

# Washington University Law Review

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Volume 86 | Issue 1

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2008

## The Wreckage of Recklessness

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### Recommended Citation

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## THE WRECKAGE OF RECKLESSNESS

GEOFFREY CHRISTOPHER RAPP\*

*“Recklessness” is one of the oldest concepts in Anglo-American tort law, and it is also one of the most poorly understood. Often identified as a tort falling somewhere between “negligence” and “intentional misconduct,” recklessness has evaded precise judicial interpretation for two hundred years. The Restatement of Torts defines recklessness as conscious disregard of a substantial risk of serious harm, but courts have been unable to interpret consistently the key elements of this definition. This Article suggests that judicial confusion is not simply the product of linguistic imprecision on the part of the American Law Institute (ALI). Rather, the Restatement version of recklessness is inconsistent with the actual behavioral and cognitive processes humans employ in the face of risk and uncertainty. Recent work in behavioral economics and neuroeconomics indicates that individuals fail to process risk in the way the black-letter definition of recklessness presumes, and calls into question the degree to which decisions can easily be classified as “conscious” or “unconscious.” Rather than continue to struggle to add clarity to an already convoluted articulation of doctrine, law reformers should reconceptualize the tort concept of recklessness not in terms of what it is, but in terms of what it does: allow a particular plaintiff to recover for a defendant’s carelessness where ordinary negligence doctrine would bar relief.*

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*On their own they perished on account of their / own recklessness, / the fools.*<sup>1</sup>

Recklessness is one of the oldest concepts in Anglo-American tort law,<sup>2</sup> although it has been known by many names.<sup>3</sup> The U.S. Supreme Court first applied a recklessness standard in common carrier and admiralty cases in the 1830s, 1840s, and 1850s.<sup>4</sup> In England, the origins of recklessness lie with distinctions made between “degrees of care” in bailment cases at the dawn of the eighteenth century.<sup>5</sup> As a critical component of mental state analysis in criminal law, recklessness became an important legal concept in twentieth century American codification

1. HOMER, THE ODYSSEY 1.7–8 (W.B. Stanford ed., MacMillan 1965), translated in Darrel Dobbs, *Reckless Rationalism and Heroic Reverence in Homer’s Odyssey*, 81 AM. POL. SCI. REV. 491, 494 (1987).

2. The concept can be dated to Roman Law, which supposedly divided negligence into three degrees: slight, ordinary, and gross negligence. See Nicholas St. John Green, *The Three Degrees of Negligence*, in ESSAYS ON TORT AND CRIME 93, 94 (1933).

3. Recklessness is sometimes equated with *gross negligence*, although others suggest that gross negligence “carries a meaning that is less than recklessness.” RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 2 cmt. a (P.F.D. No. 1, 2005); Edwin H. Byrd, III, Comment, *Reflections on Willful, Wanton, Reckless and Gross Negligence*, 48 LA. L. REV. 1383, 1384 n.7 (1988). Sometimes the term used is “willful or wanton misconduct,” although willfulness suggests a level of intent that may or may not be present in reckless conduct. See REST. 3D, § 2 cmt. a; Jim Hasenfus, Comment, *The Role of Recklessness in American Systems of Comparative Fault*, 43 OHIO ST. L.J. 399, 399 (1982); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed. 1984) (stating the term “willful” should be given mere “lip service”). There are even differences in spelling: Sometimes “wilful” is the preferred spelling, other times “willful.” See Hasenfus, *supra*, at 400 n.6. Dean Prosser viewed the choice between terms as one of simple “taste.” WILLIAM PROSSER, LAW OF TORTS § 34, at 185 (4th ed. 1971).

4. See, e.g., *Steamboat New World v. King*, 57 U.S. 469, 475 (1853) (holding the omission to exercise skill one has in management of boilers on a steamship amounts to “gross negligence”); *N.J. Steam Navigation Co. v. Merchant’s Bank*, 47 U.S. 344 (1848) (holding that the failure to exercise even slight care to avoid fire amounts to recklessness and is akin to fraud on a shipping line’s customers). In legal scholarship, an early mention of recklessness appears in a 1906 *Harvard Law Review* article on the assumption of risk doctrine by Francis Bohlen, eventual author of the First Restatement of Torts. See G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 44 (2003) (citing Francis Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 91 (1906)).

5. PROSSER, *supra* note 3, § 34, at 181. Chief Justice Holt adopted the degrees of care approach in a 1704 bailment case, and later writers on bailments supported the position. *Id.* This standard was extended outside of the arena of bailments in the latter part of that century; for example, in the form of the special “gross negligence” standard applied to attorney malpractice. See JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 280, 282 (2004). Under this standard, attorneys were not liable “for every error or mistake,” but could be made to pay when found to have engaged in “gross negligence.” *Id.* at 280. Certainly, the English House of Lords was sufficiently familiar with recklessness so as to discuss it as a standard in fraud cases by the end of the nineteenth century. See, e.g., *Derry v. Peek*, (1889) 14 App. Cas. 337 (H.L.) (appeal taken from A.C.).

efforts, namely the Model Penal Code (MPC),<sup>6</sup> and those developments in turn influenced tort law.<sup>7</sup>

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6. See MODEL PENAL CODE § 2.02(2)(c) (1985).

7. While this Article will occasionally make reference to criminal law concepts and the Model Penal Code, my focus is on the tort of recklessness, not the criminal law mental state. The importance of fine line distinctions between recklessness, negligence, and intent in the criminal law may not be as significant as similar distinctions in tort. Criminal defendants are entitled to application of the law according to the principle that punitive laws ought to be interpreted to provide maximum protection to the accused. This is the so-called rule of lenity. See Rachel E. Barkow, *Tribute to Justice Antonin Scalia*, 62 N.Y.U. ANN. SURV. AM. L. 15, 17–18 (2006); see generally Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004).

Where conduct falls on the border of recklessness and knowledge, or recklessness and negligence, in the criminal law context, a court will likely categorize conduct to favor the accused. See Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2434 n.111 (2006) (rule of lenity especially important where statutes impose minimal mens rea requirements). That is to say, criminal law has a built-in mechanism for resolving boundary line disputes. See *id.* at 2434–37. Tort law has no such interpretive principle, and thus the fine lines between recklessness, negligence, and intentional tort are of central importance.

Arguably, the principle of proximate cause serves this function in negligence cases, by prohibiting recovery by plaintiffs too remote from a defendant's wrongful conduct. David Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 57 (1996). It is of course true that proximate cause analysis is in theory a part of a recklessness case. See RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979) ("In determining liability, the factors are the same as those used in determining the existence of legal causation when there has been negligence (see § 442) or recklessness. (See § 501)."); Stephen M. Blitz, *Conduct Evidencing Negligent Entrustment is Provable Despite Admission of Vicarious Liability*, 17 STAN. L. REV. 539, 542 (1965). But see Mary H. Seminara, *When the Party's Over: McGuigan v. New England Telephone and Telegraph Co. and the Emergence of a Social Host Liability Standard in Massachusetts*, 68 B.U. L. REV. 193, 214 (1988) ("A recklessness standard does not require a court to determine the existence of elements such as duty, proximate cause, or foreseeability."). However, a finding of foreseeability is virtually automatic once the subjective awareness standard required for recklessness has been overcome. Still, at least in principle, the proximate cause link between a reckless actor's misconduct and a plaintiff's injury could be severed by the superseding conduct of a more blameworthy wrongdoer.

Moreover, my decision to avoid addressing the Model Penal Code and the criminal concept of recklessness in depth has to do with my own focus as a scholar, not because of a principled belief that there is not substantial spillover between the criminal and the tort concepts of recklessness. James Henderson and Aaron Twerski argue that concepts like intent and recklessness must be

kept endogenous to tort without adjusting for how those elements are conceptualized in nonlegal contexts or in legal contexts other than tort. Thus, the fact that in Shakespeare's tragedies "intent" may carry a special meaning that helps the playwright achieve dramatic impact, or the fact that "intent" has a special meaning in criminal statutes, should be irrelevant to the drafter of a *Restatement of Torts*. A *Restatement of Torts* speaks to, and only to, the tort system of which it is a constituent part. Other systems—Shakespearian tragedies, systems of criminal justice, and the like—should be left to conceptualize intent and recklessness on their own, perhaps quite differently.

James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1136 (2001) (footnotes omitted).

One wonders whether the Shakespeare metaphor here glosses over important questions of whether tort and criminal law should utilize a common lexicon. No one is actually wrestling with whether the Restatement's definition of intent is consistent with the Bard's. But it may be unrealistic to imagine a world where a judge sitting on a court of general jurisdiction deciding an "intent" case

Yet in spite of its lengthy history, recklessness has remained one of the murkiest standards in tort.<sup>8</sup> It has rarely been the subject of academic analysis.<sup>9</sup> In the courts, the definition of recklessness has remained elusive.<sup>10</sup>

Recklessness matters. It is often a threshold standard for imposing liability in contexts where “assumption of risk” and other affirmative defenses would otherwise bar a plaintiff from recovering.<sup>11</sup> In the personal injury context, participants in athletic events assume the risk of

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under the state’s Model Penal Code one day and an “intent” case invoking the Restatement of Torts the next will not be influenced, in each endeavor, by the other. This sort of “subject matter isolationism” is necessary in scholarly work, particularly when an author has limitations of expertise, but arguably irresponsible in the drafting of documents of far more practical consequence. See Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 15 (1996) (“The basic conceptual problem is just how any legal system can juggle more distinctions that it can use.”). In fact, courts have sought to harmonize criminal and tort concepts of recklessness and regularly apply the same definition in each context. See, e.g., *Sandler v. Commonwealth*, 644 N.E.2d 641, 643 (Mass. 1995) (“Our long-standing custom has been to measure reckless conduct by the same test whether reckless conduct is alleged as the basis for liability in tort or as the basis for guilt of involuntary manslaughter.”); *Lamb v. Anderson*, 147 P.3d 736, 745 (Alaska 2006) (criminal and tort standards for recklessness are virtually identical).

While this Article devotes relatively little time to exploring recklessness as a criminal mental state, the conclusions drawn about the impact of new findings of behavioral economics and neuroscience for conceptualizing consciousness do have implications for the study of crime and punishment.

8. W. Kip Viscusi & Richard J. Zeckhauser, *The Denominator Blindness Effect: Accident Frequencies and the Misjudgment of Recklessness*, 6 AM. L. & ECON. REV. 72, 73 (2004) (“[W]hat is meant by recklessness is not well defined.”); Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 189 (2003) (meaning of elements of recklessness is “ambiguous”); Gregory A. Williams, Note, *Tuttle v. Raymond: An Excessive Restriction upon Punitive Damages Awards in Motor Vehicle Tort Cases Involving Reckless Conduct*, 48 OHIO ST. L.J. 551, 572 n.176 (1987) (judicial imprecision with regard to terminology makes tracking the meaning of various recklessness standards difficult). The murkiness of the term “recklessness” extends outside of the law. For instance, a “contemporary edition of Noah Webster’s *An American Dictionary of the English Language* makes no mention of recklessness.” Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2204 (2003) (citing NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1490 (Springfield, Mass. 1869)).

9. A Westlaw search reveals no full length law review article focused on the tort of recklessness in the past twenty-five years. Professor Kenneth Simons has done some of the most interesting analysis of recklessness in recent years, but then generally as part of articles focusing on negligence, intent, or tort and crime as a whole. See, e.g., Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 THEORETICAL INQUIRIES L. 283 (2002) [hereinafter Simons, *Dimensions*]; Simons, *supra* note 8; Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463 (1992) [hereinafter Simons, *Rethinking*]. Anthony Sebok has also explored recklessness in a shorter symposium piece, drawing on Simons’ work. See Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)’s Definition of Intent*, 54 VAND. L. REV. 1165 (2001).

10. See *infra* Part III; see also Sebok, *supra* note 9, at 1181 (“[R]ecklessness has sat on the borderline between intent and negligence, playing a limited role.”); Simons, *Rethinking*, *supra* note 9, at 472 (recklessness is “ill-defined”).

11. Harvey S. Perlman & Gary T. Schwartz, *General Principles*, 10 KAN. J.L. & PUB. POL’Y 8, 11 (2000).

negligently caused injuries, but not those arising from reckless disregard of one another's safety.<sup>12</sup> Recklessness is an essential means of recovery for tort victims suing governmental entities, who may be barred by statutes conferring some form of sovereign immunity.<sup>13</sup> Recklessness, like intentional tort, can trigger the application of punitive damages, rarely available in other accidental injury cases.<sup>14</sup> Reckless conduct can provide a basis for recovery for injured professional rescuers, otherwise barred by the application of the so-called Firefighters' Rule.<sup>15</sup> And a defendant's recklessness trumps a plaintiff's contributory or comparative negligence.<sup>16</sup> The financial significance of a finding of recklessness—for both plaintiffs and defendants—is obvious.

Recklessness is most often explained as conduct falling somewhere along the spectrum between negligence and intentional tort.<sup>17</sup> At one end

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12. See, e.g., *Crawn v. Campo*, 643 A.2d 600 (N.J. 1994).

13. See, e.g., Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641, 684 (2004).

14. See Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1402 (1987).

15. RICHARD A. EPSTEIN, TORTS B28 (1999). In some states, this rule is referred to as the "Fireman's Rule," although since it applies to both genders and often encompasses emergency medical technicians and other professional rescuers, the term "professional rescuers' doctrine" is probably the most accurate.

16. Conversely, courts are split on whether a plaintiff's recklessness should bar or simply reduce a plaintiff's recovery from negligent defendants. See Hasenfus, *supra* note 3, at 400–01.

17. In modern casebooks, recklessness often appears as a sort of afterthought, nestled between intentional tort and negligence. See, e.g., ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES AND PROBLEMS 128 (2d ed. 2007) ("In terms of fault or blameworthiness, recklessness falls in between intentional tort and negligence."); DOMINICK VETRI ET AL., TORT LAW & PRACTICE 17 (3d ed. 2006) ("Recklessness is a more culpable type of fault than negligence and usually can be invoked in accident situations where the conduct shows a conscious disregard of a high risk of harm. Recklessness falls somewhere between intentional misconduct and negligence on the culpability continuum."); MARK A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES 451 (8th ed. 2006) ("'Reckless' and 'willful and wanton' are of course complex notions."); DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 49–50 (2005) (in defining recklessness, "line drawing can be difficult."). Some casebooks contain no discussion of recklessness at all. See RUSSELL L. WEAVER ET AL., TORTS: CASES, PROBLEMS & EXERCISES (2d ed. 2005); JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS (7th ed. 2007); RICHARD EPSTEIN, CASES AND MATERIALS ON TORTS (8th ed. 2004); WARD FARNSWORTH & MARK F. GRADY, TORTS: CASES AND QUESTIONS (2004). Similar language has been employed by the courts. See, e.g., *Williamson v. McKenna*, 354 P.2d 56, 59 (Or. 1960) ("Misconduct may be conceived as ranging in infinite gradations from the slightest inadvertence to the most malicious purpose to inflict injury . . . . At the upper end of the scale we set off intentional conduct, i.e., conduct engaged in for the purpose of inflicting harm on another. At the opposite and lower end of the scale is a range of inadvertent conduct which we call negligence. Between these two extremes the law has created still another category which is described variously as reckless, willful, or wanton conduct."); *Pomaro v. Cmty. Consol. Sch. Dist. #21*, 662 N.E.2d 438, 440 (Ill. App. Ct. 1995) (recklessness exists on a "sliding scale" between negligence and intentional tort).

of this spectrum is negligence, conceptualized in the modern doctrine as foreseeable damage caused by a departure from the standard of care exercised by a reasonably prudent person.<sup>18</sup> At the other extreme are the intentional torts, such as assault and battery, involving damage caused by an act accompanied by the desire to produce harm or a disregard of a substantial certainty of producing a harmful result.<sup>19</sup>

Recklessness is said to involve something “worse” or “more blameworthy” than unreasonably risky or careless conduct (negligence), but something “better” or “less blameworthy” than a desired injurious result flowing from an intentional unlawful act (intentional tort).<sup>20</sup> To situate recklessness in this manner is deceptively easy and deceptively clear,<sup>21</sup> for it ignores the fact that the spectrum itself has never been defined.<sup>22</sup> Sometimes this spectrum is a moral one,<sup>23</sup> invoking the imprecise concept of “wrongfulness,”<sup>24</sup> sometimes it centers on a wrongdoer’s intent, sometimes the cost of avoidance,<sup>25</sup> and other times it involves the probability that a particular course of conduct will yield a damaging consequence.<sup>26</sup>

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18. Simons, *Dimensions*, *supra* note 9, at 286 (“[T]he primary fault underlying a negligence claim is the actor’s failure to take a reasonable precaution against the risk of harm.”).

19. *See* Simons, *Rethinking*, *supra* note 9, at 471–72 (“After ‘intent’ (which includes knowledge), the next most serious mental state in the conventional tort hierarchy is recklessness.”).

20. *See* Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1079 (2006) (“‘Intentional wrongdoers,’ as we tend to call them, are [said to be] the worst type of tortfeasor, worse than merely reckless or negligent actors.”); KEETON ET AL., *supra* note 3, § 65, at 462 (recklessness “differs from negligence not only in degree but in kind, and in the social condemnation attached to it.”).

21. *See* Henderson & Twerski, *supra* note 7, at 1137 (“[T]he oft-encountered ‘culpability spectrum,’ suggesting a natural progression from negligence to recklessness to intentional tort, is neither necessarily accurate nor particularly helpful.”); Posting of Geoffrey Rapp to Sports Law Blog, <http://sports-law.blogspot.com/2006/05/wanton-and-willful-he-did-it-on.html> (May, 1, 2006, 21:05 EST).

22. *See* Simons, *supra* note 20, at 1080 (“When we compare actual legal standards within the three categories of torts, we are often comparing apples and oranges.”).

23. Then Massachusetts Supreme Court Justice Oliver Wendell Holmes explained in 1884 that “recklessness in a moral sense means a certain state of consciousness with reference to the consequences of one’s acts.” *Commonwealth v. Pierce*, 138 Mass. 165, 175 (1884), *reprinted in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 275 (Richard A. Posner ed., 1992). The “dominant vocabulary of tort” is infected with moral theory. Gerald J. Postema, *Introduction: Search for An Explanatory Theory of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS 2* (Gerald J. Postema ed., 2001).

24. *Cf.* JULES L. COLEMAN, RISKS AND WRONGS 331 (1992) (“[W]rongdoing consists in the unjustifiable or otherwise impermissible injuring of others’ legitimate interests. Wrongdoing is unjustifiable harming.”).

25. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 181–84 (1987).

26. *See* Dean Richardson, *Player Violence: An Essay on Torts and Sports*, 15 STAN. L. & POL’Y

Identifying recklessness solely by reference to two torts—intentional misconduct and negligence—which it is not, does little to help courts confronted with the task of deciding whether a particular wrongdoer’s actions amount to reckless conduct.<sup>27</sup> Further, saying that recklessness falls between negligence and intentional tort does nothing to equip judges to distinguish recklessness from either of these poles of misconduct.<sup>28</sup> Courts are faced with the task of drawing fine lines,<sup>29</sup> which means, unsurprisingly, that they are not likely to produce consistent or predictable results.<sup>30</sup>

Wading into the judicial mire,<sup>31</sup> law reformers at the ALI have made several efforts to clarify this elusive concept.<sup>32</sup> In the First Restatement of Torts, recklessness was defined as conduct creating an unreasonable risk of bodily harm and a high probability of substantial harm.<sup>33</sup> Drawing on

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REV. 133, 139 (2004).

27. The North Carolina Supreme Court referred to recklessness as occupying a “twilight zone which exists somewhere between ordinary negligence and intentional injury.” *Pleasant v. Johnson*, 325 S.E.2d 244, 247 (N.C. 1985).

28. See Byrd, *supra* note 3, at 1383 (courts are “dismayed over the difficulty involved in the interpretation and application of” the terms recklessness, wanton and willful misconduct, and gross negligence).

29. See Donald C. Langevoort, *The Reform of Joint and Several Liability Under the Private Securities Litigation Reform Act of 1995: Proportionate Liability, Contribution Rights, and Settlement Effects*, 51 BUS. LAW. 1157, 1165–66 (1996) (“Many people have noted the fine line between recklessness and negligence. But there is an equally fine line between recklessness and knowledge.”); Theresa J. Pulley Radwan, *Trustees in Trouble: Holding Bankruptcy Trustees Personally Liable for Professional Negligence*, 35 CONN. L. REV. 525, 551 (2003) (“A ‘fine line [exists] between the concepts of ‘recklessness and wantonness’ and ‘intentional’ activities.”) (citing Lee R. Russ, *Aggravated Forms of Negligence, Gross Negligence, Wantonness, Recklessness*, in 8 COUCH ON INSURANCE § 119:4 (3d ed. 1997)); Gregory G. Jackson, *Punishments for Reckless Skiing—Is the Law Too Extreme?*, 106 DICK. L. REV. 619, 632 (2002) (“There is often a fine line between an innocent mistake that results in an accident and recklessness.”); Thomas F. Miller, Note, *Torts and Sports: Has Michigan Joined the Wrong Team with Ritchie-Gamester?*, 48 WAYNE L. REV. 113, 132 (2002) (“[F]ind[ing] the fine line between negligence and recklessness” is “taxing”); Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRES L. 333, 335 (2002) (“Such a classification scheme demands that we be able to identify an intentional wrong, distinguish it from a reckless one, and distinguish both of these sorts of wrongs from a merely negligent wrong.”).

30. Byrd, *supra* note 3, at 1396 (“Although the tests were formulated to help courts identify requisite conduct, they do little to guide the courts in practical application to current disputes.”); Miller, *supra* note 29, at 132 (“In light of the potential line-drawing confusion, verdicts are likely to be inconsistent.”).

