, but the argument is not chiefly one based upon the concept of income.

Thus, Andrews leaves us wanting for an underlying theory that treats "communities" as extensions of the household. What he advances in his final argument (argument (7)) is more of an intuition than a theory. But this does not mean that his intuition is wrong. To the contrary, he may be quite right. In the remainder of this Article, I attempt to do what Andrews did not: provide a theoretical justification for the charitable contributions deduction based upon the proper taxation of charitable communities.

II. THE NON-TAXATION OF COMMUNITY INCOME

In this Part, I argue that the proper taxation of charitable communities is derived from the broader principle of how we do (or, more precisely, do not) tax the income from "communities" more generally. This Part develops the concept of "community income," explains that community income is not taxed, and discusses the justifications for not taxing community income.

A. Community Income and the Non-Taxation of Community Benefits

The starting point for developing the concept of community income is to observe the nature of public goods produced by government. A pure public good has two characteristics: non-rivalness in consumption and non-excludability.[113] The first characteristic means that one person's consumption of the good does not impair another's ability to consume the good.[114] The second characteristic means that private suppliers are unable to exclude potential consumers of the good by requiring them to pay a price for it.[115] Although economists do not agree fully on what goods and services constitute pure public goods, commonly cited examples include national defense, sanitation, public health, space research, the enforcement of contracts, law and order in general, public roads, and environmental protection.[116]

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112. *Id.* at 370.

113. *See* Lorraine Eden & Melville L. McMillan, *Local Public Goods: Shoup Revisited, in* RETROSPECTIVES ON PUBLIC FINANCE 178 (Lorraine Eden ed., 1991).

114. *See id.*

115. *See id.*

116. *See id.* at 181; Cliff Walsh, *Public Goods Provision with Price Exclusion: Market Behavior and Market Performance, in* RETROSPECTIVES ON PUBLIC FINANCE 205 (Lorraine Eden ed., 1991). Economists have also recognized that other goods supplied by government, such as public assistance and other forms of welfare, may be in the nature of public goods. *See, e.g.*, Henry Aaron & Martin McGuire, *Public Goods and Income Distribution*, 38 ECONOMETRICA 907, 915–16 & note b (1970).

Because of free-riding, the market will undersupply public goods. The reason is simple. Some people will refuse to pay (or refuse to pay sufficiently) for goods for which no formal charge can be imposed. They will prefer to let others fund the provision of the goods.[117] For a variety of reasons,[118] even those who are willing to pay something will not pay enough for the good. Government, therefore, supplies public goods that the market cannot provide.

What is notable for present purposes is the tax treatment of public goods. Taxpayers plainly consume public goods. They breathe clean air, move about freely with the knowledge of police protection, and live healthier lives because of mass immunizations. Moreover, economists have argued that household income really includes not only disposable money income, but also the value of governmentally provided public goods.[119] Interestingly, however, the Haig-Simons concept of income may properly be understood to exclude the value of governmentally provided public goods consumed by taxpayers.[120]

Government is not the only institution that supplies public goods (or benefits in the nature of public goods). Some economists classify externalities as public goods.[121] Privately produced externalities essentially constitute the positive effects of market activity that are not captured by the market in the form of price. Thus, a large company doing business in a small- or mid-sized town produces more value than is reflected in the market price of its products. Such benefits may include a lower crime rate resulting from a substantial, stable workforce; a more educated citizenry attracted to the locality because of job opportunities; additional industries attracted to the region because of the needs of the company and its employees; better health care made possible by the improved local economy; better public schools resulting from better teachers moving to the region; and, more generally, improved government services of all types made possible by a growing population.[122]

The amenities offered by a locality or region because of the presence of for-profit firms are of considerable value to the community and its members. Moreover, many forms of such externalities (e.g., lower crime rates, happier neighbors, and better governmental services resulting from a strong economy) are "consumed" by taxpayers

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117. *See* Gergen, *supra* note 4, at 1398.

118. Such reasons include the desire not to be exploited by free-riders, a lack of confidence in successful collective action, and undervaluing collective goods. *See id.*

119. *See, e.g.*, Aaron & McGuire, *supra* note 116, at 911–14.

120. *See, e.g.*, Henry Aaron, *What is a Comprehensive Tax Base Anyway?*, 22 NAT'L TAX J. 543, 543–44 (1969); Thuronyi, *supra* note 36, at 52 (stating that the Haig-Simons concept of income fails to reflect neo-classical economic theory because it does not tax leisure and public goods). Further, current law does not tax these benefits. *See* John K. McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 VA. TAX REV. 229, 232 (1984). However, some argue that under certain assumptions, the theoretically correct approach is to include in the individual income tax base not only private consumption, but also public consumption (by not allowing a deduction for expenditures on public goods). *See, e.g.*, Louis Kaplow, *Fiscal Federalism and the Deductibility of State and Local Taxes under the Federal Income Tax*, 82 VA. L. REV. 413, 422 (1996).

121. *See* Eden & McMillan, *supra* note 113, at 181 (describing the views of Carl Shoup).

122. Economists have observed that larger communities may be able to offer more public services than smaller ones. *See, e.g.*, Eden & McMillan, *supra* note 113, at 188.

who do not make out-of-pocket expenditures directly to secure these benefits. Again, the Haig-Simons concept of income does not require the direct taxation of the consumption of these benefits.

Of course, some regions offer amenities to taxpayers that are not primarily attributable to the activities of government and business. The Rockies offer breathtaking views of majestic peaks and bubbling rivers teaming with trout; coastal states offer serene ocean sunsets (or sunrises) and relaxing beaches; the southern states offer warm days in the winter, and the northern states cool nights in the summer; the heartland offers unspoiled pastures of waving grass hosting countless species of wildlife. Taxpayers who enjoy the beauty of nature in these areas are "consumers" of nature, yet no major attempt is made to isolate the consumption value of experiencing nature and tax it under the Haig-Simons concept of income.

The amenities offered by numerous charitable organizations are of a similar nature to those *untaxed* benefits offered by government, business, and the natural environment.[123] That is, the activities of charities are often recognized as producing public benefits—benefits that inure primarily to the public at large, rather than primarily to individual taxpayers. The requirements for federal income taxation are consistent with this notion. Specifically, an organization will not qualify for exemption as a charitable entity described in section 501(c)(3) of the Internal Revenue Code ("Code") unless "it serves a public rather than a private interest,"[124] nor will it qualify for exemption if its net earnings inure "to the benefit of any private shareholder or individual."[125] Even those charities that provide services to a wide class of persons which includes donors typically provide services in the nature of public goods (as Professor Andrews and others have argued), and therefore can be viewed properly as primarily serving the public.

For the remainder of this article, I will refer to these several untaxed benefits (provided by government, business firms, charitable organizations, and the environment itself)[126] that are enjoyed by taxpaying (and non-taxpaying) members of the community as "community income." Having observed that the Haig-Simons concept of income probably does not require a taxpayer directly to include any portion of community income in her taxable income, I will offer a justification for the non-taxation of community income. Next, I will explain why I believe the principle of not taxing community income is consistent with both the exemption of charities from federal income tax and the charitable contributions deduction.

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123. *Cf.* Aaron, *supra* note 120, at 544 (stating that the decisions of charities affect the welfare of households).

124. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 1990).

125. I.R.C. § 501(c)(3) (2003).

126. I am not suggesting that this list exhausts the sources of community income. I recognize, for example, that "nice, friendly, like-minded" citizens may be highly valued by most members of the community, and that the value of such citizens may even have an income effect (sueh as obviating the need to buy an expensive security system or a high fence, or the need to buy one's own recreational toys (instead of borrowing them from a friend)).

B. Why Community Income Is Not Taxed

There are several reasons that community income is not (and/or should not be) included in the tax base. One is the obvious point that it is impossible to value the portion of community income consumed by a taxpayer.[127] No market mechanism exists for determining the value of community income that a consuming taxpayer places on his share of such income.[128]

Another reason that community income arguably ought not to be taxed is equitable: that community income is available for consumption does not mean that it is actually consumed (or that it is consumed to a significant degree) by all taxpayers. For example, the agoraphobic does not consume pretty scenery; the political dissident who detests our form of government may abhor a strong national defense; the church donor may dislike the contemporary music played on the keyboard in part financed with her contributions; the card-carrying, rifle-toting member of the NRA may prefer to defend himself, rather than rely on the police; the recluse who sustains himself on the land may not use the public streets and highways; and the citizen who resents administrative regulation may not enjoy a clean enviroument.[129]

Although these arguments based on both feasibility and equity carry some force, I believe that the most persuasive reason for excluding community income from the tax base is distinct from those discussed above. My thesis is that community income ought

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127. *Cf.* Aaron, *supra* note 120, at 544–46 (stating that there is no way to value non-private goods and services consumed (but not purchased) by households); Andrews, *supra* note 29, at 358 (observing the frequent impossibility of valuing benefits provided by a charitable organization to a particular recipient); Bittker, *supra* note 36, at 938 (observing that the comprehensive tax base presumably excludes the value of various public goods because "there is no feasible way of comparing the taxpayer's benefits with his payments").

128. *Cf.* Aaron, *supra* note 120, at 545 ("There exists no institutional setting, however, which induces households truthfully to reveal the valuation placed on non-discretionary income.").

129. This argument may carry more force in the case of community income generated by government (particularly the federal government) than in the case of community income generated by other entities, such as charities. The average individual taxpayer (or small group of taxpayers) has little influence over what community income the national government will provide. A small group of taxpayers also has limited ability to determine the operations of an unrelated business. A small group of taxpayers may, however, have considerable influence on the type of community income that a particular charity produces (particularly if that taxpayer is a large eontributor to the charity). Although not all taxpaying donors ean influence the operations of a charitable donee, it must be recognized that some do, and the largest donors are among them. Surely some of this influence leads to the production of community income that influential donors desire to consume.

Of course, these observations do not compel the conclusion that donors with clout attempt to influence charities to produce the precise type of community income that such donors wisb to eonsume, or that charitable boards defer shamelessly to the wishes of sueh donors who make such an attempt. Indeed, the broader tbe base of a charitable organization's donors with different preferences, the less likely it is that any single donor or group of donors will cause the charity to produce the precise type of community income that the donor wishes to consume. Nonetheless, it does seem realistic to accept that in the case of some charitable donces, large donors exert meaningful influence over the charities, and consequently, the charities produce community ineome that those donors consume.

not to be included in the individual income tax base because it is properly attributed not to individual community members, but to the community itself, and the community is not an appropriate object of taxation.

Initially, it is necessary to explain my position that community income should not necessarily be included in the "personal income" tax base. Henry Simons himself argued that "income" has several meanings, and that "personal income" should not be equated with other notions of income.[130] Perhaps most importantly, he insisted that the sum of personal incomes need not equate to national (or social) income.[131] He first observed that, although social income purports to measure "the net results of economic activity in a community during a specified period of time,"[132] social income actually eludes meaningful quantification. Prices "are pure relations" that "cannot be summated into meaningful totals."[133] In other words, market prices are of little help in determining the value of all goods produced and services rendered.[134] Unlike social income, the measurement of personal income "implies estimating merely the *relative* results of individual economic activity during a period of time."[135] Personal income is also rights-based.[136] Whereas social income "implies valuation of a total product," personal income "is a purely acquisitive concept having to do with the possession and exercise of rights."[137]

Simons's critique of attempting to relate personal income to social income helps inform the proper treatment of community income. If social income is incapable of meaningful valuation (as Simons asserts), community income is probably equally so. As noted above, because community income consists of public and quasi-public goods, and there is no market for such goods, no single taxpayer's enjoyment of community income carries an objectively determinable price tag. Thus, total community income cannot even be conceived as the summation of market prices paid by individual consumers. Further, it is often the case that the "value"[138] of community income cannot be meaningfully quantified (for income tax purposes) through other means. In the first place, some forms of community income (e.g., externalities and amenities of the natural environment) do not have an ascertainable production cost (which might be assumed to approximate value). Secondly, even where community income has (or arguably has) an identifiable production cost (such as the cost of police protection

130. *See* SIMONS, *supra* note 37, at 44–49.

131. *See id.* at 47–49.

132. *Id.* at 45.

133. *Id.*

134. *See id.*

135. *Id.* at 49 (emphasis in original).

136. Others have observed this feature of Simons' theory of income. *See, e.g.*, Bittker, *supra* note 36, at 948; Koppelman, *supra* note 30, at 696.

137. SIMONS, *supra* note 37, at 94.

138. Economists derive the "pseudo-demand curve" for a social good by summing the prices that all consumers are willing to pay for a given quantity of the good. *See* MUSGRAVE & MUSGRAVE, *supra* note 19, at 58–59. Equilibrium is represented by the intersection of the supply schedule and the pseudo-demand curve. *See id.* The "price" (the summation of the prices that all consumers are willing to pay) of the social good at equilibrium is thus analogous to the equilibrium market price (i.e., the market value) of a private good. One may think of this equilibrium price as the value of the social good.

procured by government, and the cost of musicians' services purchased by a symphony association), such cost may very well not reflect the value of the income to the community.[139] The thrust of this argument, then, is more than that "we would tax a citizen's share of community income if we could reasonably estimate its value to him." Rather, the point is that benefits that have no market value are outside the design of a system that taxes personal income.

Moreover, if Simons is right that personal income looks to the relative positions of taxpayers, including community income in the personal income tax base is problematic. Insofar as community income consists of public goods (and those in the nature of public goods), it is comprised of benefits available (theoretically) to all members of the community. If all members of the community benefit equally from community income, there is no relative difference among community members. In actuality, as argued above, people benefit from community income in varying degrees. The extent to which an individual benefits from community income depends upon numerous factors, such as her health, age, familial status, geographical location, job status, and (more generally) personal appetite for the types of community income readily available to her. The differences among taxpayers on account of these and other factors only render more difficult the task of determining the relative enjoyment of community income among taxpayers. While this point is highly related to the equitable argument raised above, I believe it is conceptually distinct. Here, the point is not simply that it would be unfair to tax people as though they benefit from community income equally (when, in fact, they do not). Rather, the argument is that a tax system designed to apportion the tax burden among persons on the basis of their relative differences in position simply cannot account for the varying degrees to which individuals consume community income.

Finally, it is instructive to focus on Simons's assertion that the concept of personal income deals with "the possession and exercise of rights,"[140] and, specifically, those "rights which command prices."[141] Taxing community income is inconsistent with a rights-based approach to determining the tax base. In theory, community income is available to everyone. The nature of a public good is that nobody can prevent another person's consumption of the good. Nobody has exclusive rights to community income, or any part of it. If personal income implies the existence of rights that can be

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139. This may be so for a variety of reasons. First, charities and government may be less efficient purchasers of goods and services than private consumers, who (by standard assumption) are rational maximizers of utility. Secondly, to the extent that charities and local governments do not coordinate their efforts, they may over-allocate resources to those community needs that they, ex ante (i.e., prior to allocating resources), have identified (correctly) as most pressing. (To illustrate, the darkest corner in the community park receives ninety percent of the "thousand points of light" and ends up looking like a football stadium). Thirdly, the value of some public goods may be so difficult to ascertain (e.g., national defense obtained through advanced nuclear technologies) that we have no real way to know whether the cost of the goods reflects their value. Finally, of course, the process by which consumers theoretically communicate their preferences with respect to social goods—voting—is far from perfect. Elected officials consequently may buy social goods at a cost that does not reflect the value that consumers place on the goods.

140. SIMONS, *supra* note 37, at 49.

141. *Id.*

exercised to the exclusion of others, community income ought not to be included in the tax base.

These arguments suggest that no portion of community income should be allocated to individual members of the community. Rather, the community itself may be seen as the true recipient of community income. We may conceptualize the community as a whole as "society" or "the summation of all local communities" (or in some similar fashion).[142] For the moment, I believe it is helpful to view the "community" as distinct from its members, as a type of entity. My reasons are easily understood. While individuals benefit from membership in the community, they do not do so uniformly. What is good for the community is not always good for the individual, and vice versa. Moreover, individuals do not control the community as they do their own lives. To the contrary, the community itself (through government, law and order, and social and business customs, for example) exerts a great deal of control over the individual. The individual must often defer to the will of the community. Thus, it is no stretch to think of the community as distinct from its members in some sense.

If the community is conceptualized as a kind of entity, in some sense distinct from its members, it is easier to see why community income is not properly allocable to the members of the community. The community enjoys the totality of community income: national defense; a sound, free infrastructure; clean air, etc. Whereas any certain individual may not consume a per capita share of community income, the community as a whole receives it all. Although no single member of the community can prevent another from enjoying it, the community itself has a great deal of power to restrict the enjoyment of community income. For example, acting through the government, the community can alter the quantity of public goods produced by the state, and highly regulate the activities of businesses that produce externalities. Acting through all three major sectors of the economy (government, business, and nonprofit), the community can alter the enjoyment of all types of community income through ceasing to generate it.

As between the entity of community, and the individual members of the community, the entity of community appears to be the real recipient of community income. Once that point is accepted, one may understand the non-taxation of community income in yet another light. Obviously, it would seem incongruous to include in the personal income tax base income that is properly attributable to an entity, rather than to individuals. But more importantly, one may also embrace the position that the community is not a proper object of taxation. Although I do not intend to develop the argument in detail in this Article, the fundamental notion is that government exists to promote the welfare of the community.[143] True, the community consists of (and acts through) individuals, and individuals receive all kinds of protection and other benefits from government (including the recognition and preservation of individual rights), but the government exists not to serve the precise interests of any single person, but the

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142. *Cf.* Bittker, *supra* note 36, at 938 n.23 (suggesting that society, rather than its members, may be the real recipient of public goods).

143. *Cf.* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330–33 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (stating that people put on "the bonds of Civil Society" when they unite in a community for comfort, safety, and peace; arguing that those who unite into a community cede to the community's majority that power which is "necessary to the ends for which they unite into Society").

interests of all persons who comprise the community. The recognition of individual rights, for example, is ultimately an expression of the community's judgment that its members (and indeed, the members of all society) have dignity and must be treated as such. Thus, to enforce the free expression rights of any single person is to ensure that the community of all persons will enjoy this freedom. Similarly, governmental (or governmentally enforced) restrictions on the activities of individuals and firms (e.g., criminal law, tort law, and environmental regulation) are designed to promote the welfare of the community. Indeed, rights and duties find meaning and expression most plainly in the context of community.[144]

If government ultimately exists for the benefit of the community, it may be maintained that the tax system exists largely for the same purpose. Under this view, the initial presumption may well be that community income ought not to be taxed. The community does not exist to benefit government; rather, government exists to benefit community. Similarly, one may argue that community income should not fund government, but government should produce community income. True, one may counter this line of reasoning by observing that, just as the community does not exist to benefit government, neither do individuals. The response is that it is proper to tax personal income because (or perhaps "when") individuals appropriate it primarily for their benefit, rather than for the benefit of the community.[145] Moreover, personal income is taxed (in significant part) to finance the government's production of community income (which cannot be appropriated by taxpayers to the exclusion of others).

The foregoing conceptualization of community (and the reason for not taxing its income) sketches a theoretical construct that merits further development. Nonetheless, under the analysis set forth above, the concept that community income is properly excluded from the tax base is a plausible working theory. The remainder of this Article adopts this working theory and explains why it justifies the exemption of charitable entities from federal income taxation, and arguably justifies the charitable contributions deduction.

III. THE NON-TAXATION OF COMMUNITY INCOME PRODUCED BY CHARITABLE ORGANIZATIONS

Before explaining why charitable contributions arguably should be deductible under the community income theory, it is first necessary to examine the justification(s) for the federal income tax exemption provided charitable entities under Code § 501(c)(3).[146]

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144. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 4 (rev. ed. 1999) (stating that the principles of social justice "provide a way of assigning rights and duties in the basic institutions of socicty and they define the appropriate distribution of the benefits and burdens of social cooperation").

145. *Cf.* SIMONS, *supra* note 37, at 51 (analogizing society to a partnership in which individual taxpayers make "withdrawals" in the form of consumption expenditures).

146. I.R.C. § 501 (c)(3) (2003). Code § 501(a) exempts from federal income taxation orgaizations described in subsection (c). Section 501(c)(3) describes the following organizations:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to

This Part briefly places the exemption issue in its historical context of how incorporated entities have been viewed, and then explains how the exemption can be justified under the community income theory. Next, this Article explains that under this theory, the charitable contributions deduction is also arguably justified (for reasons similar to those that justify the charity income tax exemption). Finally, this Part responds to anticipated objections to the deductibility of charitable contributions under the community income theory.

A. Federal Income Tax Exemption of Charities

Numerous theories have been advanced in support of the federal income tax exemption of nonprofit organizations generally, and charitable organizations specifically.[147] These theories usually assume that some affirmative justification must be advanced in favor of exempting charities independent of whatever reasons justify taxing business entities. The basic premise is that the burden is on the charitable sector to establish its entitlement to exemption.

A different way of approaching the policy behind the exemption of charities from taxation is to determine whether the underlying justification for taxing business entities, especially corporations,[148] applies to charitable organizations. If the rationale for taxing for-profit corporations does not (or at least may not) apply to charitable organizations, and if there is no compelling alternative basis for taxing charitable entities, the presumption probably should be that charitable organizations ought not be taxed on their income.

The traditional view appears to be that, since around the late nineteenth century, Congress has conceived of business corporations as quite distinct from their shareholders, and that the status of a corporation as a separate entity justifies taxation

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> the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.

147. For a summary of the major theories supporting the exemption of charitable organizations from federal income taxation, see Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers to Charity Under Federal Income Tax Law, Theory and Policy*, 70 FORDHAM L. REV. 1243, 1284–96 (2002). *See generally* Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990); Boris I. Bittker & George K. Rahdert, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 85 YALE L.J. 299 (1976); Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419 (1998); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379 (1991); Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981).

148. More precisely, the discussion will focus on the taxation of for-profit corporations that are taxed under Subchapter C (I.R.C. §§ 301-385). Both partnerships, *see* § 701, and incorporated business firms electing S Corporation status, *see* I.R.C. §§ 1361-1363, are not subject to the same type of entity taxation as corporations subject to Subchapter C.

of its income.[149] However, this traditional view is suspect. Having exhaustively examined the evidence concerning congressional attitudes toward the taxation of corporations in the nineteenth century, Professor Steven Bank has persuasively advanced a contrary historical theory.[150] Bank argues that throughout the century preceding the enactment of the modern income tax, policymakers viewed the tax on corporate income "as the economic equivalent of a tax upon the shareholders."[151] Desiring to enact a tax that would reach shareholder wealth, Congress chose the corporate income tax as the most suitable means for doing so.[152] Of course, as Bank notes,[153] the United States has strayed from its historic justification for taxing corporate income, and now has a system that generally treats the business corporation as a separate taxable entity.

One way of understanding why charitable corporations[154] historically were excluded from federal income taxation is that the rationale for taxing corporations simply did not apply to charitable corporations.[155] If Congress favored the corporate income tax because it had the effect of taxing the income of individual investors, the absence of investors in charitable corporations (which, by statute, may not distribute earnings to private shareholders or individuals)[156] would suggest no obvious reason to tax charitable entities. Granted, this argument would lose some of its luster (at least as an historical explanation) if Congress actually thought of incorporated businesses as distinct entities for purposes of taxation when the precursor to § 501(c)(3) was enacted, but Professor Bank's historical analysis suggests that such was not necessarily the case.

What are the implications if a charitable organization is not viewed as a distinct taxpaying entity? In the case of a business firm taxed as a conduit (such as a partnership), individual members of the firm (partners) are taxed on the firm's income. Such a system is administrable when the identity of the partners is known or ascertainable. However, often it is unclear what persons should be considered "partners" of a charity. If, as required by current law, a tax-exempt charitable

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149. *See, e.g.*, George K. Yin & David L. Skakow, *Taxation of Private Business Enterprises: Reporter's Study*, 1999 A.L.I. FED. INC. TAX. PROJ. 35–36; *cf.* Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 133–36 (1990) (concluding that the Corporate Excise Tax of 1909 represented a triumph of the entity theory).

150. *See* Steven A. Bank, *Entity Theory as Myth in the Origins of the Corporate Income Tax*, 43 WM. & MARY L. REV. 447 (2001).

151. *Id.* at 531.

152. *See id.* at 527–33.

153. *See id.* at 533–37.

154. Presumably, charitable corporations should be taxed no differently from charitable trusts. If the former were thought to be improper objects of taxation, surely the latter were, as well.

155. There is little additional historical evidence of the precise reasons for exempting charities from taxation immediately following the adoption of the Sixteenth Amendment to the United States Constitution (which authorized Congress to tax incomes). *See* Bittker & Rahdert, *supra* note 147, at 301–04. Bittker and Rahdert observe that most of the modern exemptions of charities from income taxation date from the Revenue Act of 1894, and were reenacted in subsequent legislation (including the Revenue Act of 1913, which imposed an income tax following the adoption of the Sixteenth Amendment). *See id.*

156. *See* § 501(c)(3).

institution confers primarily a public benefit, ultimately the "public" comprises the analogue of a business firm's partners. Yet it is impossible to assign allocable shares of income to members of the public, except perhaps to those who receive cash or goods and services with a market value from a charity.[157] Consequently, it is plausible that a charitable organization's income should not be subject to taxation if it is conceptualized as a conduit (rather than as an entity).[158]

Perhaps these observations mean no more than that the exemption of charities from federal income taxation can reasonably be considered presumptively correct under the original rationale for taxing corporate income. These observations do not necessarily justify the continued exemption of charities from federal income taxation, for the entity theory of taxing corporate income has developed over time. If the entity theory is now assumed to be credible, the presumption arguably should be against the charity income tax exemption. Resolving whether the entity theory of corporate taxation is sensible is beyond the scope of this Article.[159] Although I recognize difficulties in taxing corporate income under the entity theory,[160] I am willing to assume that others accept the theory. For those persons, it is necessary to offer an affirmative justification for the income tax exemption of charitable corporations.[161]

The charity income tax exemption finds support in the community income theory introduced above. As observed previously, charities primarily produce community income. In theory, charities exist for no reason other than to benefit the community. If the community itself is not a proper object of taxation, it is difficult to justify taxing the very organizations that exist for, and embody, the community. One might even conceptualize charitable entities as agents of the community. The income of an agent that is earned for its principal is properly attributed to the principal, not to the agent. If the principal (the community) is not an appropriate object of taxation (i.e., it is

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157. Taxing the recipients of cash (or marketable goods and services) on the value of what they receive (without paying consideration therefore) is not strictly parallel to the taxation of partners of a partnership. The latter are generally taxed not on their actual distributions, but on their share of partnership income (whether or not distributed). *See* § 702.