31. See *infra* Part III.

32. Professor Alan Schwartz and Dean Robert Scott describe the ALI as a “self-perpetuating organization of lawyers, judges, and academics” with the “primary function” of promulgating “restatements of law.” Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 596 (1995). The Restatements are “sets of rules, organized by subject matter, the content of which is partly a function of case law but also is a function of the ALI’s collective view respecting which legal rules are normatively desirable for courts to apply.” *Id.*

33. RESTATEMENT (FIRST) OF TORTS § 500 (1934).

this definition, the Second Restatement of Torts<sup>34</sup> offered an influential but complex explanation, in which recklessness was characterized as physical harm caused by an actor's conscious and knowing disregard of a substantial risk.<sup>35</sup> While the Draft Restatement (Third) of Torts would make some textual improvements,<sup>36</sup> it remains to be seen whether those efforts will find an appreciative audience among the nation's courts.<sup>37</sup>

As law reformers began to retool recklessness, defining the term as consciously disregarding substantial risks, they also expanded the scope of intentional tort. Intentional tort came to mean not just the desired injurious consequence flowing from a wrongful act, but also injuries arising from acts which the wrongdoer believes have a substantial certainty of producing a harmful result.<sup>38</sup> Belief in substantial certainty has been called the "strangest of all" tort concepts<sup>39</sup> and inconsistent with any familiar mental state.<sup>40</sup> Exactly what "substantial certainty" means is unclear—something less than an absolute certainty, at least.<sup>41</sup> It must also mean something more than highly probable certainty, or else the intent category will simply collapse into recklessness.<sup>42</sup> In this Article, I will argue that given what behavioral economics and neuroeconomics have recently taught us about human decision making in the face of risk, it is fair to say that such a collapse has already occurred.<sup>43</sup>

Now that intentional tort includes not just the desired wrong, but also an act with a substantial certainty of producing a harmful result, it is time

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34. RESTATEMENT (SECOND) OF TORTS § 500 (1979).

35. Henderson & Twerski, *supra* note 7, at 1152.

36. The Third Restatement separates recklessness from negligence in that the former includes a significant high-level risk and an awareness by the actor of a relatively high level of risk. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM §§ 2–3 (P.F.D. No. 1, 2005); Simons, *Dimensions*, *supra* note 9, at 287–88; Henderson & Twerski, *supra* note 7, at 1155.

37. The Third Restatement has now been released in draft form, but the relevant section defining recklessness has yet to be cited by any American court.

38. *See* REST. 2D, § 8A. The First Restatement contained no definition of intent, perhaps since the authors assumed its meaning was perfectly understood. Sebok, *supra* note 9, at 1166. The Second Restatement included a two-prong definition of intent—including both "intent as desire" and the "substantial certainty" language adopted from a Washington Supreme Court battery case. *See id.*; REST. 2D, § 8A. The Draft Third Restatement would attempt to harmonize tort intent with the Model Penal Code by characterizing intent as being an act with either "purpose" or a "knowledge" (of a substantial certainty). REST. 3D, § 1 & cmt. a. Insofar as it would import criminal mental state concepts into tort law, this effort has been criticized. Henderson & Twerski, *supra* note 7, at 1153–54.

39. Sebok, *supra* note 9, at 1173.

40. *Id.*

41. *Id.* The Restatement's authors suggest a sliding scale—beginning with certainty (intent), decreasing to substantial certainty (intent), then decreasing further to something "less than substantial certainty" (recklessness), and then falling to "only . . . a risk" (negligence). REST. 2D, § 8A cmt. b.

42. Sebok, *supra* note 9, at 1173.

43. *See infra* Part IV.

to ask whether there is any space left for recklessness between negligence and intentional tort.<sup>44</sup> That is to say, is it really possible to act in a manner that is more than unreasonable, without acting with at least a belief in a substantial certainty of producing a harmful result?

An exploration of modern behavioral psychology, including the heuristics popular with adherents of “behavioral law and economics,” coupled with a consideration of modern neuroscience and neuroeconomics,<sup>45</sup> reveals a picture of human decision making in risky and uncertain situations that is wholly inconsistent with the black-letter articulation of recklessness.<sup>46</sup> Both intentional tort and negligence now stretch into areas of conduct that seem to fall under the law’s definition of recklessness. The new science suggests that any effort to continue to draw boundaries around recklessness will be ineffective.

Humans do of course engage in reckless conduct, but not in the way that term is defined in law. Reckless conduct sometimes follows underassessment of risk. When an actor has miscalculated or failed to appreciate a risk, she cannot be said to have acted in “conscious disregard” of that risk, even though she may have been negligent. Other times, “reckless” conduct involves proceeding with a dangerous course of action while ignoring its known risks. But when an actor has rejected a substantial certainty of a harmful result, she satisfies the legal standard of intent and a resort to recklessness is unnecessary. In other words, while negligence is a valid concept of human decision making, in the sense that a person might unreasonably disregard a risk due to over-optimism, quick decision making or instinct, and while a person can certainly “intend” (in the broad sense of that term) an unfortunate result, the definition of recklessness is at best a set of words that do not accurately describe the way humans think and act.<sup>47</sup>

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44. Of course, any model must necessarily simplify. See Simons, *Rethinking*, *supra* note 9, at 467. But oversimplifying, or simplifying in an inaccurate fashion, need not be tolerated, or at least need not remain unquestioned.

45. Neuroscience uses “imaging of brain activity and other techniques to infer details about how the brain works.” Colin Camerer et al., *Neuroeconomics: How Neuroscience Can Inform Economics*, 43 J. ECON. LIT. 9, 9 (2005).

46. The issue of organizational recklessness is a complex one that, due to space limitations, this Article does not address. How a fictional but mindless person could be “conscious” of anything is an interesting philosophical question, and of course organizational recklessness matters immensely, particularly in the assessment of punitive damages against major corporations. See LANDES & POSNER, *supra* note 25, at 182 n.53. Nevertheless, because modern behavioral economics and neuroscience offer more interesting insights into *human* consciousness, I have chosen to leave the issues of organizational recklessness for another day.

47. The notion that tort law should “express cognitive reality” dates back at least to Oliver Wendell Holmes’s efforts to establish a general theory of tort law. See DAVID ROSENBERG, *THE*

This is not to say that recklessness is a tort with no value. Perhaps recklessness ought to be preserved for its policy advantages.<sup>48</sup> For instance, some deserving plaintiffs might be barred from pursuing an intentional tort case due to the expiration of an applicable statute of limitations.<sup>49</sup> And perhaps recklessness serves to allow some particularly sympathetic victims to recover where an action for negligence, due to the survival of the “all-or-nothing” defense of assumption of risk, is not available as an option.<sup>50</sup> But if recklessness exists solely to advance such policy ends, it is time to make that clear. The questionable articulation of the doctrine dominant today creates unnecessary confusion as courts search for the elements of this elusive tort.<sup>51</sup>

Part I of this Article briefly describes the importance of recklessness in American tort law. As noted above, there are numerous instances in which a plaintiff injured in an accident cannot recover using negligence, but could recover using recklessness. Part II explores the origins of the tort of recklessness and law reformers’ influential efforts in the various tort Restatements to define the elements of reckless conduct. Part III then describes the significant judicial confusion that abounds as courts have wrestled with the complex definitions provided. Part IV explores the behavioral psychology and neuroscientific literature in order to reveal a picture of human decision making inconsistent with the legal definition of recklessness. Part V explores the way forward, suggesting a new approach to describing recklessness, including new language for a future torts Restatement, aimed to reduce the inaccuracy embedded in the current articulation of recklessness.<sup>52</sup> Finally, Part VI concludes.

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HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY 103 (1995).

48. See Byrd, *supra* note 3, at 1398 (“The use of consciousness as a reference point disguises what courts are in fact doing—making policy judgments under particular circumstances.”).

49. Perhaps the most famous recklessness case to date, *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979), could easily have been pursued as an intentional tort save for the fact that the plaintiff had missed the deadline for filing such a suit. See *infra* Part III.A.

50. See Sebok, *supra* note 9, at 1181 (“One might see recklessness as a gatekeeper: sometimes it allows the practical and moral consequences of intentional tort to be visited on certain actors who otherwise were innocent of harboring a specific desire of harming anyone.”).

51. See Byrd, *supra* note 3, at 1409 (“Such a standard provides little guidance and only clouds the analysis that should be performed.”). Recklessness as used in this Article refers to the complete tort of “reckless conduct,” rather than to just a state of mind or element of other torts, crimes, or defenses.

52. The call to clarify the distinction between recklessness and negligence is not a novel one. In 1853, United States Supreme Court Justice Benjamin Curtis wrote that the distinction between “slight negligence,” “ordinary negligence,” and “gross negligence” (recklessness), ought to be abolished:

It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification

## I. THE SIGNIFICANCE OF RECKLESSNESS IN TORT LAW

The importance of the distinctions among negligence, recklessness, and intentional tort cannot be understated.<sup>53</sup> Sometimes this strange, “borderline” tort is treated, consequentially, like intentional tort,<sup>54</sup> while other times it is treated like negligence.<sup>55</sup> Where recklessness is treated with the severe consequences usually applied to intentional tort, the line between negligence and recklessness becomes critically important. Conversely, where recklessness is treated like negligence, with somewhat less severe consequences, the line between recklessness and intentional misconduct is what matters.<sup>56</sup>

### A. *Recklessness Treated Like Intentional Tort*

In a number of legal contexts, recklessness is treated like the “worst” kind of tort, intentional misconduct. This typically means that the reckless defendant will be forced to pay higher damages, or will be exposed to liability that would not apply were the defendant deemed merely negligent.

Perhaps most significantly, punitive damages may only be available in cases of intentional tort or recklessness.<sup>57</sup> Negligence is generally not considered an appropriate basis for punitive damages since negligent defendants lack the “evil motive” needed to justify a punitive damages award.<sup>58</sup> Plaintiffs’ expanded efforts in recent decades to obtain punitive

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necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. . . . If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to determine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty, had better be abandoned.

*Steamboat New World v. King*, 57 U.S. 469, 474 (1853). A century and a half later, it may finally be time to answer this call.

53. Sebok, *supra* note 9, at 1168 (“[O]ne can imagine that predictable struggles emerge between plaintiffs and defense-oriented advocates over the effects on liability of labeling an action ‘intentional,’ ‘reckless,’ or ‘negligent.’”).

54. *See infra* Part I.A.

55. *See infra* Part I.B.

56. This is an issue of “enduring doctrinal importance.” Sebok, *supra* note 9, at 1181.

57. *Id.* at 1168; *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 535 (1999). Punitive damages are not always available in intentional tort cases, such as when a physician commits tortious battery by exceeding the scope of a patient’s consent. *See Simons, Rethinking*, *supra* note 9, at 475.

58. David S. Godkin & Marc E. Betinsky, *Defenses in Year 2000 Litigation: New Technology, Old Theories*, 5 B.U. J. SCI. & TECH. L. 2, 33 n.105 (1999).

damages, particularly in mass tort litigation, has led to an increasing number of cases concerning recklessness,<sup>59</sup> and elevated the importance of the distinction between recklessness and mere negligence.

Recklessness also allows recovery from defendants typically immune from liability for mere negligence, either by common law, statute, or contract. Municipalities and other governmental agencies generally cannot be sued for mere negligence, but can be sued where they are found either reckless or liable for intentional harm.<sup>60</sup> Another example is the so-called Good Samaritan statute, designed to relieve health care workers from negligence liability for providing gratuitous, voluntary care to nonpatients.<sup>61</sup> These statutes aim to increase the likelihood of rescue by reducing its potential liability costs.<sup>62</sup> Under these statutes, however, recklessness typically remains a viable cause of action for an injured rescuer.<sup>63</sup> Physicians providing gratuitous emergency medical services who engage in reckless or intentional misconduct can be sued.<sup>64</sup> Often, contractual waivers of tort liability (“express assumption of risk”) cannot limit a plaintiff’s right to recover for intentional tort or recklessness, even though they may be effective in barring a negligence action.<sup>65</sup>

Similarly, the application in recklessness cases of various common law affirmative defenses, most notably assumption of risk,<sup>66</sup> tracks the treatment of such defenses in intentional misconduct cases. This rule is particularly vital and well-known in regard to injuries suffered in the course of recreational sports activities.<sup>67</sup> Under the near-universal common law rule<sup>68</sup> (sometimes codified by statute),<sup>69</sup> plaintiffs cannot

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59. See Simons, *Rethinking*, *supra* note 9, at 484 (“Recent expansion of punitive tort damage awards for ‘reckless’ behavior gives urgency to the task of clarifying the concept.”); *id.* at 472; Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *YALE L.J.* 347, 364 n.47 (2003) (“[T]here is a general perception among researchers that this category of ‘recklessness’ punitive damages cases is growing in importance.”).

60. Sebok, *supra* note 9, at 1168.

61. See David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 *TEX. L. REV.* 653, 680 (2005).

62. See David C. Biggs, “*The Good Samaritan is Packing*”: *An Overview of the Broadened Duty to Aid Your Fellowman, with the Modern Desire to Possess Concealed Weapons*, 22 *U. DAYTON L. REV.* 225, 259 (1997).

63. See A.D. Wozzley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 *VA. L. REV.* 1273, 1277 (1983).

64. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 2 cmt. b (P.F.D. No. 1, 2005).

65. See, e.g., *Pruett v. Am. Motorcycle Ass’n*, No. 93-3887, 1995 U.S. App. LEXIS 11891, at \*10 (7th Cir. May 7, 1995).

66. Sebok, *supra* note 9, at 1168.

67. REST. 3D, § 2 cmt. b.

68. See Richardson, *supra* note 26, at 145 (there are “two principles followed by most jurisdictions in both professional and amateur contact sports: (1) negligence cannot form the basis for

recover for injuries negligently caused by co-participants during recreational athletic events.<sup>70</sup> Instead, only reckless or intentionally caused injuries are recoverable.<sup>71</sup>

Given that potentially harmful contacts are a regular and expected part of sports like football, basketball, and soccer, courts have opined that subjecting actors to liability for merely “unreasonable” actions would lead to a flood of litigation and chill the kind of vigorous participation on which competition depends.<sup>72</sup> Participants are said to assume the risks of negligent contacts, but not of reckless or intentional ones.<sup>73</sup> Alternatively, the duty of a participant is said to be limited to avoiding reckless or intentional harm, but not negligent harm.<sup>74</sup> Courts have wrestled with how far to extend this doctrine in evaluating cases involving sport-like activities that may not fall within the traditional group of “contact sports.”<sup>75</sup> In an age in which an increasing number of Americans

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a tort claim by an injured player against another participant who caused the injury, but (2) either recklessness or intentional wrongdoing can form the basis of such a claim.”). At one point, the Wisconsin Supreme Court stood as a notable exception to this clear majority rule, finding that a flexible negligence standard can adequately address sports injury cases. *Lestina v. West Bend Mut. Ins. Co.*, 501 N.W.2d 28, 35 (Wis. 1993) (“[T]he majority does not fully comprehend the objectives of other courts in adopting the recklessness standard.”). However, the state legislature adopted a statute aimed at changing the standard for co-participant liability to recklessness. See Jay A. Urban, *Sports Torts in Wisconsin*, 8 MARQ. SPORTS L.J. 365, 368 (1998).

69. Richardson, *supra* note 26, at 164–65.

70. *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992); *Crawn v. Campo*, 643 A.2d 600, 605 (N.J. 1994).

71. Professor Simons points out that intentionality in this context cannot mean the same thing as it ordinarily does in intentional tort cases, where merely intending *the act* can sometimes be the basis for a finding of intentional tort. In contact sports, of course, all sorts of intentional torts are not actionable due to consent. Merely intending an act is not the basis for a finding of intent sufficient to allow recovery for, say, wrongful battery. Instead, a sports injury plaintiff must allege intentional *harming*. See Simons, *supra* note 20, at 1082–83. Similarly, he points out that courts allowing recovery for recklessness in sports injury cases “must be using the term ‘reckless’ in a special sense. . . . Perhaps some courts have adopted recklessness as the liability standard because the term can also refer to an attitude of indifference to the welfare of others, a personal callousness that goes well beyond mere violations of rules against certain types of contacts.” Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 273 n.218 (1987).

72. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520 (10th Cir. 1979) (“[S]ubjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football, for admittedly it is violent.”); *Nabozny v. Barnhill*, 334 N.E.2d 258, 260–61 (Ill. App. Ct. 1975). While some have argued that this no-recovery-for-negligence rule should be limited only to violent contact sports, courts have generally incorporated it in the context of other sports, such as golf. See Daniel E. Lazaroff, *Golfers’ Tort Liability—A Critique of an Emerging Standard*, 24 HASTINGS COMM. & ENT. L.J. 317, 318–19 (2002).

73. *Knight*, 834 P.2d at 698.

74. *Id.*; Randolph Stuart Sergeant, *Gross, Reckless, Wanton, and Indifferent: Gross Negligence in Maryland Civil Law*, 30 U. BALT. L. REV. 1, 1–2 (2000).

75. See *Mallin v. Paesani*, 892 A.2d 1043 (Conn. Super. Ct. 2005) (holding “contact sports”

participate and are injured in recreational athletics,<sup>76</sup> litigation involving such injuries has risen.

The distinction between recklessness and negligence also determines whether a plaintiff's contributory or comparative negligence can be used to eliminate or reduce recovery. In jurisdictions that follow traditional contributory negligence, an absolute bar on recovery by plaintiffs, the defense is not available where a defendant has been reckless.<sup>77</sup> In comparative negligence regimes, courts have taken two approaches to handling a reckless defendant. Some offset a plaintiff's negligence against a defendant's recklessness,<sup>78</sup> while others refuse to do so.<sup>79</sup>

Another context in which recklessness is treated like intentional tort is that of a landowner's liability to persons injured on her property. Under rules that survive in most jurisdictions, persons on another property are divided into various categories: licensees, invitees, and trespassers.<sup>80</sup> The right of trespassers in particular to recover is limited in cases of landowners' mere negligence. Many jurisdictions do not allow trespassers to recover for a landowner's negligence, but would allow recovery for recklessness or intentional tort.<sup>81</sup>

At one point in time, recklessness was also significant in that it allowed a plaintiff to avoid the application of an automobile guest statute, although the importance of such statutes has now evaporated.<sup>82</sup>

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exception does not apply to golf under Connecticut law); *Davis v. LeCuyer*, 849 N.E.2d 750 (Ind. Ct. App. 2006); *Aquila v. LaMalfa*, No. 2005-L-148, 2007 WL 1125724 (Ohio Ct. App. Feb. 16, 2007); Posting of Geoffrey Rapp to Sports Law Blog, <http://sports-law.blogspot.com/2007/02/is-potato-sack-racing-contact-sport.html> (Feb. 27, 2007, 11:43 EST); Posting of Geoffrey Rapp to Sports Law Blog, <http://sports-law.blogspot.com/2006/06/indiana-court-declines-to-extend-co.html> (June 28, 2006, 15:21 EDT).

76. See Richardson, *supra* note 26, at 134; Urban, *supra* note 68, at 365.

77. This is explained by the fact that the defendant's conduct is "so close to intentional wrongdoing that he should not have the benefit of contributory negligence." VICTOR SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 5-3(a), at 120 (3d ed. 1994).

78. *Id.* § 5-3(b), at 120.

79. See Hasenfus, *supra* note 3, at 401. Where a plaintiff, rather than a defendant, can be labeled reckless, a further issue concerns whether such a plaintiff would have any right to recover from merely negligent defendants.

80. Even within these categories, courts draw further distinctions, such as between "criminal" trespassers and "mere" trespassers. See Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 GA. L. REV. 725, 741 (1992).

81. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 2 cmt. b (P.F.D. No. 1, 2005); Sergent, *supra* note 74, at 2.

82. A guest statute would otherwise protect vehicle owner-drivers from liability for injuries suffered by passengers. EPSTEIN, *supra* note 15, at 161-62. According to Dean Prosser, there was "no other group of statutes which have filled the courts with appeals on so many knotty little problems involving petty and otherwise entirely inconsequential points of law." KEETON ET AL., *supra* note 3, § 34. In addition to distinguishing recklessness from ordinary negligence, courts were forced to deal with convoluted choice of law cases.

### B. *Recklessness Treated Like Negligence*

In other contexts, recklessness is treated more like negligence than intentional tort. Where conduct is deemed reckless but not intentional in these instances, a wrongdoer typically receives greater favor in the eyes of the law.

For instance, the line between recklessness and intentional misconduct determines whether a tort judgment will be dischargeable in bankruptcy.<sup>83</sup> In bankruptcy cases, like tort liability arising from negligence, liability for recklessness is dischargeable, whereas liability arising from intentional misconduct is not.<sup>84</sup>

In the workers' compensation context, the line between recklessness and intentional tort determines whether an injured worker will be able to avoid the application of the workers' compensation system.<sup>85</sup> Workers injured through recklessness by their employer, like workers injured through negligence, are sometimes compensated according to the statutory scheme, with a workers' compensation claim being the worker's sole remedy.<sup>86</sup> By contrast, workers injured on the job due to an employer's intentional misconduct can pursue typically larger recoveries in court.

Recklessness also surfaces in doctrines and statutes relating to contribution and indemnification among joint tortfeasors. When multiple wrongdoers have caused a plaintiff's injury, they can seek contribution from one another for payments made in excess of their comparative fault. Wrongdoers who were negligent and reckless may pursue such contribution, but wrongdoers who have committed intentional torts typically cannot.<sup>87</sup>

In the liability insurance context, most policies are written to cover an insured's losses arising from negligent or reckless tort liability, but exclude "expected" or intentionally caused injuries.<sup>88</sup> Under such policies,

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As a result of judicial frustration, many legislatures responded by repealing their guest statutes. *Id.* Therefore, the importance of such statutes and common law guest doctrines has fallen in recent years. Such statutes and doctrines are no longer common, but still exist in some jurisdictions. *See* REST. 3D, § 2 cmt. b. Alabama may be the only state which still has a general automobile guest statute. *Id.* § 2 rpt. note.

83. Sebok, *supra* note 9, at 1168.

84. *Id.* at 1181. An exception exists for injuries caused by reckless drunk driving, which are not dischargeable in bankruptcy. *Id.*

85. *Id.* at 1168; Parker B. Potter, *Revisiting the Scrap Heap: The Decline and Fall of Smith v. F.W. Morse & Co.*, 4 PIERCE L. REV. 481, 488 (2006).