158. *Cf.* Bittker & Rahdert, *supra* note 147, at 309 (posing the question of whether a charitable organization is best viewed as a conduit between donors and ultimate recipients of the charity's goods and services).

159. For an excellent discussion of why (and how) the income of an entity should be taxed, see Herwig J. Schlunk, *I Come Not to Praise the Corporate Income Tax, But to Save It*, 56 TAX L. REV. 329 (2003).

160. I agree with Professor Thuronyi that application of the Haig-Simons concept of income to a corporation poses problems. *See* Thuronyi, *supra* note 36, at 77–79. I also observe that Thuronyi is willing to tax corporations not because they are taxable entities in their own right under a true income tax, but because they may serve as a proxy for their shareholders. *See id.* at 77. Viewing corporations as proxies for shareholders is, of course, consistent with the historical rationale for the taxation of corporate income identified by Professor Bank. *See supra* note 150.

161. Because it makes little sense to distinguish between incorporated charities and those that are not (i.e., charitable trusts and associations), I will often refer simply to charitable corporations. To restate what may seem obvious, if there is no good reason to tax charitable corporations, other charitable entities also should be exempt from tax.

ultimately a tax-exempt entity), the income earned by the agent (the charity) for the principal is not properly included in the tax base.[162]

Under this analysis, whether charitable organizations operate in corporate form is irrelevant. An analogy to local governments will help me explain my basis for this assertion. Local governments are not subject to federal income taxation.[163] The justification for not imposing a federal tax on the income of nonfederal governmental bodies is typically said to rest in notions of comity.[164] Municipalities are often incorporated, but this fact does not mean that they should be taxed. Similarly, if charitable organizations are not taxable because they embody and represent the nontaxable community, the form in which they operate (whether the corporate form or some other form of entity) is quite beside the point.

This understanding of the charity income tax exemption is distinct from Professor Evelyn Brody's theory of exemption based upon sovereignty, although it has certain similarities to (and complements) her theory. Professor Brody argues that charities historically have been viewed as limited co-sovereigns with the state.[165] As qualified (rather than absolute) co-sovereigns,[166] charitable entities generally have been thought not to be proper objects of taxation. The community income theory may help explain *why* charitable organizations have been treated as co-sovereigns with government. As observed *supra*, one may understand government as existing for the community. Similarly, charitable entities exist for the community. If, as I have argued above, community income is not properly included in the tax base, it is sensible to exclude

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162. Viewing a charity as an agent of the community has an analogue in the taxation of married couples. In *Poe v. Seaborn*, 282 U.S. 101 (1930), the Supreme Court considered the proper taxation of income earned by a husband and wife who lived in a community property state. Under state law, all of the income earned by either spouse belonged to the marital community. According to the Court, the husband earned wages as an "agent" for the principal—the marital community. Because the marital community was not recognized as a taxpayer in its own right, each spouse was deemed the beneficial owner of one-half of the income that belonged to the marital community. *See id.* at 111–18. Under the analysis in the text, a charity earns income as an agent for the community, just as each spouse was an agent of the marital community in *Seaborn*. However, unlike the "principal" in *Seaborn*, the community at large may be viewed as a tax-exempt entity in its own right. If so, the income of charitable agents acting on its behalf should not be subject to taxation.

163. The position of the Internal Revenue Service is that the income of a state or its political subdivision (such as a municipality) is not subject to federal income taxation. *See, e.g.*, Priv. Ltr. Rul. 88-49-023 (Dec. 9, 1988). Under the Code, gross income excludes "income derived from any public utility or the exercise of any essential governmental function and accruing to a State or any political subdivision thereof." I.R.C. § 115(1) (2003). However, the Internal Revenue Service maintains that income directly derived by a state or political subdivision is exempt from federal income taxation without regard to section 115. *See, e.g.*, Priv. Ltr. Rul. 89-52-016 (Dec. 29, 1989).

164. *See, e.g.*, Priv. Ltr. Rul. 88-49-023 (Dec. 9, 1988). For a critical discussion of these comity concerns, see Ellen P. Aprill, *Excluding the Income of State and Local Governments: The Need for Congressional Action*, 26 GA. L. REV. 421, 450–79 (1992).

165. *See* Brody, *supra* note 147, at 585–96.

166. I use the term "qualified" co-sovereigns because Brody argues that the state treats charities with suspicion, and is unwilling to recognize their co-sovereignty consistently for tax purposes. *See, e.g.*, *id.* at 629.

from the tax base the income of those institutions that represent and embody the community. Both governmental entities and charitable entities do so.

Because the community income theory is grounded on the concept of what we mean by income, it is an example of what Professor Brody calls a "base-defining" theory.[167] Professor Brody has opined that, relative to subsidy theories of the charity tax exemption, "a sovereignty view is easier to see in a base-defining approach."[168] I agree. Although the community income theory was not one of the base-defining theories that Brody had in mind when she made this observation, it is compatible with the sovereignty perspective. The income of charity is generally treated in the same way that the income of government is treated; it is excluded from the tax base. Because the federal government generally has no business taxing community income, it generally ought not tax the agents of the community, be they governmental bodies or charitable entities.

B. The Charitable Contributions Deduction

The preceding explanation of the basis for the charity income tax exemption paves the way for a potential justification for the charitable contributions deduction under the community income theory.[169] As argued above, charitable entities may be conceptualized as agents of the community. Thus, for purposes of the theoretical analysis of the charitable contributions deduction, initially it is helpful to look beyond charities as entities in their own right. If charities may be conceived as agents of the community, we may think of a charitable contribution as a transfer from an individual to the community. The question then becomes whether this transfer should be deductible.

One view would be that the charitable contributions deduction is unnecessary to ensure that community income is not taxed. Under this view, as long as the community is not taxed on its income (consisting of charitable gifts and the value added to such gifts in the form of goods and services produced by charity), it does not matter that the donor is taxed. This view is most sensible if charitable donors are viewed as autonomous actors who are completely independent of the community.

But this is not the only, nor necessarily even the best, way of characterizing donors. It is surely true that donors, as individuals, are economic actors who enter the market and maximize self-interest through purchases and sales of goods and services. But donors are more than profit-maximizing, self-interested islands in the sea of commerce. Donors act in numerous capacities. They are sons and daughters, husbands and wives, parents, mentors, friends, colleagues, customers, counselors, employees, bosses, board members, teachers, and people in other types of relationships too numerous to mention. Sometimes the tax system takes these relationships into account in determining relative tax burdens. For example, although each taxpayer is generally taxed on his or her own income (i.e., the individual is the taxpaying unit), the system provides for special filing

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167. *See id.* at 585–86.

168. *Id.* at 586.

169. My argument is not simply that the charitable contributions deduction is a logical corollary to the federal income tax exemption of charities. Some, however, maintain that it is. *See, e.g.*, McNulty, *supra* note 120, at 233.

status for married couples[170] and heads of household,[171] imposes a "kiddie tax" at the parents' income tax rate on the unearned income of certain minor children,[172] allows taxpayers to claim dependency exemptions,[173] includes the medical expenses of a taxpayer's spouse and dependents under the deduction for medical expenses,[174] and excludes from taxation receipts of family support.[175] These provisions reflect the common sense notion that family members often behave toward one another in a way that differs from the way in which they interact with unrelated persons. Our tax system recognizes that membership in a family may require adjustments to the normal rules applicable to our choice of taxpaying unit—the individual.[176]

A similar notion may lie at the core of the justification for the charitable contributions deduction. Just as membership in a family commonly alters the normal treatment of individual family members, so may membership in a community alter the normal rules of taxation governing individual members of the community. Specifically, the charitable contributions deduction can be understood to rest on the intuition that when individuals donate to charity, they are acting uniquely as members of a community, for the good of the community. They are not acting primarily in their capacity as private consumers of goods and services. Further, when individuals act for the community, it is not unreasonable to treat them as part of the community for purposes of taxation. Stated more technically, it is plausible to view individuals as constituent parts of another taxpaying (or, more accurately, non-taxpaying) unit. That non-taxpaying unit is the community.[177]

Under this concept, "community income" includes that income which is initially received by a donor and which, but for the charitable contribution, would properly be included in her individual income for tax purposes. For example, consider a nun who has taken a vow of poverty. Every penny she earns from performing private tutoring services is handed over to an auxiliary of the Catholic Church. Under the familiar assignment of income doctrine, the sister is treated as the earner of the income assigned to the Church.[178] Nonetheless, subject to limitations based upon her adjusted gross income, her contribution reduces her income subject to tax. This treatment is justified if the sister's income from tutoring is properly viewed as the income of the Church. One may reasonably argue that when she receives compensation for tutoring and then

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170. *See* I.R.C. § 1(a) (2003).

171. *See id.* § 1(b).

172. *See id.* § 1(g).

173. *See id.* § 151(a), (c).

174. *See id.* § 213(a).

175. *See* Gould v. Gould, 245 U.S. 151, 153–54 (1917).

176. *See* Bittker, *supra* note 36, at 973.

177. Professor Andrews espouses a similar concept when he likens "community" to an extension of the household. *See* Andrews, *supra* note 29, at 369. However, Andrews does not support this notion with an underlying theory, and his emphasis is on the treatment of imputed income from household services. *See id.*

178. *See, e.g.*, Lucas v. Earl, 281 U.S. 111, 113–15 (1930) (holding that income which was earned by a husband and which, pursuant to a prior contract with his wife, was transferred to her is properly attributable to the husband for federal income tax purposes); Rev. Rul. 77-290, 1977-2 C.B. 26 (ruling that income received by a member of a religious order from outside employment is taxable to the person providing services notwithstanding a commitment not to retain such income).

donates her salary to the Church, her membership in the community of the Church is more dominant than any other capacity in which she acts. If this is true, it is at least plausible to treat her for some purposes as part of the non-taxpaying unit to which she contributes (the Church, and ultimately the community itself).[179]

Of course, many charitable contributions are, on the surface, less compelling cases for deductibility (under the theory advanced above) than that of our hypothetical sister. Whereas she was bound to transfer all compensation to the Church, many donors are not similarly constrained. Yes, some donors may feel morally obligated to tithe their income to a church or synagogue, and others may be obligated to fulfill a charitable pledge made before the income was earned. But countless other donors decide to donate sums well after they have earned the income. Is it still plausible to treat their income as "community income"?

One obvious argument against deductibility is that it unjustifiably collapses the receipt of income and the use of income. Some view a taxpayer's voluntary entrance into the market as the trigger of taxation.[180] Criticizing Professor Andrews' argument that a cash-contributing donor should be taxed as the taxpayer who donates services to charity (the latter of whom is not taxed on the imputed value of such services), Professor Kelman argues that "people ought to be taxed only when they voluntarily convert property rights into marketable form."[181] He believes this principle reflects "a basic human resistance to commoditization."[182] One problem with this analysis is that the argument can be turned on its head. It recognizes the imperative not to "commoditize" people with respect to their potential receipt of funds, but it arguably forces commoditization of taxpayers with respect to their use of funds. That is, Kelman's argument treats all non-business uses of funds that are not accumulated as though the taxpayer has entered the market and purchased goods and services, but charitable donors have decided to do just the opposite—to sacrifice the opportunity to purchase goods and services on the market.[183] Granted, the average charitable donor may have more "control" over her earnings than our hypothetical nun. However, as argued above, income is not synonymous with control over wealth, or even control over accretion.

It is difficult to deny that the concept of income depends to some extent on the uses to which taxpayers put accretion. All disciples of Henry Simons agree, for example, that when a taxpayer expends funds for business purposes, he is entitled to a deduction. Once it is admitted that the income tax does (and should) pay some attention to a taxpayer's use of funds, the distinction between the nun (who ex ante intends to donate her salary to the Church) and the more impetuous giver (who conclusively decides to donate to charity only after his salary has been earned) may not be pivotal. Both taxpayers have decided that the community of which they are a part ultimately should

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179. This analysis suggests that the portion of the nun's income assigned to charity should be excluded from her gross income. A deduction (more precisely, a deduction that is unlimited) produces the same result as an exclusion. *See* McNulty, *supra* note 120, at 243.

180. *See, e.g.*, Kelman, *supra* note 60, at 838, 842.

181. *Id.* at 842.

182. *Id.*

183. *Cf.* Thuronyi, *supra* note 36, at 75 (arguing that not taxing both the donor and donee of an intra-family gift may be justified because the parties have intended a "private, noncommercial transaction motivated by human affection").

receive some or all of the earnings that they have commanded in the marketplace. In each case, the community has appropriated income, and it has done so through the decisions of a community member acting on its behalf.

One's perspective of the capacity in which a taxpayer receives income may prove critical to resolving the difficult question of whether charitable contributions should be deductible. The common view is individualistic.[184] It assumes that people who realize income do so as independent economic actors who are taxable in their own right. As Simons explained, a personal income tax is, strictly speaking, a tax on persons according to their incomes, not a tax on income itself.[185] The implicit assumption appears to be that persons who earn income are presumed to have received it exclusively on behalf of themselves. But this is not the only way of viewing the world. The tax system could adopt a more neutral conceptual view of persons and how they behave. The system already recognizes that persons act in numerous capacities when they provide compensated services.[186] The system could also reserve judgment on the capacity in which a taxpayer has received income until the taxpayer has acted with respect to that income. For example, a taxpayer who earns money not simply to spend it on himself but also to share his bounty with the poor would be taxed as one who acts on behalf of the community with respect to that portion of his income given to charities organized to relieve poverty.[187] Although this view is arguably quite problematic if one focuses only on the moment in which this taxpayer receives a paycheck, the perspective is more sensible when one considers that income is a function of time. The relevant period of time is the taxable period. It is not unreasonable to reserve judgment on the question of to what extent a taxpayer has realized income for the community until the taxable period has ended.

The preceding explanation obviously departs from typical, individualistic notions of how personal income should be taxed.[188] However, even radically individualized approaches to income taxation must deal with an analogous issue. Market purchases require a determination of the capacity in which a taxpayer acts. Thus, items purchased for personal consumption at home are not deductible, whereas many of those same items may be fully deductible if purchased for exclusive business use at the office. Stated another way, if a taxpayer is acting as a businessperson, many expenses are fully deductible, notwithstanding that the same expenses would not be deductible if the same taxpayer were acting primarily as a consumer. Simons himself recognized this problem, and conceded that a completely "precise and objective distinction" between personal

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184. *See id.* at 69.

185. *See* SIMONS, *supra* note 37, at 128.

186. For example, income derived from the services of an agent is taxed to the principal, not the agent.

187. Taxpayers may act in this manner from a sense of moral duty. Some have argued that expenditures made in performance of this moral duty should reduce the donor's income for tax purposes. *See, e.g.*, Boris I. Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37, 58-59 (1972).

188. Opponents of the charitable contributions deduction often approach the analytical issues from an individualistic view of the world. *See, e.g.*, Kelman, *supra* note 60, at 880 (likening charitable donors to "everyone else in an individualist culture"); Koppelman, *supra* note 30, at 703 (asserting that if income is selected as the tax base because it best measures economic welfare, "it should be interpreted in an individualistic way").

consumption and business expense is "inconceivable."[189] As Marvin Chirelstein has commented, notwithstanding that a plain distinction "between pleasure-seeking and profit-seeking is alien to human psychology and essentially unrealistic," the concept of net income "depends directly on the idea that one's business and one's personal life can be distinguished."[190] That the system must determine whether a taxpayer is acting in the capacity of a businessperson or a consumer does not mean that we are taxing something other than "income." Similarly, that the system may require a distinction between a taxpayer's activities conducted primarily in her capacity as an individual consumer and those conducted primarily in her capacity as a member of the community does not imply that the system is no longer taxing personal income.[191]

Still another way of looking at this issue is to reflect upon Simons' analogy of society as a partnership.[192] He analogizes an individual's consumption to withdrawals by a partner, and his accumulation as the change in the value of his equity in the partnership.[193] This analogy is sensible if all of society's income and wealth is attributable to individuals. The problem is that this conception defies reality. As argued above, some of society's resources are better attributed to the community than to individuals. A better analogy is to think of society as comprised of two partnerships. One is a partnership consisting of all private wealth, and the other is a partnership consisting of assets held by the community. When an individual makes a charitable contribution, there is no question that she has contributed to the community partnership. The only questions are (1) whether she has withdrawn from the private partnership (and thereby "consumed" assets, according to Simons); and (2) if so, whether her income should be offset by her contribution to the capital of the community partnership. Assuming, *arguendo*, that Simons properly analogized consumption to "withdrawals," it would seem appropriate to conceptualize partnership "contributions" as negative consumption. Moreover, when a taxpayer contributes money to the partnership of community, there is no increase in any capital account reasonably attributed to the taxpayer. Unlike a partner in a private partnership, a member of the partnership of community has no percentage share in the income and assets of the community. Thus, even if we characterize a person's charitable contribution to the community as a "withdrawal" from the private partnership that gives rise to positive consumption, this amount should be offset by the negative

189. SIMONS, *supra* note 37, at 54.

190. MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION 97–98 (rev. 8th ed. 1999).

191. I readily admit that conceptualizing individual taxpayers as agents of the community acting on its behalf (with respect to that portion of their income that is transferred to the community) is more difficult than conceptualizing charitable organizations as agents of the community. Charities are organized for purposes that are exclusively in the public interest. Individuals are not. However, many people see themselves as existing, and even as having been created, for purposes that transcend their own individual desires. They see themselves as living not only for themselves, but also for others. We might even say that they live in part for purposes described in §§ 170(c)(2)(B) and 501(c)(3) of the Internal Revenue Code. To the extent that they manifest their charitable purposes through actual gifts, the charitable contributions deduction effectively exempts some of their income from taxation, just as § 501(c)(3) exempts the income of charitable entities from taxation.

192. *See* SIMONS, *supra* note 37, at 51.

193. *See id.*

consumption that inheres in the contribution to the community partnership. The net result is no income to the taxpayer. By reducing a taxpayer's income subject to tax, the charitable contributions deduction effectuates the same result.

C. Responding to Anticipated Objections

The purpose of this Article is to introduce and explain the community income theory of the charitable contributions deduction, rather than to defend it against every conceivable objection. Nonetheless, because a few likely criticisms of the theory are obvious, I will identify and briefly respond to them in this Part.

One likely objection to my theory is that it too quickly dismisses the personal benefits (psychic or otherwise) that donors receive from charitable contributions. In addition to what I have written previously with respect to how utility is (and is not) taxed,[194] I would offer two further comments. First, the idea that the charitable contributions deduction should be denied simply because donors may receive some tangible benefit from their donations is inconsistent with how business expenses are treated under the income tax. Numerous types of outlays that are conceived as "pure" business expenses (or expenditures that result in a deductible depreciation expense) nonetheless produce material personal benefits to the business taxpayer.[195] Examples include the purchase of beautiful office furniture, the payment of utility bills after setting the office thermostat at a comfortable seventy-two degrees Fahrenheit, the hiring of employees who are not only competent but also affable lunch partners and interesting conversationalists,[196] the purchase of bottled water and decent coffee for office staff, the rental of office space in an exclusive section of town, the acquisition of the most technologically sophisticated and ergonomically suitable office machines, and the construction of a plush business facility. In the case of personal benefits received by business taxpayers as a result of these outlays, we allow a deduction because the business purpose appears primary. Similarly, in the case of charitable contributions, a deduction is arguably proper because the purpose of the taxpayer in producing community income is primary.

Moreover, we allow a deduction for state and local income taxes (and property taxes) paid to states and municipalities, notwithstanding that these governmental bodies provide benefits to taxpayers.[197] Some question the deduction for such taxes on account of the benefits received by taxpayers.[198] Although it has been correctly

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194. *See supra* text accompanying notes 97–99.

195. *See* Thuronyi, *supra* note 36, at 62 (observing that taxpayers enjoy personal consumption benefits in the workplace); Kahn, *supra* note 85, at 44 (observing that many deductible business expenses confer personal benefits on taxpayers).

196. *But cf.* Koppelman, *supra* note 30, at 706 (alleging that salary expense is deductible "because it provides no direct personal benefit to the employer").

197. *See* I.R.C. § 164(a) (2003). Professors Billman and Cunningham have observed the parallel between transfers to charity and those to local governments for federal income tax purposes. *See* Brooks D. Billman & Noël B. Cunningham, *Nonbusiness State and Local Taxes: The Case for Deductibility*, 28 TAX NOTES 1107, 1119 (1985).

198. *See, e.g.*, Koppelman, *supra* note 30, at 710. Koppelman states that the system must choose between total denial of a deduction for state and local taxes, and total allowance of a deduction, except where one can precisely identify the benefit received from the tax. *See id.*

observed that there may be no strong correlation between taxes paid and benefits received,[199] the deduction is often justified more affirmatively on ability-to-pay grounds.[200] The community income theory offers an independent justification for the deduction. Just as charities produce community income, so do state and local governments. Those who pay taxes are acting as law-abiding members of the community, just as charitable donors are acting as conscientious members of the community. Just as charities may be seen as agents of the community, so may governmental bodies. In each case, the receipt of benefits by individuals from the respective community agents appears ancillary to the primary purpose of the transfer of funds to those agents.

A second objection to the community income theory is that it requires a difficult determination of whether any given entity purporting to qualify as "charitable" is a sufficient representative of the community.[201] I agree, but this determination is already inherent in federal income tax law, and more generally, in the common law of charity. Although the determination is necessarily imprecise, it is not devoid of governing criteria. We ought not to reject a theoretically sound approach simply because its implementation requires the exercise of judgment. Moreover, my theory may suggest that some reforms are in order. For example, if the charity income tax exemption and the charitable contributions deduction are properly understood to hinge on the notion that charities are agents of the nontaxable community, it may be proper to reexamine whether the regulations issued under Code § 501(c)(3) suffice to ensure that charitable organizations are truly representing the community.[202]

Another possible objection is that the community income theory does not necessarily explain various tax-imposed limitations on the activities of charitable organizations and numerous limitations on the deductibility of charitable contributions under Code § 170. My general response is that the theory may be sound, even if Congress is unwilling to implement it to its logical extreme. For example, it is easy to speculate why the charitable contributions deduction is available only within limitations based upon a taxpayer's adjusted gross income. But for these limitations, a wealthy taxpayer could avoid paying taxes by donating all of her income to charity and living off of her savings.[203] While this may be theoretically acceptable under a proper

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Actually, other approaches are available. *See, e.g.*, Kaplow, *supra* note 120, at 425–26 (explaining that a deduction could be allowed for the difference between taxes paid and average taxes paid per individual in the taxing jurisdiction).

199. *See* Billman & Cunningham, *supra* note 197, at 1112–14; Kaplow, *supra* note 120, at 490–91.

200. *See* Billman & Cunningham, *supra* note 197, at 1114–15.

201. *Cf.* Gergen, *supra* note 4, at 1424–25 (criticizing Professor Andrews' argument for the charitable contributions deduction based upon charitable organizations' production of collective goods; stating that Andrews fails to explain how widely shared the benefits of a charity must be).

202. *Cf.* Albert M. Sacks, *The Role of Philanthropy: An Institutional View*, 46 VA. L. REV. 516, 526 (observing the "generally accepted thesis" that philanthropy is "accountable to the public").

203. *See* CHIRELSTEIN, *supra* note 190, at 174. Professor Bittker has expressed the alternative view that the percentage limitations may be nothing more than a political compromise between supporters of the deduction and their opponents. *See* Bittker, *supra* note 187, at 62.

conception of income, it may be quite objectionable as a political matter.[204] Charities are not the only agents of the community. The federal government is also such an agent—indeed, a highly significant one. To allow all of the resources of the wealthy to fund those charitable activities that they value, at the cost of denying the federal government any control over the use of such funds, may simply be politically unacceptable to governmental policymakers.[205]

CONCLUSION

This article has introduced and explained the community income theory, a new tax-base theory in support of the charitable contributions deduction. I do not contemplate that my discussion will resolve all doubts concerning the theory, nor do I suspect that it is my final word on the subject. My primary goal is to articulate the theory and explain why it is plausible.

The community income theory hinges on two elements of a system of personal income taxation: the proper tax base, and the proper taxpaying (or non-taxpaying) unit. The thrust of the theory is that some income, identified in this article as "community income," is properly excluded from the personal income tax base because it is more naturally attributed to the community than to the individual members of the community. Moreover, the community is properly viewed as an entity exempt from federal income taxation. Charities are exempt from taxation because (or perhaps "when") they are merely agents of the community. When individuals donate to charitable entities, they likewise may be viewed as acting on behalf of the community with respect to the portion of their income that is donated. The charitable contributions deduction is a mechanism for excluding the portion of income received by an individual that is properly attributed to the tax-exempt community.