86. Sebok, *supra* note 9, at 1181. This is not the universal rule. *See Pleasant v. Johnson*, 325 S.E.2d 244, 244 (N.C. 1985).

87. Sebok, *supra* note 9, at 1181.

88. Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 921

recklessness is generally viewed as an accident and a policy-holder's losses will be covered.<sup>89</sup>

Recklessness is also subject to negligence-like statutes of limitation.<sup>90</sup> Typically, intentional torts have short statutes of limitation.<sup>91</sup> While intentional torts are the so-called worst torts, they are also torts for which an accusation of responsibility is considered to have the greatest potential reputational harm.<sup>92</sup> Statutes of limitations serve to force plaintiffs to seek prompt legal relief and militate against the filing of "stale claims."<sup>93</sup> Where a defendant has acted recklessly rather than intentionally, however, the plaintiff has a longer time period to commence her action.<sup>94</sup>

## II. THE RESTATEMENTS ON RECKLESSNESS

### A. *The First and Second Restatements*

The Restatement of Torts was first published in 1934 as part of the ALI's efforts to clarify and reform common law.<sup>95</sup> The Restatement (First) of Torts contained the following definition of recklessness:

#### § 500. Reckless Disregard of Safety Defined

The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the

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(2004); Sebok, *supra* note 9, at 1168, 1181.

89. Kirkpatrick v. AIU Ins. Co., 204 F. Supp. 2d 850, 856 (E.D. Pa. 2002). Whether an insurer has an obligation to advance litigation or defense costs where a plaintiff has alleged both recklessness and intentional tort is a more complicated question.

90. Sebok, *supra* note 9, at 1168.

91. Johnson, *supra* note 88, at 923.

92. Intentional torts often overlap with criminal offenses, and the accusation of criminal misconduct is considered to pose particularly severe damage to one's reputation under defamation law. See RESTATEMENT (SECOND) OF TORTS § 670 cmt. a (1979).

93. Grell v. Laci Le Beau Corp., 87 Cal. Rptr. 2d 358, 361–62 (Cal. Ct. App. 1999) (quoting Jolly v. Eli Lilly & Co., 751 P.2d 923, 928 (Cal. 1988)).

94. See Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 525 (10th Cir. 1979) (recklessness has a six-year statute of limitations under Colorado law, while battery has a one-year statute of limitations).

95. For an excellent history of the ALI and the Restatement project, see generally G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1 (1997).

other but also involves a high degree of probability that substantial harm will result to him.<sup>96</sup>

In a “special note,” the authors of the First Restatement clarify that its definition of recklessness would encompass what legislatures and courts call “wanton and wilful misconduct.”<sup>97</sup> Despite offering this expansive view of what recklessness means, the definition appears to be quite cumbersome and clunky. This is, after all, a single sentence that goes on for five lines. It contains clause upon clause, as well as a number of quite ambiguous adverbs and adjectives.

Three decades later, the Restatement (Second) of Torts did very little to clean up this language. Despite repeated references to recklessness in other substantive sections, the authors of the Second Restatement did very little to define the concept.<sup>98</sup> Instead, section 500 of the Second Restatement simply added a few touches to the parallel section from the earlier ALI product.<sup>99</sup> The Second Restatement’s version, which is not even included in the ALI’s official “concise” Restatement book,<sup>100</sup> provides:

§ 500. Reckless Disregard of Safety Defined

The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.<sup>101</sup>

Did anything significant change between these two versions? Three modifications stand out, although the authors offer little description of why such changes were made or their intended legal consequences.

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96. RESTATEMENT (FIRST) OF TORTS § 500 (1934).

97. *See id.*, § 500 spec. note.

98. Henderson & Twerski, *supra* note 7, at 1151.

99. The Second Restatement’s “Scope Note” is significantly modified, focusing in two pages on the role of recklessness in determining landowners’ liability to trespassers and licensees. RESTATEMENT (SECOND) OF TORTS § 500 (1979). This likely reflects the large number of cases between the publication of the First and Second Restatements addressing this issue.

100. *See* A CONCISE RESTATEMENT OF TORTS 99–100 (2000). Why would the ALI omit section 500 from its own version of the Restatement, marketed to law students and others? The ALI seems to recognize that section 500 has contributed to judicial confusion. One might even ask whether the section is a bit of an embarrassment. It is certainly not an example of fine legal drafting.

101. REST. 2D, § 500.

First, the term “bodily harm” is changed to “physical harm.” What exactly is meant by that distinction is unclear since the terms usually mean the same thing.<sup>102</sup> Perhaps bodily harm suggests too grave an invasion, whereas physical harm allows for somewhat less injurious results, although that is not the connotation given to the term “bodily harm” elsewhere in the Restatement.<sup>103</sup> The First Restatement’s authors seemed to view recklessness as limited to cases in which a plaintiff was exposed to loss of life or limb. To these scholars, only risks that involve a “high degree of probability that death or serious bodily harm will result therefrom” would trigger recklessness liability.<sup>104</sup> While the change from bodily to physical may have been designed to loosen this apparent requirement, the Second Restatement’s authors could have been far more clear. Moreover, section 500 appears limited to “physical harm,” even though recklessness is applied to nonphysical harms elsewhere in the Restatement.<sup>105</sup>

Second, the word “intentionally” in the first clause of the definition was moved. In other words, while the First Restatement talked about “*intentionally . . . act[ing]*”<sup>106</sup> or “fail[ing] to . . . act” the Second Restatement talked about “act[ing]” or “*intentionally fail[ing]* to . . . act.”<sup>107</sup> The authors offer no comment to explain this change, which has led to some confusion in the courts.<sup>108</sup> The phrase “does an act or intentionally fails to do an act” is viewed as “clumsy and redundant,” with “acts or fails to act” considered a better alternative.<sup>109</sup>

Third, the authors have added the final clause, attempting to clarify that the risk posed by reckless conduct exceeds the minimum level necessary to label the conduct negligent. In so doing, the Second Restatement elevates this supposed distinction, which had appeared thirty years before in commentary but not in the provision itself.<sup>110</sup> The First Restatement’s commentary explained that reckless conduct “must be

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102. See BLACK’S LAW DICTIONARY 1032 (5th ed. 1979) (“physical injury” means “bodily harm or hurt, excluding mental distress, fright, or emotional disturbance”); REST. 2D, § 905 cmt. b (“bodily harm” means “any impairment of the physical condition of the body, including illness or physical pain”).

103. See REST. 2D, § 905 cmt. b (“Bodily harm is any impairment of the physical condition of the body, including illness or physical pain.”).

104. RESTATEMENT (FIRST) OF TORTS § 500 cmt. a (1934).

105. Henderson & Twerski, *supra* note 7, at 1151.

106. REST. 1ST, § 500 (emphasis added).

107. REST. 2D, § 500 (emphasis added).

108. See *infra* notes 172–74 and accompanying text.

109. Henderson & Twerski, *supra* note 7, at 1151.

110. See REST. 1ST, § 500 cmt. g.

something more than negligent.”<sup>111</sup> Recklessness must “contain a risk of harm to others in excess of that necessary to make the conduct unreasonable and therefore, negligent” and “must involve an easily perceptible danger of substantial bodily harm or death and the chance that it will so result must be great.”<sup>112</sup> The Second Restatement places that language in the section itself—a change in style but not in substance.

In additional commentary in both versions of the definition, the authors attempt to provide further guidance. Comments f and g aim to distinguish recklessness from intentional misconduct and negligence, respectively.<sup>113</sup> Despite their importance for the actual judicial determinations of boundary-line disputes, these comments make “little or no sense” and the differences they attempt to draw are “difficult to see.”<sup>114</sup> Recklessness differs from negligence in that it “requires a conscious choice of a course of action” involving knowledge of “serious danger.”<sup>115</sup> While sometimes negligence and recklessness may differ only as a matter of degrees of risk, this “difference of degree is so marked as to amount substantially to a difference in kind.”<sup>116</sup>

For conduct to be reckless, the “act or breach of duty” must “itself [be] intended.”<sup>117</sup> Still, recklessness is not intentional tort. The authors explain:

While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless.<sup>118</sup>

Second Restatement comment a explains the two kinds of recklessness: deliberate (in)action in the face of a known risk; or (in)action in the face of facts that would make the risk apparent to a reasonable person, even though the wrongdoer himself need not grasp that risk.<sup>119</sup> Second Restatement comment b, although entitled “perception of

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111. *Id.* § 500 cmt. a.

112. *Id.*

113. RESTATEMENT (SECOND) OF TORTS § 500 cmt. f & g (1979).

114. Sebok, *supra* note 9, at 1179 n.29.

115. REST. 1ST, § 500 cmt. g; REST. 2D, § 500 cmt. g. This language may have played an important role in helping the drafters of the Model Penal Code define recklessness as consciously disregarding a substantial or unjustifiable risk of harm. *See infra* Part II.D.

116. REST. 1ST, § 500 cmt. g.

117. *Id.* § 500 cmt. b.

118. *Id.* § 500 cmt. f.

119. REST. 2D, § 500 cmt. a.

risk,” is actually about the requirement that the “act or omission” leading to the harm be “itself intended.”<sup>120</sup>

Scholars have identified numerous problems with the Second Restatement’s approach. Most notably, section 500 includes no language implicating a sense of the callousness, depravity, and self-conscious gratuitousness that lend recklessness its wrongful moral character.<sup>121</sup> More significantly, as demonstrated in the following subsection and in Part III, these articulations of recklessness have not provided an adequate roadmap for courts attempting to render tort decisions.

### *B. Where Things Stand*

As a result of these efforts, the black-letter definition of recklessness has come to occupy an odd place in tort law. Recklessness, intentional tort, and negligence can be compared along two dimensions: cognitivity and subjectivity. By cognitivity, I mean the degree to which the notion references the mental processes that led to a wrongful act. By subjectivity, I mean the degree to which the law considers the *actual* mental processes of a defendant, rather than the constructive mental processes of a reasonable person.

Recklessness is both cognitive and subjective. Negligence is neither cognitive nor subjective. Intentional tort can be both, or neither.

Recklessness definitively appears to be cognitive, in the sense that it requires an inquiry into the consciousness of the wrongdoer.<sup>122</sup> In the same vein, it appears that the threshold test for recklessness is subjective.<sup>123</sup>

By contrast, negligence is neither cognitive nor subjective<sup>124</sup> since it asks only whether the wrongdoer failed to act as a reasonable person would have acted.<sup>125</sup> A court evaluating a claim of negligence need merely define the reasonable level of precaution—an uncertain but

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120. *Id.* § 500 cmt. b.

121. Henderson & Twerski, *supra* note 7, at 1152.

122. See Commonwealth v. Pierce, 138 Mass. 165, 175 (1884), reprinted in LANDES & POSNER, *supra* note 25, at 275 (recklessness “is understood to depend on the actual condition of the individual’s mind with regard to consequences.”).

123. See Henderson & Twerski, *supra* note 7, at 1143; Simons, *Rethinking*, *supra* note 9, at 467 (“The modern account of recklessness, emphasiz[es a] cognitive awareness of a risk . . .”). Once this subjective threshold is met, however, recklessness has objective components involving the level of risk and the type of harm posed. See Catheline v. Seaboard Coast Line R.R., 348 F. Supp. 43, 45 (M.D. Fla. 1972).

124. See Sebok, *supra* note 9, at 1181–82; COLEMAN, *supra* note 24, at 333.

125. See Richardson, *supra* note 26, at 147.

objective aspiration.<sup>126</sup> Considerations of a person's character and will are not relevant in negligence analysis.<sup>127</sup>

Intentional tort can be both subjective and cognitive, in one of its forms, to the extent that it can be demonstrated via a showing that an actor *desired* to produce a wrongful result.<sup>128</sup> But "intent-as-desire" cases, though perhaps rare,<sup>129</sup> are susceptible to easy resolution without a very detailed inquiry into what the wrongdoer knew at the time he acted. Man shoots gun at neighbor; man desired to shoot neighbor (or at least to assault his neighbor, in which case the transferred intent doctrine would allow imposition of liability against the man).<sup>130</sup> A showing that a wrongdoer acted in a way that had a "substantial certainty" of producing a result can suffice to establish intent.<sup>131</sup> But like negligence, that is in some sense an objective inquiry.<sup>132</sup> The intentional tort/substantial certainty plaintiff merely needs to establish that the wrongdoer's action was substantially certain to produce the harmful result.<sup>133</sup> At most, what matters is what the actor believed, not what the actor knew.<sup>134</sup>

Recklessness, subjective and cognitive, remains a far more ambiguous concept.<sup>135</sup> Recklessness can refer to three distinct categories of wrong, "either singly or in combination: a state of belief (belief that one is creating a substantial risk); a state of desire (reckless indifference); or conduct (gross negligence)."<sup>136</sup> In recklessness as defined by the Restatements, what the actor knew (and consciously disregarded) is, at least in theory, all that matters. As we will see through an exploration of

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126. *But see* Williamson v. McKenna, 354 P.2d 56, 59 (Or. 1960).

127. *See* Martin Stone, *The Significance of Doing and Suffering*, in PHILOSOPHY AND THE LAW OF TORTS, *supra* note 23, at 162.

128. *See* JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 28–29 (5th ed. 1999).

129. Marc Lloyd Frischhertz, *Louisiana Workers' Compensation Scheme: Substantially Certain to Result in an Unsafe Workplace*, 50 LOY. L. REV. 209, 215 (2004) ("The substantial certainty test was developed as an alternative way of establishing actual intent because it is inherently difficult to establish subjective desire to cause harm.").

130. RESTATEMENT (SECOND) OF TORTS § 16 (1979).

131. *Id.* § 8A.

132. Thomas A. Gionis et al., *The Intentional Tort of Patient Dumping: A New State Cause of Action to Address the Shortcomings of the Federal Emergency Treatment and Active Labor Act (EMTALA)*, 52 AM. U. L. REV. 173, 301 (2002) ("An objective standard should be used to determine whether there was a substantial certainty that the injury would occur.").

133. REST. 2D, § 8A.

134. *But see* Henderson & Twerski, *supra* note 7, at 1136 (sometimes, acts one believes to be reasonable can lead to international tort liability).

135. Simons, *Rethinking*, *supra* note 9, at 483 (the Restatement "describes the concept in all three ways, sometimes emphasizing the gross deficiency of the conduct, sometimes the actor's subjective awareness of risk, and sometimes the actor's callousness.").

136. *Id.* at 482.

published and unpublished opinions in the area of recklessness, that turns out to be a fanciful notion inconsistent with judicial escapades in tortured reasoning.<sup>137</sup>

But recklessness is unique in another sense. Unlike intent or negligence, which may, but need not involve wrongfulness (in the moral sense), recklessness has to have some element of “bad attitude.”<sup>138</sup> One can intend a harmful act, and therefore incur liability, even if one wanted to do the right thing.<sup>139</sup> One can be negligent simply by being careless or inattentive. But one can only be reckless if one has done something reprehensible and morally blameworthy.<sup>140</sup>

### III. CONFUSION IN THE COURTS

Since the ALI published the Second Restatement, there have been hundreds of cases dealing with the tort of recklessness.<sup>141</sup> Fortunately, for my purposes, I need only highlight a few key discussions that focus on courts’ efforts to distinguish recklessness from intentional tort<sup>142</sup> and recklessness from negligence,<sup>143</sup> and to define precisely the “triggers” that ought to justify a finding of recklessness.

The picture revealed is one of considerable confusion,<sup>144</sup> as courts have

137. *See infra* Part III.

138. *See* Henderson & Twerski, *supra* note 7, at 1144 (describing recklessness as “negligence with an attitude”).

139. *Id.* at 1136–37.

140. *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 71 (1988). The etymology of the term “recklessness” suggests that some level of wrongfulness is embedded in its meaning. Although the German origins of the term, *recheleas* (“careless, thoughtless, heedless”), implies a close connection to negligence, the Dutch variant, *roekeloos*, means “wicked.” *See* ONLINE ETYMOLOGY DICTIONARY, available at <http://www.etymonline.com/index.php?term=reckless> (last visited Sept. 20, 2008).

141. A keycite (conducted on Mar. 18, 2008) of RESTATEMENT (SECOND) OF TORTS § 500 (1979) produced 570 hits in state and federal court opinions between 1969 and 2007. A search for the term “recklessness” produced over 10,000 hits in cases between 1969 and 2007. Many if not most of these cases are, of course, criminal law decisions.

142. *See infra* Part III.A.

143. *See infra* Part III.B.

144. In 1982, James Hasenfus wrote that the various labels applied to recklessness have “led to considerable confusion.” Hasenfus, *supra* note 3, at 400 n.7. A generation later, little further clarity has been achieved. The definition of the term remains “nebulous.” *See* Sergeant, *supra* note 74, at 2. As one court explained, “[m]uch confusion has been generated by inconsistent use of loosely defined terms such as willfulness, wantonness, recklessness, gross negligence, and unjustifiable conduct.” *Owens v. Parker Drilling Co.*, 676 P.2d 162, 164 (Mont. 1984). *See also* Piamba Cortes v. Am. Airlines, Inc., 177 F.3d 1272, 1287 (11th Cir. 1999) (study of the cases “reveals a body of law that frequently is inconsistent and that provides a vague and nebulous definition of willful misconduct, rendering it difficult to apply.”); *Burnett v. City of Adrian*, 326 N.W.2d 810, 820 (Mich. 1982) (definition of recklessness is “fraught with misunderstanding”).

“struggled to define” the term recklessness and its contours.<sup>145</sup> Courts are unsure whether recklessness is closer to intentional tort or negligence, and unsure whether the differences between recklessness and whichever pole it abuts are differences of kind or of degree.<sup>146</sup> The “potential for interpretational dispute and linguistic gymnastics is enormous, both among laypersons and jurists.”<sup>147</sup>

Articulated tort doctrine rarely seems decisive in these cases. In many cases, it appears that courts are applying a sort of moral intuition in drawing the lines between recklessness and other types of conduct, which represents “the judicial process in its most naked form.”<sup>148</sup> Courts seem to decide whether a defendant’s conduct falls under the label reckless in tort cases based on whether the denial of relief to a particular plaintiff would be wrong.

Alternatively, courts may use recklessness—which often justifies deviation from the black-letter rules of negligence law—as a sort of escape valve when they are uncomfortable with established tort doctrine itself. It may then be sentiment not about a particular plaintiff or defendant, but rather about a rule itself, that shapes judicial applications of recklessness doctrine.<sup>149</sup> For example, suppose that a court finds unconvincing the notion that participants in sporting events cannot recover for injuries resulting from the negligence of co-participants.<sup>150</sup> The court could do one of two things. First, the court could explicitly state its objections to such a rule. While that approach might be refreshing—

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145. Alex L. Rubenstein, *Injuries to Public School Students: The Liabilities and Immunities of Public Schools and Their Employees*, CBA RECORD, Apr. 1996, at 40, 41.

146. See Hasenfus, *supra* note 3, at 401 (“A recurring question in the opinions is whether recklessness is fault of a different degree than ordinary negligence, or whether it amounts to fault of a different kind altogether.”).

147. Gary S. Franklin, Comment, *Punitive Damages Insurance: Why Some Courts Take the Smart out of “Smart Money,”* 40 U. MIAMI L. REV. 979, 993–94 (1986).

148. *Williamson v. McKenna*, 354 P.2d 56, 68 (Or. 1960).

149. Similar forces may explain some decisions courts have made over the years with respect to conflicts of law issues. Some decisions seeming to resist utilization of traditional conflicts principles may be explained by judicial rejection of the policy basis for a particular legal rule. See Scott A. Burr, *The Application of U.S. Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity*, 15 U. PA. J. INT’L BUS. L. 221, 233 (1994) (discussing *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972) (engaging in no governmental interest analysis in deciding to apply Kentucky law, which did not feature an automobile guest statute)); Charles M. Thatcher, *Choice of Law in Multi-State Tort Actions After Owen v. Owen: The Less Things Change . . .*, 35 S.D. L. REV. 372, 380–81 (1990) (discussing *Owen v. Owen*, 444 N.W.2d 710 (S.D. 1989)).

150. The Wisconsin Supreme Court, for instance, found unconvincing the notion that ordinary negligence law could not handle contact sports cases without chilling vigorous competition and opening the floodgates to sports injury cases. See *Simons*, *supra* note 20, at 1083 n.78. The Wisconsin legislature, however, responded by creating statutory protection from negligence suits in contact-sports injury cases. *Id.*

and indeed, seems common in some American appellate courts—it is also inconsistent with long-standing norms of judicial modesty.<sup>151</sup> A judge might be uncomfortable simply declaring that a rule offered by a higher court is inconsistent with the judge’s policy views. Instead of casting doubt on the rule, however, courts can simply use the recklessness “exception to the exception” to allow a case to go to a jury and give the plaintiff at least a chance to recover.<sup>152</sup> Such an approach might invite appellate review and draw attention to the difficulties associated with the underlying rule, without appearing to represent a departure from norms of *stare decisis* and an intrusion on the prerogatives of the legislative branch. Perhaps the best example of this in practice concerns judicial treatment of guest statutes, which typically barred a passenger from suing a driver of a car for mere negligence, but often contained an exception to allow suits against reckless drivers.<sup>153</sup> Courts may have widened the meaning and application of recklessness in order to express displeasure at the legislature’s inaction in the face of a growing policy critique of guest statutes as a whole.<sup>154</sup>

Regardless of the source of inconsistent judicial approaches to defining recklessness, the resulting confusion and unpredictability has “left its wound on our law.”<sup>155</sup> In either case, the confusing and muddled articulation of the doctrine of recklessness in the First and Second Restatements has left room for courts to apply naked intuition to the cases before them. With the doctrine itself hopelessly ill-defined, courts have not produced systematically coherent jurisprudence in the area.

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151. See Saul Levmore, *A Theory of Deception and then of Common Law Categories*, 85 TEX. L. REV. 1359, 1377 (2007).