I do not intend this paper to posit that the community income theory is the only way of thinking about the charitable contributions deduction. However, I do believe that the theory offers a fresh lens through which we may assess the merits of the deduction, and that it may help illumine some of the philosophical assumptions of those who have previously considered the deduction. Further, the theory may advance academic thought with respect to the proper personal income tax base, and the extent to which the income of charitable entities should be taxed.

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204. Denying a deduction because doing so may be necessary for some governmental purpose (other than the purpose of implementing a theoretically correct concept of income) is hardly novel. *See, e.g.*, I.R.C. § 162(f) (2003) (denying a deduction for the payment of governmental fines).

205. Phrased a bit less cynically, the federal government may recognize that community income is not properly taxed, and may even accept that members of the community ought not be taxed on sums that they devote to the use of the community, but nevertheless may require that some portion of such funds be channeled through the federal government. Of course, a taxpayer receives no deduction (for federal income tax purposes) for tax payments to the federal government. But because the government could raise the same revenue by allowing a deduction and increasing the rate of tax, this observation is inapposite.

The Kindynamic Theory of Tort

CHRISTOPHER P. GUZELIAN*

Commentators complain of two major deficiencies in modern tort law: (1) that liability concepts such as "negligence" or "duty" are so vacuously defined as to permit inadvertent subjectivity and error to hinder proper case adjudication, and (2) that tort is too slow in recognizing newly discovered risks and properly compensating nascent classes of injury. We accordingly report on the Kindynamic Theory, an emerging philosophy that overcomes these twin deficiencies and sharpens understanding of poorly articulated tort intuitions.

Kindynamics contends that causation is the cornerstone of tort, and that all risks are, at core, causal propositions. Contrary to its many everyday definitions, the word "risk" has a single exact meaning in Kindynamic Theory. A risk, *unlike* uncertainties, *must be* objectively known *to be causally possible ("epistemically possible"). Put differently, Kindynamics prescribes that a change in a specific alleged stimulus must be objectively known to determine an asymmetric, directional change in a particular alleged harm.*

*Second, and in the only notable break with traditional tort intuition, some Kindynamic proponents advocate permitting compensation only for injuries arising from "*significant*" risks: those that are (1)* widespread *and (2) also likely to be* injurious. *Similar to common regulatory practice, the prescriptive "significant risk" constraint seeks to sensibly prioritize risk deterrence, given limited judicial resources.*

Third, Kindynamic Theory invokes decision analysis*—the method for formal, quantitative risk analysis universally familiar to risk analysts—to elucidate risk tradeoffs and make decisions about a risk's costs and benefits. With its empirical grounding, decision analysis improves upon other cost-benefit models, which are typically too theoretical or assumption-laden for practical use.*

Finally, courts have long desired and intuitively but unsuccessfully sought an objective method for apportioning liability for a single injury among multiple *alleged tortfeasors. Kindynamic Theory formally presents such a method.*

Searle Scholar, Northwestern University Law School (guzelian@pobox.com). I thank my family, Afsheen Afshar, Steve Brock, Marc Franklin, John C.P. Goldberg, R. Kent Goodrich, Joseph Grundfest, Christine Halmes, Lawrence Lessig, Robert Newman, Mitchell Polinsky, Karen Prena, Robert Rabin, Nathan Schachtman, Michael Stein, Michael Victeroff, Robert Weisberg, and Benjamin Zipursky. Statements and, more important, errors remain mine alone. This Article's use of the first person plural follows the convention of mathematicians. They believe, as do I, that publications are a collective effort—which includes participation by the reader—to come closer to truth. The use of masculine, third-person pronouns is the result of my newly established convention of flipping a U.S. quarter to determine pronoun gender (the male gender prevailed on this flip; the protocol for this flipping is available upon request). This is done to avoid linguistic gymnastics and gross grammatical error, not to offend. I gratefully acknowledge present financial support by the Searle Foundation at Northwestern University and former financial support by the Iohn M. Olin Foundation at Stanford Law School. I wish to also recognize the invaluable support of my Northwestern faculty assistant Ashir Badami and Northwestern Law librarian James McMasters. This Article borrows or adapts some statements made in a previous publication, Christopher P. Guzelian, *Liability & Fear*, 65 OHIO ST. L.J. 713 (2004), for which I have retained copyright control.

INTRODUCTION

Those who have the happy fortune of attending law school recite forevermore that duty, negligence, actual cause, proximate cause, and injury lead to tort liability.

Very well. Define "duty."

There is one condition on this challenge: a definition must permit consistent *prediction* of case outcomes. Consider the traditional definition: duty is the "*foreseeability* that harm may result if [the duty] is not exercised."[1] This definitional test of duty is surely not predictive; as far back as *Palsgraf*, there have been doubts about the efficacy of a "foreseeability" test in predicting duties.[2] "Foreseeability" has proven to be a vacuous delimiter, which courts apply equally—but without consistency—in the distinguishable contexts of duty, negligence, and proximate cause.[3]

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1. Orlo v. Conn. Co., 21 A.2d 402, 404 (Conn. 1941) ("The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised.") (citing Botticelli v. Winters, 7 A.2d 443, 445 (Conn. 1939)) (emphasis added).

2. *Compare* Palsgraf v. Long Island R.R., 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, J.) ("If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else."), *with id.* at 103 (Andrews, J., dissenting) ("Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others . . . . [W]hen injuries do result from our unlawful act we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable.").

3. H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 273 (2nd ed. 1985) ("Liability in negligence has and must have its limits but it is not clear that foreseeability is an appropriate notion for settling them."); Lawrence M. Solan & John M. Darley, *Causation, Contribution, and Legal Liability: An Empirical Study*, 64 LAW & CONTEMP. PROBS. 265, 274–75 (2001) (noting that "[i]n many [] cases, foreseeability plays a prominent role . . . . [However,] courts are not in accord as to whether the issue to which it relates is duty, proximate

In fact, "duty" has been so conceptually elusive that the California Supreme Court once said, "'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[4] When a notable court concedes in frustration that it cannot predict duties, it is unsettling. Each day, law enforces sizeable—sometimes bankrupting—judgments against "duty-violating" defendants. They are the unhappy violators of a murky word.[5]

Try defining "negligence" instead. Yes, negligence means the "breach of a duty," or the "breach of a forcseeable obligation," but the first taxonomy is circular and the latter, again, ineffective. They do not tell us how to *predict* negligence.

Here is a final opportunity to justify law school tuition: what is "proximate cause"? Even the most respectable courts are so confused by tort concepts that they sometimes equate duty and proximate cause, although this substitution is incorrect.[6] Is proximate cause a limitation on liability only to those events that are "reasonably foreseeable"?[7] (Observe that this standard is just a variation on the "foreseeability" test that has proven incapable of predictably delimiting case outcomes.) Or is proximate eause a confessedly "political" and "arbitrary" restriction?[8]

Unsettling looseness plagues basic definitions at the eore of tort liability. An occasional justification for this confusion is that tort law must accommodate multiple (sometimes mutually exclusive) aims. These thinkers believe no single theory can

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causation, or a generalized notion of negligence. Some judges have recognized this disagreement among courts in analyzing this problem").

4. Dillon v. Legg, 441 P.2d 912, 916 (Cal. 1968) (quoting WILLIAM L. PROSSER, LAW OF TORTS 353 (3d ed. 1964)).

5. *See* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 3 (2002) (observing that "a large fraction of legal scholarship makes at least some claims about the world based on observation or experience" rather than on proper scientifically measured bases).

6. Invoking "duty" when discussing proximate cause has dramatic procedural repercussions too, for proximate cause is ostensibly a jury question, while duty remains a judge question. Dobbs describes the general confusion between proximate cause and duty well:

> Many writers and some courts favor approaching scope of risk issues involved in proximate or legal cause decisions through the language of duty. The great advantage of doing so is that the confusions engendered by the use of causal language might be avoided . . . . [F]ew if any judges can specialize in the diverse legal issues that confront them. They cannot all be up-to-date experts in tort tbeory. Consequently, when judges confront a problem already labeled as a proximate cause problem, the label alone is likely to have at least some subliminal effects that steer analysis in the wrong direction.
>
> But . . . duty issues themselves are slippery chameleons. Moreover, to cast an issue in terms of duty is to provide another subliminal suggestion—namely that the decision is to be made by judges rather than juries.

1 DAN B. DOBBS, THE LAW OF TORTS § 230, at 584–85 (2001).

7. *See* Poskus v. Lombardo's of Randolph, Inc., 670 N.E.2d 383, 386 (Mass. 1996) ("There must be limits to the scope or definition of reasonable foreseeability based on considerations of policy and pragmatic judgment.").

8. *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

represent tort's scope. One leading tort scholar, Vanderbilt Professor John Goldberg, rejects this view:

> Must we, or ought we, concede that all we can say of any given tort decision, or any given tort doctrine, is that, if well-rendered, it will reflect the attainment of an unarticulated and unarticulable balance among various considerations—including some that are diametrically opposed? . . . [T]o make such a concession, is to give up on the idea of law.[9]

Even if Professor Goldberg is right and tort does have articulable and coherent aims, current liability standards are not achieving them. As we have seen, tort is based on vacuous (and therefore easily manipulated) terms. To achieve better consistency and predictability in case outcomes, tort requires better standards for determining liability.[10]

There is still a second dilemma that tort faces beyond these inherent linguistic shortcomings. Commentators now also acknowledge that tort—as it is practiced in courts and regardless of which particular theory one favors—does not sufficiently accommodate the expanding scope of contemporary risks and the accelerating pace of risk assessment and risk discovery.[11] Professor Goldberg, for instance, has commented that:

> [O]ne may speculate that, in the near term, mechanized accidents will cease to provide the focal point of tort . . . . [I]t is quite possible that tort theorists soon will be required to provide . . . comprehensive and comprehending theories of tort—theories that see the "new negligence" as part of a multifaceted yet broadly coherent law of wrongs.[12]

Tort law will have to adjust in two ways, then, to remain current and relevant to the remuneration of injuries caused in contemporary society. First, it must create more exact and rigorous judicial tests of liability that better articulate long-standing tort law

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9. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 580 (2003).

10. *Cf.* LUDWIG WITTGENSTEIN, CULTURE AND VALUE 18e (Peter Finch trans., University of Chicago 1984) (1931) ("Language sets everyone the same traps; it is an immense network of easily accessible wrong turnings. And so we watch one man after another walking down the same paths and we know in advance where he will branch off, where he will walk straight on without noticing the side turning, etc. etc. What I have to do then is erect signposts at all the junctions where there are wrong turnings so as to help people past the danger points."). Some have argued that incentives of trial attorneys and judges favors an expansionist universe of tort with muddied, inefficient standards. *See* Todd J. Zwicki, *Public Choice and Tort Reform*, Geo. Mason Law & Econ Research Paper No. 00-36 (2000), *available at* http://ssrn.com/abstract=244658.

11. Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403, 2436 (2000) ("[T]he role of personal injury law at the end of the twenty-first century is probably as unpredictable as its current role was at the end of the nineteenth. Not only might personal injury law doctrine and the background institutions to tort law change significantly, but also technological advances may well change the pattern of accidental bodily injury that will exist 100 years from now in ways we cannot anticipate.").

12. Goldberg, *supra* note 9, at 582–83.

intuitions. Next, a modern theory must accommodate changes in the alleged sources of injuries that are being litigated.

Here, we report on the development of the Kindynamic Theory,[13] which is rapidly gaining support among academics and is starting to surface (anonymously, as yet) in courts as a considerable step in the direction of a unifying theory that reflects longstanding intuitions about tort, while offering considerably more flexibility over past theories to accommodate new alleged sources of injuries.[14]

I. A CAPSULE INTRODUCTION TO THE KINDYNAMIC THEORY

Many tort scholars emphasize the risk-deterrence aspect of tort,[15] yet common dictionaries contain a dozen different definitions of the word "risk." Even leading risk philosophers assert that a "risk" cannot be precisely defined.[16] Tort scholars curiously have not commented on this striking conclusion, although it has sizeable repercussions for the courtroom.

Proponents of Kindynamic Theory contend that standardless or "common sense" notions of "risk" in place of a clear definition means assigning liability is inevitably an arbitrary, subjective enterprise, *even though courts strive for objectivity.*[17] A precise definition of risk would remove ambiguity surrounding duty, negligence, and proximate cause and permit more predictable and consistent case outcomes.

Kindynamic theorists believe risks *are* rigorously definable. They contend that a judicially cognizable "risk" incorporates three distinct concepts: (1) a risk identifies an *objectively known* (epistemic) causal relationship between a stimulus *A* and a harmful/injurious effect *B* (sometimes expressed as "$A \rightarrow B$"); (2) a risk expresses a quantified frequency of occurrence (avoiding extrapolation) and that risk is sufficiently likely to result in harm, sufficiently widespread, and sufficiently costly as to merit judicial redress; and (3) a risk involves an effect *B* that is undesirable (a "harm" or "injury").[18] Linguistically, therefore, a statement of "risk" contains a causal, a

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13. The term "Kindynamics" derives from the Greek "kindynos" ("risk").

14. Kindynamic Theory is *both* prescriptive and explanatory. Its risk prioritization requirement is a logical, but never practiced, proposal for tort law. Its clarification of tort definitions and delimiters, however, is not prescriptive, but rather an attempt to precisely articulate intuitions that have underlain tort law throughout the past century. Similarly, decision analysis, another element of Kindynamics, is "new" to tort law, but including it in the theory does not make Kindynamics prescriptive in that regard. Instead, decision analysis is simply a more refined method of conducting cost-benefit considerations long accepted as an integral part of tort.

15. There have been so many articles discussing this major focus of tort theory that it is not worthwhile to itemize them here.

16. *See generally* JOHN C. CHICKEN & TAMAR POSNER, THE PHILOSOPHY OF RISK (1998).

17. *Cf.* Brown v. Allen, 344 U.S. 443, 496 (1953) (Frankfurter, J.) ("Discretion without a criterion for its exercise is authorization of arbitrariness.").

18. Because harms are subjective, there is obvious trouble in deciding whether a given effect is objectively undesirable (i.e., whether an effect, *B*, is a "harm" or rather, a "benefit"). Moreover, objectively identifying the proper *scope* of an effect or harm *B* is hardly a trivial enterprise, either. The number of unwanted effects created by a given stimulus varies with different acts. For example, in one case defendants' failure to clean a barge's hold caused accumulation of explosive gases. Johnson v. Kosmos Portland Cement Co., 64 F.2d 193, 194

numerical, and a nominative connotation: There is a ten percent (*numerical*) risk of lung cancer (*nominative*) from cigarette smoking (*causal*).[19]

What becomes immediately apparent from this definition is that a risk must be established not just numerically, but also *causally*. Experts are often asked to determine "risks" even when there is insufficient knowledge of causation ($A \rightarrow B$) or probabilities, or both. To deal with such gaps in knowledge, in some cases causality is *inferred* or simply *assumed*, as is a probability. Still, the term "risk" is often invoked to describe such derivations or "discoveries." In reality, what are being referred to are not risks, but rather causal *possibilities* or *hypotheses* ("*uncertainties*"). Kindynamic Theory demands, therefore, that the causal soundness of any judicially cognizable risk be established before all else. This process is described in Parts II and III.

In the only purely prescriptive break with traditional tort intuition, many (but not all) Kindynamic theorists advocate compensation only for injuries arising from risks that are "*significant*," that is, that: (1) are *likely* to result in injury (the risk is "*injurious*") and (2) affect a large number of people or a sizeable amount of property (the risk is "*widespread*").[20] Similar to practices at some regulatory agencies,[21] a

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(6th Cir. 1933). Lightning struck the barge, it exploded, and two men died. *Id.* The court, faced with an issue of deciding *what* the risk of harm was before it could find liability, chose to classify the $A \rightarrow B$ risk broadly as some intervening incendiary force. However, it could have framed the question much more narrowly as "the risk of lightning strike." Deciding how broadly to classify these liability-fixing attributes is in turn a function of the number of untoward outcomes associated with a stimulus in a particular context. *See id.* at 196 n.3 ("The particular consequences of negligence are almost invariably surprises. It is the unexpected rather than the expected that happens in the great majority of the cases of negligence. It is not necessary [for liability to attach] that injury in the precise form in which it in fact resulted should have been foreseen.") (citations omitted); Stodola v. Grunwald Mech. Contractors, Inc., 422 N.W.2d 341, 344 (Neb. 1988) ("'The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen.'") (quoting Brown v. Nebraska Pub. Power Dist., 306 N.W.2d 167, 171 (Neb. 1981)). Legal theorists, as they have come closer to understanding the true causal nature of risk, have also correctly perceived that framing (1) the scope of an injury and (2) the risk "density" is integral to defining a risk. These concepts of correctly framing the risk density and *delimiting* the scope of the harm or stimulus are quite important. We have discussed this elsewhere. *See infra* note 87. *But see* Edward S. Abrams et al., *At the End of* Palsgraf, *there is Chaos: An Assessment of Proximate Cause in Light of Chaos Theory*, 59 U. PITT. L. REV. 507 (1998) (contending that some injuries may be the result of external shocks to a condition-sensitive chaotic system).

19. Occasionally common parlance will refer only to the harm as a risk, for example, "What is the risk of dying?" Observe that this particular risk proposition does not take exactly the same form as the four we state in the main text, *see infra* text accompanying note 39; it focuses upon the harm (death), but no cause is identified. We can understand this "risk" to be an *aggregation*—it asks for the likelihood of an effect summed across *all* causes. Although aggregated risk propositions such as this are commonly referred to as "risks," they are of little use for assigning individual causal blame and liability, as in legal circumstances. *See infra* note 45.

20. As is discussed in detail in Part III, *infra*, the injuriousness of a risk and the reach of the risk are inversely related variables under Kindynamic Theory. As the reach of a risk increases, the threshold injuriousness necessary for liability decreases, and vice versa.

21. *See infra* notes 77, 94.

"significance" requirement attempts to sensibly prioritize which risks to deter using limited judicial resources. Part IV.A discusses Kindynamic risk "significance."

Kindynamic Theory next calls for quantitative analysis of the social benefits and costs of the act, in context, that gives rise to the litigated injury. Here, Kindynamic Theory offers improvement at achieving the traditional goal of Learned Hand-style cost-benefit considerations when it introduces *decision analysis*—a staple method of quantitative risk analysis—to the legal arena.[22] Part IV.B describes decision analysis.[23]

Assimilating considerations from Parts II through IV, Part V formally presents three fundamental Kindynamic definitions: negligence, duty, and proximate cause ("proximate risk").

Finally, as Part VI reveals, Kindynamic Theory is a tort theory that is capable of precisely apportioning liability for a single injury among multiple potential contributors.

In sum, the Kindynamic Theory offers great promise as a predictable, consistent means of deterring risks caused by social actors and of remunerating injured plaintiffs.

II. CAUSALITY

Classic definitions of causality describe an external stimulus[24] capable of producing internal change in an object (i.e., an "effect") as the "cause" of that change.[25]

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22. Social justice theorists object to the utilitarian nature of Kindynamic Theory. Even among those who agree that an objective standard must be used in assessing risk (and some social justice theorists, curiously, do not even accept this proposition), they contend that where a risk results in injury, recompense must follow. Kindynamic Theory acknowledges this argument as theoretically plausible. However, for a judicial system where litigation costs are more reminiscent of Soviet economies than a zero-transaction cost realm, Kindynamic Theory stresses pragmatism over utopia: it allocates court time and resources toward redress of the most prevalent or deleterious risks first. Kindynamics contends that if the judicial system must deny complete justice to some (and it must because of limits on time and resources), better it would be to deny recovery for those who suffer from infrequently caused risks, as there would be less social deterrence resulting from such damage awards.

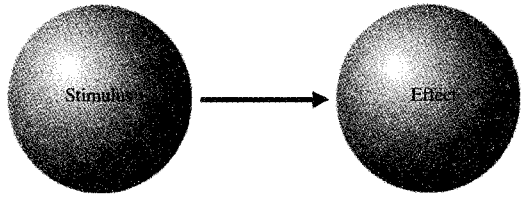
23. This article does not fully address the strong contributions that the law and economics literature has made to tort theory, some of which have cast doubt on the differentiation between negligence, intent, and strict liability. *See, e.g.*, Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). *See also* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 32–36 (1987) (demonstrating that in many instances, the answer to whether a negligence or strict liability rule is economically preferable is indeterminate). Kindynamic Theory is certainly capable of incorporating the economists' critiques. As the reader will see in Part IV.B when we discuss decision analysis, however, the particular form of Kindynamic Theory that we are reporting on maintains the distinction, in part because economists have not shown convincingly that courts would have the financial and time resources to handle strict liability cases the same as negligence—even if it might be net beneficial from a social standpoint.

24. A stimulus in its broadest sense could be any act, omission, action, event, circumstance, element, occurrence, and so on. Because tort law focuses on humans' acts, when we speak of a "stimulus" after this introductory section, we will almost categorically be referring to *anthropogenic* stimuli—actions, omissions, or creations *by people*.

25. ARISTOTLE, PHYSICS, bk. II, ch. 3, 194b5, at 28–29 (W. Charlton trans., Clarendon Press 1970) (n.d.) (defining efficient cause as "the primary source of the change or the staying

Symbolically, causality is represented as a "*causal path*," $A \rightarrow B$, with an arrow between stimulus and effect:[26]

Figure 1
A→B: A Causal Path



The path arrow symbolizes causality, but it does not suggest a *method* for proving that a particular stimulus *A* "causes" a particular effect *B*. Galileo sought to rectify this gap. He postulated that an "*efficient cause*" exists where a stimulus *A* is both necessary and sufficient for the outcome *B*.[27]

Causality to later thinkers like Pierre Laplace and John Stuart Mill was instead *holistic*: a universal interconnectedness, involving a number of stimuli and effects beyond human comprehension (and thus "infinite").[28] By this, every effect is the *joint*

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unchanged: for example, the man who has deliberated is a cause, the father is a cause of the child, and in general that which makes something of that which is made, and that which changes something of that which is changed"); ARISTOTLE, METAPHYSICS, bk. I, ch. 3, 983a–b, (W.D. Ross ed., Clarendon Press 1924) (n.d.) (defining four elements of causality, including efficient cause).

26. Causal *chains* involve multiple paths, sometimes with causality running bidirectionally, where our dots represent both stimuli to subsequent effects and effects to antecedent stimuli. *See* Christopher P. Guzelian, *Liability & Fear*, 65 OHIO ST. L.J. 713, 728 fig. 2 (2004).

27. *See* GALILEO, *The Assayer*, *in* DISCOVERIES AND OPINIONS OF GALILEO 229, 231–80 (Stillman Drake trans., 1957) (1623).

28. PIERRE SIMON, MARQUIS DE LAPLACE, A PHILOSOPHICAL ESSAY ON PROBABILITIES 4 (Frederick Wilson Truscott & Frederick Lincoln Emory trans., Dover Publ'ns, Inc. 1951) (1819) (stating Laplace's Demon: "We ought then to regard the present state of the universe as the effect of its anterior state and as the cause of the one which is to follow. Given for one instant an intelligence which could comprehend all the forces by which nature is animated and the respective situation of the beings who compose it—an intelligence sufficiently vast to submit these data to analysis—it would embrace in the same formula the movements of the greatest bodies of the universe and those of the lightest atom; for it, nothing would be uncertain and the future, as the past, would be present to its eyes."); JOHN STUART MILL, A SYSTEM OF LOGIC 214 (Longmans, Green & Co. 1941) (1843) (stating that, in order to understand the cause of an event, one has to understand the totality of changing conditions, both positive and negative, which in their cooperation invariably and unconditionally result in the mentioned event). Another significant protest, put forth in various statements by Descartes, Locke, Berkeley, Hume, and Kant, was that causality might be nothing more than a *relation*—an entirely fictional mental construct. *See* GEORGE BERKELEY, WORKS *passim* (Alexander Campbell Fraser ed., Clarendon Press 1871) (1709–52); RENÉ DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY *passim* (John Cottingham trans., Cambridge Univ. Press 1986) (1641); DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING § vii (The Open Court Publ'g Co. 1949) (1748); DAVID HUME, A TREATISE OF HUMAN NATURE bk. I, pt. III, §§ ii–iv (L.A. Selby-Bigge ed., Clarendon Press 1888) (1739); IMMANUEL KANT, KRITIK DER REINEN VERNUNFT (1787); 1

product of *all* stimuli that exist or have existed in the universe at any time prior to that effect. By taking away any one stimulus, it would be impossible to know how that deletion would impact on the effect unless one knew the causal interconnectivity of *all* remaining stimuli in that universe.[29] Because human knowledge is limited, Galileo's efficient causality is unattainable.