152. Juries, too, might be induced to “stretch” the definition of recklessness in order to allow a plaintiff to recover. See Jeffrey O’Connell, *Two-Tier Tort Law: Neo No-Fault & Quasi-Criminal Liability*, 27 WAKE FOREST L. REV. 871, 880 (1992).

153. John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425, 462 (2003).

154. Chief Justice Stanley Fuld of the New York Court of Appeals famously called guest statutes “unfair” or “anachronistic” in 1972. *Neumeier v. Kuehner*, 286 N.E.2d 454, 456 (N.Y. 1972). Some courts were so distressed by the harsh results of guest statutes that they embraced rarely utilized constitutional doctrines to strike them down. See *Emberson v. Buffington*, 306 S.W.2d 326 (Ark. 1957); see also Cynthia Nance, *The Uniform Correction or Clarification of Defamation Act: How Not to Reform Arkansas Defamation Law*, 51 ARK. L. REV. 721, 770 (1998) (discussing *Emberson*). *Emberson* struck down a guest statute on the basis of the “right to a remedy/open courts” provision of the state constitution, which provided that “Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformable to the laws.” *Emberson*, 306 S.W.2d at 327 (quoting ARK. CONST. art. II, § 13).

155. *Williamson v. McKenna*, 354 P.2d 56, 59 (Or. 1960).

### A. *Recklessness and Intent*

At times, it is difficult for courts to distinguish recklessness from intentional tort. Recklessness has been described as “tantamount to” or a “proxy for” intentional misconduct.<sup>156</sup> In his judicial writings, Richard Posner has described recklessness as having such a close proximity to intentional torts that they are virtually indistinguishable, and are treated indistinguishably by the law.<sup>157</sup> Courts have emphasized that a reckless defendant must “intentionally do the act or intentionally fail to do the act” which causes harm, meaning that the defendant must make a choice of a “course of action that spells danger.”<sup>158</sup>

Sometimes, courts have addressed recklessness in situations where intentional tort could easily have been alleged. In the seminal *Hackbart* case,<sup>159</sup> a professional football player suffered debilitating injuries after he was struck in the back of the head by another player.<sup>160</sup> This is, of course, a classic battery case.<sup>161</sup> While the consent defense to battery might apply in many football contact cases, such as a running back’s consent to be tackled or a lineman’s consent to be struck in the chest while coming out of his stance,<sup>162</sup> consent would not have applied in circumstances like those in *Hackbart* because the hit was a “dirty” play well outside the expected contacts involved in football.<sup>163</sup>

However, Dale Hackbart was unable to recover for battery due to the application of an applicable statute of limitations.<sup>164</sup> Instead, he pursued his claim under alternative theories of recklessness (pursuant to section 500 of the Second Restatement) and negligence.<sup>165</sup> Rather than admit that the case could easily have been one of intentional tort, Judge Doyle of the Tenth Circuit attempted to distinguish reckless misconduct from

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156. *Fagan v. City of Vineland*, 22 F.3d 1296, 1324 (3d Cir. 1994).

157. *Graf v. Elgin, Joliet & Eastern Ry. Co.*, 697 F.2d 771, 778 (7th Cir. 1983).

158. *Williamson*, 354 P.2d at 69; *see also Spagnulo v. Commonwealth*, 20 Mass. L. Rptr. 728, 2006 WL 1238671, at \*6 (Mass. Super. 2006) (recklessness must involve “near-intentional” disregard of danger).

159. *Hackbart* has been cited sixty-one times by other courts, ranking it second behind *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. App. Ct. 1975) (112 citations), among leading recklessness cases.

160. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979).

161. The elements of battery are harmful contact, intent, and causation. *See* RESTATEMENT (SECOND) OF TORTS § 13 (1979).

162. *See Miller*, *supra* note 29, at 117.

163. *Hackbart*, 601 F.2d at 525.

164. *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352, 355 (D. Colo. 1977), *rev’d*, 601 F.2d 516.

165. *Id.*

intentional tort.<sup>166</sup> He wrote, “[r]ecklessness exists where a person knows that the act is harmful but fails to realize that it will produce the extreme harm which it did produce.”<sup>167</sup> Even though a reckless actor may intend the act, he does not intend “to inflict serious injury.”<sup>168</sup> Intending to inflict injury is not, of course, a requirement for intentional tort.<sup>169</sup>

Other courts, however, have focused on the Restatements’ varied requirements of an “intentional act” or “intentional omission” in determining whether a finding of recklessness is appropriate. Maryland case law, for example, allows findings of recklessness only upon a showing of an “intentional act or omission” by a defendant.<sup>170</sup> At times, the “intentional act” requirement can be satisfied quite easily.<sup>171</sup>

Courts’ consideration of “intentional omission,” however, is more perplexing,<sup>172</sup> as is the term itself.<sup>173</sup> These cases seem to hinge on a defendant’s *awareness* of a duty, or *awareness* of a potential harm, rather than on any particular level of intent with respect to an omission, even though the courts frame their discussion in terms of intentional omission. While plaintiffs are charged with proving that the “defendant intentionally decided” not to perform some obligatory task,<sup>174</sup> it is not at all clear how a plaintiff is supposed to go about doing so.

Perhaps the most convoluted discussion of the role of intent in defining recklessness has occurred among the appellate courts in Illinois. Illinois has a long history of analysis of so-called willful and wanton conduct,<sup>175</sup>

166. *Hackbart*, 601 F.2d at 524.

167. *Id.*

168. *Id.*

169. *See supra* notes 19, 38 and accompanying text.

170. *See* *Sergent*, *supra* note 74, at 50.

171. In one case, a finding of intent sufficient to trigger a conclusion of recklessness was based on the intentional act of bringing a “racially inflammatory” letter to an institution. *See* *Md. State Dept. of Pers. v. Sealing*, 471 A.2d 693, 700 (Md. 1984); *Sergent*, *supra* note 74, at 50.

172. *See, e.g.*, *Galloway v. Walker*, 99 P.3d 625, 629 (Idaho Ct. App. 2004) (inclusion of word “intent” in jury instructions in recklessness case not error).

173. *See* *Dotzler v. Tuttle*, 449 N.W.2d 774, 781 (Neb. 1990) (“It is somewhat puzzling why the failure to do an act is modified by ‘intentionally’ whereas doing an act is not.”). The failure to provide a legally required accounting by a trustee was deemed insufficient to rise to the level of recklessness since there was a lack of proof that the trustee knew of the obligation and “intentionally disregarded it.” *Jacob v. Davis*, 738 A.2d 904, 920 (Md. Ct. Spec. App. 1999); *Sergent*, *supra* note 74, at 50 n.353. On the other hand, where a corporation was aware of a leaking gas tank and had a legal duty to correct that condition, a court found an intentional omission. *Exxon Corp. v. Yarema*, 516 A.2d 990, 1006–07 (Md. Ct. Spec. App. 1986); *Sergent*, *supra* note 74, at 50 n.354.

174. *Sergent*, *supra* note 74, at 50.

175. The state code defines these terms, at least with respect to municipal and governmental immunity, as follows: “‘Willful and wanton conduct’ as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.” 745 ILL. COMP.

originating in early twentieth century jurisprudence applying the *in loco parentis* doctrine in school law.<sup>176</sup> By 1976, the state courts recognized that their standard of willful and wanton misconduct was consistent with section 500 of the Second Restatement.<sup>177</sup> Under Illinois law, “willful and wanton misconduct” is said to represent a “hybrid between acts considered negligent and those found to be intentionally tortious.”<sup>178</sup> At times, recklessness “may be only degrees more than ordinary negligence,” while in other circumstances it “may be only degrees less than intentional wrongdoing.”<sup>179</sup>

Yet in a series of cases in the 1990s, Illinois created two subcategories of willful and wanton misconduct: *intentional* wanton and willful misconduct, and *unintentional* wanton and willful misconduct.<sup>180</sup> The courts have thus created four separate categories of tort:<sup>181</sup> negligence; intentional misconduct; “willful and wanton acts that were committed intentionally”;<sup>182</sup> and “willful and wanton acts committed recklessly.”<sup>183</sup> In various contexts, this will now require special interrogatories to juries asking them to identify whether particular “wanton and willful” misconduct is of the “reckless” or “intentional” variety.<sup>184</sup>

Recent application reveals the difficulty courts have had with this standard.<sup>185</sup> The Illinois Supreme Court in 2008 granted defendants’ leave to appeal in a challenging case involving an injury suffered by a youth hockey player after he was violently checked into the sidewall of a hockey rink.<sup>186</sup> The defendants

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STAT. 10/1-210 (2002).

176. *Drake v. Thomas*, 33 N.E.2d 889, 892 (Ill. App. Ct. 1941) (no civil liability for teacher imposing corporal punishment absent a showing of wanton and willful conduct or malice).

177. *Turner v. Commonwealth Edison Co.*, 341 N.E.2d 488, 493 (Ill. App. Ct. 1976).

178. *Poole v. City of Rolling Meadows*, 656 N.E.2d 768, 771 (Ill. 1995).

179. *Ziarko v. Soo Line R.R.*, 641 N.E.2d 402, 406 (Ill. 1994).

180. *Id.*; *Poole*, 656 N.E.2d at 770; *Burke v. 12 Rothschild’s Liquor Mart, Inc.*, 593 N.E.2d 522, 531 (Ill. 1992).

181. Arguably, only three categories exist to the extent that “intentional wanton and willful” conduct is viewed simply as intentional tort with the necessary label for overcoming various applicable immunity provisions. However, since some intentional misconduct might not be “blameworthy,” *see supra* note 174 and accompanying text, intentional but non-wanton conduct appears to be a separate, and fourth, category.

182. *Poole*, 656 N.E.2d at 771.

183. *Id.*

184. *Id.* at 772.

185. *See, e.g., Karas v. Strevell (Karas I)*, 860 N.E.2d 1163 (Ill. App. Ct. 2006), *rev’d and aff’d*, 884 N.E.2d 122 (Ill. 2008); *Murray v. Chicago Youth Ctr.*, 864 N.E.2d 176, 195 (Ill. 2007).

186. *See Karas v. Strevell (Karas II)*, 884 N.E.2d 122, 125–26, 129 (Ill. 2008).

checked [plaintiff] from behind while he was near the boards that formed the wall of the playing rink and while he was partially bent over and looking down with his head pointing toward the boards. The collision caused [plaintiff's] head to strike the boards and resulted in his serious injury.<sup>187</sup>

The defendants' conduct was alleged to have been reckless, and thus outside of the protection of Illinois' contact sports doctrine,<sup>188</sup> because they proceeded in this manner heedless of the presence of the word "STOP" in large letters on the back of the plaintiff's jersey.<sup>189</sup> In the plaintiff's view, the large lettering served to emphasize the no-checking rule which prohibited crashing into another player, and any player who ignored the "STOP" warning and violated the rule engaged in wanton and willful misconduct.<sup>190</sup>

The appellate court reversed the district court's dismissal of plaintiff's claims against these co-participants, but explained that further inquiry into the recklessness of defendants' conduct would need to be based on "close scrutiny" of the developed factual record.<sup>191</sup> In particular, the court suggested that the recklessness of defendants' conduct would hinge in large part on the curious factor of the location of the puck at the time of the incident:

[T]he complaint notably does not say where the hockey puck was at the time the player defendants struck [plaintiff]. The location of the puck and, perhaps relatedly, what [plaintiff] and the player defendants were attempting to do at the moment of impact are all matters yet to be fleshed out by evidence, and those matters might well be relevant to [defendants'] states of mind at the time they struck [plaintiff]. It is quite possible that, once all the circumstances surrounding this incident are revealed, the inference of willful and wanton conduct will disappear. However, on the bare facts pled here, we can, and therefore must, infer willful and wanton conduct.<sup>192</sup>

What was really going on here? What created the inference of wanton and willful misconduct? Is it that the defendants intended to strike the

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187. *Karas I*, 860 N.E.2d at 1169–70.

188. *Pfister v. Shusta*, 657 N.E.2d 1013, 1015 (Ill. 1995).

189. *Karas I*, 860 N.E.2d at 1169.

190. *Id.* at 1173.

191. *Id.* at 1172–74.

192. *Id.* at 1174.

plaintiff? Or might it be that the court simply found the plaintiff—a youth who suffered a terrible and debilitating injury—to be a compelling victim? It certainly does not appear that *any* development of a factual record would help a court decide if this conduct is intentional wanton and willful misconduct or merely negligent wanton or willful misconduct.

After defendants appealed to the Illinois Supreme Court, the court handed down an opinion that hardly clarified the law.<sup>193</sup> The court reaffirmed that in contact sports, mere negligence could not state a valid cause of action. However, the court delineated a special category of sports—“full contact sports” (including hockey and football)—in which, apparently, even *consciously disregarding* another’s safety could not be grounds for liability.<sup>194</sup> Allowing liability even for recklessness, to the court, would chill vigorous participation in sports in which harm is an inherent and expected part of the game. Instead, legal actions in full contact sports could only be based on “extreme misconduct.”<sup>195</sup> In defining extreme misconduct, however, the court only gave two examples: intentional injuring and “conduct . . . ‘totally outside the range of the ordinary activity involved in the sport.’”<sup>196</sup> Unhelpfully, however, the court’s choice of quoted language came from a case which allowed co-participants to sue each other for injuries resulting from recklessness.<sup>197</sup> In the case at bar, the court found that, as a matter of law, the plaintiff had not stated a claim for “extreme misconduct,” although its order gave the plaintiff the chance to reargue his case under the newly articulated standard.

Only future case development will (possibly) distinguish this new category of “extreme misconduct.”<sup>198</sup>

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193. See *Karas II*, 884 N.E.2d 122.

194. *Id.* at 132 (“In full-contact sports such as tackle football, and ice hockey where bodychecking is permitted, a conscious disregard for the safety of the opposing player is an inherent part of the game.”).

195. *Id.* at 134.

196. *Id.* (citation omitted).

197. The court cited the California case, *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (rejecting plaintiff’s claim because facts did demonstrate defendant acted recklessly). *Karas II*, 884 N.E.2d at 137.

198. For a perspective from one of the attorneys in the case, see posting of Tim Epstein to Sports Law Blog, <http://sports-law.blogspot.com/2008/02/full-contact-illinois-supreme-court.html> (Feb. 25, 2008, 15:07 EST).

### B. *Recklessness and Negligence*

Recklessness and negligence are both invoked frequently in cases involving accidental injuries.<sup>199</sup> The line between recklessness and negligence is particularly difficult to distinguish,<sup>200</sup> and the various factors courts take into account in recklessness analysis bear a marked similarity to those analyzed in negligence cases.

One commentator suggested that recklessness ought to be renamed “negligent willful misconduct,” even while admitting that such a phrase is “equivocal.”<sup>201</sup> Some courts have treated recklessness as simply a form of negligence. Illinois courts, for example, have noted that recklessness “shades imperceptibly into simple negligence.”<sup>202</sup>

Wisconsin refers to the concept at various times as “reckless[ness],” “rash[ness],” “wanton[ness],” or gross negligence, and specifies that this represents “a high percentage of ordinary negligence.”<sup>203</sup> This odd formulation leaves much to ponder. How is recklessness a high percentage of negligence? How is negligence even measured in percentage terms? Does this mean that a negligent act can be measured according to a percentage of the “reasonableness” a prudent person would employ? And if recklessness is somehow reducible to a percentage of negligence, what percentage would be sufficient to cross from negligence into recklessness?

Other courts have sought to distinguish recklessness from negligence more precisely, arguing that recklessness, at a minimum, involves some higher level of knowledge of risk:

Reckless conduct is not the same as negligence. Negligence is the failure to use such care as a reasonable, prudent, and careful person would use under similar circumstances. Reckless conduct differs from negligence in that it requires a conscious choice of action, either with knowledge of serious danger to others or with knowledge of facts which would disclose the danger to any reasonable person.<sup>204</sup>

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199. See, e.g., *Kirkpatrick v. AIU Ins. Co.*, 204 F. Supp. 2d 850, 854 (E.D. Pa. 2002) (“[C]onduct which is reckless . . . does not equate to intentional conduct, but, rather, constitutes an accident or occurrence.”).

200. Byrd, *supra* note 3, at 1400.

201. SCHWARTZ, *supra* note 77, at 119.

202. *Mattyasovszky v. West Towns Bus Co.*, 330 N.E.2d 509, 511 (Ill. 1975).

203. *Bielski v. Shulze*, 114 N.W.2d 105, 112–13 (Wis. 1962).

204. Jury Instructions, *Jardel Co. v. Hughes*, 523 A.2d 518 (Del. 1987), *cited in* *Viscusi & Zeckhauser*, *supra* note 8, at 73.

Yet courts have not always been precise about what a plaintiff would need to show to distinguish reckless misconduct from negligence. One court said that plaintiff had an obligation to “show something” that “truly distinguishes” a recklessness claim from a negligence one.<sup>205</sup> Calling on plaintiffs to demonstrate a true distinction by showing “something” is particularly unhelpful in generating consistent jurisprudence in this area.

### 1. *Recklessness and Risk of Injury*

The First and Second Restatements establish that recklessness must be grounded in a finding of a “substantial risk.”<sup>206</sup> The Supreme Court has recently opined that the “high risk of harm, objectively assessed . . . is the essence of recklessness at common law.”<sup>207</sup> While the concept of risk itself may be more complicated than the way it is ordinarily treated in the law,<sup>208</sup> it has been particularly problematic in judicial treatment of recklessness since recklessness requires not only unjustified risk, but also some aggravated or enhanced level of risk.

Courts have wrestled with how to quantify this requirement.<sup>209</sup> How high, exactly, does the probability of a harmful result have to be before a finding of recklessness is appropriate? Would it be necessary for a plaintiff to show that harm was more likely than not to occur? Would that even suffice, or would something even higher than probable be the appropriate standard? Largely, courts have been unable to define a specific level of risk that would warrant a finding of recklessness. Some courts have seemingly admitted defeat, defining the level of risk required for recklessness in an entirely circular fashion: reckless conduct is defined as “conduct which is characterized by *the strong probability of harm that recklessness entails*.”<sup>210</sup>

Some courts have required “almost certain” or “near certain” harm before issuing a finding of “substantial risk.”<sup>211</sup> Such a requirement,

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205. *Spagnulo v. Commonwealth*, 20 Mass. L. Rptr. 728, 2006 WL 1238671, at \*3 (Mass. Super. 2006).

206. *See supra* Parts II.A, II.B.

207. *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215 (2007) (quoting *KEETON ET AL.*, *supra* note 3, § 34 at 213).

208. For an interesting discussion of the philosophy of risk and probability, see generally Steven R. Perry, *Risk, Harm, and Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 321 (David G. Owen ed., 1995).

209. *See* *Sergent*, *supra* note 74, at 58.

210. *Thompson v. McNeill*, 559 N.E.2d 705, 708 (Ohio 1990) (emphasis added).

211. *See* *Liscombe v. Potomac Edison Co.*, 495 A.2d 838, 847 (Md. 1985); *Spagnulo v. Commonwealth*, 20 Mass. L. Rptr. 728, 2006 WL 1238671 (Mass. Super. 2006); *Sergent*, *supra* note 74, at 58.

obviously, compacts recklessness into intentional misconduct for which a “substantial certainty” is required.<sup>212</sup> Other times, a far lower standard is required: knowing that one’s actions “could cause” harm has been found sufficient.<sup>213</sup>

Many courts have simply said that recklessness requires, as the Restatement indicates, a showing of a “high degree of probability” of harm.<sup>214</sup> Applying such a standard, words such as “possibility of physical harm” are insufficient to trigger recklessness liability.<sup>215</sup> Others courts have said that the probability that harm will result must be “strong.”<sup>216</sup>

However, specific applications reveal courts at times playing fast and loose in their analyses of levels of risk. A prime example is the treatment of intoxicated driving in recklessness analysis. To be sure, drunk driving is widely and no doubt rightly considered immoral.<sup>217</sup> At the same time, the level of drunk driving in this country is probably so high,<sup>218</sup> and the proportion of drunk-driving incidents leading to accidents so small,<sup>219</sup> that

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212. See *supra* notes 21, 40 and accompanying text. There is simply no meaningful distinction between a “substantial certainty” and a “near certainty.” Indeed, a “near certainty” or “almost certainty” would seem to be even more certain than a “substantial” one.

213. See *Md. State Dept. of Pers. v. Sealing*, 471 A.2d 693, 700 (Md. 1984); *Sergent*, *supra* note 74, at 60 (internal quotations omitted).

214. See *Lawhead v. Woodpecker Truck & Equip., Inc.*, 517 P.2d 283, 286 (Or. 1973) (emphasis omitted).

215. *Id.*

216. *Williamson v. McKenna*, 354 P.2d 56, 70 (Or. 1960).

217. See Julie Anne Rah, Note, *The Removal of Aliens Who Drink and Drive: Felony DWI as a Crime of Violence under 18 U.S.C. § 16(b)*, 70 *FORDHAM L. REV.* 2109, 2138 (2002) (“To characterize a drunk driving accident as a ‘misfortune’ . . . is an injustice to the thousands who have been injured or killed by drunk drivers.”); PAUL A. LEBEL, JOHN BARLEYCORN MUST PAY: COMPENSATING THE VICTIMS OF DRINKING DRIVERS 4 (1992) (“Any serious accident is likely to produce loss and regret, but a drinking-driver accident provokes an additional element of personal and societal anger at the fact that unnecessary and unacceptable behavior has contributed to the injury and loss.”); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 268 (1970) (“Drunken driving can be described clearly enough for individuals to know what is considered wrongful totally aside from the occurrence of any accident.”). A law and economics approach advises that an ideal world would involve liability imposed on drunk drivers regardless of whether an accident results. *Id.* at 269. That is to say, all drunk drivers would be “taxed” for the risk they pose to highway safety. The reason such an approach cannot be taken is the high cost of identifying every drunk driver. *Id.*

218. Estimates based on polling data indicate that Americans make between 809 million and one billion driving trips a year within two hours of consuming alcohol. See NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, NATIONAL SURVEY OF DRINKING AND DRIVING ATTITUDES AND BEHAVIORS: 2001, *described at* <http://www.nhtsa.dot.gov/people/injury/alcohol/traffic-tech2003/TT280.pdf> (last visited Sept. 25, 2008). At the same time, there are only 254,000 persons injured a year as a result of automobile crashes in which alcohol was involved. See 2005 DRUNK DRIVING STATISTICS, <http://www.alcoholalert.com/drunken-driving-statistics-2005.html> (last visited May 28, 2008). That produces a “injured persons per alcohol driving incident” rate of three one-hundredths of one percent, hardly a “substantial” level of risk, no matter how morally reprehensible the conduct may be.

219. See Gerald S. Reamey, *The Growing Role of Fortuity in Texas Criminal Law*, 47 *S. TEX. L.*

driving while intoxicated is not consistent with reckless conduct's defined characteristic of a substantial level of risk.<sup>220</sup> The Seventh Circuit opined that an accident caused by drunk driving is "recklessness at worst and misfortune at best."<sup>221</sup>

Yet even where an injury seems to be the result of "misfortune" coupled with drunk driving, courts have no problem finding recklessness in such cases.<sup>222</sup> Courts have found intoxicated driving reckless without engaging in any sophisticated analysis of the potential for injurious results.<sup>223</sup> A Pennsylvania court, for example, noted that automobiles are "lethal and deadly weapons," and that intoxicated driving increases the "possibility of death and serious injury . . . substantially" and "presents a significant and very real danger to others in the area."<sup>224</sup> The court noted that "statistical analyses" show that a high percentage of highway fatalities arise from drunk-driving incidents,<sup>225</sup> ignoring the fact that this correlation says little about the actual *risk* that drunk driving poses.<sup>226</sup>

Arguably, drunk driving might be said to present a substantial risk when risk is viewed on an interstitial level. That is to say, drunk driving may be many times more risky than sober driving, even if the chance that someone will crash on a particular drive (drunk or sober) is quite small. Drunk driving might thus be characterized as posing a risk that is more substantial than the risk it "should" pose. The First and Second Restatements, however, focus on risk in absolute terms.<sup>227</sup> They do not seem to leave open the possibility that conduct would be labeled reckless for posing a greater risk than necessary. The proposed Restatement

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REV. 59, 90 n.212 (2005) ("[I]f the drunk driver and others sharing the road are lucky, no one will die, despite his recklessness in driving while intoxicated.").

220. See *Taylor v. Super. Ct. of Los Angeles County*, 598 P.2d 854, 864–65 (Cal. 1979) (Clark, J., dissenting).

221. See, e.g., *Bazan-Reyes v. INS*, 256 F.3d 600, 612 (7th Cir. 2001) (quoting *United States v. Rutherford*, 54 F.3d 370, 372 (7th Cir. 1995)).

222. See *LEBEL*, *supra* note 217, at 43–44.

223. See *Bourgeois v. State Farm Mut. Auto. Ins. Co.*, 562 So.2d 1177, 1182 (La. Ct. App. 1990) ("[S]everal courts have . . . indicated that a presumption of recklessness can be made when the intoxication of the defendant is the cause-in-fact of the accident."). The Louisiana court in *Bourgeois* rejected this presumption, but nevertheless found the defendant reckless due to his high level of intoxication. *Id.* at 1184.

224. *Focht v. Rabada*, 268 A.2d 157, 161 (Pa. Super. Ct. 1970).

225. *Id.* at 161 n.1.

226. The risk that drunk driving poses would be properly measured through a demonstration of the rate of harmful accidents per incident of drunk driving. See *supra* note 222 and accompanying text.

227. See *supra* notes 95–117 and accompanying text. To be more precise, the First and Second Restatement discuss the risk required for recklessness relative to the risk required for findings of negligence. This, however, seems to capture risk in terms of its absolute level. See *supra* Part III.B.1.

(Third) of Torts might rectify this problem, in that it allows for findings of recklessness even where the absolute level of risk was not high, so long as the expected harm associated with the risk was far greater than the cost of avoidance.<sup>228</sup> In the drunk-driving context, one might argue that the risk created by drunken driving can be cheaply avoided—say, by taking a \$10 cab ride rather than getting behind the wheel. This avoidance cost pales in comparison to the potential harm associated with a highway fatality. As noted above, this position is one of the more controversial modifications made by the authors of the Third Restatement, and it remains to be seen whether it will attract a wide following in the courts.<sup>229</sup>

As another example, consider the difficulties courts have had in determining whether injuries resulting from stray golf balls can trigger recklessness liability.<sup>230</sup> Table One provides a listing of some recent cases in which courts evaluated the likelihood of a harmful result in determining whether to render a finding of recklessness. In one case, a court held that a defendant could be found reckless after admitting that he saw plaintiff was in the “line of fire” for his golf ball.<sup>231</sup> In order to strike the plaintiff, however, the defendant not only had to “shank”<sup>232</sup> his shot, but also the small golf ball must have impacted a victim who occupied a tiny fraction of the area in which the golf ball might have flown. Although the likelihood of a wayward shot may be high,<sup>233</sup> the probability that a shot will strike a particular victim, or any victim at all, is low for a single shot. This has been recognized in other golf injury cases, where courts have rejected allegations of recklessness for injuries arising due to “freak” shots.<sup>234</sup>

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228. *See infra* Part V.C.

229. *See infra* Part V.C.

230. *See generally* Lazaroff, *supra* note 72.

231. *See* Schick v. Ferolito, 767 A.2d 962, 978 (N.J. 2001).

232. “In a shank (if you are right handed) the ball squirts almost straight right from the moment you hit it.” Pat Dolan, *The Shank*, TOP END SPORTS, available at <http://www.topendsports.com/sport/golf/shank.htm> (last visited Mar. 18, 2008).

233. *Schick*, 767 A.2d at 972.

234. *See* Thompson v. McNeill, 559 N.E.2d 705, 709 n.2 (Ohio 1990).

TABLE ONE: EVALUATING RECKLESSNESS IN THE CONTEXT OF  
ERRANT GOLF SHOTS

Case	Conduct	Ruling on Recklessness
<i>Thompson v. McNeil</i> <sup>235</sup>	Plaintiff went to look for lost ball near a water hazard. <sup>236</sup> Defendant may have warned plaintiff of impending shot. <sup>237</sup> Shot shanked ninety degrees and struck plaintiff. <sup>238</sup>	Not reckless <sup>239</sup>
<i>Barnhill v. Tipple</i> <sup>240</sup>	Defendant failed to yell "fore" prior to hitting ball, which "sliced" and struck plaintiff. <sup>241</sup>	Not reckless <sup>242</sup>
<i>Dilger v. Moyes</i> <sup>243</sup>	Defendant claims trees obscured his shot, which struck plaintiff who was on border between fairways. <sup>244</sup> Dispute existed as to whether defendant yelled "fore." <sup>245</sup>	Not reckless <sup>246</sup>
<i>Maxwell v. Rowe</i> <sup>247</sup>	Plaintiff struck by defendant's ball. Defendant failed to yell "fore" and there was dispute about whether he saw plaintiff before shooting. <sup>248</sup>	Reckless <sup>249</sup>
<i>Monk v. Phillips</i> <sup>250</sup>	Plaintiff struck after golf ball traveled at 90-degree angle after defendant hit it off the "toe" of his club. <sup>251</sup> Plaintiff was told "look out, he's fixing to hit," but not to stop or wait. <sup>252</sup>	Not reckless <sup>253</sup>
<i>Schick v. Ferolito</i> <sup>254</sup>	Defendant perceived plaintiff to be in the "line of fire," waved plaintiff off in an effort to induce plaintiff to move from his location. <sup>255</sup> Plaintiff did not move, or defendant did not wait for him to move, and defendant hit anyway. <sup>256</sup>	Reckless <sup>257</sup>
<i>Gyuriak v. Millice</i> <sup>258</sup>	Defendant's shot traveled 220 yards into neighboring fairway to strike plaintiff. <sup>259</sup> Others in defendant's foursome yelled "fore." <sup>260</sup>	Not reckless <sup>261</sup>

235. 559 N.E.2d 705.

236. *Id.* at 706

237. *Id.*

238. *Id.*

239. *Id.* at 709.

240. No. 47-94, 1995 WL 495569 (Ohio Ct. App. June 13, 1995).

241. *Id.* at \*1.

242. *Id.* at \*2.

243. 63 Cal. Rptr. 2d 591 (Cal. Ct. App. 1997).

244. *Id.* at 592.

245. *Id.*

246. *Id.* at 594 (finding no duty to yell "fore," although failure is a violation of golf etiquette).

247. No. 97CA0075, 1998 WL 663228 (Ohio Ct. App. Sept. 23, 1998).

248. *Id.* at \*1

249. *Id.* at \*2.

250. 983 S.W.2d 323 (Tex. App. 1998).

251. *Id.* at 324.

252. *Id.*

253. *Id.* at 326.

254. 767 A.2d 962 (N.J. 2001).

255. *Id.* at 964.

256. *Id.*

257. *Id.* at 970.

258. 775 N.E.2d 391 (Ind. Ct. App. 2002).

259. *Id.* at 393.

Case	Conduct	Ruling on Recklessness
<i>Alexander v. Tullis</i> <sup>262</sup>	Golf ball stuck plaintiff who was on fairway in a depression invisible to defendant. <sup>263</sup>	Not reckless <sup>264</sup>
<i>Shin v. Ahn</i> <sup>265</sup>	Defendant failed to look before teeing off. <sup>266</sup> Ball traveled at 45-degree angle and struck member of defendant's foursome. <sup>267</sup>	Reckless <sup>268</sup>
<i>Yoneda v. Tom</i> <sup>269</sup>	Plaintiff was emerging from restroom on golf course 175 yards from defendant who hit his golf ball without yelling "fore." <sup>270</sup>	Not reckless <sup>271</sup>

## 2. Recklessness and Awareness of Risk

A related issue is the degree to which the defendant needs to have awareness of the risk posed by her actions in order to be found reckless. Courts have wrestled with how to distinguish mere knowledge of a risk from an appreciation of the severity of the risk.<sup>272</sup> Courts have also wrestled with whether recklessness can be proven even in the absence of *conscious* awareness of risk on the part of a defendant.<sup>273</sup>

260. *Id.*

261. *Id.* at 396.

262. No. 2005-P-0031, 2006 WL 763088 (Ohio Ct. App. Mar. 24, 2006).

263. *Id.* at \*1.

264. *Id.* at \*3.

265. 46 Cal. Rptr. 3d 271 (Cal. Ct. App. 2006), *aff'd* 165 P.3d 581 (Cal. 2007).

266. *Id.* at 275.

267. *Id.* at 276.

268. *Id.* at 285. To be precise, the appellate court held that the plaintiff could recover under a simple negligence theory, since the defendant had increased the risk of harm inherent in golf by failing to look before taking his swing. *Id.* However, the court opined that the duty of a golfer "to play within the bounds of the game; to not intentionally injure another player or to engage in conduct 'that is so reckless as to be totally outside the range of the ordinary activity involved in' golf" and found that the defendant breached that duty. *Id.* (internal citation omitted).

269. 133 P.3d 796 (Haw. 2006).

270. *Id.* at 798.

271. *Id.* at 809.

272. *See* *Sergent*, *supra* note 74, at 52.

273. *See* *Catheline v. Seaboard Coast Line R.R.*, 348 F. Supp. 43, 46 (M.D. Fla. 1972) ("The distinction between the Restatement's standard for wilful and wanton conduct, and the more restrictive rule requiring actual consciousness of probable injury, appears determinative in the case at bar."). The Supreme Court recently suggested that civil recklessness includes no subjective knowledge requirement, *see* *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215 (2007), although that seems inconsistent with the bulk of state court jurisprudence on the subject. *See, e.g.,* *Bailey v. Palladino*, 2006 WL 2068136, at \*7 (N.J. Super. Ct. App. Div. July 27, 2006) (quoting *Schick v. Ferolito*, 767 A.2d 692, 696 (N.J. 2001)) ("Recklessness, unlike negligence, requires a conscious choice of a course of action, with knowledge or a reason to know that it will create serious danger to others."); *Cohen v. 5 Brooks Stable*, 72 Cal. Rptr. 3d 471, 497 (Cal. Ct. App. 2008) (Haerle, J., dissenting); *Boyd v. Nat'l R.R. Passenger Corp.*, 845 N.E. 2d 356, 363 (Mass. 2006).

It is generally undisputed that recklessness requires some level of consciousness;<sup>274</sup> what confuses courts is whether a conscious action without a conscious appreciation of risk will be sufficient to state such a claim.<sup>275</sup> Some courts have described a defendant's conscious awareness of risk as "vital" and "crucial" in establishing recklessness.<sup>276</sup> Other courts have taken the middle ground: recognizing that while consciousness of risk is required, such consciousness can be implied or constructive, proven by the circumstances confronting the defendant rather than any direct evidence of cognitive recognition of risk.<sup>277</sup> However, courts universally recognize that where conscious awareness of a risk can be demonstrated, establishing liability for recklessness will be far easier.<sup>278</sup>

In one case, a court found that knowledge of a hole in a tire was not sufficient to establish recklessness for the sake of punitive damages where the defendant was not aware of the failure of steel support belts within a tire (something not susceptible to visual assessment).<sup>279</sup> Similar opinions seem to suggest that the awareness of risk needed to prove recklessness must be fairly specific: awareness of a general risk is not enough for a finding of recklessness.

### 3. *Recklessness, Carefulness, and Precautions*

Commentators on recklessness have frequently suggested that the low cost of accident avoidance should be a factor considered in finding recklessness.<sup>280</sup> Courts have explored this option, particularly in cases

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274. See *Bourgeois v. State Farm Mut. Auto. Ins. Co.*, 562 So.2d 1177, 1181 (La. Ct. App. 1990) (recklessness is "usually" accompanied by consciousness of risk, although it can be proven by facts that would have made a reasonable person aware of a high risk even without showing subjective awareness on the part of the defendant).

275. *Id.*

276. See, e.g., *Jardel Co. v. Hughes*, 523 A.2d 518, 530 (Del. 1987) ("the . . . crucial element involves the actor's state of mind . . . The actor's state of mind is thus vital.").

277. See, e.g., *Minick v. Englert*, 167 N.W.2d 551, 554 (S.D. 1969); *Williamson v. McKenna*, 354 P.2d 56, 70 (Or. 1960) ("It is not necessary that [a] defendant actually know of the risk.") (emphasis omitted).

278. *Williamson*, 354 P.2d at 71. Easy cases, of course, make bad law. See, e.g., *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 640 (1990) (Stevens, J., concurring in the judgment); *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 804 (1980) (Blackmun, J., concurring in the judgment). Professor Jody Armour suggests that conscious risk taking should be viewed in recklessness analysis as an evidentiary factor supporting recklessness, not as the tort's core component. See Jody David Armour, *Interpretive Construction, Systemic Consistency, and Criterial Norms in Tort Law*, 54 VAND. L. REV. 1157, 1162-63 (2001).

279. *Murphy v. Edmonds*, 601 A.2d 102, 118-19 (Md. 1992) (knowledge of hole not sufficient to establish gross negligence); *Sergent*, *supra* note 74, at 55.

280. See *Henderson & Twerski*, *supra* note 7, at 1143.

involving recklessness in its “gross negligence” guise. Indeed, some courts have made the defendant’s level of care the critical factor in determining whether a finding of recklessness was appropriate.<sup>281</sup> Here, two further distinctions could be drawn: (1) the defendant’s actual level of care; and (2) the level of care appropriate under the circumstances. Recklessness can be identified under the first category where a defendant has failed to exercise even a minimal amount of care. Under the second category, recklessness can be found where a defendant has failed to exercise anything close to the level of care appropriate under the circumstances.

Some courts have found that recklessness can be satisfied by a showing that a defendant has failed to exercise even “slight care.”<sup>282</sup> The failure of a driver approaching an intersection to slow down, signal, or look at oncoming traffic, for example, amounts to a failure not just to do what a prudent person would do but rather a failure to do what even an imprudent or foolish person might do.<sup>283</sup> This is another odd notion: Exactly what care a fool would employ is hard to judge.

Other courts, however, have suggested that a finding of recklessness requires a showing of “no care.”<sup>284</sup> Where a defendant has taken just minimal precautions against a risk of harm, courts are far less likely to render a finding of recklessness.<sup>285</sup>

#### 4. *Recklessness and Harm*

Courts have also imposed in recklessness cases a requirement that the harm raised by a defendant’s conduct be extremely severe, even as the Restatement authors have moved away from the apparent “life and limb” requirements set forth in early articulations of the scope of recklessness.<sup>286</sup>

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281. *See, e.g.*, *G.D. v. Monarch Plastic Surgery, P.A.*, 239 F.R.D. 641, 646 (D. Kan. 2007) (“The level of care (or lack thereof) taken by the defendants to protect confidential patient information would appear to be the appropriate measure of any alleged ‘recklessness’ on the part of the defendants.”).

282. *See, e.g.*, *Nist v. Tudor*, 407 P.2d 798, 804 (Wash. 1965).

283. *Id.*

284. *See, e.g.*, *Featherstone v. Hy-Vee, Inc.*, No. 04-1710, 2006 WL 1231662, at \*2 (Iowa Ct. App. Apr. 26, 2006); *Cobb v. Mantua Twp. Bd. of Trs.*, No. 2000-P-0127, 2001 WL 1602680, at \*6 (Ohio Ct. App. Dec. 14, 2001) (“[W]anton conduct [is] . . . the failure to exercise any care whatsoever.”) (internal quotations omitted).

285. *See, e.g.*, *Santho v. Boy Scouts of Am.*, 857 N.E.2d 1255, 1263 (Ohio Ct. App. 2006) (“[I]t is undisputed that Bennett took certain precautions when she initiated the relay race. . . . [W]e cannot say that Bennett’s conduct in organizing the relay race was in reckless disregard of the safety of another.”).

286. *See supra* notes 122–24 and accompanying text.

Courts have suggested that the harm a defendant's misconduct poses must be "grave" in order to trigger a holding of recklessness.<sup>287</sup>

*Sandler*, a recent Massachusetts Supreme Court case, is particularly revealing on the significance some courts assign to the level of harm necessary to prove recklessness.<sup>288</sup> The case involved an injured bicyclist attempting to evade Massachusetts' recreational use statute (which protects, among others, park operators from tort liability for mere negligent conduct).<sup>289</sup> The state supreme court found no recklessness even though the park authority was aware of poor lighting and visibility in a heavily traveled tunnel along a bike path.<sup>290</sup> The plaintiff suffered injuries when he fell from his bike after striking an uncovered drain hole (vandals had apparently removed the drain cover).<sup>291</sup> Plaintiff introduced evidence that the government was aware of the dangers posed and took no precautions.<sup>292</sup>

However, the court found no recklessness because the level of injury posed by an uncovered drainage hole in a poorly lit tunnel did not pose a risk of "death or grave bodily injury."<sup>293</sup> The risk was considered to be a "simple tripping hazard."<sup>294</sup> In a footnote, the court compared the instant case to cases involving victims who had been killed, maimed, and severely burned, leading to findings of recklessness.<sup>295</sup> Since this victim had not been killed, the court concluded no recklessness was present, in spite of the government's awareness of the risk and failure to take precautions. It is not enough that the plaintiff could have been killed—death must have been "seen as likely."<sup>296</sup>

In some contexts, a requirement of grave harm makes absolutely no sense as a component of recklessness analysis. For example, recklessness

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287. *Spagnulo v. Commonwealth*, 20 Mass. L. Rptr. 728, 2006 WL 1238671, at \*6 (Mass. Super. 2006).

288. *See Sandler v. Commonwealth*, 644 N.E.2d 641 (Mass. 1995).

289. *Id.* at 642, 644.

290. *Id.* at 644–45.

291. *Id.* at 642–43.

292. *Id.* at 644.

293. *Id.* at 643, 645. This finding is questionable. A bicyclist who is thrown from her bicycle while traveling at speeds of 15–25 mph could easily suffer a fatal head injury. The fact that the plaintiff did not should not play any role in determining the ex ante expected level of harm posed by the uncovered drain hole. There are some 600 bicycle-related deaths due to head injuries each year. *See BICYCLE RELATED INJURIES*, [http://www.ok.gov/health/documents/Bicycle\\_Injuries.pdf](http://www.ok.gov/health/documents/Bicycle_Injuries.pdf) (last visited Sept. 12, 2008).

294. *See Spagnulo v. Commonwealth*, 20 Mass. L. Rptr. 728, 2006 WL 1238671, at \*3 (Mass. Super. 2006) (discussing *Sandler*, 644 N.E.2d 641).

295. *Sandler*, 644 N.E.2d at 644 n.4.

296. *Spagnulo*, 2006 WL 1238671, at \*3 (discussing *Sandler*, 644 N.E.2d 641).

applied as a standard for imposing liability in a partnership, corporate, or other fiduciary context cannot require bodily harm, or else risk losing its utility. It is very difficult to imagine situations in which partners might expose one another to death or dismemberment, yet the law sets forth recklessness as the standard for intra-partner disputes where conflicts of interest are not involved.<sup>297</sup>

More generally, however, it is not clear what policy goal is served by focusing on level of harm in setting recklessness apart from negligence. A plaintiff's compensatory damages in a negligence case turn on the severity of the injury the plaintiff suffered.<sup>298</sup> A dismembered plaintiff can (almost always) recover more money than one who is just bruised and battered, and that greater potential liability should lead a hypothetical defendant to avoid exposing such victims to loss of life or limb. The operation of incentives in this way is the essence of the economic case for negligence. Why a different standard, recklessness, would serve any additional role in cases in which the risk of harm posed was grave is hard to fathom.

*a. Recklessness and Victims*

On a related note, courts seem far more willing to find recklessness in cases involving sympathetic victims. In the Massachusetts case *Sandler*, the court's list of victims who had successfully proven recklessness included three young boys, a young girl, and a disabled person.<sup>299</sup> While the court did not explicitly acknowledge that the sympathetic or vulnerable character of the victim of a tort should shape its rulings on recklessness, that is the clear implication.