This holistic critique found advocates in the logical positivist movement (spearheaded by Bertrand Russell)[30], and confirmation in scientific fields like quantum mechanics[31] and chaos theory.[32] Holists rejected as fictitious any causal path between *finite* sets of stimuli and effects, such as in Figure 1, "as a thread external and parallel to the remaining threads."[33]

Although this attack was so persuasive that even Galilean diehards began to concede that "strict causal lines or chains simply do not exist,"[34] philosopher Mario Bunge explains that the isolation of artificial causal paths between *finite* numbers of stimuli "approximately" necessary and/or sufficient for a *finite* number of effects remains man's best rough-and-ready method for the acquisition of knowledge:

> The isolation of a system from its surroundings, of a thing or process from its [infinite] context, of a quality from the complex of interdependent qualities to which it belongs—such "abstractions," in short, are indispensable not only for the applicability of causal ideas but for any research, whether empirical or theoretical. . . . [I]t is the concern of science to analyze such mazes of interconnected elements, singling out a few entities and features, and focusing on them with the hope of attaining a better understanding of the whole after the singled-out parts have finally been replaced in it. Holists complain that this procedure damages the totality concerned, and this is true; but analysis is the sole known method of attaining a rational understanding of the whole: first it is decomposed into

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JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING bk. II, ch. xxvi, § 1 (Alexander Campbell Fraser ed., Dover Publ'ns, Inc. 1959) (1690). One cannot dismiss this possibility. Yet we do not address the issue further. If we are simply "brains in a vat," significantly greater existential crises than whether a particular plaintiff should recover from a defendant for injury will arise! *But cf.* MICHAEL HEUMER, SKEPTICISM AND THE VEIL OF PERCEPTION (Rowan & Littlefield 2001) (providing a readable overview of skepticism and a direct realist's rebuttal to it); John Foster, *Induction, Explanation and Natural Necessity*, 83 Proceedings Aristotelian Society 87 (1983) (inference to the best explanation is capable of withstanding skeptics' arguments).

29. John Bernal explained this concept succinctly: "[C]hance variations or side reactions are always taking place. These never completely cancel each other out, and there results an accumulation which sooner or later provides a trend in a different direction from that of the original system." J. D. BERNAL, THE FREEDOM OF NECESSITY 31 (1949).

30. Bertrand Russell, *On the Notion of Cause*, *in* MYSTICISM AND LOGIC 188 (1957).

31. *See, e.g.*, H. POINCARÉ, THERMODYNAMIQUE ix (J. Blondin ed., 1908) ("On the deterministic hypothesis the state of the universe is determined by an excessively large number, *n*, of parameters which I shall call x1, x2, . . . , xn. If the value of these *n* parameters are known at any given instant, and their time derivatives are also known, then the values of the same parameters at a previous or at a later time can be calculated.") (translation by author).

32. *See generally* JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE (1987); ILYA PRIGOGINE, THE END OF CERTAINTY: TIME, CHAOS, AND THE NEW LAWS OF NATURE (1997); STEPHEN WOLFRAM, A NEW KIND OF SCIENCE (2002).

33. MARIO BUNGE, CAUSALITY AND MODERN SCIENCE 132 (3d ed. 1979).

34. *Id.* at 133.

> artificially isolated elements, then an attempt is made to synthesize the components. The best grasp of reality is not obtained by respecting fact and avoiding fiction but by vexing fact and controlling fiction.[35]

Bunge further suggests such finite causal paths or chains "afford both a satisfactory approximate picture [of universal interconnectedness]," but only if the chains are drawn "in particular respects, in limited domains, and for short time intervals."[36]

Although causality is an approximation of reality, establishing causality is emphatically *not* a subjective art. Rather, as Bunge states, it is a process of "vexing fact and *controlling* fiction."[37] Properly established risks embody an *objectively good* causal depiction.[38] As the next sections shall demonstrate, what is therefore required is a *method* by which to bifurcate *risks* (*objectively known* "epistemic" causal relationships) and "*uncertainties*" (hypothetical causes of harm).

III. RISK VS. UNCERTAINTY

All proposed relationships between a given stimulus and a given effect are either possible or impossible. Impossible are those that contradict logic or violate a known scientific law. It is impossible (with apologies to string theorists) for a person to be in two places at once, for a person to walk through a wall (two material objects cannot occupy the same space at the same time), or (with apologies to Michael Crichton) for a person to be devoured by a dinosaur (extinct animals cannot bite). It follows that risks must *not* be *impossible*. Consider, then, the following four propositions:[39]

> (1) What is your risk of being trampled by a non-equine horse?
> (2) What is your risk of being trampled by a horse galloping faster than the speed of light?
> (3) What is your risk of being trampled by a four-legged alien?
> (4) What is your risk of being trampled by a horse?

Kindynamics, in establishing whether a proposition is indeed a "risk," *first* examines whether the proposed method of causing harm is *possible and known*, and *then* answers

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35. *Id.* at 129.

36. *Id.* at 133. Indeed, even when approximations of reality are known to be less accurate than the "best" present human knowledge, such approximations may still be valid in certain contexts. Consider that Einstein's theory of relativity displaced Newtonian force as the "proper" approximation of velocities approaching light speed, yet Newtonian force equations are still taught in introductory physics classes and were employed in sending men to the moon. So too is finite causality a sufficient everyday means to categorizing relationships. We do not need quantum mechanics to build a bridge. Chaotic or quantum events that radically defy causal models do not typically impinge meaningfully on our daily lives or even on most scientific investigation. This fact permits finite causality to persist so hardily.

37. *Id.* at 129 (emphasis added).

38. Without such objectivity, "remedies" based on bogus "risks" punisb "wrongdoers" who are accused (subjectively and sometimes absent any appropriate evidence) of "creating" harms. Liability, in effect, becomes limitless without objective causation.

39. Harvard physicist Dick Wilson helped motivate these scenarios. *See* Richard Wilson, *Ensuring Sound Science in the Courts*, 26 TECH. IN SOC'Y 501 (2004).

what the *probability* of each proposition's occurrence is, as we do now for the four propositions:

Scenario 1: Horses, by definition, are equine. A non-equine horse is what Plato called a *logical impossibility*;[40] it is impossible because it requires an object to embody a principle and its logical opposite. Because such a creature is *impossible*, we are inclined to say that the *probability* of being trampled by one is zero.

Scenario 2: Impossibly violates Einstein's laws of relativity. The justification for impossibility, however, is not the same as in the first scenario. A warp speed horse is not illogical. But it defies a *natural law*, and one concludes that Scenario 2 is *impossible*. (By extension, the *probability* of being trampled is zero.)

Scenario 3: Self-professed alien abductees aside, currently there is not convincing evidence of alien life. But insomuch as the notion contravenes no law of nature, it is formally *possible* that a four-legged alien could exist and could trample someone. (We should resist the urge to quickly add that this harm is "quite unlikely" to occur, to avoid commingling the causal and numerical aspects of risk. This is a point we shall return to momentarily.)

Scenario 4: It is *possible* to be trampled by a horse—there are numerous historical and ongoing examples of such accidents. Estimating the *probability* of particular persons being trampled would then require understanding such circumstances as place and time.

The four scenarios suggest that merely stating the *possibility* of a relationship, $A \rightarrow B$, as a quantified probability does not suffice to establish that $A \rightarrow B$ is a risk. There are three classes of possibility: (1) *logical*, (2) *nomological*, and (3) *epistemic*. A risk must be *logical*; a "non-equine horse" cannot be included in a causal chain. A risk must also be *nomological* (i.e., comply with laws of nature); the alleged owner of a warp-speed horse cannot be held legally liable.[41] These are easy requirements. But for alien tramplings and ordinary horse tramplings, observe that one cannot rule out the "possibility" of each causal relationship—*each* is a nomological possibility. Nomological possibilities are causal *uncertainties*, conjectures, hypotheses. They await confirmation, might in some cases have been partly corroborated through scientific investigation, but are either not yet scientifically known "facts," or, if they at one time had achieved such "factual" status, have reverted to mere uncertainties because of newer contradictory evidence. Thus, an alien trampling is nomologically possible, even if it is *unknown*.[42]

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40. *See*, PLATO, MENO *passim* (G.M.A. Grube trans., 1976) (invoking Socratic "elenchus" to prove logical impossibilities).

41. How scientific laws are established is, like any issue of knowledge, a topic for epistemologists. We leave this debate to them, insomuch as it is not hugely important for our purposes of distinguishing nomological from epistemic possibility. The interested reader can see D.M. ARMSTRONG, WHAT IS A LAW OF NATURE? (1983); JOHN W. CARROLL, LAWS OF NATURE (1994); IGOR HANZEL, THE CONCEPT OF SCIENTIFIC LAW IN THE PHILOSOPHY OF SCIENCE AND EPISTEMOLOGY: A STUDY OF THEORETICAL REASON (1999); Carl G. Hempel, *Studies in the Logic of Explanation*, *in* ASPECTS OF SCIENTIFIC EXPLANATION (1965) (essay originally coauthored with Dr. Paul Oppenheim); and Carl G. Hempel, *Postscript (1964) to Studies in the Logic of Explanation*, *in* ASPECTS OF SCIENTIFIC EXPLANATION (1965).

42. *Compare* EUGENE F. MALLOVE & GREGORY L. MATLOFF, THE STARFLIGHT HANDBOOK (1989) (restricting discussion of space travel to present and reasonably anticipated

Epistemic possibilities, in contrast, are those nomological possibilities that are objectively *known*—causal relations that are objective "facts" on the basis of the best scientific evidence at a given moment in time.[43] A trampling by an ordinary horse is *known*—it has happened before, continues to happen in modern times, and is expectable as long as man and horse interact.

A risk is based *only* on epistemic possibility. In this past century, there has been insufficient discussion by philosophers or legal theorists of this need.[44] But a few late-nineteenth and early-twentieth century European thinkers, beginning with German physiologist and epistemologist Johannes von Kries, recognized it.[45] In an important 1886 publication,[46] von Kries criticized the use of quantified probabilities for which the underlying "possibility" is not objectively known.[47] To resolve possibility in any

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technologies), *with* JOHN H. MAULDIN, PROSPECTS FOR INTERSTELLAR TRAVEL (1992) (discussing nomological possibilities of space travel, including space warps, Zero Point Energy, and Higgs fields).

43. Philosophers might find our term "epistemic possibility" ambiguous, because "epistemic" simply means "known" possibility. An epistemic possibility could be "subjectively" known or "objectively" known. By "epistemic," we are referring *only* to "objectively known" possibilities. We prefer "epistemic" because the word "objective" has too much linguistic baggage attached already.

44. *Contra* Stordahl v. Rush Implement Co., 417 P.2d 95, 99 (Mont. 1966) ("Whenever a medical expert testifies that an asserted cause of disease is *possible*, this alone is not to be accepted as reasonable medical proof.") (emphasis in original).

45. Prior to von Kries, the reigning causality theorist was Maximilian von Buri, whose conception of causality-as-applied-in-law was Laplacian:

> [T]he German criminal jurist, von Buri, [] developed the theory of *conditio sine qua non* in the sense of a so-called doctrine of equivalence. Since all cooperating conditions within the [Laplacian] causal relation are equally necessary no one of them could be eliminated without at the same time canceling the effect, and since determining their greater or lesser quantitative operations transcends human cognitive ability, he formulated the statement that all conditions are equal in value. . . . [Von Buri concluded] that every *conditio sine qua non* may separately be viewed as a cause [in law], when all others are given.

HERMAN DOOYEWEERD, ESSAYS IN LEGAL, SOCIAL, AND POLITICAL PHILOSOPHY 40 (1996). Von Buri recognized that determining Laplacian causality is beyond human capability. To avoid this problem, he concluded that legal causality should be inferred *equally* for *each* condition. This doctrine of equivalence has a homespun "equality" appeal, but everything in the universe has such Laplacian causal properties. Under the doctrine of equivalence, the judge who sentences a murderer is also a cause of that murder, simply because the judge existed at the time it occurred. Because the doctrine of equivalence admits such silly propositions, it is not useful for establishing liability.

46. JOHANNES VON KRIES, PRINCIPIEN DER WAHRSCHEINLICHKEITSRECHNUNG (2d ed. 1927). It is said that von Kries's work on epistemic possibilities ("objective Möglichkeiten") had sizeable influence on John Maynard Keynes's later work on uncertainty.

> 47. When . . . we say that a certain Event (Occurence) is to be expected with a specific, quantified probability, we have made the positive claim therein that the relevant Event is bounded by a certain 'Relationship Space,' (Verhaltungs-Spielraum) [which is limited in scope as a result of the imprecision of our knowledge]. Every probability expression therefore contains (causal) knowledge of objective meaning at its core. . . . There are

other fashion or, worse, to ignore it, would make probabilities *appear* to reflect causal inference when in fact they might not.

What has been missing, however, is a consistent, objective protocol by which to separate epistemic possibilities from nomological ones. The dividing "line" is sometimes a fuzzy boundary, within which it is occasionally open to debate whether a given stimulus-and-effect relationship is epistemically known. But the exception does not undercut the rule. Most pitches are called either balls or strikes based on a predefined strike zone, even if some close pitches spawn controversy. The existence of legitimate debate over how to classify some possibilities that rest at the interface does not disprove the logic of a dichotomous categorization.

Said differently, most proposed $A \rightarrow B$ relationships are not murky or difficult to assess. Alien tramplings are not "known." They are only hypothetical possibilities according to the best scientific evidence. Von Kries would say that while alien tramplings are nomologically possible, it is illegitimate and deceitful to discuss a *quantified* "risk" of an alien trampling.[48] Instead, Kindynamic theorists refer to such unknown possibilities as "*uncertainties*."[49] This is because such propositions are predicated on an insufficiently corroborated hypothesis (i.e., a hypothesis backed by *assumptions*), rather than on what is *known*.[50]

> several easily recognizable and essentially different parts to this knowledge. First, there must be a certain knowledge of the actual relation according to measures that define the essential Relationship Space of the probability. This same knowledge must also, at least partially, be imprecise in the aforementioned sense [of Relationship Space]; in another way, however, it is essential that the knowledge be precise. (For example, the quantified relationship between the amounts in relation to each other.)

Id. at 75 (translation by author).

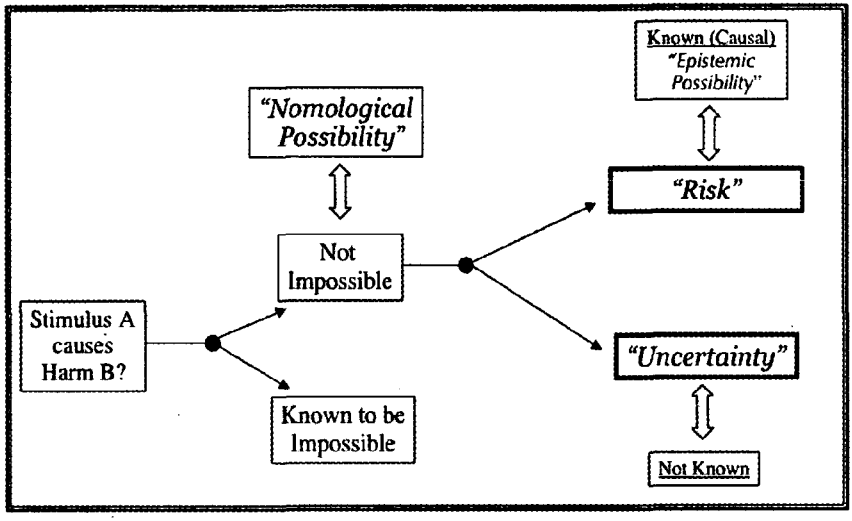
48. Thus, von Kries would disapprove of the Drake Equation, an equation formulated in 1961 that supposedly offers a means of estimating the probability of other intelligent life in the universe. *See* SETI Institute, *Drake Equation*, *at* http://www.seti.org/site/pp.asp?c=ktJ2J9MMIsE&b=179073 (last visited Feb. 1, 2005) (describing the Drake Equation "factors" included in computing the probability of intelligent alien life).

49. The reader must take care not to confuse the Kindynamic definition of "uncertainty" with lay definitions, or, for that matter, with the way some who have overlooked the causal prerequisite to establishing a "risk" use the word: to describe those nomological possibilities—both known *and unknown*—for which a reliable probability is not easily ascertained. *See, e.g.*, Richard Posner, *A Few Closing Thoughts* (Aug. 29, 2004), *available at* http://lessig.org/blog/arehives/posner.shtml (last visited May 17, 2005) ("There is an old but still useful distinction between 'risk' and 'uncertainty,' the former referring to contingencies to which a probability can be attached, the latter to contingencies to which no probability can be attached. The former is the domain of insurance and cost-benefit analysis. The latter? No one can assign a probability to any given time, place, or manner of a terrorist attack within a very broad range (obviously some possibilities can be excluded); and yet we have to take counterrorist [sic] measures; we have, in short, to manage uncertainty as well as risk.").

50. To be sure, self-proclaimed UFO abductees will insist that their personal encounters make alien tramplings *known*, not just nomological possibilities. But if courts simply accept anecdotal, improperly selective, or subjective evidence that does not reflect the "best" scientific evidence (or even of opinions advanced by a professed "authority" or "expert"), separation of nomological and epistemic possibilities cannot occur.

The distinctions between "known impossibilities" (those propositions that either defy logic or known natural laws) and "nomological possibilities," and the further bifurcation of nomological possibilities into "risks" and "uncertainties," can be represented as a flow diagram:[51]

Figure 2
Establishing Whether a Proposition is a Risk



In 1956, Harvard Medical School Dean Sydney Burwell succinctly identified the fundamental epistemological problem in assessing what is objectively "known" at any given time when he stated: "My students are dismayed when I say to them, 'Half of what you are taught as medical students will in ten years have been shown to be wrong. And the trouble is, none of your teachers knows which half.'"[52] Burwell's quote illustrates that causality is *tied to a definite moment in time*. At one moment, a relation $A \rightarrow B$ may reflect the best scientific theory, but not earlier or later. Scientific explanation builds causal paths and chains, and then deconstructs[53] and reconstructs

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51. Table adapted from Philip S. Guzelian et al., *Evidence-Based Toxicology: A Comprehensive Framework for Causation*, 24 HUM. & EXPERIMENTAL TOXICOLOGY 161 (2005). © 2005 Edward Arnold (Publishers) Ltd. All rights reserved.

52. G.W. Pickering, *The Purpose of Medical Education*, 2 BRIT. MED. J. 113, 115 (1956).

53. Deconstructing finite causal chains in an infinite causal nexus might seem like "proving the negative"—demonstrating that a relation does *not* exist. Strictly speaking, proving the negative is impossible for any infinite set. Nonetheless, because of something that Michael Martin calls the Negative Evidence Principle, we can approximately and objectively "prove" the *absence*, just as we can objectively "prove" the *existence* of a finite causal chain:

> A person is justified in believing that X does not exist if (1) all the available evidence used to support the view that X exists is shown to be inadequate; and (2) X is the sort of entity that, if X exists, then there is a presumption

links as compelling contradictory or corroboratory evidence is found. This explanatory process is not always progressive. The Dark Ages, in which anecdotal experience, ungrounded hypotheses, unscientific alchemy, and mythos reigned, caused loss of public knowledge.[54] Scientific "explanations" are no less immune to fashion or to fancy than fiction itself if they do not derive from an objective protocol.[55]

Thus, according to Kindynamic Theory, an *objective*, consistent metric for "knowing what we know" *at a given time* is essential.[56] Without such, some of the most taken-for-granted "facts" or so-called "risks"—even when advocated by well-regarded authorities[57]—turn out to be nothing more than uncertainties. Consider, for instance,

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> that [there] would be evidence adequate to support the view that *X* exists; and (3) this presumption has not been defeated although serious efforts have been made to do so; and (4) the area where evidence would appear, if there were any, has been comprehensively examined; and (5) there are no acceptable beneficial reasons to believe that *X* exists.

MICHAEL MARTIN, ATHEISM: A PHILOSOPHICAL JUSTIFICATION 283 (1990).

54. *See, e.g.*, Michael J. Minnicino, *The New Dark Age: The Frankfurt School and "Political Correctness,"* 1 FIDELIO 4 (1992), *available at* http://www.schillerinstitute.org/fid_91-96/921_frankfurt.html (contending that the "Frankfurt School" of academia, public opinion polls, infotainment, and political correctness are causing a deconstruction of modern culture and scientific knowledge akin to the Dark Ages' regression).

55. *See, e.g.*, AM. COUNCIL ON SCI. AND HEALTH, FACTS VERSUS FEARS: A REVIEW OF THE GREATEST UNFOUNDED HEALTH SCARES OF RECENT TIMES (4th ed. 2004) (reviewing the deleterious effects of 25 prominent fear epidemics based on uncertainties or minute risks, including the 1959 Cranberry Scare, Red Dye Number 2, saccharin, hair dyes, Three Mile Island, and cellular phones); CARL SAGAN, BROCA'S BRAIN: REFLECTIONS ON THE ROMANCE OF SCIENCE 43–146 (1979) (recounting various historical anecdotes of "Paradoxers"—pseudoscientists—who propagated widespread myths).

56. It is critical that we understand that an epistemic possibility is linked to a specific moment in time. What is uncertain today may tomorrow become epistemic because of critical experiment or carefully controlled observation that corroborates the causal relation.

57. Philip S. Guzelian & Christopher P. Guzelian, *Authority-Based Explanation*, 303 SCIENCE 1468, 1469 (2004) ("Uncritical acceptance of authority-based opinions as conclusive evidence is pervasive, even though top authorities unsuccessfully predict what scientific knowledge will be preserved as 'fact.'"). Dr. David Sackett explains that reliance on expert medical opinions, which themselves are not based upon an objective methodology, poses a jeopardy of improperly bestowing epistemic status upon uncertainties:

> For the problems we're likely to encounter very infrequently ([for example]...a man who developed bad pneumonia while trying to reject his heart-lung transplant), we "blindly" seek, accept, and apply the recommendations we receive from authorities in the relevant branch of medicine. This "replicating" mode also characterizes the practice of medical students and clinical trainees when they haven't yet been granted independence and have to carry out the orders of their consultants. The trouble with the "replicating" mode is that it is "blind" to whether the advice received from the experts is authoritative (evidence-based, resulting from their [objective appraisal of evidence consistent with "best evidence" methods]) or merely authoritarian (opinion-based, resulting from pride and prejudice)....If we tracked the care we give when operating in the "replicating" mode into the literature and [objectively] appraised it, we would find that some of it was

the dogma in early nineteenth-century France that phlebotomies (bleeding of patients) cured cholera.[58] Until the 1980s, generations of doctors—persuaded by authorities whose entire careers were devoted to proving that peptic ulcers were an acid problem—administered milk and bland diets and performed selective vagatomies and antrectomies only to be shown by a young resident, Barry Marshall, that the disease is

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> effective, some useless, and some harmful. But in the "replicating" mode we'll never be sure which.

DAVID L. SACKETT ET AL., EVIDENCE-BASED MEDICINE: HOW TO PRACTICE AND TEACH EBM 5 (2d ed. 2000). Daniel Friedland and his co-authors compare "traditional" (authority-based) and "evidence-based" assumptions as applied in medicine:

> Evidence-based medicine is a movement that has developed to help us make . . . decisions with our patients *systematically*. This movement is represented by a recent profusion of literature and course work in evidence-based medicine, and . . . has been characterized as a paradigm shift.
>
> The *traditional medical paradigm* comprises four assumptions:
>
> 1. Individual clinical experience provides the foundation for diagnosis, treatment, and prognosis. The measure of authority is proportional to the weight of individual experience.
> 2. Pathophysiology provides the foundation for clinical practice.
> 3. Traditional medical training and common sense are sufficient to enable a physician to evaluate new tests and treatments.
> 4. Clinical experience and expertise in a given subject area are a sufficient foundation to enable the physician to develop clinical practice guidelines.
>
> The new *evidence-based medicine paradigm* comprises a different set of assumptions:
>
> 1. When possible, clinicians use information derived from systematic, reproducible, and unbiased studies to increase their confidence in the true prognosis, efficacy of therapy, and usefulness of diagnostic tests.
> 2. An understanding of pathophysiology is necessary but insufficient for the practice of clinical medicine.
> 3. An understanding of certain rules of evidence is necessary to evaluate and apply the medical literature effectively.

DANIEL J. FRIEDLAND ET AL., EVIDENCE-BASED MEDICINE: A FRAMEWORK FOR CLINICAL PRACTICE 2 (Daniel J. Friedland ed., 1998) (emphasis in original). *See also* G. Rowe & George Wright, *Expert Systems in Insurance: A Review and Analysis*, *in* 2 INT'L J. INTELLIGENT SYS. IN ACCT., FIN., AND MGMT. 129 (1993) (Daniel E. O'Leary ed.) (concluding there is little evidence that experts are more veridical than laymen in risk assessment); George Wright et al., *An Empirical Test of the Relative Validity of Expert and Lay Judgments of Risk*, *in* 22 RISK ANALYSIS 1107, 1118 (2002) (Elizabeth L. Anderson ed.) (finding that underwriters—risk assessment experts—are little better at estimating certain risk measures than laypersons because of lack of objective feedback); *contra* Paul Slovic et al., *Characterizing Perceived Risk*, *in* PERILOUS PROGRESS: MANAGING THE HAZARDS OF TECHNOLOGY 91-125 (R.W. Kates et al. eds., 1985) (reaching opposite conclusions, but criticized by Wright et al., *supra*, for lack of statistical power and for use of a heterogeneous panel of experts).

58. Paris clinician Pierre Louis dispelled this belief through systematic examination of patients. See P. Ch. A. Louis, Researches on the Effects of Bloodletting in Some Inflammatory Diseases (C. G. Putnam trans., 1835), reprinted in Researches on the Effects of Bloodletting in Some Inflammatory Diseases Together with Researches on Phthisis (Morton D. Bogdonoff et al. eds., 1986).

a bacterial infection.[59] More recently, a generation of well-meaning cardiologists put its postmenopausal patients at risk of cancer and heart disease through estrogen treatments that were widely and incorrectly believed, ironically, to reduce heart disease.[60] And in

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59. Rachel K. Sobel, *Barry Marshall: A Gutsy Gulp Changes Medical Science*, U.S. NEWS & WORLD REP., Aug. 20–27 2001, at 59, *available at* http://www.usnews.com/usnews/doublcissue/heroes/marshall.htm.