In other instances, courts have taken into account the vulnerability of a victim in allowing a plaintiff to recover for mere negligence where otherwise recklessness would be required.<sup>300</sup> This is not precisely the same thing as taking a victim's characteristics into account when analyzing recklessness, but does show that courts are influenced by victim

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297. UNIFORM PARTNERSHIP ACT § 404c (1997).

298. RESTATEMENT (SECOND) OF TORTS § 903 & cmt. a (1979) (“[C]ompensatory damages are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him. . . . They give to the injured person some pecuniary return for what he has suffered or is likely to suffer. There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.”) (internal quotations omitted).

299. *Sandler*, 644 N.E.2d at 644 n.4.

300. *See, e.g.*, *Outlaw v. Bituminous Ins. Co.*, 357 So.2d 1350 (La. Ct. App. 1978) (negligence can be recoverable where adult golfer strikes child golfer).

characteristics even when deciding whether to analyze recklessness in the first place.

What role the victim's characteristics should play in a coherent analysis of recklessness is unclear. To be sure, the level of *justified* risk exposure with respect to a sympathetic victim might be less than to an unsympathetic victim.<sup>301</sup> But the justification for a risk is already part of negligence analysis. Perhaps a sympathetic victim suffers more substantial harm than an unsympathetic one, although it should have nothing to do with the actual magnitude of loss resulting from risky conduct. Certainly, the sympathetic character of a victim has nothing to do with a defendant's consciousness of risk.

##### 5. *Recklessness and Blameworthiness*

Some courts have left undefined the precise contours of recklessness, preferring instead to simply characterize recklessness by reference to what it is not (negligence or intentional tort). Typically, this approach centers on distinguishing recklessness from negligence by way of the greater level of blameworthiness associated with recklessness.

For instance, the Illinois Supreme Court has explained that “[w]illful and wanton [mis]conduct carries a degree of *opprobrium* not found in merely negligent behavior”; this amounts to a “qualitative distinction.”<sup>302</sup> The Oregon Supreme Court has opined that the “basic ingredient” in cases finding recklessness is the defendant’s “*I don’t care* attitude.”<sup>303</sup>

Blameworthiness has also arisen as a defining characteristic of recklessness in cases involving malicious behavior or bad faith. Courts have found it easy to find recklessness where there is bad faith,<sup>304</sup> even if the other requirements of recklessness have not been established in great detail.

Some courts have gone so far as to suggest that an intentional act which exposes another to a high risk of harm is not sufficient for a finding of recklessness unless it shows a sufficiently cruel nature and wicked intent.<sup>305</sup>

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301. Consider, for instance, courts’ continued willingness to tolerate higher levels of risky conduct with respect to criminal trespassers. See *supra* notes 80–81 and accompanying text.

302. *Poole v. City of Rolling Meadows*, 656 N.E.2d 768, 770 (Ill. 1995) (emphasis added).

303. *Williamson v. McKenna*, 354 P.2d 56, 67 (Or. 1960) (emphasis added) (internal quotations omitted).

304. See *Sergent*, *supra* note 74, at 71.

305. *Chaffin v. Chaffin*, 397 P.2d 771, 777 (Or. 1964). Oregon subsequently abrogated the common law interfamilial immunity that required the plaintiff in *Chaffin* to plead recklessness. Heino

## IV. BEHAVIORAL, COGNITIVE AND NEUROSCIENTIFIC PERSPECTIVES

In this Part, I develop the argument that the judicial confusion surrounding recklessness does not arise from simple linguistic imprecision.<sup>306</sup> The source of the “twilight zone” status of recklessness<sup>307</sup> is more fundamental. Simply put, recklessness as described in black-letter law is not consistent with the way the human mind processes decisions in the face of risk and uncertainty.

Tort law ought not to be scientifically naive.<sup>308</sup> Law should be written and applied to account for the manner in which humans make decisions. A hundred years ago, that may not have been possible, but today, advances along two scientific lines, behavioral economics and neuroeconomics, provide new insight into how humans make decisions. These advances should now be incorporated into the cognitive foundations of tort law.

Behavioral economics and neuroeconomics are two related (but distinct) disciplines. Each offers important contributions into why the structure of recklessness which the ALI constructed, and American courts confused, is incomplete. Behavioral economics, derived from a wealth of experimental research in behavioral psychology, focuses on how human beings actually behave.<sup>309</sup> An important insight of behavioral economics is that human actors rarely comport themselves according to the rational risk-averse utility maximizer<sup>310</sup> envisioned by traditional neoclassical economics<sup>311</sup> (and its wayward offspring, conventional law and economics<sup>312</sup>).

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v. Harper, 759 P.2d 253 (Or. 1988) (en banc). See also *supra* note 141 and accompanying text.

306. Certainly, there is no “magic verbal formula which will describe with precision the difference between negligence and reckless conduct.” *Williamson*, 354 P.2d at 69.

307. See *Pleasant v. Johnson*, 325 S.E.2d 244, 247 (N.C. 1985).

308. See Jeffrey J. Rachlinski, *The “New” Law and Psychology: A reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 739 (2000) (“Despite the difficulty of the task, the law needs an accurate model of human judgment and choice.”).

309. See Colin F. Camerer & George Loewenstein, *Behavioral Economics: Past, Present & Future*, in *ADVANCES IN BEHAVIORAL ECONOMICS* 3 (Colin F. Camerer et al. eds., 2004).

310. See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 154 (2003). The idealized “economic person” has sometimes been referred to as *homo economicus*. *Homo economicus* selfishly pursues individual happiness (utility, following Mill). At the same time, she sensibly avoids risks that do not offer a positive expected return. See Barbara P. Billauer, *The Right to Health—A Holistic Health Plan for the Next Administration*, 5 RUTGERS J. L. & PUB. POL’Y 234, 269 n.80 (2007) (“A purely rational person (also known as *homo economicus*) is an individual who is extremely individualistic, considering only those benefits and costs that directly affect him or her.”).

311. John B. Davis, *Behavioral Economics, Neuroeconomics and Identity*, in *ECONOMICS & THE MIND* 58 (Barbara Montero & Mark D. White eds., 2007).

312. Behavioral law and economics has become a popular school in American legal scholarship, drawing on the insights of behavioral economics. See Camerer & Loewenstein, *supra* note 309, at 36.

By contrast, neuroeconomics,<sup>313</sup> based on recent advances in the understanding of the actual cognitive processes at work in human thought, focuses on choice as a product of brain activity.<sup>314</sup> Neuroeconomics is “the study of how the embodied brain interacts with its external environment to produce economic behavior.”<sup>315</sup> Neuroeconomics exploits recent developments in brain imaging technology to investigate systematically how brain function causes certain behaviors.<sup>316</sup> Neuroeconomics contributes to behavioral economics in that it offers a neurobiological basis for some of the departures from rational action experimentally observed by Behavioralists.<sup>317</sup>

#### A. *Behavioralism, Heuristics and Recklessness*

Behavioral law and economics has its origins in a series of famous experiments<sup>318</sup> by Nobel Prize winner Daniel Kahneman and the late Amos Twersky, along with similar work by economist Richard Thaler.<sup>319</sup> These experiments built a foundation for later work; collectively, the result has been to paint a picture of human decision making quite different from the rational utility maximization presumed by neoclassical economics.<sup>320</sup>

These experiments have demonstrated that real-world humans differ in several ways from the rational decision-making units postulated by neoclassical economics. They are, for instance, more altruistic, fairness-

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313. Neuroeconomics is perhaps best understood as “the combination of neuroscience and behavioral economics” and a “strategy for grounding the behavioral regularities that cognitive science has established in brain structures.” Davis, *supra* note 311, at 67; *see generally* Peter Coy, *Why Logic Often Takes a Backseat; The Study of Neuroeconomics May Topple the Notion of Rational Decision-making*, BUS. WK., Mar. 28, 2005, at 94.

314. ECONOMICS & THE MIND, *supra* note 311, at 1 (behavioral “economists have tended to . . . tak[e] an extreme behaviorist orientation and [have] neglect[ed] the role of the mind entirely.”).

315. Terrence Chorvat et al., *Law and Neuroeconomics*, 13 SUP. CT. ECON. REV. 35, 44 (2005). “Economics,” in this sense, has nothing to do with money (or at least, need not have anything to do with money). Instead, it is simply decision making in the face of budget constraints.

316. Davis, *supra* note 311, at 67; Kevin McCabe et al., *Lessons from Neuroeconomics for the Law*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 68 (Francesco Parisi & Vernon Smith eds., 2005); Chorvat et al., *supra* note 315, at 44.

317. Erin Ann O’Hara, *How Neuroscience Might Advance the Law*, in LAW & THE BRAIN 21, 25 (Semir Zeki & Oliver R. Goodenough eds., 2004).

318. Experiments were important in the development of the field because “experimental control is exceptionally helpful for distinguishing behavioral explanations from standard ones.” Camerer & Loewenstein, *supra* note 309, at 7.

319. *Id.* at 6.

320. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1471 (1998).

sensitive, and loss-averse.<sup>321</sup> Further, they are more likely than neoclassical economists assumed to discount future costs and benefits.<sup>322</sup> Scholars have argued that these decision-making “errors” result from the application of heuristics<sup>323</sup>: decision-making “short-cuts” designed to reduce the costs associated with complex choice.<sup>324</sup> In addition, scholars have found systematic errors in subjects ability to estimate probabilities.<sup>325</sup>

Behavioralism’s insights into human decision making should change our view of the black-letter law of recklessness because they call into question the degree to which we are capable of consciously disregarding known risks.<sup>326</sup> Indeed, behavioralism may undercut the validity of the concept of “known risk” entirely.<sup>327</sup>

### 1. *Over-Optimism Bias*

Recklessness requires inquiry into a defendant’s subjective calculation of the probability of an unfortunate result, or at least into the level of risk a prudent person would appreciate if in possession of the defendant’s knowledge of the facts prior to an accident. To be reckless, a defendant must proceed indifferent either to a specific awareness of a substantial risk, or to awareness of facts that would make a sensible person appreciate such a risk.<sup>328</sup> The manner in which we estimate probabilities, therefore, is an essential component of any theory of recklessness. Behavioral science has revealed that even where we appreciate the actual probability of an unfortunate event, we tend to underestimate the probability that it will happen to us *in particular*, due to our tendency to be overly optimistic.<sup>329</sup>

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321. See generally Camerer & Loewenstein, *supra* note 309, at 15–21.

322. *Id.*

323. See Michael A. McCann, *It’s Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1476 (2006).

324. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1053, 1085 (2000). Heuristics serve a useful purpose because most complex decisions involve a greater expenditure of cognitive energy than decision makers are willing to allocate. See Rachlinski, *supra* note 308, at 758.

325. Eric A. Posner, *Probability Errors: Some Positive and Normative Implications for Tort and Contract Law*, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR, *supra* note 316, at 456.

326. For a strong critique of the application of behavioral psychology to legal scholarship, see generally Gregory Mitchell, *Taking Behavioralism too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002).

327. The concept of deliberation underlies the modern notion of culpability in both tort and crime. See Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1267 (1990).

328. See *supra* Part II.B.

329. See Korobkin & Ulen, *supra* note 324, at 1091; McCann, *supra* note 323, at 1460. Over-

Over-optimism is a highly robust<sup>330</sup> example of bounded rationality and judgment error.<sup>331</sup> More than 250 studies have documented that people believe negative events are less likely to happen to them than to others.<sup>332</sup> For instance, a study has demonstrated that smokers believe that they individually are less likely “than the average smoker to suffer health problems as a result of smoking.”<sup>333</sup> Interestingly, risk calculations are not constant across levels of risk. Humans tend to overestimate the risks of low probability events (such as a terrorist attack), but underestimate the risks of high probability events (such as the adverse health outcomes associated with consumption of red meat).<sup>334</sup>

Over-optimism calls into question the ability of human actors to appreciate consciously substantial risks with any degree of certainty and precision. An actor may engage in risky conduct, and may even fully appreciate the base level of risk such conduct poses. At the same time, behavioral economics’ demonstration of persistent and pervasive over-optimism suggests that such actors may underestimate the probability that they in particular will experience an unfortunate outcome. To the extent that we hold an actor who appreciates a substantial risk liable for recklessness, we may be applying an unrealistic standard; that is, one that is higher than median for the relevant population. Actors may appreciate risks yet believe (irrationally) that they will be fortunate enough to avoid them.

Nor does the supposedly objective component of recklessness analysis save the concept. Virtually all people (thus all reasonable people) suffer from over-optimism bias. Awareness of facts that a prudent person might recognize as indicators of substantial risk is a flawed measure, since risk evaluation, looking in from the outside, differs in a scientifically demonstrable and predictable way from risk evaluation from the inside.

The drunk-driving example discussed earlier is probably the best example of over-optimism bias at work. Thanks to public education campaigns and criminal enforcement, the risks associated with drunk

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optimism may be desirable and adaptive because it makes people happier, more content, and increases their productivity. Christine Jolls, *On Law Enforcement with Boundedly Rational Actors*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR*, *supra* note 316, at 268, 271.

330. Jolls, *supra* note 329, at 277.

331. *Id.* at 270.

332. *Id.*

333. Ole-Jørgen Skog, *Addiction, Choice, and Irrationality*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR*, *supra* note 316, at 111, 122.

334. See W. Kip Viscusi, *Judging Risk and Recklessness*, in *PUNITIVE DAMAGES: HOW DO JURIES DECIDE?*, 171, 182, 183 (Cass R. Sunstein et al. eds., 2002).

driving may be well known. Seventy-two percent of adult Americans report serving as or relying on designated drivers.<sup>335</sup> Americans seem to know that getting behind the wheel increases the chances they will be involved in a crash by many times (even if it may not make an accident probable). Yet they regularly drive after consuming too many drinks.<sup>336</sup> Even though they know the overall level of risk, drivers believe that they are going to be one of the lucky ones. This over-optimism sometimes has tragic results.

This is not to say that we are incapable of appreciating risk. Not just recklessness but both intentional tort (in its substantial certainty form) and negligence assume that human actors (subjectively or objectively) can appreciate risk and conform their conduct to a safe standard.<sup>337</sup> To a large extent the gross ability of human actors to assess risk is a presupposition of all law. But over-optimism does call into question our ability to measure risk *accurately* or *precisely*. Therefore, employing standards that require drawing fine lines between negligence, recklessness, and intentional tort is unwise, and perhaps unfair given the demonstrated inability of the model human to make precise probability estimates that such clear distinctions require.

## 2. Availability

A second behavioral trait relevant to recklessness is the so-called availability heuristic, which also has a profound effect on probability estimates. Availability is a well-known example of judgment error which describes how “the ease with which a given event comes to individuals’ minds” influences “probability estimates.”<sup>338</sup>

Availability posits that the more “available” a particular event or occurrence is to an actor, the more heavily that event will weigh in the actor’s assessments of probability: “[T]he perceptions of boundedly rational actors about probabilities of uncertain events are heavily influenced by how available other instances of the event in question are.”<sup>339</sup> Recurrent incidents are overweighed in most decision makers’

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335. NIELSON RESEARCH, DESIGNATED DRIVING STUDY, *available at* <http://www.alcoholstats.com/mm/docs/5116.doc> (last visited Aug. 25, 2008).

336. *See supra* note 218 and accompanying text.

337. This is the case even where the law does not require a showing that a particular defendant could appreciate risk and conform to a safe approach in order to trigger liability.

338. Jolls, *supra* note 329, at 271; *see also* Jolls et al., *supra* note 314, at 1518.

339. Jolls, *supra* note 329, at 271.

calculations of expected outcomes.<sup>340</sup> By the same token, people are likely to underestimate the likelihood of low-probability events—even ones posing significant harm—due to this heuristic.<sup>341</sup>

For many actors, availability, like over-optimism, may lead to significant underestimation of the level of risk particular conduct poses, even where such conduct might lead to legal liability for recklessness. Many of the circumstances in which courts render findings of recklessness are freak or strange occurrences—like the golf ball that shoots out at an unpredictable angle and strikes a fellow golfer in a sensitive area (most commonly the eye). Courts, *ex post*, have no problem saying that such freak occurrences were nevertheless the product of conscious indifference to known risks. But *ex ante*, the actors involved may not have appreciated the likely risk of harm where examples of those bad outcomes score low on the availability scale. Events that have not occurred to a particular actor before, or that occurred a long time ago or in other contexts, are not available and are not easily incorporated into probability determinations. By contrast, more available events—particularly more recent events—weigh more heavily. Consider, for instance, a driver who repeatedly drives in her car while sending text messages from a cell phone or e-mails from a personal digital assistant. Objectively, we might be able to say that such conduct is incredibly risky.<sup>342</sup> But when an individual assesses the risk of this practice, the available memories of her previous texting-while-driving activity (which did not lead to an accident) may cloud her ability to appreciate that substantial risk consciously.

Availability influences probability unconsciously, or at least at the borders of consciousness. Few actors are aware that they are employing a short-cut heuristic in making decisions in the face of risk. A legal standard tied to distinguishing conscious probability evaluations from unconscious ones imposes on courts an unreasonable burden. Unconscious heuristics interfere with conscious probability calculations, leaving individual decision making a product of both conscious and unconscious risk. Asking courts to label an actor's conduct as one or the other is unfair and unwise.

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340. Thomas S. Ulen, *Human Fallibility and the Forms of Law: The Case of Traffic Safety*, in *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR*, *supra* note 316, at 397, 407.

341. See Jolls et al., *supra* note 320, at 1519.

342. Washington State has recently outlawed the practice in recognition of this risk. See Paul McNamara, *State bans texting while driving*, <http://www.networkworld.com/community/?q=node/15088> (last visited Aug. 25, 2008).

### 3. *Hindsight Bias and Judicial Calculations*

The availability heuristic contributes to undermining the legal concept of recklessness in another way. Here, it is not the bias of the purportedly reckless actor that matters, but rather the bias of the *ex post* decision maker seeking to determine whether the level of risk an actor's conduct posed was sufficiently high or substantial to trigger a finding of recklessness.<sup>343</sup>

The tendency of the human mind to fixate on the available leads to hindsight bias, one of the most studied shortcomings in human beings' probability assessments.<sup>344</sup> Humans find it easier to imagine events "that actually occurred" rather than events "that did not," leading to overestimates of the probabilities of events that actually did occur.<sup>345</sup> Thus, hindsight bias describes a "tendency of actors to overestimate the *ex ante* prediction that they had concerning the likelihood of an event's occurring after learning that it actually did occur."<sup>346</sup> Juries are "likely to believe precautions that could have been taken would have been more cost effective than they actually appeared to be *ex ante*."<sup>347</sup> As a result,

Hindsight bias will lead juries . . . to find defendants liable more frequently than if cost-benefit analysis were done correctly—that is, on an *ex ante* basis. Thus, plaintiffs will win cases they deserve to lose. This prediction is consistent with the frequently expressed (though difficult to verify) view that the tort system imposes too much liability.<sup>348</sup>

Studies support the suggestion that hindsight bias plays a role in judges' and juries' calculations of risk probabilities. Juries have been

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343. See *supra* Part III.B.1. The availability bias and the hindsight bias lead to exactly the opposite result with respect to probability determinations. Availability leads to underestimation of risk *ex ante*; hindsight bias leads to overestimation of risk *ex post*. The difference between the two has to do with who is falling victim to the bias. Availability bias affects the actor embarking on a risky course, while hindsight bias affects the fact-finder evaluating the actor's conduct after the fact.

344. See Korobkin & Ulen, *supra* note 324, at 1095.

345. Camerer & Loewenstein, *supra* note 309, at 10.

346. Ulen, *supra* note 340, at 410.

347. *Id.* at 412.

348. Jolls et al., *supra* note 320, at 1524. The probability that a McDonald's patron would suffer severe, debilitating burns from a cup of scalding hot coffee, for instance, can hardly be said to be substantial or even high *ex ante*. Yet a jury had no trouble finding that McDonald's had acted recklessly in that famous case. See *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994).

shown to grossly overestimate the probabilities of low-probability events.<sup>349</sup>

Recklessness requires the actor to have been aware of a risk, or of facts that raised such a risk, and requires that the risk be fairly substantial. But the jury or judge deciding whether the risk was substantial is not engaging in the same analysis as the actor. An important, salient, and available event—the accident itself—has occurred in the time since the actor embarked on a supposedly reckless course of conduct. Expecting juries and judges to overcome their own hindsight bias is demonstrably unscientific.

The effect of hindsight bias is not limited to analysis of recklessness. In negligence determinations as well, courts and juries applying the “Hand Formula”<sup>350</sup> to determining the appropriate level of risk and precaution are likely to overestimate the probabilities of harmful results based on the fact that such results actually occurred.<sup>351</sup> But the effects of hindsight bias are likely to be particularly potent in analyses of recklessness. Whereas negligence merely requires balancing the probability of a harmful result, the severity of harm, and the costs of accident avoidance, recklessness adds an additional requirement: that the probability of harm be substantial. Finders of fact tasked with determining whether a particular risk was substantial prior to an accident are far more likely to reach an affirmative conclusion because the harmful result actually occurred.

Augmenting the effect of hindsight bias is the “denominator blindness” effect identified by Kip Viscusi and Richard Zeckhauser.<sup>352</sup> Their research reveals that, in calculating the “risk” of an accident, people tend to focus only on the “number of adverse outcomes,” rather than on the more

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349. See Viscusi, *supra* note 334, at 185.

350. According to this formula, named after Judge Learned Hand (who articulated the ideas expressed in the formula in *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947)), a “reasonable” and therefore non-negligent actor takes precautions when the benefit of those precautions in terms of reduced accident likelihood or severity outweighs the costs of taking such precaution. If B is the burden of precautions, and P is the probability of an unfortunate outcome of magnitude L, a reasonable person takes all precautions for which  $B < P * L$ . Due to the increasing marginal cost of further “levels” of precaution and the diminishing returns associated with further precaution, at some point a reasonable person does not take further steps to avoid an accident because of the low value those steps would have. Judge Posner describes the Hand Formula as involving “determining whether the burden of precaution is less than the magnitude of the accident, if it occurs, multiplied by the probability of occurrence.” *McCarty v. Pheasant Run, Inc.* 826 F.2d 1554, 1556 (7th Cir. 1987). The formula is analytically precise but not operationally precise because juries are rarely given sufficient information to insert values into the formula.

351. Jolls et al., *supra* note 320, at 1523–25; Korobkin & Ulen, *supra* note 324, at 1096; Ronen Perry, *Re-Torts*, 59 ALA. L. REV. (forthcoming 2008) (manuscript at 16 n.56, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1021547](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1021547)).

352. Viscusi & Zeckhauser, *supra* note 8, at 75.

accurate “number of adverse outcomes” *divided by* the number of *potential* adverse outcomes (which the authors describe as a defendant’s “exposure” to adverse outcomes).<sup>353</sup> Since juries and judges tend to ignore the denominator in this more accurate measure of risk, they may be prone systematically to find recklessness in evaluating larger-scale operations.<sup>354</sup> Even if such operations are characterized by a lower rate of serious accidents, the large scale may mean a larger number of accidents and thus a larger numerator.<sup>355</sup>

Courts are particularly unlikely to be able to overcome hindsight bias and the denominator effect where an accident leading to a claim of recklessness had been preceded by other similar unfortunate incidents, no matter how improbable those incidents may have been. In fact, many courts explicitly acknowledge the role that previous prior incidents play in leading to findings of recklessness.<sup>356</sup> While previous incidents can rightly play a role by suggesting a defendant’s knowledge of facts involving the risk, they also enhance the prospect that a court will overestimate the risk that a course of conduct actually posed at the time the defendant undertook it.

### *B. Neuroeconomics and Recklessness*

Neurobiology is a field that has seen dramatic advances in the last quarter century. These advances include both improved technology capacity for imaging and measuring the function of the brain,<sup>357</sup> and a reconceptualization of the study of the mind that recognizes that particular

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353. *Id.* at 75–76.

354. *Id.* at 88.

355. *Id.* at 77–78.

356. *See* *Sergent*, *supra* note 74, at 69; *see, e.g.*, *Featherstone v. Hy-Vee, Inc.*, No. 04-1710, 2006 WL 1231662, at \*2 (Iowa Ct. App. Apr. 26, 2006) (fact of only one prior accident defeats claim of recklessness).

357. Significant advances in this area include “non-intrusive methods for . . . locating brain activity” such as positron emission tomography (PET) and functional magnetic resonance imaging (fMRI), techniques for measuring and localizing brain reactions and brain electrical activity such as electroencephalogram (EEG) and magnetoencephalogram (MEG), and neurochemical studies of the brain. Oliver R. Goodenough & Kristin Prehn, *A Neuroscientific Approach to Normative Judgment in Law and Justice*, in *LAW & THE BRAIN*, *supra* note 317, at 77, 89, 90; *see also* Paul J. Zak, *Neuroeconomics*, in *LAW & THE BRAIN*, *supra* note 317, at 133, 138–40. Of these, brain imaging is currently the most popular technique. *See* Camerer et al., *supra* note 45, at 12. In controlled experiments, groups of people are asked to perform sets of tasks (some “control” and some “treatment”), and while they are performing those tasks, images are recorded of their brains. *Id.* Comparisons of the two sets of images reveal which portions of the brain are activated by the different behaviors. *Id.* While it has led to a number of interesting findings, brain imaging remains “only a crude snapshot.” *Id.*

human thoughts, tendencies, and behaviors can be isolated to particular parts and processes of the brain.<sup>358</sup> Microeconomics, at its core the study of decision making under resource constraints,<sup>359</sup> has cultivated these neurobiological advances into the burgeoning field of neuroeconomics.<sup>360</sup> These developments are only now resonating in the study of the law.<sup>361</sup>

Neuroscience has the potential to open up the “black box” of human cognition.<sup>362</sup> As law professor Oliver Goodenough and neurobiologist Kristin Prehn explain, some

traditional psychology, at the behaviourist extreme, was left with a mysterious ‘black box’ as the explanation for the central part of th[e] chain [connecting sensory “input” to behavioral “output”] . . . . By untangling human brain function itself and relating it to the processes of sensation, thought and action under study, we can offer much more complete and competent descriptions and explanations of human psychology.<sup>363</sup>

Goodenough and Prehn compare preneuroscientific study of human behavior to the development of automobile engineering without ever opening a car’s hood.<sup>364</sup> Without the ability to see under the hood, such an exploration would “rely on explanations such as ‘the car’s desire to move

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358. Semir Zeki & Oliver R. Goodenough, *Introduction to LAW & THE BRAIN*, *supra* note 317, at xi, xi–xii.

359. *See* Zak, *supra* note 357, at 133.

360. The field of neuroeconomics evolved in part as a result of the need of experimental and behavioral economists, on the one hand, for a neural explanation for the behavioral patterns they observed, and a need by neuroscientists interested in studying decision making for a theory of choice. *See* PAUL W. GLIMCHER, *DECISIONS, UNCERTAINTY & THE BRAIN: THE SCIENCE OF NEUROECONOMICS* 321–22 (2003).

361. Morris B. Hoffman, *The Neuroeconomic Path of the Law*, in *LAW & THE BRAIN*, *supra* note 317, at 3; Zak, *supra* note 357, at 134. One reason for the slow incorporation of neuroeconomic concepts into legal scholarship may have to do with the fact that neurobiology’s early legal champions also tended to advocate the relevance of evolutionary biology to the law. *See* O’Hara, *supra* note 317, at 27. For a detailed critique of efforts to introduce evolutionary biological theories into legal scholarship, see generally Brian Leiter & Michael Weisberg, *Why Evolutionary Biology is (So Far) Irrelevant to Law* (Univ. of Texas Law, Public Law Research Paper No. 89, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=892881](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892881). Although evolutionary biology is not yet at a stage where it can offer accurate predictions of human behavior, neuroscience can contribute to legal reasoning without any reference to evolutionary biology. *See* O’Hara, *supra* note 317, at 27. It does not matter how or why particular brain structures developed. The fact is, they are now thus, and any consideration of how deviant or reckless behavior arises should start with a consideration of this reality. *See id.* Moreover, neuroscience is one of the rare areas where scientific knowledge has advanced to the point that biology can meaningfully explain behavior. *See* Leiter & Weisberg, *supra*, at 35–36.

362. Camerer et al., *supra* note 45, at 9–10.

363. Goodenough & Prehn, *supra* note 357, at 84–85.

364. *Id.* at 85.

inspires its motive force.”<sup>365</sup> The exposure of the engine, like neuroscientific inquiry into brain function, makes possible a far more complete understanding.<sup>366</sup>

Of course, much work remains to be done.<sup>367</sup> But preliminary efforts have yielded several valuable insights which help call into question the black-letter law articulation of recklessness. Specifically, these lessons indicate that the law’s presumption that decision making can be categorized neatly into “conscious” or “unconscious” risk taking is inaccurate as a positive description of cognitive function.<sup>368</sup>

### *1. Automation and Consciousness*

Early thinking about the brain, originating with French philosopher René Descartes, divided human behavior into two categories: behaviors representing simple motor responses to applied stimuli, and complex behaviors representing a higher order decision-making process.<sup>369</sup> To a large degree, this dichotomy is embedded within the legal definition of tortious recklessness, which suggests that courts ought to distinguish between conscious indifference (rising to the level of recklessness) and something less conscious (which might lead only to negligence). Modern neurobiology built a wealth of evidence to suggest that this division is a false one.<sup>370</sup>

Instead, even what appears to be a simple or reflexive behavior is actually the result of the same process as more complex decision making. Judge Morris Hoffman explains:

Perhaps the brain—both in its ‘simple’ and ‘complex’ activities—is a probability machine rather than some contraption that inexplicably switches back and forth between reflexive/determinate outcomes (burn your hand, pull it back) and

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365. *Id.*

366. *Id.*

367. See GLIMCHER, *supra* note 360, at 322 (“Building a complete neuroeconomic theory of the brain is an enormous, and largely empirical, task.”).

368. See Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 272 (2002) (“[M]odern neuroscientific research has revealed a far more fluid and dynamic relationship between conscious and unconscious processes. If such fluidity exists, human behavior is not always conscious or voluntary in the ‘either/or’ way that the voluntary act requirement presumes. Rather, consciousness manifests itself in degrees that represent varying levels of awareness.”) (footnote omitted).

369. Hoffman, *supra* note 361, at 11; GLIMCHER, *supra* note 360, at 268.

370. Hoffman, *supra* note 361, at 12; Denno, *supra* note 368, at 274; DON ROSS, *ECONOMIC THEORY AND COGNITIVE SCIENCE: MICROEXPLANATION* 323 (2005).

cognitive/indeterminate outcomes (you decide you will walk home today rather than take the bus). Perhaps all behaviours are represented in the brain by a set of probability distributions, which are then continuously influenced by the interaction between ultimate causes (the initial probabilities that evolution built into brains) and proximate causes (the particular environmental challenges brains are called upon to solve).<sup>371</sup>

A key finding of neuroscience is that much of brain functioning is “automatic,” with an individual largely unaware of the brain’s activity.<sup>372</sup> Neuroscience has documented

the ability for the brain to ‘automate’ processes that had previously required conscious thought, thereby conserving cognitive resources. The idea is that if there is a behaviour that we commonly perform, we simply begin to perform the action without much thought. In fact, the brain is continually ‘automating’ much of our behavior.<sup>373</sup>

This is because the brain, like an economist, tries to maximize benefit at minimum cost. In the neuro-world, the cost of conscious deliberation is measured in terms of the cognitive resources depleted;<sup>374</sup> the benefit in terms of the quality of the decision produced.<sup>375</sup> We may initially make conscious decisions when engaged in new activities, but with time we “automate” those decisions—that is, we make them “without thinking.”<sup>376</sup> Automative processes are designed “to keep behavior ‘off-line’ and below consciousness.”<sup>377</sup> Such automation conserves cognitive resources because “conscious processing is apparently more costly than unconscious processing.”<sup>378</sup> Automatic processes are faster and require little effort.<sup>379</sup> This means that often, “the brain’s processing occurs outside of our conscious awareness, making correction of some phenomena difficult.”<sup>380</sup>

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371. Hoffman, *supra* note 361, at 13.

372. Camerer et al., *supra* note 45, at 11.

373. Terrence Chorvat & Kevin McCabe, *The Brain and the Law*, in *LAW & THE BRAIN*, *supra* note 317, at 113, 122–23 (citations omitted).

374. *Id.* at 123; O’Hara, *supra* note 317, at 25; Terrence Chorvat & Kevin McCabe, *Neuroeconomics and Rationality*, 80 *CHI.-KENT L. REV.* 1235, 1248–49 (2005).

375. More precisely, the benefit of a cognitive process is the *perceived* quality of the decision or outcome.

376. Chorvat & McCabe, *supra* note 373, at 122–23 (citations omitted).

377. Camerer et al., *supra* note 45, at 11.

378. Chorvat & McCabe, *supra* note 373, at 123.

379. Camerer et al., *supra* note 45, at 16.

380. O’Hara, *supra* note 317, at 25 (citations omitted).

By contrast to these automatic processes, controlled processes tend to be associated with a subjective feeling of effort, with the individual able to recall the steps she went through in reaching a decision.<sup>381</sup> Neuroimaging has revealed rough locations in the brain in which controlled, as opposed to automatic processes, occur. Controlled processes occur mostly in the front part of the brain, especially in the prefrontal cortex.<sup>382</sup> Automatic processes are concentrated in the back, top, and side parts of the brain.<sup>383</sup>

Many behaviors that result from the interplay between the brain's automatic and controlled processes are "routinely and falsely interpreted as being the product of cognitive deliberation alone."<sup>384</sup> In fact, the "default mode of brain operation" is the *automatic process*.<sup>385</sup> Controlled processes are triggered only at "special moments when automatic processes become 'interrupted,' which happens when a person encounters unexpected events, experiences strong visceral states, or is presented with some kind of explicit challenge in the form of a novel decision or other type of problem."<sup>386</sup> In most other scenarios, there is a large degree of interplay between the automatic and the controlled processes.<sup>387</sup>

Automatic and controlled processes both play a role when an individual faces a risky decision. On the one hand, controlled processes may be triggered to produce explicit evaluations of outcome probabilities.<sup>388</sup> On the other hand, automatic processes generate implicit judgments and influence choice.<sup>389</sup> Moreover, the brain is designed to respond to "changes in . . . risk rather than to their absolute levels."<sup>390</sup> Thus, even where a course of conduct poses an absolute level of risk that is substantial, the brain may not process it as such unless there has been a recent change in the level of risk.<sup>391</sup>

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381. Camerer et al., *supra* note 45, at 16.

382. *Id.* at 17. The prefrontal cortex is the "executive" region of the brain, which draws inputs from other sections of the brain and integrates them. *Id.*

383. *Id.*

384. *Id.* at 11.

385. *Id.* at 18; Chorvat & McCabe, *supra* note 373, at 115.

386. Camerer et al., *supra* note 45, at 18.

387. Denno, *supra* note 368, at 312.

388. Camerer et al., *supra* note 45, at 50.

389. *Id.*

390. O'Hara, *supra* note 317, at 25.

391. Essentially, the brain "tunes out" a base level of risk. Consider, for instance, a stock car diver who circles a track at 180 miles per hour. Even during a warm-up lap, the driver is engaged in activity that involves an extremely high level of risk. Yet only unexpected changes in risk level are likely to activate conscious processes—a blown tire, a collision, and the like.

Recklessness does not leave room for the automated decision maker. It assumes that humans deliberate in the face of substantial risk, and imposes special liability where they have chosen the wrong course. Neuroeconomics suggests that in many instances, behaviors flow not from conscious choice, but from unconscious choice. Moreover, recklessness measures absolute levels of risk while the brain's conscious response is triggered only by changes in risk level. Thus, where an actor has acted unconsciously, it may not be proper to label the actor's conduct reckless. Similarly, a holding of recklessness may be neurobiologically unfair where the actor has failed to respond to a level of risk that is absolutely high but that has remained static over the relevant time.

I do not mean to assert that the human brain is not capable of consciousness. Most neuroscientists are wary of wading into such a weighty question.<sup>392</sup> However, it is fair to say that a theory of consciousness or free will is simply not necessary in a neuroeconomic approach.<sup>393</sup> Recklessness may be inconsistent with neuroeconomics, in that it makes consciousness far more central in evaluating conduct than the brain does when making decisions.<sup>394</sup>

## 2. *Deception and Self-Deception*

In addition, neuroscience has uncovered evidence indicating a high tendency towards self-deception by the human brain, which may help explain, in part, the over-optimism demonstrated by behavioral scientists. A number of recent neuroscientific and psychological studies have explored the contours of deception and self-deception.<sup>395</sup> Someday,

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392. See, e.g., GLIMCHER, *supra* note 360, at 342.

393. *Id.* ("Some philosophers and scientists have argued that consciousness is a causal force linked closely to the concept of free will. The whole neuroeconomic approach argues against this conceptualization because free will, or any nonphysical process held responsible for behavioral indeterminacy, is not required by the neuroeconomic approach.")

394. In a bizarre future world, see *MINORITY REPORT* (Twentieth Century-Fox Film Corp. 2002), neuroscience might evolve to the point where individuals' brains could be measured at the time a decision is made, such that ex post evaluations of whether conscious or unconscious processes were at work could be drawn. Even more useful for accident reconstruction purposes would be a sort of "cognitive black box," like an airplane flight recorder, that measured neural activity and could be utilized to unravel the pre-accident mental processes a defendant employed. Either would require, unrealistically, that every citizen be "wired" for measurement, since we never know when a person might engage in risky behavior that causes an accident. It is not likely that our political system would ever consider such an approach, and in any event, technology has not yet reached the necessary stage for such precise determination.

395. See generally Zubair Moomol & Stephanus Petrus Henzi, *The Evolutionary Psychology of Deception and Self-Deception*, 30 S. AFR. J. PSYCHOL. 45 (2000).

neuroscience may be able to aid the law in helping to “sort[] deception from self-deception.”<sup>396</sup> When a defendant’s mental state is disputed,

[T]he defendant claims that he did not intend to harm or that he was unaware of the consequences of his actions, and the legal decision-maker must determine whether his claim is credible. In many situations, the judge or jury must effectively determine whether the defendant is attempting to deceive them about his intentions or knowledge. This finding might in turn depend on a determination about whether the defendant, whose position is clearly unreasonable, is engaging in deceptive or self-deceptive claims. . . . [Neurobiology suggests] that the telltale physiological signs of deception can be suppressed only if the actor himself is unaware of his deceptive behavior.<sup>397</sup>

At this point, neurobiology has simply documented the robustness of self-deception and identified it as being correlated with certain portions of the brain.

If one is “unaware of self-deception,” then characterizing an actor as *consciously aware* of his actions is awkward.<sup>398</sup> The defendant “may be negligent for failing to comprehend that he was deceiving himself, but he cannot be said to have acted knowingly or intentionally,” or, by the same token, recklessly.<sup>399</sup> Neuroscience, to date, has not developed a reliable way to distinguish deception from self-deception.<sup>400</sup> This leaves judges and juries forced to “make their determinations about the defendant’s state of mind based on a ‘gut instinct’ that may be infected by unfortunate biases or prejudices.”<sup>401</sup>

The point here is not that all reckless actors have deceived themselves about the risk associated with a course of conduct. Some may have. The larger point is that courts and juries are unlikely to be able to distinguish the actor who was conscious of a risk from the actor who was not because of the operation of self-deception. Placing so much emphasis in the doctrine of recklessness on conscious awareness of risk may draw too much attention by legal decision makers to something that they are simply not qualified to gauge.

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396. O’Hara, *supra* note 317, at 28.

397. *Id.* at 29.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

### 3. *Emotion, Risk and Intuition*

Recklessness is cold. It involves indifference to risk. Not caring about the consequences of one's actions towards others is at the core of many courts' decisions to impose liability for recklessness. In fact, however, intuitive or emotional factors that have no place in the black-letter definition of recklessness shape many decisions in the face of risk.

The standard account of human decision making, reflected in the law's articulation of the recklessness standard, is that decisions follow deliberation.<sup>402</sup> As indicated above, many decisions flow from automatic processes.<sup>403</sup> In addition to automation, a second way in which the brain differs from the standard "conscious mind" depiction involves the role of emotion in shaping decisions.

Neuroscience has revealed that emotions provide important guidance in human decision making.<sup>404</sup> Emotions are particularly activated when a decision maker faces "incomplete information, risk, or choice in a social context."<sup>405</sup> While humans do attempt to apply controlled processes to evaluating risk and uncertainty, people also react to risks on an emotional level and such reactions can have a major effect on behavior.<sup>406</sup> A growing body of empirical literature indicates that emotions play a critical role in "apprehension of personal and societal dangers."<sup>407</sup>

Researchers have used brain imaging technology to measure the brains of experimental subjects exposed to ambiguity and risk.<sup>408</sup> Ambiguity tended to produce higher brain activity in the ventromedial prefrontal cortex,<sup>409</sup> an area of the brain thought to be associated with emotional response.<sup>410</sup>

The point here is that ambiguous situations may lead to emotional responses, and choices in such situations may be motivated more by emotion and less by consciousness.<sup>411</sup> Current thinking in neuroscience,

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402. George Loewenstein, *Out of Control: Visceral Influences on Behavior*, in *ADVANCES IN BEHAVIORAL ECONOMICS*, *supra* note 309, at 689, 695. There is, in fact, very little evidence to support this standard depiction of decision making. *See id.*

403. *See supra* Part IV.B.2.

404. Zak, *supra* note 357, at 143.

405. *Id.*

406. Camerer et al., *supra* note 45, at 47.

407. *See* Daniel M. Kahn, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. (forthcoming 2008) (manuscript at 2, available at <http://ssrn.com/abstract=962520>).

408. Under risk, the likelihoods of alternative outcomes are fully known. Under ambiguity, the likelihoods are unknown. McCabe et al., *supra* note 316, at 79.

409. Chovat et al., *supra* note 315, at 53.

410. Chovat & McCabe, *supra* note 373, at 115.

411. In a forthcoming article, Dan Kahn challenges the dichotomy between emotion and rational

such as the “social intuitionist model,” argue that “fast, automatic and affective intuitions are the primary source of moral judgments” and that “conscious deliberations play only a minor causal role and are used principally to construct *post hoc* justifications for judgments that have already occurred.”<sup>412</sup>

A person facing a highly risky situation where there remains some ambiguity as to the actual level of risk may be making decisions as a result of emotion, rather than consciousness. This is perhaps easiest to imagine in the emotionally laden arena of competitive contact sports. Why did the two kids slam another competitor into the walls of the hockey rink?<sup>413</sup> Did they consciously disregard the risk, or were they simply responding intuitively, in the heat of the moment, to the presence of a highly desired puck? Recklessness requires distinguishing the emotional and intuitive actor from the deliberative one, but courts may be unable to do so.

#### 4. *Adult and Adolescent Brains*

Science has taught us a great deal about the development of the brain during the course of the human life. One type of person regularly engages in the kind of behavior recklessness imagines: the adolescent. Adolescents take risks adults avoid.<sup>414</sup> Adolescents, unlike adults, may not be able to think clearly about the possible consequences of their actions, even where they recognize the risk involved.<sup>415</sup>

An explanation for adolescent recklessness can be found in the biology of the brain. The adolescent brain is not yet fully developed. The old notion that the brain is fully mature at age three is a myth.<sup>416</sup> Instead, along a whole host of dimensions,<sup>417</sup> adolescent brains continue to grow

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choice, arguing that emotions provide a “perceptive faculty uniquely suited to discerning what stance toward risk best coheres with a person’s values.” Kahan, *supra* note 407, at 3. While I am sympathetic to the argument that emotion can help make rational decisions, I hesitate to embrace the notion that emotionally driven actions are the consequence of “conscious deliberation” as imagined by recklessness doctrine.