60. David Herrington and Timothy Howard tout the newfound realization that this untested hypothesis-turned-dogma could have been easily prevented:

> During the past decade, postmenopausal hormone therapy became one of the most frequently prescribed therapies in the United States, with a highly diversified portfolio of presumed benefits for postmenopausal women. The belief that hormone therapy might reduce a woman's risk of coronary heart disease contributed considerably to its widespread use. Beginning in 1998, results from a series of randomized clinical trials . . . have clearly demonstrated that hormone therapy does not slow the clinical or anatomical progression of established coronary disease, nor does it prevent clinical cardiovascular events in previously healthy women. Indeed, data from the Women's Health Initiative (WHI), in conjunction with data from several other trials with clinical cnd points, suggest that hormone therapy may even increase cardiovascular risk. . . .
>
> . . . The simple and intuitively appealing concept that replacing estrogen lost during menopause would be beneficial was easy for both patients and physicians to believe. This fact, coupled with impressive indirect evidence of a cardioprotective effect and growing awareness of the need for effective means to treat and prevent heart disease in women, made for a nearly unshakable belief in the benefits of hormone therapy. As a result, many people suspended ordinary standards of evidence concerning medical interventions and concluded that hormone therapy was the right thing to prevent heart disease in millions of postmenopausal women—despite the absence of any large-scale clinical trials quantifying its overall risk-benefit ratio.
>
> Not surprisingly, when the initial randomized clinical trials failed to show a cardiovascular benefit, the results were heavily criticized and, in some cases, disregarded in lieu of the less credible evidence that fit the prevailing paradigm . . . .
>
> The lesson is that belief, no matter how sincerely held, is no substitute for proof . . . . Similarly, observational or mechanistic studies, animal models, and basic research have tremendous value for the generation of hypotheses but should not be used to justify broad-based pharmacologic interventions.

David M. Herrington & Timothy D. Howard, *From Presumed Benefit to Potential Harm—Hormone Therapy and Heart Disease*, 349 NEW ENG. J. MED. 519, 519 (2003). *See also* Lars Holmberg & Harald Anderson, *HABITS (Hormonal Replacement Therapy for Breast Cancer—Is It Safe?), A Randomised Comparison: Trial Stopped*, 363 LANCET 453 (2004) (randomized trials ended because of unacceptable recurrence of breast cancer in women using estrogen therapy), *available at* http://image.thelancet.com/extras/03let12260web.pdf. And as another author observes, there were published indications as early as 1986 that would have offered an evidence-based practitioner insight into the dubious value of estrogen therapy:

> As long ago as 1986 Diana Petitti and colleagues showed that HRT was apparently equally protective against accidental and violent deaths in an observational study as it was against cardiovascular disease deaths. They pointed out that given the

a most recent and shocking finding, the longstanding, universal application of corticosteroids to patients with traumatic head injury, although indicated by seemingly sound pathophysiological explanations to reduce brain swelling, has been shown in a recent well-designed randomized trial to result in a sizeable *increase* in deaths.[61] This unsettling discovery prompted editorialists to conclude that "administration of corticosteroids to brain-injured patients has seemingly caused more than 10[,]000 deaths during the 1980s and earlier"[62] and that "[t]he key message . . . is that applying treatments with unproven effectiveness is like flying blindly."[63]

Courts too are starting to see the need to divide risks and uncertainties. One federal judge found that the U.S. Environmental Protection Agency, which first promoted the now-accepted dogma that second-hand cigarette smoke causes lung cancer, had no objective basis at the time for that proclamation.[64] Former Yale and Pennsylvania Law dean and federal judge Louis Pollak preliminarily concluded only two years ago that there was no objective basis for presenting "evidence" that a murder suspect's fingerprints were identical to those later taken by authorities, despite a century of fingerprinting's evidentiary use and a professional requirement that multiple experts examine each pair of prints.[65]

Thanks to remarkable advances in informatics and database searchability, one can now objectively judge much causal "knowledge" without relying on popular, unfounded, or incompletely founded opinion. This method is referred to as "best evidence" or "evidence-based logic" ("EBL"). Medicine, dentistry, engineering, computer science, veterinary science, insurance companies and HMOs,[66] human toxicology,[67] library science,[68] and even professional baseball[69] have adopted EBL to

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> lack of any biologically plausible link between HRT and these external causes of death both associations should be suspected of suffering from residual confounding.

Debbie A. Lawlor et al., *Commentary: The Hormone Replacement—Coronary Heart Disease Conundrum: Is This the Death of Observational Epidemiology?*, 33 INT'L J. EPIDEMIOLOGY 464, 466 (2004) (footnote omitted).

61. Stefan Sauerland & Marc Maegele, *A CRASH Landing in Severe Head Injury*, 364 LANCET 1291 (2004).

62. *Id.* at 1291.

63. *Id.* at 1292.

64. Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA, 4 F. Supp. 2d 435, 465–66 (M.D.N.C. 1998) (rejecting EPA "research finding" that second-hand cigarette smoke causes lung cancer for lack of objective evidence), *vacated by* 313 F.3d 852 (4th Cir. 2002) (holding that issuance of report was not reviewable agency action).

65. Adrian Cho, *Fingerprinting Doesn't Hold Up as a Science in Court*, 295 SCIENCE 418 (2002). *See also* Exxon Corp. v. Makofski, 116 S.W.3d 176 (Tex. App. 2003) (conducting preliminary EBL review to assess whether benzene contamination of aquifer caused plaintiffs' ailments).

66. *See* Christopher P. Guzelian, *Liability & Fear*, 65 OHIO ST. L.J. 713, 741-42 & nn.84-89 (2004) (listing cites for evidence-based medicine, dentistry, engineering, computer science, veterinary science, and insurance companies).

67. Guzelian et al., *supra* note 51.

68. Jonathan D. Eldredge, *Evidence-Based Librarianship: An Overview*, 88 BULL. MED. LIBR. ASS'N 289 (2000).

gauge what is "known" (i.e., an epistemic possibility) at a particular time. Elsewhere this author, along with others, has set out a comprehensive overview of how EBL functions in two contexts: human toxicology and medicine.[70] Here, it suffices to note that EBL exists and is the best method for objectively distinguishing risks and uncertainties.[71]

Admittedly, many regulatory agencies, public advocacy groups, crisis managers, and safety experts advise that certain actions (such as evacuations, waste cleanups, restricted product usage, etc.) be taken even if only a nomological possibility of harm (i.e., an "uncertainty") exists. Journalists or government officials often warn about uncertainties.[72] Such regulation, warnings, and reporting are defended by reference to the *precautionary principle*: better safe than sorry.[73] The precautionary principle has

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69. *See* MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003) (describing rudimentary EBL-style steps recently taken by the Oakland Athletics to maximize chances of making the playoffs with the league's lowest-salaried roster).

70. For an instructive overview of EBL, see Guzelian et al., *supra* note 51.

71. Whether a single method for addressing *general* and *specific* causation can exist is open to the most basic epistemological debates. *See* Christopher Hitchcock, *Probabilistic Causation: Singular and General Causation*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall ed. 2002) (citing specific/general causation dichotomy literature and noting "we make at least two different kinds of causal claim, singular and general. With this distinction in mind, we may note that . . . counter-examples . . . are all formulated in terms of singular causation. So one possible reaction to . . . counter-examples . . . would be to maintain that a probabilistic theory of causation is appropriate for general causation only, and that singular causation requires a distinct philosophical theory. One consequence of this move is that there are (at least) two distinct species of causal relation, each requiring its own philosophical account—not an altogether happy predicament."), *available at* http://plato.stanford.edu/entries/causation-probabilistic/. EBL recognizes that this fundamental tension between specific and general causation exists and attempts to resolve both forms of causation adequately, as courts increasingly demand be done. *See, e.g.*, Eskin v. Carden, 842 A.2d 1222, 1229-30 (Del. 2004) (holding in case involving biomechanical expert testimony that "[e]xtrapolating from general . . . principles to demonstrative evidence that supports or disproves injury to an individual may not be reliable in every case. We, therefore, hold that a trial judge may admit . . . expert opinion that a particular injury did (or did not) result from the forces of an accident only where the trial judge determines that the testimony reliably creates a connection between the reaction of the human body generally to the forces generated by the accident and the specific individual allegedly injured or another determinative fact in issue.") (footnote omitted).

72. This observation should not be taken to mean that communicating uncertainties or rare risks should be wholly disallowed. But the risk communicator must think about how his audience is going to *perceive* the information he presents. If it is an uncertainty, the audience must perceive it as that, not as a risk grounded in epistemic possibility. *See* Guzelian, *supra* note 66 (advocating that negligent risk communicators be assigned liability for clinically serious emotional harms or fears caused by errant risk communication); *see also* Christopher P. Guzelian, *Scientific Free Speech* (Working Paper 2005) (on file with author).

73. V. Dethlefsen et al., *The Precautionary Principle: Towards Anticipatory Environmental Management*, *in* CLEAN PRODUCTION STRATEGIES 41 (Tim Jackson ed., 1993); COMMISSION OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION ON THE PRECAUTIONARY PRINCIPLE 3 (2000) (maintaining that some applications of the precautionary principle are valid, but stressing "[r]ecourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty"), *available at* http://europa.eu.int/eur-lex/en/com/cnc/2000/com2000_0001en01.pdf.

critics; some say that it encourages wasteful, ad hoc expenditures on uncertainties at the expense of efficient resource allocation toward reducing risks.[74] The debate is an

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74. Elizabeth Whelan, president of the American Council on Science and Health, critiques the precautionary principle:

> There are . . . at least two reasons why the precautionary principle itself, when applied in its extreme, is a hazard, both to our health and our high standard of living.
>
> First, if we act on all the remote possibilities in identifying causes of human disease, we will have less time, less money and fewer general resources left to deal with the real public health problems which confront us. This does not mean that before we take prudent action to protect public health we have to dot every scientific "i" and cross every environmental "t". It does mean that we should not let the distraction of purely hypothetical threats cause us to lose sight of the known or highly probable ones.
>
> Second, the precautionary principle assumes that no detriment to health or the environment will result from the proposed new banning or chemical regulation . . .
>
> . . . .
>
> When we apply the precautionary principle and focus on hypothetical risks and ponder what actions we might take "just in case", we leave the world of science and enter the realm of ideology. We allow ourselves to come under the spell of those who are motivated, for whatever reason, by a desire to return to what they perceive as a pre-industrial Garden of Eden.
>
> These "what if" ideologues need to be reminded that wealth and industrial progress are associated with better, not worse health. Blanket applications of the precautionary principle ultimately would mean rejecting the modern technologies that have given us our enviable state of good health and longevity, and the freedom to enjoy it.

Elizabeth M. Whelan, *Too Much Safety Be Hazardous? A Critical Look at the "Precautionary Principle"*, AMERICAN COUNCIL ON SCIENCE AND HEALTH (May 23, 2000), *at* http://www.acsh.org/healthissues/newsID.236/healthissue_detail.asp. *See also* THOMAS R. DEGREGORI, BOUNTIFUL HARVEST: TECHNOLOGY, FOOD SAFETY, AND THE ENVIRONMENT 122 (2002) ("The precautionary principle is often defined as 'absence of evidence is not the same as absence of risk.' What this really says is that the proponents of the principle have lost the argument on the evidence (otherwise they would argue the evidence), so they argue that we should follow their policy prescriptions anyway. Stated differently, if our fears and phobias are right, we are right, but even if we are wrong, well we are still right: it's 'my policy, right or wrong.'"); BJORN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST: MEASURING THE REAL STATE OF THE WORLD 258–324 (Hugh Matthews trans., Cambridge Univ. Press 2001) (1998) (arguing for evidence-based prioritization of resources toward "real" problems rather than nomological possibilities for global warming); CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT (2002) (arguing that government agencies should predicate regulatory decisions and prioritize expenditures on the basis of sound risk assessments); John D. Graham & Susan Hsia, *Europe's Precautionary Principle: Promise and Pitfalls*, 5 J. RISK RES. 371, 371 (2002) (finding the European Commission's broad regulatory adoption of the precautionary principle unsatisfactory and concluding that "[c]ritical terms need to be defined, the evidentiary hurdles for precaution need to be clarified, and checks and balances against ill-considered application of the principle need to be strengthened. A systematic process of ranking hazards and targeting cost-effective protection opportunities should be implemented by the EC as a counterweight to enactment of precautionary measures on a crisis-by-crisis basis."); Gary E. Marchant, *From*

interesting one, but which side has the better of it does not matter for common law tort liability.[75] Because plaintiffs have a burden of proof to establish causality, only risks (*known* causal possibilities) are relevant; the fact that a regulatory agency issued sanctions or took "preventative" action against uncertainties because it was compelled to *by law* does not demonstrate an established causal contribution (or lack thereof).[76]

To summarize the first major contribution of Kindynamic Theory: a properly identified risk is (1) an *epistemic* causal possibility, (2) expressed as a quantified probability/likelihood, (3) that results in a harm/injury. All other would-be "risk" propositions are either uncertainties or impossibilities, and Kindynamic Theory asserts that they cannot serve as a basis for liability.

IV. PROXIMATE RISK AND NEGLIGENCE

Someone creates a risk. Someone is injured. Does the victim recover? Not automatically. A negligence-based tort requires more than the mere creation of risk and injury. But exactly *which* elements should factor into a finding of negligence (and thus, liability) has resulted in intense debate without good resolution.

General Policy to Legal Rule: Aspirations and Limitations of the Precautionary Principle, 111 ENVTL. HEALTH PERSP. 1799, 1801 (2003) ("The ambiguity of the [precautionary principle] invites arbitrary application, both with respect to which risks it is applied to and what it requires when it does apply.") (citation omitted).

75. In his struggle to address the arbitrariness of the precautionary principle's application, Gary Marchant has indirectly suggested a more refined set of classes of possibility than those we described in Figure 2. Marchant, *supra* note 74. By extension of Marchant's reasoning, uncertainties consist of two subclasses: (1) those that have arisen in some individuals' imagination but remain empirically controverted ("*hypotheses*"), and (2) those that have not yet even been dreamt up ("*ignorance*"). *See id.* at 1800 ("It is difficult to see how the [precautionary principle] can help address risks for which we are ignorant rather than uncertain."). It is far from clear that Marchant's standard does anything to refine the precautionary principle other than to state what is necessarily true: there is no possibility of taking action against things we cannot even imagine. *But see* Paolo F. Ricci et al., *Precautionary Principles: A Jurisdiction-Free Framework for Decision-Making Under Risk*, 23 HUM. & EXPERIMENTAL TOXICOLOGY 579 (2004) (presenting decision analysis framework that offers reproducibility and formal structure for making precautionary decisions about uncertainties).

76. *See* Philip S. Guzelian & Christopher P. Guzelian, *Authority-Based Explanation*, 303 SCIENCE 1468, 1469 (2004) ("It may be prudent for preventative purposes to act as if some chemicals present health risks, but such decisions should never be confused with evidence-based conclusions that such agents do cause harm."). And as Judge Richard Posner has said, "[l]aw lags science; it does not lead it." Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996). *See also* Black v. Rhone-Poulenc, Inc., 19 F. Supp. 2d 592, 606 (S.D. W. Va. 1998) ("[T]he Court cannot abdicate its role as 'gatekeeper' and subject the jury unfairly to confusing and misleading 'pseudoscientific' research."); Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 727-28 (Tex. 1997) ("Courts should not embrace inferences that good science would not draw. . . . [T]he law should not be hasty to impose liability when scientifically reliable evidence is unavailable."); Christopher P. Guzelian, *Did Daubert Rid Coutrooms of Advocacy Science?*, in SCI. EV. REV. (7th ed., Am. Bar Assoc., forthcoming 2005); Arnold J. Rosoff, *Evidence-Based Medicine and the Law: The Courts Confront Clinical Practice Guidelines*, 26 J. HEALTH POL., POL'Y & L. 327 (2001) (advocating expanded use of evidence-based approach to separate uncertainties from epistemic possibilities).

Unlike regulatory agencies,[77] American courts have never systematically *prioritized* tort claims. As has been observed in regulatory contexts,[78] without risk prioritization, coherent risk deterrence does not occur. Accordingly, many Kindynamic theorists contend that negligence must involve systematic risk prioritization.[79]

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77. *See, e.g.*, SCI. ADVISORY BOARD, U.S. ENVTL. PROT. AGENCY, SAB-EC-90-021, REDUCING RISKS: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION 6 (1990) (encouraging EPA to "target its environmental protection efforts on the basis of opportunities for tbe greatest risk reduction").

78. Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 50-51 (2001) ("[M]any commentators believe that lack of appropriate risk analysis and comparative risk prioritization represents the greatest obstacle to achieving sound environmental regulation. They argue, with considerable justification, that without a sustained effort to measure and compare risks, environmental regulation is little more than shooting in the dark . . . .") (footnote omitted).

79. Courts rarely bother to quantify risks (some even expressly refuse to). *See, e.g.*, *In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 788 (3d Cir. 1994) ("Paoli II") ("Nor do we think that an expert must quantify the increased risk."); Merry v. Westinghouse Elec. Corp., 684 F. Supp. 847, 850 (M.D. Pa. 1988) (criticizing a quantification of risk requirement because "[w]e think this formulation unduly impedes the ability of courts to recognize that medical science may necessarily and properly intervene where there is a significant but unquantified risk of serious disease") (quoting Ayers v. Jackson Township, 525 A.2d 287, 309 (N.J. 1987)). They rely instead on quantitative adjectives such as "substantial," "inconsequential," "trivial," or "significant" to delimit which risks are judicially redressable. Such modifiers, absent supporting quantification, are notoriously imprecise. They encourage both subjectivity and error; they defeat any effort to sensibly risk prioritize. As this author has written elsewhere:

> Quantitative adjectives lack precision and accuracy. Descriptors such as "significant," ... "serious," "large," "small," "trivial," "meaningful," "substantial," "inconsequential," and so forth are simply ineffective standards for classifying risk magnitudes unless backed by actual quantification. Say we wish to discuss a particular level of risk. What level of risk *is* "significant"? . . .
> The correct answer . . . is "*it depends.*" Quantitative adjectives only gain meaning *in a context.* Is a quantitative adjectival "bright line" getting at a *proportionate* risk increase ("[A] relative risk of 1.0 means that the agent has no effect on the incidence of disease. . . . [A] relative risk of 2.0 implies a 50% likelihood that an exposed individual's disease was caused by the agent."), an *aggregate* level of risk ("[a]sbestosis sufferers . . . have a significant (one in ten) risk of dying of mesothelioma . . . ."), or *both* ("because of plaintiff's exposure to benzidine, his risk of developing bladder cancer had increased from one in ten thousand to one in ten")[?] In determining whether medical screening is advisable, for instance, physicians focus only on aggregate risk; diagnostic decisions do not turn on *the source* of risk, just that a threshold has been transgressed. However, . . . fair apportionment of [] liability . . . requires *both* aggregate and relative risk considerations.

Guzelian, *supra* note 66, at 815–16 (emphases added). *See also* CHICKEN & POSNER, *supra* note 16, at 11 ("[A]ny precise discussion of the acceptability of a risk must describe the risk in quantitative terms; if the risk is described only in soft, qualitative terms, any conclusions about its acceptability will be equally soft or, to put it another way, will be merely uncertain speculation."); SUNSTEIN, *supra* note 74, at 111 (suggesting that accounting for both quantitative and qualitative aspects of risk is necessary for adequate risk assessment); Christopher P.

One problem with an explicit move to a risk-prioritized tort system—in which certain injury-resulting risks would not be judicially cognizable because they occur too infrequently to merit judicial attention—is that courts are tasked (possibly as a constitutional requirement) with dispensing individual justice injury-by-injury. Yet the practical reality is that there is nothing superhuman about the judicial branch. It is constrained by finite budgets, time, expertise, and staff (more so even than regulatory agencies comprised of expert risk analysts).[80] Even while paying lip service to the adage that "every man must have his day in court," tort law faces the reality that if every alleged negligence-and-resulting-injury claim really had its day in court, the system would buckle.

To maintain an *illusion* of individual justice, the current tort system has fashioned an unprincipled haphazard set of rules to limit the number of cognizable injuries.[81] Take a specific example: a person within the "zone of danger" who witnesses his daughter struck and killed by an automobile has an actionable claim (emotional distress). But a plaintiff who witnesses his fiancée struck and killed in identical circumstances cannot recover in some jurisdictions. This is not because the fiancé's emotional distress is scientifically believed any less injurious and terrible than the father's. Rather, it is because courts have set up a veiled, illogical patchwork of prioritization rules that quietly eliminate certain classes of injuries, which in a world of unlimited judicial resources might well be actionable. This patchwork prevents administrative overload of the courts, while maintaining the false public belief that individual justice is being done.[82]

Class action suits and the rise of so-called "enterprise liability" theory are recent theoretical attempts to improve individual justice. Still, the take-home lesson is that inability to ensure individual justice, *regardless* of how much one cherishes that goal, is an inherent aspect of *any* constrained judicial system where claims outpace resources.

As we show in the following Parts IV(A) and (B), some Kindynamists contend that within this administratively limited system of justice, better risk prioritization should, must, and can be attained in tort law.

Guzelian et al., *A Quantitative Methodology for Determining the Need for Exposure-Prompted Medical Monitoring*, 79 IND. L.J. 57, 62 (2004) ("Judicial use of quantitative adjectives as a proxy for assessing the actual increase in risk is a questionable practice. One pair of authors observes that 'the court[s] self-consciously rel[y] on a series of quantitative modifiers . . . in an effort to reserve liability for truly deserving cases. Anyone familiar with modern American trial practice will understand that, however well-meaning, this reliance on superlatives will not prevent most well-prepared cases from reaching triers of fact.'") (quoting James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 845 (2002)).

80. *See* COUNCIL OF ECONOMIC ADVISERS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM (2002), *available at* http://www.whitehouse.gov/cea/tortliabilitysystem_apr02.pdf.

81. For a related idea, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (contending that selective transmission to the public of rules governing decisionmakers' adjudications is a questionable practice).

82. *See* Guzelian, *supra* note 66, at 766–850 (describing the nonsensicality of fear and emotional distress tort liability rules and proposing rules to sensibly prioritize emotional harm claims).

A. "Significant" Risks

Case-by-case regulation is an inefficient and possibly disadvantageous means for risk deterrence.[83] Nonetheless, common law tort is ingrained in American culture. Abandoning it in favor of an administrative regime designed for risk prioritization probably will not happen. But common law can still be tilted toward individual case adjudication that is based on orderly risk prioritization. For *any* regulatory system, Kindynamic Theory favors infusing whatever amount of risk prioritization is possible. It therefore expects courts to systematically decide whether a risk is "*significant.*"[84] Assessing whether a risk is "significant" proceeds according to a basic risk priority rule (which we state first and then examine in detail immediately below):

A Kindynamically "Significant" Risk

The more an at-risk (and injured) plaintiff can establish that the risk he suffers is

1. one that results in judicially cognizable injury more frequently relative to other risks ("*injurious*" risk); and
2. one for which comparatively more people or property are at similar risk relative to other risks ("*widespread*" risk),

the greater should be the plaintiff's priority among would-be claimants for recovery.[85]

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83. As one academic states:

> [J]udicial review may make problems of fragmentation and lack of consistency worse by overlaying extensive legal procedures and case-by-case litigation on an already unwieldy and fragmented legal and institutional apparatus. This overlay of procedural formality and litigation makes many aspects of the U.S. environmental regulatory system more costly and burdensome than the similar command-and-control systems of other advanced industrialized countries that achieve equivalent levels of environmental protection.

Stewart, *supra* note 78, at 38 (footnote omitted).

84. As we will see in Part V, a risk must be "significant," according to Kindynamic Theory, if the claim of "negligence" hinging upon that risk is to be cognizable. Furthermore, even if a risk is "significant," it must also be net costly to lead to liability. *See infra* Part IV(B).

85. Sutcliffe v. G.A.F. Corp., 15 Phila. 339, 345–46 (1986). The court in *Sutcliffe* held that:

> [W]hen attempting to establish increased risk of harm . . . by statistical evidence, it is imperative that statistics be given for both the plaintiff and for the average individual (the base rate). One without the other is of no statistical or probative value since it would require sheer speculation as to the missing statistic in attempting to determine the actual increase in risk and whether such a risk is of sufficient significance . . . .

Id.

For fear or emotional distress liability assignments, an additional assumption that a Kindynamic-minded jurist must make is to assert that the person placed at physical risk *perceives* that risk. For additional details about this requisite supposition and the unique

1. The Injurious Risk Threshold

The first step Kindynamic Theory takes to risk prioritize is to limit court access to those plaintiffs whose defendant-caused[86] risks are more likely to be *injurious* (i.e., result in the predicted injury) than other risks. Evidence-Based logic can usually nail down what percentage of people at similar risk as the plaintiff[87] *do*, in fact, sustain injury. Thus, Kindynamic Theory envisions establishing an *injurious risk cut-off* for each risk. Risks whose likelihoods of resulting in harm fall below this threshold are generally not cognizable; risks whose likelihoods surpass the threshold generally are.[88]

There is a considerable problem with this rationale, however, which Kindynamic Theory acknowledges: it is anything but clear *at what level* the injurious risk cut-off should be set. Indeed, some natural rights philosophers reject *any* non-zero injurious risk threshold, as philosopher Robert Nozick once explained:

> [W]hat is the magnitude of the specified [injurious risk] value? The harm of the least significant act (yielding only that harm for certain) that violates a person's natural rights? This construal of the problem cannot be utilized by a tradition which holds that stealing a penny or a pin or anything from someone violates his rights. That tradition does *not* select a threshold measure of harm as a lower limit, in the case of harms certain to occur. It is difficult to imagine a principled way in which the natural-rights tradition can draw the line to fix which probabilities impose unacceptably great risks upon others. This means that it is difficult to see how, in these cases, the natural-rights tradition draws the boundaries [a threshold] focuses upon.[89]

Thus, inherent philosophical tension between judicial pragmatism (explained at the outset of this section) and this natural rights critique makes it difficult to set a *particular* "injuriousness" level or range and even less obvious *on what basis to do so*. To complicate matters further, the *disutility* of a particular injury may influence the

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techniques necessary for addressing psychic injury claims, see Guzelian, *supra* note 66, at 750–66.

86. The *cumulative risk* of a specific injury to a particular person usually results from an *aggregation* of acts and circumstances, not just from one tortfeasor's act. For instance, the cumulative risk of contracting leukemia from benzene exposure almost invariably presupposes that there are *multiple agents* contributing as sources of that benzene exposure—the dry-cleaning shop around the corner, the large textile factory across town, and exposure to background benzene residues—both natural and man-made. *See* Guzelian et al., *supra* note 79, at 91-92 (indicating that a risk is the sum of the plaintiff's contribution plus the pre-exposure incidence) (citing David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 855-56 (1984)). In setting the injurious risk threshold, Kindynamic Theory focuses exclusively on the creation of or augmentation in risk resulting from a *defendant's* acts. It does not concern itself with cumulative risk.

87. *See* Guzelian, *supra* note 51 (describing how specific delimiters can be used to tailor general causal conclusions to an individual case).

88. There are at least three reasons for deviation from this general principle: (1) the amount of disutility a particular risk's effect causes, on average, in injured victims (see immediately below in this section); (2) how widespread the risk created by the individual defendant is, *see infra* Part IV(A)(2); and (3) economic considerations, *see infra* Part IV(B).

89. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 75 (1974) (emphasis in original).

particular injury cut-off. For instance, if the injurious risk cut-off is 5% for contracting cancer, is the acceptable cut-off higher (e.g. 15%) for a less grievous harm (e.g. destroying another's property)?

As the Supreme Court itself has come close to acknowledging, society can only *arbitrarily* delineate which risks to address and which to ignore.[90] Judges have to decide what *quantified* aggregate level of risk for a specific harm they are philosophically uncomfortable with permitting and set the corresponding *quantified* injurious risk cutoff.[91] What Kindynamic Theory recommends is *transparency*: when judges select a particular quantified injurious cutoff (or range), they should be explicit in stating that level. As a result, the tenor and quality of policy debate as to whether that cutoff is appropriate will vastly improve.

2. Widespread Risks

There is another reason the "injurious risk cutoff" is difficult to identify in practice: it is a benchmark that is not necessarily the same as the cutoff set in any courtroom. For instance, might we allow an actor to engage in certain behaviors whose likelihood of causing risk exceeds the risk threshold (e.g., the threshold is 10%, the defendant's act causes an 11% chance of harm)? Conversely, would we ever want to hold a specific defendant liable even if the risk of physical harm he has created does not meet the risk floor (e.g., the cutoff is 10%, the defendant's act causes an 8% risk of harm)?

Under Kindynamic Theory, establishing the "significance" of a risk incorporates considerations beyond those that factor into setting the "injurious risk cut-off." One cause for deviation from the injurious risk threshold is the number of people or amount of property a tortfeasor has placed at risk.[92] Say, for instance, that tortfeasor *A* by his careless actions has placed 100 people at risk of cancer, and that the fashion in which he did is known by EBL to cause 11% of the same to contract cancer, where the injurious risk cut-off is set at 10%. Assume tortfeasor *B* has negligently placed 100 *million* people at risk of cancer, and that EBL predicts 9% will contract cancer. On

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90. *See* Indus. Union Dep't v. Am. Petrol. Inst., 448 U.S. 607, 655 n.62 (1980) ("[W]hile [a regulatory agency] must support its finding that a certain level of risk exists by substantial evidence, we recognize that its determination that a particular level of risk is 'significant' will be based largely on policy considerations. At this point we have no need to reach the issue of what level of scrutiny a reviewing court should apply to the latter type of determination."). *See also* NOZICK, *supra* note 86, at 75 ("One might plausibly argue that beginning with probabilities that may vary continuously and asking that some line be drawn misconstrues the problem and almost guarantees that any position of the line (other than 0 or 1) will appear arbitrary.").

91. *See, e.g.*, Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 90 (Tex. 1999) (rejecting fear of asbestos-related illness claims of asymptomatic plaintiffs, even upon accepting the testimony of an expert "that the chances of [plaintiffs'] developing a disease as a result had increased from one in a million, which [the expert] estimated to be the risk that a person would ever develop a disease from asbestos exposure not occupationally related, to about one in 500,000 for the next ten or fifteen years, and as much as one in 100 over twenty or thirty years.").

92. There are at least two other reasons to deviate from the theoretical threshold. *See supra* note 88.

average, *A* should cause 11 people to suffer the harm, but *B* will cause 9 *million* people to suffer the same. Should *A* be liable while *B* is not?[93]

Following the current logic of many regulatory agencies,[94] the Kindynamic answer is typically "no." Applying an aggregate cutoff *equally* to all physical injurers would enable a behemoth injurer to escape liability simply because he doesn't meet the one-size-fits-all *percentage* threshold. An *individual* threshold (or range) must be constructed along a sliding scale based on *how many* individuals a physical injurer puts at risk, with the threshold serving only as the initial benchmark. This Kindynamic concept is motivated by antitrust law, where some actions regarded as lawfully "competitive" by companies with little market power (analogous to tortfeasors who put few people or little property at risk) are unlawfully "monopolistic" when undertaken by larger competitors (analogous to tortfeasors who put many people or much property at risk).[95]

Cutoffs set for an individual defendant can deviate in practice, sometimes substantially, from the theoretical injurious risk threshold. Kindynamic Theory suggests judges, however, *first* derive that cutoff, and *then* determine whether an individual defendant's circumstances merit upward or downward departure. Only by this method can one separate the distinct considerations that go into establishing the aggregate and individual "significances" of a risk.

B. Excusing "Significant" Risks: Decision Analysis

Even if a defendant's act creates an individually "significant" risk, he sometimes will be excused from liability because of cost-benefit considerations. Robert Nozick explained:

> [I]t might be decided that mining or running trains is sufficiently valuable to be allowed, even though each presents risks to the passerby no less than compulsory Russian roulette with one bullet and *n* chambers (with *n* set appropriately), which is prohibited because it is insufficiently valuable. There are problems in . . .

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93. Assume that the cost-benefit ratios, scaled accordingly for the magnitude of each injurer's act, are identical.

94. Curtis C. Travis et al., *Cancer Risk Management: A Review of 132 Federal Regulatory Decisions*, 21 ENVTL. SCI. & TECH. 415, 419 (1987) (finding an inverse relationship between the EPA and other regulatory agencies' injurious risk thresholds and the sizes of the at-risk populations).

95. Areeda and Hovenkamp, for example, define market power as "the ability to raise price by restricting output." *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, IIA ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION § 5A (2d ed. 2002). By analogy, a tortfeasor with "risk power" has the resources and means to put many people in a society at risk by his act(s). Kindynamic Theory thus far has accommodated all philosophical camps in assessing what the correct size of "society" is in considering the scope of a risk. Some contend that local risk regulation is more effective. *See, e.g.*, Richard A. Minard, JR., *CRA and the States: History, Politics, and Results*, *in* COMPARING ENVIRONMENTAL RISKS 23 (J. Clarence Davies ed., 1996). Others believe only a national (or international) integrated approach can adequately address risk. ENVIRONMENTAL LAW AND POLICY 508–17 (Peter S. Menell & Richard B. Stewart eds., 1994). An answer to this debate may have to be borne out over time.

> making . . . these decisions. . . . The problems could lessen if the overall states (totality below the threshold, and so on) can be reached by the operation of some invisible-hand mechanism. But the precise mechanism to accomplish this has yet to be described . . . .[96]

Learned Hand long ago popularized a rudimentary cost-benefit test.[97] A persistent criticism of Hand's test (which Nozick recognized when he said that no "precise" mechanism for such analysis exists) is its denomination of physical harms and economic/property harms on a single monetized scale.[98] Kindynamic Theory mandates use of "decision analysis," which avoids the problems of Hand's test,[99] but still appropriately exonerates certain physical injurers from liability, *even for some injurers who have created "significant" risks to certain individuals.*

Decision analysis is best understood through case examples,[100] but its conceptual thrust is that it is a robust,[101] evidence-based, and widely accepted methodology used to

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96. NOZICK, *supra* note 89, at 74.

97. *See* United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947) (holding that the risk of a defendant's conduct is calculated as a combination of (i) the magnitude of damage that might occur; (ii) the probability that a certain magnitude of damage will occur).

98. *See, e.g.*, Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 346 (1996) ("[I]t is neither natural nor necessary to conceptualize accident and precaution costs in economic terms."); Kenneth W. Simons, *Negligence*, 16 SOC. PHIL. & POL'Y 52, 80 (1999) (objecting that monetization of physical risks turns "moral analysis into a bloodless form of calculation," but noting that such "qualitative" balancing as described would avoid this problem).

99. Decision analysis allows quantification of estimated risk "losses" *in terms of risk*. It is simultaneously capable of itemizing estimated monetary values for *economic* losses. But it doesn't require that the analyst reduce risks and property harms to a singular monetary scale, as Hand's formula necessarily must. In this fashion, decision analysis can contribute to unprecedented judicial consistency and accuracy in gauging negligence without sacrificing reflection on the "moral" nature of many injuries. *Cf.* Ileto v. Glock, Inc., 349 F.3d 1191, 1205-06 (9th Cir. 2003) (holding without conducting quantified decision analysis that handgun manufacturers' distribution of guns to police departments, which ostensibly allows for easier criminal access to used guns, "is outweighed by the health and safety interests of potential victims of gun violence at the hands of prohibited purchasers"); Joseph L. Arvai et al., *Testing a Structured Decision Approach: Value-Focused Thinking for Deliberative Risk Communication*, 21 RISK ANALYSIS 1065 (2001) (finding that focus group use of "value-foeused thinking"—a crude and sometimes non-quantitative form of decision analysis—can help to improve public perceptions of risk).

100. *See generally* DETLOF VON WINTERFELDT & WARD EDWARDS, DECISION ANALYSIS AND BEHAVIORAL RESEARCH (1986) (explaining how to perform decision analysis); THE PRINCIPLES AND APPLICATIONS OF DECISION ANALYSIS (1983) (Ronald A. Howard & James Matheson eds.); Jerome P. Kassirer et al., *Decision Analysis: A Progress Report*, 106 ANNALS INTERNAL MED. 275 (1987) (explaining that decision analysis in the clinical profession has become more widely used and improved); Stephen G. Pauker & Jerome Kassirer, *Decision Analysis*, 316 NEW ENG. J. MED. 250 (1987) (applying the principles of decision analysis to patient care); Harold C. Sox, Jr., *Decision Analysis: A Basic Clinical Skill?*, 316 NEW ENG. J. MED. 271 (1987) (commenting on problems with using decision anlaysis in the medical context); Ronald A. Howard et al., *The Decision to Seed Hurricanes*, 176 SCIENCE 1191 (1972) (using decision analysis to help determine whether seeding hurricanes would be worthwhile).

determine whether leaving an act unaltered is *relatively* less socially costly than modifying the act so as to mitigate some or all of the act's associated "significant" risks. Stated formally, a defendant has no liability if the *expected net social cost*[102] after any feasible modification to his act is higher than the expected net social cost of leaving the act unchanged. (Conversely, if some viable modification would have made the act less costly, the actor is liable.) Purely for simplicity, we will consider only an act's costs, not its benefits.[103] This simplifying assumption means that individual liability exists whenever the modified act's expected *total* social cost is less than the unaltered act's expected *total* social cost.[104]

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101. Stephen G. Pauker, *Deciding About Screening*, 118 ANNALS INTERNAL MED. 901 (1993) ("A formal decision analysis can help structure the problem, organize data, elucidate tradeoffs, and estimate benefits and costs."). Decision analysis has been shown in medicine to be a particularly helpful alternative to conducting costly and time-consuming controlled clinical trials when a physician wishes to assess whether a proposed medical intervention is more likely to be of benefit than of harm to patients. *See* Peter Doubilet & Barbara J. McNeil, *Clinical Decisionmaking*, 23 MED. CARE 648, 648 (1985) ("Decision analysis is most applicable to clinical questions that cannot be answered by appealing directly to the results of clinical trial or to a large database. This can occur because no trial has been carried out or because the patient in question differs substantially from the populations in existing sources of data."). As such, decision analysis's predictive power is directly translatable to determining negligence. It could be used to predict whether modification or elimination of an act that has caused harm is socially preferable to the alternative of allowing the act to proceed unchanged.

102. "Net social cost" is measured by subtracting "total social costs" (the social disutility suffered from a defendant's act, *see infra* note 104) from "total social benefits" (the social utility gained from a defendant's act). A person causing a significant risk is negligent whenever a modification could have been made to the underlying act that would have resulted in a *relative* decrease in net social cost. Thus, it is theoretically possible that the "net social cost" is *positive* (i.e. a net social *benefit*), yet a person is still negligent.

103. This assumption obviously need not be true in reality. A modification or elimination of an act could have disparate impacts on social benefits and social costs associated with it. Decision analysis is fully capable of addressing both. Dobbs explains well why one makes this assumption: "The usefulness or [benefit] of conduct actually includes the costs saved by not adopting some other course of conduct, but it is sometimes clearer if [benefit] and cost of greater safety are stated separately." 1 DOBBS, *supra* note 6, § 144 at 338 n.5 (2001).

104. A "total social cost" is derived for *both* the unaltered act *and* each proposed modification of that act. The "total social cost" associated with the unmodified act ("TC_{act}") is a vector of all "n" significant risks ("R_i") along with a vector of all "m" property damages, ("P_j"):

$$TC_{act} = \overrightarrow{R_i} + \overrightarrow{P_j}, \quad i \in \{1,...,n\},\ j \in \{1,...,m\}$$

Assuming only for notational simplicity that the defendant would suffer no transactional (out-of-pocket) financial costs by being forced to modify his act, the "total social cost" ("TC_{mod}") of each proposed and EBL-justified *modification* of the act is expressed similar to the unmodified total social cost equation above, but the number and magnitudes of some or all of the associated "significant" risks must be assessed for *each* modification and are not necessarily the same across modifications. Thus, proposed modification number 1 might have s "significant" risks associated with it, and t property costs, and so on for every other possible modification. (The vector sizes of the modifications may or may not be equal to the vector sizes of the unmodified act. There is no way of universalizing how a modification will affect the *number* of significant risks, or the *number* of different property damages.) The final EBL-known modification, the z^{th} possible modification, has u "significant" risks associated with it, and v property costs:

An act's total social cost can actually *increase* when one trics to reduce a particular risk. This is because of "*risk covariance*": eliminating the "significance" of one risk can make another "significant."[105] For example, designing a street-corner lamp pole to collapse easily in a vehicular collision decreases the risk of injury to drivers, but the modification may simultaneously convert a previously insignificant risk of injury to nearby pedestrians into one that is significant.[106] Modifications, however, do not always cause other risks to become significant. Bailing water out of a flooded lifeboat into the ocean substantially reduces the risk of drowning, but does not increase the risk of coastal flooding.[107]

Decision analysis, in sum, promises to elucidate tradeoffs and offers effective risk minimization and avoidance without suffering the sustained criticisms that cost-benefit computations that set all losses in economic terms do.

V. KINDYNAMIC DEFINITIONS: PROXIMATE RISK, NEGLIGENCE, DUTY

Kindynamic Theory, based on the principles set out in the previous sections, can offer rigorous definitions of proximate cause, negligence (breach), and duty that have been lacking so greatly.[108] Thc reader will observe that these Kindynamic definitions are quite formal, as they must be when incorporating the precise concepts of risk and a risk's "significance" discussed in Sections III and IV.

$$TC_{\text{mod 1}} = \overrightarrow{R_k} + \overrightarrow{P_l}, \quad k \in \{1,...,s\}, l \in \{1,...,t\}$$
$$\vdots$$
$$TC_{\text{mod z}} = \overrightarrow{R_a} + \overrightarrow{P_b}, \quad a \in \{1,...,u\}, b \in \{1,...,v\}$$

Observe from this process that it is still possible to reduce the expected utilities of a risk to a common scale, as Hand did. The power of decision analysis is that that computation is not *required*; one has the ability to tabulate risks in risk-terms, rather than to monetize them.

105. *See generally* RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT (John D. Graham, Jonathan B. Wiener, & Cass R. Sunstein eds.) (1997) (contending that risk covariance is ubiquitous).

106. Bernier v. Boston Edison Co., 403 N.E.2d 391 (Mass. 1980) (concluding that pedestrian risk of injury became too significant and hence defendant was negligent for designing breakaway pole to protect drivers).

107. *See* Indiana Consolidated Ins. Co. v. Mathew, 402 N.E.2d 1000 (Ind. Ct. App. 1980) (finding no negligence where defendant immediately fled plaintiff's garage after mower caught fire instead of pushing mower outside first, because the expected risk of harm to the garage was less than the expected risk of injury tending to a potentially explosive mower marginally longer).

108. Kindynamic definitions are partly motivated by Ludwig Träger's "most clairvoyant person" rule. *See* LUDWIG TRÄGER, DER KAUSALBEGRIFF IM STRAF- UND ZIVILRECHT (1904). This author has discussed this rule elsewhere in detail. *See* Christopher P. Guzelian, *Liability & Fear*, 65 OHIO ST. L.J. 713, 777–804 (2004). Under the Kindynamic adaptation of Träger's rule, liability should attach if the risk (a) is recognizable under EBL at the time the event occurred; and (b) taking into account any additional knowledge the alleged tortfeasor has. Condition (b) is not usually applicable but may have relevance for, say, individuals with classified or secret information.

> ***Proximate Cause* (*"Proximate risk"*).** A proximate cause ("proximate risk") is (i) a risk associated with an act that should have been mitigated at the time the act occurred because (ii) the risk is "significant" and (iii) the net social cost, if the act had been modified so as to counteract this particular risk, would have been less than the unaltered act's net social cost.

The definition is a mouthful, but if we break it down into its three enumerated parts, it is sensible.

(i) *Risk*. Proximate cause is a kind of *risk*, verified as an epistemic possibility by EBL (*see* Part III, *supra*). Proximate cause is also a form of *negligence* (which, we will see in the next definition below, is a *set* of risks).[109] Negligence exists even if there is only exactly one risk that meets its definitional conditions. Not coincidentally, that is also the definition of a proximate cause, which can therefore be thought of as the "weakest" form of negligence.[110]

Furthermore, beware: proximate cause (or negligence in general) is *not* an *act* (a human-prompted stimulus). It is a *risk* associated with an act.[111] Courts and scholars, beginning with then-Judge Cardozo,[112] have often made this mistake.[113] The distinction may seem semantic, inasmuch as an act must occur for a risk to exist. Yet it is necessary because examining the "act" usually regresses to considering only the defendant's *conduct*. This deprives scrutiny of the *context* in which that act occurred

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109. Dobbs suggests that proximate cause—"a rule limiting liability for risk to the scope of the risk"—is properly viewed "as a corollary to or even a part of the basic rule of negligence." DOBBS, *supra* note 6, § 181 at 446. In fact, the rigorous Kindynamic definition permits us to go one better: proximate cause is *always* a kind of negligence.

110. Notice, however, the implicit prerequisite to proximate cause that is *not* imposed on negligence generally: for proximate cause to exist, not only must it be the case that it is *generally* "possible" for the particular risk of harm to cause injury, it *must have done so* in the particular instance. Thus, the legal issue of "*specific* scientific causality" ("specific cause in fact") must be resolved *before* proximate cause can be.

111. True, a person cannot have created or perpetuated a risk *without* committing an act or omission. But this is not the same as saying the act *is* the proximate cause (or negligence). Even if zebras were the only creatures with stripes, this does not mean a zebra is a stripe.

112. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928)

> [O]ne who drives at reekless speed through a crowded city street is guilty of a negligent act and therefore of a wrongful, one irrespective of the consequences. Negligent the act is, and wrongful in the sense that it is unsocial . . . . If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation . . . .

113. Hernandez v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432, 437 (4th Cir. 1999) ("[I]t is well understood that negligence is '*conduct* which falls below the standard established by law for the protection of others against unreasonable risk of harm.'" (quoting RESTATEMENT (SECOND) OF TORTS § 282 (1965) (emphasis added)). Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 544 (N.J. 1982) ("negligence is conduct-oriented, asking whether defendant's actions were reasonable . . . .").

and jeopardizes rigorous assessment of whether the risk associated with the act is both epistemic and "significant."[114] Although then-Judge Cardozo himself made this mistake in *Palsgraf*, he was on the right track when he distinguished speedy drivers on a racetrack and those on a crowded public street.[115]

(ii & iii) ***"Significant" Risk & Decision Analysis (Cost-Benefit Analysis).*** For a risk associated with an act to also be a proximate cause, it must be both "significant" and inexcusable by decision analysis. The aim of these requirements, consistent with the "significant risk" principle set out in the introduction to Section IV (see *supra* text accompanying note 74), is to prioritize risk deterrence and address the most socially costly, inexcusable risks first.

We make two other observations about proximate causes. First, a plaintiff must *identify* the proximate cause. Proximate causes are therefore always *litigated* risks. Second, litigators and judges should use the expression "proximate risk," rather than the misnomer "proximate cause," to avoid continued confusion with scientific causation—both in its general and specific forms.[116] We will do so ourselves henceforth.

> ***Negligence.*** "Negligence" is a *subset* of all risks that are associated with an act. Specifically, it is any subset {A} of risks that should have been mitigated at the time the act occurred because (i) the risk(s) in {A} was/were significant and (ii) the net social cost, if the act had been so modified as to counteract any significant risk(s) in {A}, would have been less than the unaltered act's net social cost.

Negligence is a particular kind of *set* of risks ("negligent risks") associated with an act.[117] For negligence to exist, *at least one* risk must be "significant," and an *aggregate* decision analysis (see *supra* Part IV.B) must show that leaving the act unaltered has a greater total social cost than eliminating or abating some or all "significant" risks.[118]

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114. *See* Guzelian, *supra* note 51 (discussing how to form necessary "delimiters" so that risk propositions are properly stated).

115. Judges sometimes create categorical duty "rules," such that an act is presumptively wrongful, no matter what its context. In the limit, these rules blur negligence with strict liability. For instance, dynamite blasting is categorized as an "ultrahazardous" activity—harms resulting from it are presumptively recoverable. *See* Garden of The Gods Vill., Inc. v. Hellman, 294 P.2d 597, 600 (Colo. 1956) ("Where damage to property is done by vibration or concussion from blasting operations . . . there is liability irrespective of negligence . . . . [P]roof of negligence is unnecessary to establish liability."). *See also Palsgraf*, 162 N.E. at 100 (Cardozo, J.) ("Some acts, such as shooting are so imminently dangerous to any one who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer."). This author has misgivings about the widespread invocation of categorical duty rules, particularly in the context of fear, but that topic is beyond the scope of this article.

116. *See supra* note 109.

117. Some acts or omissions may have *no* known negligent risks associated with them at a given time. Understand, however, it is never permissible to pronounce such acts as "definitively" non-negligent. Because risk knowledge is a product of time and humanity's collective knowledge, uncertainties that are not known risks today may become so tomorrow.

118. *Aggregate* decision analysis proceeds much the same as decision analysis would for proximate risk. The only change is that aggregate decision analysis considers whether act

The traditional judicial concept of negligence says that an individual is still "negligent," even if the negligent risks associated with his conduct are *not* the ones being litigated.[119] Thus, a defendant could be negligent, but be exonerated from liability because he has not created a proximate risk (which is a *litigated* risk).

Identifying *all* negligent risks associated with a conduct is not necessary in practice. Instead, one should simply ask whether the *litigated* risk is a proximate risk. If the answer is no, there is no need to discuss negligence – the claim can be dismissed for want of proximate risk. If instead proximate risk exists, so too does the minimal form of negligence.[120]

> ***Duty***. (i) Duty exists for a defendant in a negligence-based cause of action if a reasonable jury could find negligence and proximate risk, (ii) unless there exists an ulterior policy motivation, unrelated to negligence and proximate risk, that compels the conclusion that liability should not attach to a defendant, (iii) Duty likewise exists, even if no reasonable jury could find negligence or proximate risk, (iv) if there exists an ulterior policy motivation, unrelated to negligence and proximate risk, that compels the conclusion that liability should attach to a defendant.

There is a hugely important difference between "duty" and the former two definitions: duty is judge-determined, but "negligence" and "proximate risk" are often jury questions.[121] Defining duty rigorously, therefore, is vital for judicial procedure.

Duty in a negligence-based action arises in one of two fashions. Per part (i) of our definition, to decide whether the issue is suited for a jury (and hence, whether a duty

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modification to avoid *any* set of significant risks (not necessarily the *litigated* risk(s)) would be net socially beneficial.

119. Dobbs gives a fine example of this conception of negligence:

> [S]uppose the defendant parks his car on the street, parallel to the curb, in a no-parking zone. This conduct is negligent because it runs the [significant] risk that traffic will be impeded, but leaving a car parked in a no-parking zone does not negligently create a risk of injury to an able bodied pedestrian. Courts are likely to say that the driver is not a proximate cause of the pedestrian's harm from walking into the car, even though other risks made it negligent to park the car in such a way.

DOBBS, *supra* note 6, § 181 at 446.

120. This is because a proximate risk is a "significant" risk not exemptable by decision analysis. Such a risk, if it exists, *also* meets negligence conditions (ii) and (iii) stated above, meaning there is a *set* of negligent risks: a set with at least one element (the proximate risk). This technique yields only the "weakest" form of negligence: only one negligent risk has been proven to exist. Observe that asking about the *litigated* risk(s) first will also avoid the similarly Sisyphean task of identifying *every* risk associated with a particular act. One simply asks whether the *litigated* causal proposition is epistemically possible.

121. *See generally* DOBBS, *supra* note 6, § 225 at 577 ("The most significant identity of limited or no-duty rules and immunity rules is that they are determined by judges or legislatures, not by juries. That is an enormous contrast with the negligence issue, which is a jury determination whenever reasonable people can differ.").

exists), a judge makes his own preliminary conclusion whether a reasonable jury could find proximate risk and negligence.

But as part (ii) of our definition states, there is a notable exception to this general rule. Courts are sometimes motivated by policy considerations to say that "no duty exists," *despite* the fact that a reasonable jury could find negligence and proximate risk.[122] What are these considerations? They can be nearly anything courts believe should affect liability that are not part of *typical* liability assessment (i.e. negligence, proximate risk, scientific cause, and injury determination). For example, the financial solvency of the defendant or a class of defendants,[123] the existence of a special relationship between litigating parties,[124] the youthful age of a defendant,[125] the scope of a governing statute (where applicable),[126] the illegality or immorality of the tortious

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122. Courts weighing duty have been remarkably lax in failing to separate negligence and proximate risk considerations—typically reserved for juries—from extra-negligence factors. Rather, many courts heap negligence-related and extra-negligence factors together in a confused mass that makes duty appear increasingly like a jury question, rather than the question of law it is. *See* DOBBS, *supra* note 6, § 229 at 583 ("[Duty] factors are so numerous and so broadly stated that they can lead to almost any conclusion.... [H]owever, they are mainly the very same factors that determine the negligence question. Yet when the question is phrased as a question of duty, the judge, not the jury, will be the decision maker, even on such quintessential jury issues as foreseeability."). Consider, for example, the factors that are to be weighed under California's test of duty:

> (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, (6) the policy of preventing future harm[,] and (7) effective judicial administration, including guarding against limitless liability.

Amaya v. Home Ice, Fuel & Supply Co., 379 P.2d 513, 522 (Cal. 1963), *overruled by* Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (rejecting *Amaya*'s holding, but not its duty factors). Factor 1 assesses whether the tort case is based in negligence. Factor 2 is akin to negligence's foreseeability prong. Factor 3 touches on actual causality and certainty of injury, two other traditional requirements for recovery. Factor 4 is a vague description of proximate cause. Factor 5 is a vague factor that could represent effectively anything, but if reduced to an "economic" set of considerations, represents the cost-benefit prong in the definition of negligence. Factor 6 is related to the "significance" prong of the negligence definition. Thus, only Factor 7—judicial administrative ease and curbing the risk of a litigation flood—appears to be a purely "extra-negligence" consideration.

123. *See* Christopher Guzelian, *Liability & Fear*, 65 OHIO ST. L.J. 713, 849 (2004).

124. Lough by Lough v. Rolla Women's Clinic, 866 S.W.2d 851, 854 (Mo. 1993) ("[I]n determining existence of a duty, . . . a relationship between the parties where one is acting for the benefit of another . . . plays a role.").

125. Except where children are engaged in adult activities (such as driving), courts typically hold that children under the age of six or seven are conclusively presumed to lack sufficient risk comprehension to be held liable. *See* Price v. Kitsap Transit, 886 P.2d 556 (Wash. 1994).

126. This concept—that no rule is intended to remedy each type of conceivable loss or harm—has been advocated particularly in the German civil law system, which refers to it as "Normzweck" ("Legal Purpose"). *See e.g.*, J.G. WOLF, DER NORMZWECK IM DELIKTSRECHT. EINE

conduct,[127] social custom,[128] or any combination of the above[129] have been such extra-negligence factors.[130]

The second form of duty (Elements (iii) and (iv)) is assessed *independent of negligence or proximate risk considerations*. Intentional tort and strict liability duties often take this form, as do some categorical duty rules in negligence cases that are motivated by extra-negligence factors, such as special relationships.

VI. JOINT TORTFEASOR LIABILITY

A final contribution of Kindynamic Theory is that it is the first tort theory to objectively allocate liability for a single injury among *multiple* alleged tortfeasors. We report on how it does so in the following two subsections.

A. Enabling Tort

Liability usually involves two parties: an injured plaintiff ("π") and a tortfeasor (call him the "Secondary" ("2°")). This traditional liability arrangement appears as:

DISKUSSIONSBEITRAG (1962); E. VON CÄMMERER, DAS PROBLEM DES KAUSALZUSAMMENHANGE IM RECHTE, BESONDERS IM STRAFRECHTE (1956). *But see* Kernan v. Am. Dredging Co., 355 U.S. 426 (1958) (holding defendant liable where his tug carried a kerosene lamp closer to the water than the required 8-foot minimum and exploded upon entering petroleum-laden waters, even though statutory prescription was only intended to prevent collisions).

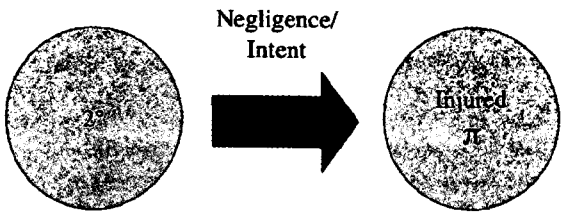
127. Zysk v. Zysk, 404 S.E.2d 721, 722 (Va. 1990) ("A party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequence of that act." (*quoting* Miller v. Bennett, 56 S.E.2d 217, 218 (Va. 1949))). *But see* Doe v. Roe, 841 F. Supp. 444, 447 n.8 (D.D.C. 1994) (condemning *Zysk*'s categorical bar because it ostensibly frustrates efforts to deter the spread of sexually transmitted diseases).

128. *See* Richard Epstein, *The Path to T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEG. STUDIES 1 (1992) (theorizing which classes of defendants should be made liable under social custom).

129. *See e.g.*, Burgess v. Superior Court, 831 P.2d 1197, 1200-01 (Cal. 1992) (finding the duty supporting a direct victim negligent infliction of emotional distress case can have three alternative origins: (1) it can be a duty assumed by defendant, or (2) it can be a duty imposed on defendant by law, or (3) it can be a duty arising out of a preexisting relationship between defendant and plaintiff).

130. Because it is commonly accepted that judicial administrative ease should not come at the expense of individual justice, it is not usually explicitly cited as an extra-negligence factor. *See* John C.P. Goldberg, *20th Century Tort*, 90 GEO. L.J. 513, 534 (2002) ("The abstract idea of "policy" [or "administrability"]—for which no criteria have been developed—can just as readily support decisions to limit or not limit particular forms of negligence liability. Even if rendered adequately determinate, it often seems unable to explain limits on negligence liability.").

Figure 3
Traditional Tort



Stanford Professor Robert Rabin, however, has described an important shift, which he calls "enabling tort," in how the common law assigns negligence-based liability:[131]

> [Enabling tort] comes to full flowering in our risk-saturated closing decades of the twentieth century—an epoch in which our perceptions of hazards in the neighborhood, workplace, and environment have reached unprecedented heights. In this milieu, blameworthiness is not so readily confined as was the ease in times past. Beyond the immediate perpetrator of harm, the victim perceives the individual, or more often, the enterprise, that set the stage for the suffering that unfolded. The Enabler.[132]

Blaming Enablers adds a third, fourth, or more parties to the liability dance, depending on how far we want to extend "reachback" liability. Rabin observes the Enabler does not *himself* commit the final act leading to injury,[133] but is still liable for bolstering another's tortious risk.[134] Assuming there is one "Enabler" (we will

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131. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999). This shift was actually *predicted* first by Hart and Honoré. *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 284 (2d ed. 1985) ("[T]he law is in a transition from a stage at which liability was based almost exclusively on negligently causing harm to one in which it is based not merely on causing harm but also on exposing others to a risk of harm by providing other persons or things with the opportunity of doing harm. Probably the future will see a considerable extension of the latter form of liability."). *See also* LEONARD TALMY, TOWARD A COGNITIVE SEMANTICS 504–09 (2000) (describing same).

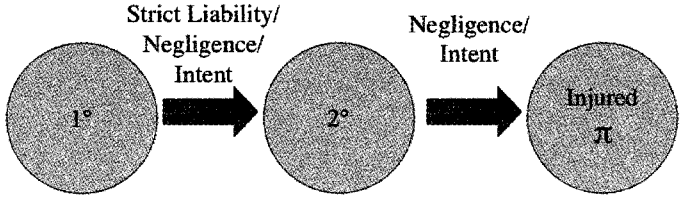
132. Rabin, *supra* note 131, at 437–38.

133. Thus, enabling torts are not the same as "legally concurrent" causes of injury. *See* Watts v. Smith, 134 N.W.2d 194 (Mich. 1965) (plaintiff suffering an indivisible injury in two unrelated car crashes on the same day can recover jointly and severally from the unrelated tortfeasors).

134. Rabin, *supra* note 131, at 450 ("[T]he essential element in enabler responsibility is that a dangerous 'instrumentality' has been put in the hands of a third-party with a foreseeable expectation that a 'remote' victim will suffer harm."). Rabin's requirement that victims be "remote" (i.e. "innocent") has been relaxed in many circumstances. For example, in recent tobacco suits, individual smokers have been able to recover, despite their own complicity in smoking, because of negligent or intentional concealment by the tobacco industry of internally generated "addiction" data. *See, e.g.*, Whiteley v. Phillip Morris, Inc., 11 Cal. Rptr. 3d 807 (Cal. Ct. App. 2004). Criminal law too has assigned liability for those who negligently assist suicide victims. *See, e.g.*, People v. Kevorkian, 527 N.W. 2d 714 (Mich. 1994).

symbolize him as the "Primary" ("1")) demands modification of Figure 3's traditional liability scheme as follows:

Figure 4
Facilitated Tort



Observe that the general *form* enabling tort takes—"*facilitated tort*"—is not new. For example, law penalizes *intentional* facilitation of a crime (think of conspiracy),[135] and manufacturers are strictly liable for defective product designs, even if another person is the direct cause of injury.[136]

Conversely, enabling tort—that class of facilitated torts in which an Enabler suffers liability when it is specifically his *negligence* (as the term is customarily used)—has only recently begun to emerge:[137]

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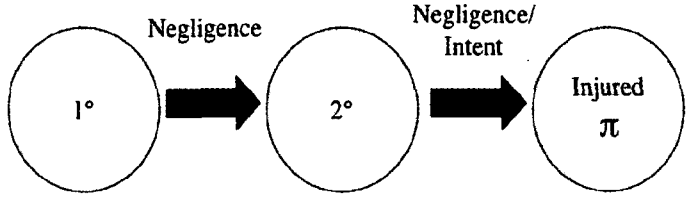
135. *See* MODEL PENAL CODE § 5.03(a) (1962)

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

136. For example, handgun manufacturers have been sued under strict liability theories for failure to put trigger-locks on their guns. *Compare* Turley & Harrison, *Strict Liability of Handgun Suppliers*, 6 HAMLINE L. REV. 285 (1983) (proposing strict liability for handgun manufacturers under the product liability principles of RESTATEMENT (SECOND) OF TORTS § 402A (1964)), *with* Martin v. Harrington and Richardson, Inc., 743 F.2d 1200, 1206 & n.2 (7th Cir. 1984) (Cudahy, J., concurring) (discussing possible strict liability of handgun manufacturers under the ultrahazardous activity principles of Restatement (Second) of Torts §§ 519-520 (1976)). *See also* Soule v. Gen. Motors Corp., 882 P.2d 298 (Cal. 1994) (holding auto manufacturer liable for injuries resulting from "defective" wheel and floorboard mounting when driver was struck by another driver who careened out of control).

137. Traditional tort law did not hold Enablers liable. Oliver Wendell Holmes rejected negligence-based Enabler liability in a famous law review article, Oliver Wendell Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1, 10 (1894). ("The principle seems to be pretty well established, in this country at least, that every one has a right to rely upon his fellow-men acting lawfully, and, therefore, is not answerable for himself acting upon the assumption that they will do so, however improbable it may be."). Recognizing that his rule would provide too much shield from liability for certain Primaries, Holmes conceded that liability could be assessed against a Primary if "he intended to bring about consequences to which that unlawful

Figure 5
Enabling Tort



The traditional prohibition on negligence-based "enabler" liability is ending. A century after Oliver Wendell Holmes specifically rejected enabler liability for handgun manufacturers,[138] Rabin's chief example of enabling tort is recent (sometimes successful[139]) litigation against the handgun industry. The enabling theory is that these

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act was necessary." *Id.* at 11. *Intent* was Holmes's dividing line for facilitator liability. This means he categorically rejected enabling tort.

Criminal law, in contrast, has already shifted to an "enabling model"; often it condemns negligent enabling acts where the Secondary tortfeasor commits a crime. Kevorkian, 527 N.W.2d at 738 n.70 ("[T]here may be circumstances where one who recklessly or *negligently* provides the means by which another commits suicide could be found guilty of a lesser offense, such as involuntary manslaughter." (citing People v. Duffy 595 N.E.2d 814 (N.Y. 1992)) (emphasis added)). *See also* Persampieri v. Commonwealth, 175 N.E.2d 387 (Mass. 1961) (convicting husband of manslaughter after taunting drunken and possibly suicidal wife and showing her location of and means to use handgun); State v. Bier, 591 P.2d 1115 (Mont. 1979) (upholding husband's negligent homicide conviction for placement of gun near drunken wife who committed suicide); Zinck v. Whelan, 294 A.2d 727, 730 (N.J. Super. Ct. App. Div. 1972) ("A substantial and growing number of jurisdictions, though still a minority, have held, in the ordinary fact case of theft [of car keys] and accident within a reasonable time thereafter that there are at least jury questions as to duty, negligence, and proximate cause [of a negligent car owner] . . . ."). *But see* Mays v. City of East St. Louis, 123 F.3d 999, 1003 (7th Cir. 1997) ("A person whose negligence just sets the stage for a criminal act generally is not liable for ensuing injury. For example, a person who negligently leaves a car unattended, with the keys in the ignition, is generally not liable to a person injured by a thief driving the car."); Wise v. Superior Court, 272 Cal. Rptr. 222 (Cal. Ct. App. 1990) (finding, in the absence of a special duty, that wife of a sniper who shot plaintiff from his roof is not liable for her failure to warn plaintiff about her husband).

138. Holmes posed an "enabling tort" hypothetical in 1894 that must strike an eerily prophetic note with a modern crowd when he wrote: "[W]hy is not a man who sells fire-arms answerable for assaults committed with pistols bought of him, since he must be taken to know the probability that, sooner or later, someone will buy a pistol of him for some unlawful end?" Holmes, *supra* note 137, at 10 (concluding that the gun manufacturer shouldn't be liable).

139. Ileto v. Glock, Inc., 349 F.3d 1191 (9th Cir. 2003) (finding duty under negligent distribution theory); NAACP v. AcuSport, Inc., 271 F. Supp.2d 435, 490-91 (E.D.N.Y. 2003) (rejecting liability on other grounds, but acceding that "a duty of care could be imposed on gun manufacturers where there [i]s a 'tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries and ... defendants were realistically in a position to prevent the wrongs.'" (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1062 (N.Y. Ct. App. 2001))); Hamilton v. Accu-Tek, 62 F. Supp.2d 802 (E.D.N.Y. 1999) (awarding damages under negligent distribution theory). *But cf.* McCarthy v. Olin Corp., 119 F.3d 148 (2d

corporations share responsibility for handgun deaths and injuries as a result of conscious or negligent oversupply of markets with lax gun laws.[140]

Other enabling torts have recently emerged: second-hand smoke litigation,[141] defective products that the Secondary has negligently manipulated or altered,[142] property owners with inadequate security measures in crime-ridden neighborhoods,[143] negligent municipalities or companies whose poor maintenance of defective roadways or property contributed to injuries caused by negligent drivers,[144] vicarious employer liability or *respondeat superior* claims,[145] failure of an employer to provide work areas

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Cir. 1997) (finding bullet manufacturer did not have duty to control distribution of ammunition to protect against gunman's act in opening fire).

140. Rabin, *supra* note 131, at 435–36.

141. *See* Broin v. Philip Dobbs Cos., 641 So. 2d 888 (Fla. Dist. Ct. App. 1994) (certifying a class in an action by flight attendants for their alleged second-hand smoke injuries).

142. Although most product liability cases proceed in strict liability a few Enablers have been held liable for *negligence* in product manufacture. *See* Liriano v. Hobart Corp., 700 N.E.2d 303, 308 (N.Y. 1998) (requiring duty to warn of foreseeable risks of harm even when there is no design defect liability).

143. Sharon P. v. Arman, Ltd., 65 Cal. Rptr. 2d 640 (Cal. Ct. App. 1997) (liable owner of parking complex in which plaintiff had been sexually assaulted, despite no prior incidents); Zuniga v. Hous. Auth., 48 Cal. Rptr. 2d 353 (Cal. Ct. App. 1995) (public housing authority liable for failing to make arrests or erect safety barriers in building, where tenants died as a result of arson); Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970) (landlord duty to protect against third-party violence); Carlisle v. Ulysses Line Ltd., S.A., 475 So. 2d 248 (Fla. Ct. App. 1985) (cruise line failed to warn or protect against masked gunman in port); Tenney v. Atl. Assocs., 594 N.W.2d 11 (Iowa 1999) (landlord liability for negligently supervising lock changes and key issuance where tenant was raped in apartment); Cruz v. Middlekauff Lincoln-Mercury, Inc., 909 P.2d 1252 (Utah 1996) (keys left in car where theft was likely means defendant may be proximate cause of harms done by thief while trying to escape police). *But see* Ann M. v. Pac. Plaza Shopping Center, 863 P.2d 207 (Cal. 1993) (no duty of shopping mall retail store owner to provide security absent previous incidents); Leslie G. v. Perry & Assoc., 50 Cal. Rptr. 2d 785 (Cal. Ct. App. 1996) (rejecting landlord liability where only evidence of negligence was expert's testimony that rapist was attracted to and entered the garage because of broken security gate).

144. Bigbee v. Pac. Tel. & Tel. Co., 665 P.2d 947 (Cal. 1983) (jury question whether telephone company is liable when man in phone booth with a faulty door could not escape car veering onto sidewalk); McKenna v. Volkswagenwerk Aktiengesellschaft, 558 P.2d 1018 (Haw. 1977) (city liable for constructing defective road shoulder where negligent driver caused accident); Cruz v. City of New York, 218 A.D.2d 546 (N.Y. App. Div. 1995) (construction crew leaving hole in road where negligent driver drove into it, became immobilized, and a second car struck the first, injuring the second driver); Harvey v. Hansen, 445 A.2d 1228 (Pa. Super. 1982) (sign obstruction by bushes facilitating vehicles' collision).

145. Warner Trucking, Inc. v. Carolina Cas. Ins. Co., 686 N.E.2d 102 (Ind. 1997) (employer may still be liable for intoxicated driver's actions, even if driving in violation of company rule); Foster v. The Loft, Inc., 526 N.E.2d 1309 (Mass. Ct. App. 1988) (failure to properly screen formerly convicted bartender who punched plaintiff); McLean v. Kirby Co., 490 N.W.2d 229 (N.D. 1992) (employer hiring door-to-door salesman without conducting simple and revealing background check liable for salesman's rape of potential buyer); Christensen v. Swensen, 874 P.2d 125 (Utah 1994) (setting standards for vicarious employer liability for employee's negligence toward third party during course of employment).

safe from third-party dangers,[146] media or publisher "inducement" of negligent or reckless behavior,[147] liability for Enablers where Mother Nature is the intervening cause of harm,[148] lawsuits against both tobacco and the fast food industry in which the plaintiffs cast themselves as "remote victims" as a result of the products' purported addictiveness,[149] and perhaps even crime-enabling speech.[150]

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146. Lillie v. Thompson, 332 U.S. 459, 461–62 (1947) (holding railroad company liable for assault upon woman employee).

> Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence.

Id. See also Derdiarian v. Felix Contracting Corp., 414 N.E.2d 666 (N.Y. 1980) (employer who failed to erect adequate traffic barricade liable to plaintiff construction worker struck and injured by negligent driver).

147. Weirum v. RKO Gen., Inc., 539 P.2d 36 (Cal. 1975) (disc jockey announcing that first listeners to drive to his location would win prize liable for vehicular death caused by listeners' reckless driving). *But cf.* Rice v. Paladin Enter.'s, Inc., 128 F.3d 233 (4th Cir. 1997) (where writer *conceded intent* in publishing tutorial on murder was to assist crime perpetrators, liability attaches); Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888 (1981) (negligence alone not enough to create liability for television broadcaster's inducing viewer to commit "copycat" crime).

148. Gallick v. Baltimore & O. R. Co., 372 U.S. 108 (1963) (finding jury question of employer's negligence where employee working near a standing pool of water was bitten by an insect and suffered life-threatening infection); Bradford v. Universal Constr. Co., 644 So. 2d 864 (Ala. 1994) (unsecured plywood sheets that wind blew into plaintiff); Lanz v. Pearson, 475 N.W.2d 601, 603 (Iowa 1991) (Act of God jury instruction denied because icy and obscured highway conditions could have been "reasonably anticipated."). *But see* Memphis & C.R. Co. v. Reeves, 77 U.S. (10 Wall.) 176 (1869) (no liability for delayed tobacco shipments destruction due to "unexpected" and "sudden and extraordinary" flood); Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp., 887 P.2d 848 (Utah 1994) ("no duty" to protect against "unforeseeable" flooding). At least one court has noted where a defendant was negligent *and* the inclement conditions were extraordinary and "unforeseeable," the liability "concurs" and the defendant remains liable for the whole of the harm done. Lang v. Wonnenberg, 455 N.W.2d 832 (N.D. 1990). This ruling is equivalent to a joint-and-several liability rule that imposes all financial burden on the Primary where the Secondary is not reachable.

149. For example, class action attorneys have recently targeted the fast food industry in enabling-style lawsuits. *See* Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (dismissing lawsuit for lack of specificity against McDonald's restaurants for allegedly contributing to minors' obesity). The theory for recovery is that these fast food chains have concealed their aim and internal research efforts to improve the taste of their calorie-laden food products to make them more "addicting," and that these foods, consumed in excess, contribute to the myriad health conditions associated with obesity. *See* ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL (2d ed. 2002) (describing emergence of "flavor industry" to increase sales of American fast food products). Similar lawsuits against tobacco companies are now familiar. Rabin disputes that these are true enabling torts, insomuch as the injured third parties are also responsible. Nonetheless, by asserting the "addictiveness" of

While these examples confirm enabling torts newfound popularity, many counter-examples persist.[151] Such inconsistency must be explained. Rabin, like Richard Posner before him,[152] asserts that the "inconsistency" in applying enabling tort is nothing more than proper determination of which party is best suited to bear liability.[153] This view equates liability with *capability or suitability to provide social insurance*.[154] However appealing Rabin's theory may be prescriptively,[155] it is not the motivation behind the new popularity of enabling tort. Courts assume much more righteous airs, invoking terms such as "fairness" or "morality" to justify the reachback liability they place on Primaries. These are judicial fighting words, not bland cost-benefit musings.[156]

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these products, the plaintiffs are clearly trying to shift liability from themselves to the Enablers to conform their lawsuits to the now-recognized form of enabling tort. *See generally* Little v. York County Earned Income Tax Bureau, 481 A.2d 1194, 1201 (Pa. Super. Ct. 1984) (woman incarcerated for failure to pay income taxes can recover emotional harms damages from negligent tax advisor).

150. Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

151. Brewer v. Teano, 47 Cal. Rptr. 2d 348 (Cal. Ct. App. 1995) (no recovery against deceased's estate for emotional harms stemming from arrest and prosecution where plaintiff's car had been struck by deceased's, but plaintiff fled the scene in apparent fear of the deceased and was arrested on suspicion of felony hit and run); Poskus v. Lombardo's of Randolph, Inc., 670 N.E.2d 383 (Mass. 1996) (no Enabler liability for negligent valet service when police officer suffered injury arresting car thief who had already abandoned vehicle); Sheehan v. City of New York, 354 N.E.2d 832 (N.Y. 1976) (no Enabler liability where bus in violation of traffic regulations did not pull over to curb when stopping and was struck from behind by negligently driven garbage truck, injuring bus passenger); Johnson v. Angretti, 73 A.2d 666 (Pa. 1950) (no liability for bus company where bus negligently stopped in the road and another driver negligently tried to overtake the bus but struck and killed oncoming car's driver); Newton v. S.C. Public Rys. Comm'n, 462 S.E.2d 266 (S.C. 1995) (defendant employed to maintain malfunctioning railroad crossing signal not liable when plaintiff stopped as a result of signal and was struck from behind by negligent driver who failed to halt); Phan Son Van v. Peña, 990 S.W.2d 751 (Tex. 1999) (storeowner who negligently and illegally sold alcohol to minors not liable for subsequent murder commission). Other counter-examples are offered throughout notes 143–48, *supra*.

152. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (arguing that responsibility, especially in civil law, should be placed on the person who is in the best place to most cheaply avoid the loss).

153. For example, Rabin concludes for crime-ridden property cases: "[n]ot only is the renter in a better position than the tenant to adopt precautionary measures, but the renter is better situated than the police to diminish the risk of criminal assault on the premises—the police, after all, cannot be expected to patrol the interiors of large residential apartment buildings and to exercise vigilance in private spaces." Rabin, *Enabling Torts*, *supra* note 131, at 444. Is this really why Enabler liability is increasing?

154. Rabin concedes that an implicit but important motivation behind some enabling torts may simply be an attempt to reach solvent pocketbooks. *Id.* at 444 (suggesting a major motivation of enabling tort "is the inability to effectively reach the putative [Secondary] wrongdoer himself, either through criminal or tort sanctions. This is the...link to creating responsibility for enabling behavior.").

155. Kindynamic Theory rejects Rabin's theory as inconsistent with the major goals of tort law. *See supra* text at Part I.

156. *In re* Kinsman Transit Co., 338 F.2d 708, 719 (2d Cir. 1964) ("[T]he discredited notion that only the last wrongful act can be a [liable] cause [is] a notion as faulty in logic as it is wanting in fairness."); Michael S. Moore, *The Metaphysics of Causal Intervention*, 88 CAL. L.

Kindynamic theorists assert that the reason for confusion and incorrect theories about when enabling tort is the suitable form of liability stems from a lack of rigorous *quantification* of the Primary's and Secondary's respective risk contributions. Without knowing *how much* risk of a future injury an agent contributes, it is an utterly futile proposition to apportion to him any particular amount of blame or to have confidence that that liability is a "deterrent" commensurate with that actor's risk contribution. Yet courts are universally lacking a rigorous risk quantification metric, namely EBL and decision analysis.[157] Moreover, varied and inconsistent terminology obscures the causal principles behind "enablement."[158] Absent risk quantification and a solid understanding of the causal principles that underlie tort law, we should hardly be surprised that recent commitment to enabling torts appears to some as proof that tort is "out of control" or "arbitrarily" decided. Yet, as we report next, Kindynamic theorists offer a new consistent method for establishing when to (and when not to) extend liability to Enablers.

REV. 827, 828 (2000) ("It is morality, not legal policy, that tells us that actions that cause harm are more blameworthy than those that merely attempt or risk such harm."). *Cf.* U.S. v. Gottshall, 512 U.S. 532, 543 (1994) ("FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur." (quoting Ellis v. Union Pacific R.R. Co., 329 U.S. 649, 653 (1947))).

157. It is evident that courts *desire* some workable risk calculus in enabling tort. Consider, for instance, one federal court's implicit adoption of a primitive risk assessment for handgun liability:

> "Duty" at its essence is a question of policy. While there is a general reluctance to impose liability where harm results in part from the conduct of third-party tortious or criminal conduct,...a duty of care could be imposed on gun manufacturers where there was a tangible showing that defendants were a direct link in the causal chain that resulted in the plaintiffs' injuries and defendants were realistically in a position to prevent the wrongs. A showing of a direct link between the negligenee and damage to the public at large ensures that there is no threat of a specter of limitless liability. *Important in the determination is that a plaintiff not rely merely on the foreseeability of harm to attempt to hold all members of an industry liable, but rather present evidence tending to show to what degree the risk of injury was enhanced by the presence of negligently or intentionally harmfully marketed and distributed guns.*

NAACP v. AcuSport, Inc., 271 F. Supp.2d 435, 490-91 (E.D.N.Y. 2003) (emphasis added) (citations omitted).

158. Commentators, including courts, have sometimes described Rabin's "enablement" as "indirect causation." Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1065 (9th Cir. 1996) (referring to habitat alteration as "indirect cause of harm" for interpretation of Endangered Species Act); Erich J. Greene & John M. Darley, *Effects of Necessary, Sufficient, and Indirect Causation on Judgments of Criminal Liability*, 22 LAW & HUM. BEHAV. 429, 439-41 (1998). Others have indicated that language patterns may be to blame for proper understanding of enabling causality. For example, one pair of authors has shown psychological differences prompt some to write statements such as "the plant bloomed" and others to write "the gardener caused the plant to bloom." The authors contend that the linguistic similarity of these statements encourages judges to bypass causality issues without critically considering causal differences in these statements. Lawrence M. Solan & John M. Darley, *Causation, Contribution, and Legal Liability: An Empirical Study*, 64 LAW & CONTEMP. PROBS. 265, 279-80 (2001).

B. Kindynamic Modes of Joint Tortfeasor Liability: Traditional, Enabling, and Leapfrogging Liability

The usual test for assessing division of liability among multiple parties asks whether a Secondary is a *superseding cause*.[159] In the traditional model (*see supra* Figure Three), a superseding cause exists and only the Secondary is liable. In enabling tort, no superseding cause exists and both Enabler and Secondary are liable (*see supra* Figure Five).

The existence of a superseding cause usually turns on "reasonable foreseeability."[160] We already have seen the problems with "foreseeability;" to be consistent in allocating liability, we need a better delimiting definition of superseding cause.

Two fact patterns can clarify what "superseding cause" is getting at. Construction employee A is working on a busy public highway near traffic. Employer B, without statutory obligation to do so,[161] erects a barricade to protect A and others. An automobile veers out of control and crashes through the barricade. Stronger barricades

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159. Dobbs attempts to explain superceding cause's motivation:

> A ruling that an intervening actor is a superseding cause embodies the dual conclusion that the intervening actor should be responsible and that the original actor, iu spite of his causal negligence, should not.... [I]n contemporary law, when courts then ask what counts as a superseding cause...[t]he rule is that if the intervening cause itself is part of the risk negligently created by the defendant, or if it is reasonably foreseeable at the time of the defendant's negligent conduct, then it is not a superseding cause at all. In that case, the defendant is not relieved of liability merely because some other person or force triggered the injury.

DOBBS, *supra* note 6, § 186, *citing* RESTATEMENT (SECOND) OF TORTS, §§ 442(A)-(B). However, like others before him, Dobbs is linguistically hampered by a lack of firm definitions for negligence and proximate risk. *See* ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); Glanville Williams, *The Risk Principle*, 77 L. Q. REV. 179 (1961); Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 371 (1939).

160. Duphily v. Delaware Electric Coop. Inc., 662 A.2d 821, 829 (Del. 1995)

> If the intervening negligence of a third party was reasonably foreseeable, the original tortfeasor is liable for his negligence because the causal connection between the original tortious act and the resulting injury remains unbroken. If, however, the intervening negligence was not reasonably foreseeable, the intervening act supersedes and becomes the *sole* proximate cause of the plaintiff's injuries, thus relieving the original tortfeasor of liability.

Id. (emphasis in original) (citations omitted).

161. The issue of inferring negligence or proximate risk from statutory non-compliance complicates risk analysis, and thus, liability analysis. Statutes can be generated by politics or other factors, rather than pure risk analysis. If a statute is divorced from optimal Kindynamic policy, non-compliance *does not* mean a person is negligent, yet the legal presumption usually given to non-compliance is that the person *is* negligent. Cass Sunstein has championed the evident way to solve this deadlock: create administrative and legislative policies that are rooted in Kindynamic analysis, not politics. CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT (2002). If Sunstein's vision is achieved, illegality would become a better proxy of negligence or proximate risk.

could have slowed, perhaps stopped, the careening car. A is injured by the car. B is probably liable to A.[162]

Now imagine a permutation: an airplane crashes on the highway, slides down the road and breaks through the barricade. It causes exactly the same injuries to A as the car collision would have. There are barricades that can shield against sliding airplanes, but they are quite expensive. B is probably not liable to A.[163]

Most people should have an intuitive understanding of the difference in these liability results: an airplane strike seems "extraordinary," while a car collision seems "normal." Our intuition, while correct, conceals that there are *two* pertinent differences. First, the likelihood of being struck by an airplane while working on an urban street is orders of magnitude lower than the likelihood of being struck by a car.[164] Thus, airplane strikes are less likely to amount to a "significant" risk than are vehicular collisions. The second difference is a cost-benefit consideration: the airplane barricade is much more expensive than is a vehicular barricade. Even if the risks of an airplane strike and a vehicular strike were *equally* likely, the marginal risk reduction benefit from investment in a vehicular barricade would be greater than from investment in airplane barricades. Kindynamic Theory urges investment of risk-reducing dollars in the most efficient manner possible.

These examples make evident that "reasonable foreseeability," the fulcrum on which superseding cause currently rests, should be replaced by our definition of proximate risk (see boxed text at note 109 *supra*). Kindynamic Theory accordingly rewords the superseding cause test:

> If a tortfeasor creates a proximate risk and if relevant duty exists, there is no superseding cause for that tortfeasor.

A Secondary's acts may (1) cause *new*, *additional* risks; *or* (2) amplify *existing* risks. If a Secondary creates a *new* risk, a Primary obviously shares no liability. But if a Secondary *amplifies* a risk to which the Primary also contributed, multiparty liability allocation is not as simple. One must then ask: what would the risk have been *in the absence* of the Secondary's behavior? Would the Primary's risk have been "significant" *on its own*? To see this concept better, consider the following diagram (assume the "significant" risk threshold is 0.3):

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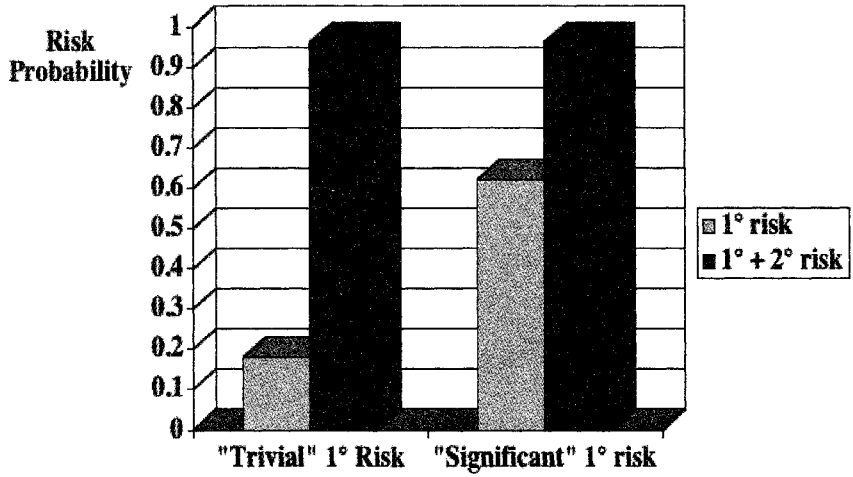
162. *See* Derdiarian v. Felix Contracting Corp., 414 N.E.2d 666 (N.Y. 1980) (finding liability for this fact pattern). In this example, we are assuming that the cause of action is negligence, not workman's compensation.

163. *See* Doss v. Town of Big Stone Gap, 134 S.E. 563 (Va. 1926) (finding no liability for alleged negligence of city in forcing vehicular detour around impassable road where decedent was struck and killed by an airplane while on detour).

164. Kimberly M. Thompson et al., *The Risk of Groundling Fatalities from Unintentional Airplane Crashes*, 21 RISK ANALYSIS 1025 (2001) (estimating the total lifetime risk of a groundling being killed by an airplane to be approximately nine in ten million persons, with the risk "rapidly declining" outside the first two miles around an airport).

Figure 6
Risk "Significance": A Requirement for Individual Liability



To set liability for jointly caused risks, it is essential to quantitatively determine whether that *fraction* of the total risk attributable to a Primary is a proximate risk *on its own*. Even if the Primary's risk contribution is "significant," his actions may be economically justified and therefore still not create a proximate risk.[165] But if not, the judge will conclude that a reasonable jury could find the Primary to have created a proximate risk.[166]

To assess a *Secondary's* liability for *amplifying* an *existing* risk, the same method applies: first one subtracts the Primary's risk contribution from the total risk. If the remaining risk fraction attributable to the Secondary is "significant"—and observe that nothing invariably requires the "significant" risk cut-off be the same for a Secondary and a Primary—the Secondary has contributed an *independent* proximate risk if his act is unexcused by decision analysis or duty.[167]

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165. *See supra* Part IV.B.

166. Even this doesn't mean Primary liability follows automatically. Procedurally, a judge determines *duty*, not proximate risk. A policy consideration, unrelated to negligence or proximate risk, could still militate against finding a duty. But if there is no such policy concern, the case goes to a jury, which will (re)deliberate the issues of negligence and proximate risk to set liability. Note that even after being released to a jury, cases can be dismissed on other grounds such as failure to demonstrate actual causality or injury, or for procedural or jurisdictional reasons.

167. Note that for a Secondary to be liable *every* element of proximate risk must be met, *independent of other risk contributions*. For instance, there is a temptation to erroneously place liability on the Secondary if his amplification of extant risk causes the *total* risk—not his *individual contribution to that total*—to be significant. *See* Lipke v. Celotex Corp., which held:

> [O]ne guilty of negligence cannot avoid responsibility merely because another person is guilty of negligence contributing to the same injury. Under *Romine v. City of Watseka* (1950), 341 Ill. App. 370, 377, 91 N.E.2d 76, where such guilt

Up to now, we have discussed two ways liability is allocated among multiple tortfeasors: traditional and enabling tort. Kindynamic Theory recognizes *a third* form of liability allocation, "*leapfrogging tort.*" Leapfrogging tort, like enabling tort or traditional tort, involves a Secondary who (1) creates a new (additional) proximate risk,[168] *or* (2) amplifies an *existing* risk of the Primary's. For example: Driver *A* creates a risk of injurious collision with each of two pedestrians, *B* and *C*. To escape injury, *B* dives out of the car's path. *A* swerves and grazes *C*. Simultaneously, *B*'s dive knocks *C* down, breaking *C*'s arm. This broken arm would not have occurred if *A* alone had grazed *C*. *C* can recover against *A* but not *B* for his broken arm.[169]

The conceptual premise of leapfrogging tort is subtle to catch particularly because it is unintuitive that the last contributing agent in a causal chain known to lead to harm assumes no liability. Yet this is exactly what sometimes happens.[170] The implication of leapfrogging tort is that *all* liability hypasses the Secondary actor and accrues entirely to Enablers upstream (in the two-person model, to the Primary). If those Enablers also did not *individually* create proximate risks, there simply is no liability, even if there has been cognizable injury.

> exists, '*it is no defense that some other person, or thing contributed to bring about the result for which damages are claimed.* Either or both parties are liable for all damages sustained'. Thus, *the fact that plaintiff used a variety of asbestos products does not relieve defendant of liability for his injuries. Evidence of such exposure is not relevant.*

505 N.E.2d 1213, 1221 (Ill. App. Ct. 1987) (emphasis added). *See also* Kochan v. Owens-Corning Fiberglass Corp., 610 N.E.2d 683 (Ill. App. Ct. 1993) (same).

Further, a Secondary may amplify extant risk—perhaps even "significantly"—but has still not created a proximate risk if decision analysis exonerates his act. In such an instance, liability for the Secondary's "significant" but economically justifiable risk increase could be assigned jointly and severally to those tortfeasors who *did* create a proximate risk of that injury. *But cf.* Kennedy v. Southern Calif. Edison, 268 F.3d 763 (9th Cir. 2001) (finding, in a multifactorial causation case, that microscopic particles fo radioactive material that the plaintiff's husbad carried home on his work clothes was not a substantial factor in causing her leukemia, where the court defined "substantial" as something more than "negligible" or "infinitesimal" or "theoretical").

168. This includes the class of "rescue" cases in which a person who aids the victim of a negligent tortfeasor is himself injured in the rescue attempt. In the rescue cases, the rescuer has created a *novel* risk of harm—injury to himself—rather than having *amplified* the extent or likelihood of injuries to the original victim. *See* Thomas v. Garner, 672 N.E.2d 52 (Ill. App. Ct. 1996); Solomon v. Shuell, 457 N.W.2d 669 (Mich. 1990); Wagner v. Int'l. R.R. Co., 133 N.E. 437 (N.Y. 1921).

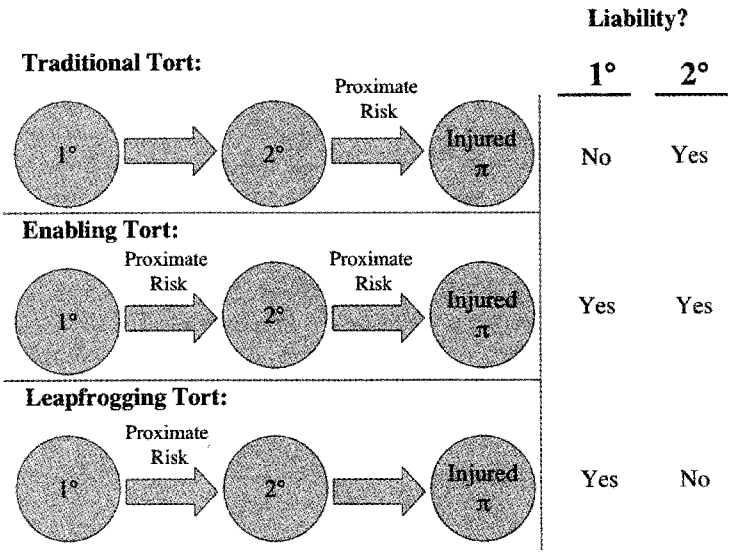
169. *See* RESTATEMENT (SECOND) OF TORTS § 445cmt. C, illus. 3 (1965) (describing leapfrogging tort by example: "A negligently drives his car so as to endanger B in the street. To escape being hit B leaps out of the way. In doing so he knocks down C, who was not in the path of the car. A's liability to C will depend upon whether he should have realized when driving that such a person in the vicinity of B might be injured by his negligent driving.").

170. Consider, for instance, emotional harms or fear claims. In such cases, risk communicators—who often are the ultimate "cause" of fear—almost universally escape liability, while physical injurers who have allegedly placed a plaintiff at physical risk must pay the entirety of the fear or emotional harm claim, sometimes even if that fear is irrational. *See generally* Christopher P. Guzelian, *Liability & Fear*, 65 OHIO ST. L.J. 713 (2004).

Kindynamic Theory corrects perennial oversights about *why* enabling tort is coming into vogue. Enabling tort *always* should have been recognized. The long-running failure to do so consistently is attributable to misconceptions about risk. How could courts expect to correctly identify *multiple* proximate risks resulting in a single harm, as in enabling tort, when judges have enough trouble identifying *single* proximate risks? Undoubtedly similar misapprehensions explain why leapfrogging tort has not even been named before. But under Kindynamic Theory, torts involving two causal actors can result in three distinct modes of liability assignment:[171]

171. We have been working with the simplest form of enabling tort: cases with two alleged tortfeasors. But the principles are generalizable. If there are N accused tortfeasors, liability should accrue to however many of those actors have created independent proximate risks. To do this in practice, one should calculate the total risk and then determine each of the N actors' potential proximate risk creations by beginning farthest *upstream* in the causal chain. Each layer of risk augmentation or additional risk creation, regardless of whether it amounts to a proximate risk, should be subtracted from the total risk magnitude or number of risks, until the last tortfeasor, by definition, the only non-Enabler, is reached. Presumably, if there are numerous risk communicators who each created a proximate risk they are jointly and severally liable, along with any proximately negligent physical injurers for a resulting injury. To the extent that a state does not recognize joint-and-several liability, other liability apportioning mechanisms may have to be introduced, such as market share liability or m. *See* Hamilton v. Accu-Tek, 62 F. Supp. 2d 802 (E.D.N.Y. 1999) (imposing collective liability for sellers of .25 caliber handguns who negligently marketed handguns, such that they were too likely to be used illegally and criminally by teenagers); Hymowitz v. Eli Lilly Co., 539 N.E.2d 1069 (N.Y. 1989) (market share approach adopted in DES cases); Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984) (liability in proportion to risk imposed, with market share relevant to determining that risk proportion). *But see* Smith v. Eli Lilly & Co., 560 N.E.2d 324 (Ill. 1990) (rejecting market share approach to collective liability for DES production). Novel liability apportionment schemes may also be more efficient in some circumstances. *See* Ronen Avraham, *Modular liability rules*, 24 INT'L REV. L. & ECON. 269 (2004).

Figure 7
Kindyuamic Theory's Modes of Liability



CONCLUSION

Legal scholars complain that traditional tort theory is inadequate to address the expanding scope of risks in the post-industrial world.[172] The alleged risks that are increasingly finding their way into litigation are more complex and less intuitive to establish. Risks are also dynamic constructs subject to change as risk assessment generates greater knowledge about their causal and numerical natures.[173] Tort must accurately reflect the dynamic nature of risk analysis.

Most jurists and scholars concur that the primary aim of tort law is (efficient) risk deterrence. Thus, this Article set out asking and preliminarily answering two brief questions. First, what is a risk? Second, how does one *objectively* determine which risks to deter through tort?

The typical Industrial era attorney would have answered these questions by immediately launching into a lengthy, and at times muddied, discussion of duty and breach (negligence), and proximate cause. He would have given a short nod to general or specific causation[174]—issues that were rarely contentious.

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172. *See supra* note 9.

173. In assessing by EBL whether a nomological possibility is a risk, *stare decisis* makes less sense than anywhere else in the field of law. Current scientific knowledge, not legal precedent, determines what is, and is not, a risk.

174. The leading legal treatise on causation, H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985), is out-of-print. Causation, the fulcrum of Kindynamic tort law, is undoubtedly being under-addressed.

But as risk knowledge has improved and as risks have changed, the population of risks alleged in modern courtrooms is not the same as in 1930. A new theory of tort—Kindynamic Theory—accommodates these changes. Kindynamic Theory hones the understanding of long sensed, but poorly articulated tort intuitions in three ways, and offers one significant prescriptive modification to tort.

First, contrary to its many everyday definitions, the word "risk" has a single exact meaning in Kindynamic Theory. To a Kindynamic theorist, a risk must be *objectively known* to be possible ("epistemically possible"). Put differently, Kindynamics prescribes that a specific alleged stimulus must be objectively known to cause a particular harm before liability can even begin to be considered.[175] This can only be achieved by use of Evidence-Based Logic (EBL), the transparent and systematic protocol for identifying scientific knowledge.

Second, and in the only notable break with traditional tort intuition, many Kindynamic proponents advocate modifying tort by permitting compensation only for "significant" risks. This particular brand of risk (which must also usually result in injury to be redressable by tort) is (1) *widespread* and (2) likely to be *injurious*. Similar to common regulatory practice, this prescriptive constraint seeks to sensibly prioritize risk deterrence, given limited judicial resources.[176]

Third, Kindynamic Theory invokes *decision analysis*—the method for formal, quantitative risk analysis universally familiar to risk analysts—to elucidate risk tradeoffs and make decisions about the costs and benefits of a risk. With its empirical grounding, decision analysis improves upon cost-benefit models that are typically too theoretical or assumption-laden for practical use.[177]

Finally, courts have long desired and intuitively but unsuccessfully sought an objective method for apportioning liability for a single injury among *multiple* alleged tortfeasors. Kindynamic Theory is the tort theory that formally presents such a method.[178]

Kindynamics is indeed in one aspect (risk prioritization) a *purely* prescriptive theory that does not pretend to capture past legal trends.[179] Other than risk prioritization, however, Kindynamics is not a prescriptive theory, but rather a rigorous restatement and clarification of longstanding tort intuitions. Kindynamics only seems prescriptive and novel because it uses new vocabulary and is a uniquely demanding, quantitative, and precise way of thinking about traditional tort concepts.

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175. *See supra* Part II–III.

176. *See supra* Part IV.A.

177. *See supra* Part IV.B.

178. *See supra* Part VI.

179. The argument of those Kindynamicists who advocate risk prioritization (and not all Kindynamic thinkers do) is that even assuming the goal of tort were solely corrective justice—the right to have one's day in court—risk prioritization is logically necessary as long as a jurisdiction's case load overtaxes thorough judicial review of each case. If courts can only sufficiently address a certain number/category of cases, then each jurisdiction effectively has a "race" system of case prioritization. Whoever files suit first or bangs one's fist the loudest gets more adequate redress, while others may receive shoddy judicial attention or simply settle the case under suboptimal terms to avoid such treatment. Kindynamics contends that if individual justice must be constrained (and if the Soviet command-control nature of tort law does constrain), then why not do so sensibly according to a primary tenet of tort: *proximate* risk?

It is true that Kindynamics rejects many decisions as improper. While some will accuse it of being a purely prescriptive theory dressed in explanatory clothing, it must be understood that Kindynamics is often times *not* criticizing the *aims* of decisionmakers in cases it declares "wrongly" decided. Rather, because of its rigorous nature, Kindynamic Theory is uniquely capable of discovering that judges, lacking access to the powerfully objective and precise tools of EBL (evidence-based logic), decision analysis, and Kindynamic multiparty liability allocation, have often reached conclusions they simply did not *intend* to make. Indeed, Kindynamic advocates contend that if courts had been able to apply Kindynamic methods, many outcomes would have been different, even when *holding judges' and juries' tort philosophies constant*.

Kindynamic Theory holds great promise as a modern theory of tort.[180] In a complex world, Kindynamic Theory is better suited than its predecessors to achieving the age old jurist's wish to efficiently marshall judicial resources towards deterring society's most pressing risks and fairly recompense those harmed by those risks.

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180. Kindynamic Theory is currently investigating how to systematically frame the causal question underlying any risk. Scientific investigation is capable of establishing nearly any risk as epistemic if a causal proposition is stated too broadly. Conversely, if a risk proposition is put too narrowly, scientific knowledge will nearly always be incapable of speaking to such an overly restrictive proposition. What is therefore required is an objective process for framing the appropriate scope of the cause *A* and effect *B* at issue in a particular claim, then assessing by evidence-based methods whether a risk indeed exists as a general causal proposition. It will then be up to the trier of fact to assess through the introduction of case-specific evidence whether the plaintiff's individual circumstances meet that general pattern of that risk. *See generally* Guzelian, *supra* note 51.