412. Goodenough & Prehn, *supra* note 357, at 90–91.

413. See *supra* notes 185–98 and accompanying text.

414. Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequentialist Thought: Evidence from Neuroscience*, in *LAW & THE BRAIN*, *supra* note 317, at 245, 254.

415. Sedra Spano, *Adolescent Brain Development*, *YOUTH STUD. AUSTL.*, Mar. 2003, at 36, 38.

416. Baird & Fugelsang, *supra* note 414, at 251.

417. During adolescence, the brain over produces gray matter, and then undergoes a “pruning” process “where connections among neurons in the brain that are not used wither away.” Spano, *supra* note 415, at 36–37.

well into the teenage years. The brain's frontal lobes,<sup>418</sup> in particular the prefrontal cortex, undergo significant transformation during adolescence,<sup>419</sup> developing the biological prerequisites for regulating impulses.<sup>420</sup> Yet it is the frontal lobes that play a critical executive role in deliberative processes and, at times, in risk evaluation.<sup>421</sup> Until this executive function develops, young people may know of a risk but be unable to control their impulses.

The brain changes with age. While consciously disregarding known risks may be something adolescents regularly do, brain structures change by adulthood. For adults, the fully developed brain should equip them to avoid identified risks, rather than consciously confront them. For adults, risks are likely either unappreciated (in which case only negligence would be appropriate), or they are sufficiently appreciated that intentional tort's "substantial certainty" standard would encompass conduct disregarding such risks. The only actors for whom "conscious disregard of risk" is really accurate in a *descriptive* sense is likely teenagers!

#### V. MOVING FORWARD

Despite its lengthy history, recklessness has never proven amenable to an accurate and cohesive doctrinal articulation. The authors of the Restatements should be applauded for their ongoing efforts, but a consideration of court decisions in this area reveals a cloudy picture. Recklessness is nebulous, existing in a bizarre twilight zone not susceptible to concrete prediction or accurate application.

This Article has suggested that the Restatement's current efforts to refine further the legal standard for recklessness may be misplaced. Revising a legal standard to achieve greater clarity only makes sense if that standard has some reliability, and some accuracy in terms of what that standard means to describe. Recklessness may not be such a standard. Behavioral economics suggests that the application of heuristics like over-optimism bias and availability leads to systematic miscalculation of relevant probabilities. Neuroeconomics cautions that most human

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418. The frontal lobes are the frontal areas of the mammalian brain, and include the prefrontal area, premotor area, and motor areas. See About Brain Injury: A Guide to Brain Anatomy, <http://www.waiting.com/frontallobe.html> (last visited Sept. 7, 2008).

419. Baird & Fugelsang, *supra* note 414, at 251–53.

420. Cynthia V. Ward, *Punishing Children in the Criminal Law*, 82 NOTRE DAME L. REV. 429, 460 & nn.119–20 (2006).

421. Peggy Sasso, *Implementing the Death Penalty: The Moral Implications of Recent Advances in Neuropsychology*, 29 CARDOZO L. REV. 765, 788 (2007).

behavior is the product of unconscious or automated process, not the kind of conscious deliberation recklessness imagines. In the face of these new understandings of human behavior and cognition, it is unlikely that any effort to wring accuracy from the recklessness standard will bear fruit.

Three possible avenues for moving forward exist, assuming that there is no general call to try to craft a description of recklessness that involves considering the way humans really behave and the way the brain really works.<sup>422</sup> First, recklessness could be treated with greater indefiniteness, described not in terms of what it *is* but in terms of what it *does*. Second, the importance of recklessness in tort doctrine could be reduced through an elimination of the various exceptions to exceptions that elevate its financial significance. Third, we could simply await the results of the Third Restatement's reform efforts in the hopes that a definition of recklessness drawing on the language of the MPC offers a better chance for consistent and predictable jurisprudence. For the reasons discussed below, the first option—embracing greater *indefiniteness* in the description of recklessness—would most likely lead to meaningful change.

#### A. *Towards Greater Indefiniteness*

Perhaps the problem is that recklessness has been defined in descriptive terms in the first place. Maybe the reformers working on a tort standard of recklessness should simply wash their hands of any effort to actually describe how people think. Kenneth Simons has suggested that recklessness in the criminal law is perhaps too descriptive. He wonders whether “the culpability provisions should be more thoroughly and explicitly evaluative, requiring the trier of fact to make a direct moral judgment about the wrongfulness of the conduct.”<sup>423</sup> This Article has revealed that recklessness in tort, to the extent that it aims at description, is wholly inaccurate. In place of accurate assessments of descriptive recklessness, courts in fact do regularly substitute an evaluative, or moral gauge. If that is what is going on anyway, considerable judicial confusion could be reduced through a straightforward abandonment of description in favor of an explicit moral evaluation.

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422. It would be difficult to imagine a definition of recklessness that, for instance, explicitly distinguished between liability for actions arising from “automated” processes and those arising from “conscious” deliberation. Certainly, our technology does not currently allow for distinctions to be drawn in individual cases (as opposed to revealing that, across various actors and types of actions, such distinctions do exist).

423. Simons, *supra* note 8, at 199.

If courts still value recklessness for its policy advantages, such as allowing a sympathetic victim to recover where law would otherwise bar, or placing special shame on a wrongdoer viewed as having a “dark heart,” why not jettison the description, indeed the category itself, in its entirety? Courts could simply set forth a standard, such as assumption of risk in the sports injury context, which bars recovery for mere negligence. Then, courts could preserve for themselves the freedom to disregard that standard in the face of compelling policy circumstances. Courts could name this doctrine whatever they want. Gross negligence, of course, is unlikely to be the chosen term given its tangled history. But why not something like, “negligence plus *shame on you*”? Or “naughty negligence”? Some term that captures the fact that in practice recklessness is little more than negligence with greater political or moral disapproval. Other terms like aggravated negligence, consequentially aggravated negligence, wrongful negligence, immoral negligence, dark heart negligence, or spiteful negligence, could be set forth as the standard for awarding punitive damages in non-intentional cases and establishing liability in other contexts where recklessness now plays a central role. A new term would give courts a clean slate on which to evaluate wrongful conduct, unburdened by hundreds of years of confusion over gross negligence, recklessness, and wanton and willful misbehavior.

Importantly, a new term might capture the essence of recklessness without bogging down courts in linguistic analysis.<sup>424</sup> Courts could forget about quantifying risk, separating grave from un-grave harms, and just do what they have always done when involving recklessness: decide whether or not to ignore black-letter rules based on the unusual facts of particular cases. A future Restatement of Torts, should it choose to embark on this path, would be better off not bothering to define the term at all. In other words, just set apart a certain category of behavior, but leave it uncluttered with clunky and anachronistic definitions.

To the extent that the Restatement's authors are compelled to offer some further articulation of the tort of recklessness, it would be better to

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424. Courts have embraced indefiniteness, to some extent, in the way in which they define proximate cause in jury instructions. At one point in time, judges sought to provide a detailed description of what was a proximate cause and what was not. But these kinds of efforts bogged courts down in battles over how to describe a deliberately vague, policy-motivated legal doctrine in a linguistically precise fashion. Rather than provide a detailed definition, the modern trend appears to be to leave the exact meaning of the term to juries. *Johnson v. Owens-Corning Fiberglass Corp.*, 729 N.E.2d 883, 888 (Ill. App. Ct. 2000) (“[G]rafting the frequency, regularity, and proximity test onto jury instructions is likely to confuse, rather than clarify, the concept of proximate cause.”) (citing *Spain v. Owens Corning Fiberglass Corp.*, 710 N.E.2d 528 (Ill. App. Ct. 1999)).

describe recklessness based on what it *does*, rather than what it *is*. For instance, consider the following language:

Section 500. Aggravated Negligence [Reckless Conduct]

Aggravated negligence [reckless conduct] is generally treated with the liability consequences associated with intentional tort even though the elements of intent are not present. For example, a victim of an actor's aggravated negligence [reckless conduct] may sometimes recover punitive damages and avoid the application of certain common law and statutory defenses.

This is not a definition at all, but rather a description of consequence. My suggestion to replace an imprecise description with an undefined one is not foreign to tort law. The best example is proximate cause, a central element of negligence yet one rarely defined in specific terms.<sup>425</sup> Instead, proximate cause is stated as an element of negligence but left for juries and judges to evaluate based on only the most general description.<sup>426</sup> The idea of such an approach is to trust the moral intuition and sensibility of fact-finders.<sup>427</sup> A similar approach might work in the context of recklessness.

While one generally expects that clear legal rules generate greater consistency and predictability, it is important to emphasize the distinction between clarity and verbosity. A longer definition is not necessarily a clearer one. Relying on intuition in evaluating reckless conduct, as suggested here, would create the potential for inconsistency, as the moral sensibilities of courts and juries will differ across time and space. At the same time, I hope that it could also push the law towards unpredictability that is, frankly, less silly. At present, courts render unpredictable and chaotic decisions in part because they, to varying degrees at various times, focus on one factor over another. In spite of the appearance of analysis and rigor, what most courts are already doing is applying moral intuition. The proposed reworking of recklessness described here would reduce clutter and chaos and make it less likely that unimportant factors come to cloud recklessness determinations in a particular case.<sup>428</sup>

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425. See Daniel J. Steinbock et al., *Expert Testimony on Proximate Cause*, 41 VAND. L. REV. 261, 275–76 (1988).

426. See *id.*

427. See *id.* at 278–79 nn.95–98 and accompanying text.

428. In future work, I hope to explore how this proposed articulation of recklessness would play out in particular cases. For instance, would *Sandler* and *Hackbart*, discussed above, turn out the same if courts resisted focusing respectively on (1) the gravity of the injury posed and (2) the level of

Of course, such change could not be accomplished overnight. Countless state statutes establish liability using the term recklessness—sometimes defining the term (awkwardly), other times leaving to courts the job of importing a description from the Restatements or elsewhere. It would take time to clean up the mess legislatures, courts, and the ALI have helped generate over the last hundred years of recklessness jurisprudence. But it is a project well worth our time.

*B. Collapsing the Exceptions to the Exceptions*

A second alternative to dealing with judicial confusion surrounding the boundaries of negligence, recklessness, and intentional tort would be to eliminate the middle category of recklessness by eradicating doctrinal “exceptions to exceptions.” While I suspect that courts and legislatures will not embrace this approach, it is worth some discussion.

For example, the black-letter rule of law is that an injured person can recover from those whose negligence is the cause of those damages.<sup>429</sup> One exception to that rule is that, either due to a limited duty or the application of assumption of risk as a defense, participants in athletic contests may not recover from co-participants whose negligence causes them injury.<sup>430</sup> The exception to the exception is that a “reckless” act can lead to liability of a sportsperson.<sup>431</sup> One can easily defend the black-letter rule allowing recovery for negligence as advancing important economic and social policy objectives; similarly, one could defend the exception to

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“intent” involved in the wrongful act? Instead, courts would simply ask whether these represented appropriate instances in which to deviate from the general rule that neither a recreational user of public land nor a professional athlete can recover in the absence of intent. In *Sandler*, my suspicion is that the court following my proposed definition of recklessness would allow recovery. See *infra* notes 288–96 and accompanying text. The state was clearly aware of the harm, did nothing to prevent it, and the plaintiff was quite literally exposed to a hidden trap as a result. In *Hackbart*, by contrast, a court would likely decline to award recovery to the plaintiff. See *infra* notes 159–68 and accompanying text. Since an intentional tort lawsuit would have been available to the plaintiff had he timely filed, there is simply no reason for the court to allow a recklessness claim to go forward—and the idea that the plaintiff did not discover the magnitude of his injury (in that it ended his career) until the statute had run is unsupported by the record. Moreover, the plaintiff in *Hackbart* had already played professionally for some sixteen years. Would it really be “unjust” to deny him recovery for the value of a lost year or two? Note that his thirteen-year career already exceeded the average professional football career by many years, and Hackbart might not have played much longer even in the absence of his injury at the hands of Charles Clark. The average NFL playing career, according to the NFLPA, is just four years. Bob Hille, *The 120 Coolest Numbers in Sports*, THE SPORTING NEWS, available at <http://www.sportingnews.com/features/120th/numbers.html> (last visited Sept. 26, 2008). It is no surprise that players in the league joke that the acronym “NFL” stands for “not for long.”

429. RESTATEMENT (SECOND) OF TORTS § 281 (1979).

430. See *supra* Part II.A.

431. See *supra* Part II.A.

that rule, as courts have done, by arguing that allowing negligence recovery in co-participant injury cases would lead to a flood of litigation and would deter the “vigorous competition” on which sport depends, and from which sport derives, its social and health benefits. But what policy basis is there for the exception to the exception? The most savage of cases—like the beating at issue in *Hackbart*<sup>432</sup>—can be addressed using intentional tort without any recourse to negligence, so long as plaintiffs file in time. What value, then, does the exception to the exception serve? It likely affects only a handful of cases in a state in a given year. Would anyone seriously argue that eliminating the option for recovery for recklessness would actually alter behavior in any meaningful way? By simply jettisoning the exception to the exception, courts could eliminate the importance of defining recklessness entirely.

There are likely to be two prime sources of resistance to such an approach. First, to the extent that it encroaches on judicial autonomy or power, courts might object.<sup>433</sup> But defending a rule on the basis that it gives courts power seems a thin justification on a social-policy level.

More significantly, objections might arise in connection with the implications of this approach for punitive damages awards. The black-letter rule of law is that damages are awarded for compensation in negligence cases.<sup>434</sup> The exception is that punitive damages may be awarded as a special deterrent in cases of intentional harm (but not in accident cases).<sup>435</sup> The exception to the exception here would be that punitive damages are possible in accidental injury cases even where intent cannot be proven so long as recklessness can be shown.<sup>436</sup> Eliminating the exception to the exception would limit punitive damages to cases of intentional harm.

This would obviously restrict the range of lawsuits in which punitive damages are available, or at least make it harder for plaintiffs to prove that punitive damages are warranted by requiring them to show intent. By reducing the availability of punitive damages, the elimination of exceptions to the exceptions could thus undercut the policy goals punitive damages are meant to serve: (1) punishing wrongdoers who possess ill

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432. See *supra* Part III.A.

433. Under the “open courts” and “right to remedy” provisions of many state constitutions, courts have sometimes struck down legislative actions that are viewed as encroaching upon judicial power. See Michelle M. Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, 45 HARV. J. ON LEGIS. 59, 67 & n.27 (2008).

434. See RESTATEMENT (SECOND) OF TORTS § 903 (1979).

435. See *id.* § 908.

436. *Id.*

motive or dark hearts; and (2) providing additional deterrence to large, wealthy defendants (read: corporations) that would otherwise be happy to absorb litigation expenses.<sup>437</sup>

Even assuming that one agrees with these proffered justifications for punitive damages, there is reason to doubt that severing the tie between punitive awards and recklessness would really change things all that much. The reason is that the Supreme Court has already, to a large extent, destroyed the significance and policy potency of punitive damages through its due process jurisprudence: *BMW v. Gore*,<sup>438</sup> *State Farm v. Campbell*,<sup>439</sup> and *Philip Morris v. Williams*.<sup>440</sup> The Court has now suggested that punitive awards ought to be limited to a “nine to one” ratio between the punitive award and actual damages; without articulating a precise standard, the Court suggested that awards with ratios large than “single digits” would be presumed unconstitutional.<sup>441</sup> But punitive damages may only have had real power to affect social behavior when far more extreme ratios—1000 to one or the like—were possible.<sup>442</sup> This is not to say that the Court’s jurisprudence on this issue is incorrect. Rather, the fact is simply that punitive damages do not pack the punch they used to.<sup>443</sup> This suggests that, on a policy level, restricting the range of cases in which they are available might not be that big a deal. Given how atrophied the threat of punitive damages has become, would anyone really miss it?

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437. See Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 976–77 (2007).

438. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

439. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

440. *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

441. See Erwin Chemerinsky, *More Questions About Punitive Damages*, TRIAL, May 2007, at 72, 73 (discussing *Campbell*, 538 U.S. at 424–25).

442. A punitive damages award nine times the compensatory damages suffered *would* still influence litigation decisions. Like treble damages in antitrust cases, the threat of punitive damages could serve to encourage settlements. However, it is arguable that punitive damages of a 9:1 ratio would not affect behavior in the world at large (that is, outside of the courtroom). See Kathleen S. Kizer, Note, *California’s Punitive Damages Law: Continuing to Punish and Deter Despite State Farm v. Campbell*, 57 HASTINGS L.J. 827, 887 (2006) (explaining that “one-size-fits-all” approach unlikely to serve deterrence objective behind punitive damages). If the possibility of causing a \$100,000 injury would not alter corporate behavior, why would the possibility of causing a \$500,000 injury?

443. See Leila C. Orr, Note, *Making a Case for Wealth-Calibrated Punitive Damages*, 37 LOY. L.A. L. REV. 1739, 1762 (2004) (“In addition, if, as the Supreme Court suggests in *State Farm*, the ratio is limited to single-digit multipliers, then the deterrent effect of an award of punitive damages is further minimized.”); Larry S. Stuart, *Constitutional Requirements for Punitive Damages*, FLA. B.J., Mar. 2004, at 34, 37 (“Although defendant interests decry the unpredictability of punitive damages, it is that very feature that underlies their deterrent effect.”).

### C. Hope for the Third Restatement

A third option would be to hope that the forthcoming Restatement (Third) of Torts, now in its final draft stage, will offer an articulation of recklessness that clears up the confusion obvious in judicial opinions on the subject over the last half century. For a number of reasons, this hope is likely misplaced and this option is not the best way forward.

The drafters of the Third Restatement recognized the need for further work on the description of recklessness. In published work and commentary released during the drafting process, the drafters have admitted they found defining recklessness to be “especially difficult.”<sup>444</sup> Notably, the authors found crafting a general definition hard because a description of recklessness that “works” in one context might not work in another.<sup>445</sup>

The Proposed Final Draft of the Third Restatement (Physical Harm) makes significant linguistic modifications in defining recklessness. Largely, the Third Restatement adopts an articulation of recklessness modeled after the criminal law version embodied in the Model Penal Code. Still, the draft adopts a “rather traditional restatement approach . . . .”<sup>446</sup> The draft provides:

#### § 2. Recklessness

A person acts recklessly in engaging in conduct if:

(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation, and

(b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.<sup>447</sup>

Although this proposed draft offers several improvements,<sup>448</sup> the hope that courts will embrace it may be unrealistic.<sup>449</sup> For instance, a number of

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444. See Perlman & Schwartz, *supra* note 11, at 10.

445. *Id.* at 11.

446. *Id.*

447. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 2 (P.F.D. No. 1, 2005).

448. Henderson & Twerski, *supra* note 7, at 1155.

449. Restatement efforts to reform tort law have not always been successful. For example, the Second Restatement’s suggestion that the terms “factual cause” and “proximate cause” be merged into a single “legal cause” test measured via “substantial factor” analysis was generally rejected by

courts are likely to reject the assertion in subsection (b) of the Restatement's definition of recklessness that the relative ease with which risk could be avoided should be an indication of the actor's indifference to the risk.<sup>450</sup> This is meant to focus the recklessness inquiry on the ease with which a risk could be avoided rather than the magnitude of the risk (in the Second Restatement, a "substantial and unjustifiable" risk),<sup>451</sup> which the Restatement's authors believe has become too rigid a threshold for finding recklessness.<sup>452</sup> While intellectually appealing, this innovation is unlikely to attract a wide following in the courts. It creates the possibility that an actor who creates a small risk (in absolute terms) that could be avoided by an extremely inexpensive precaution, could be labeled reckless.<sup>453</sup> Such conduct, while economically inefficient, lacks the immoral character usually associated with recklessness.<sup>454</sup> For that reason, courts are not likely to universally adopt this approach.

The Third Restatement authors would further erode the requirement that, to be reckless, conduct pose a risk of death or serious bodily harm.<sup>455</sup> Although recklessness must involve "substantial" harm, it need not be limited to loss of life or limb.<sup>456</sup> Would courts like the Supreme Court of Massachusetts, which has only recently re-emphasized this bodily harm element, be likely to embrace a Restatement offering a looser requirement?

In spite of their clarifying efforts, the authors of the Third Restatement acknowledge the inadequacies in their definition.<sup>457</sup> Even where courts accept the word choice of the Third Restatement's authors, however, the bigger problem is that they are unlikely to do away with the complex and confounding weight of authority discussing the various pieces of tort recklessness. That is to say, courts should be expected to "read in" to the new Restatement all of the various muddled precedents on recklessness they have produced over the last five decades.

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American courts and "has not . . . withstood the test of time, as it has proved confusing and has been misused." REST. 3D, § 26 cmt. j & reporter's notes cmt. j.

450. Henderson & Twerski, *supra* note 7, at 1155.

451. *Id.*

452. *See* REST 3D, § 2 cmt. e.

453. *See* Henderson & Twerski, *supra* note 7, at 1156.

454. Henderson and Twerski suggest imposing some minimum threshold for the absolute level of risk (such as "significant") before recklessness (and all of its consequences) would be triggered. *Id.*

455. REST 3D, § 2 cmt. e.

456. *Id.*

457. *See id.* § 2 cmt. b. The authors describe their effort as one of "acknowledging and balancing several factors." *Id.*

## VI. CONCLUSION

Tort law is not about punishment. Tort law is about assigning financial responsibility for injuries. In so doing, tort law aims to optimize the level of precaution brought to bear—to ensure that society does not waste resources avoiding injuries when the benefits of doing so do not outweigh the cost.<sup>458</sup> Sometimes, the rules we adopt to produce optimal levels of caution do not seem to achieve that goal in circumstances we find troubling. Therefore, recklessness has survived in the law of tort. Maybe punitive damages are needed to discourage deep-pocketed corporate defendants from callously disregarding human life when it is cost-efficient to do so. But that does not mean that punitive damages need to be tied to an amorphous and ill-constructed legal doctrine.

Two caveats are appropriate at this point. First, to the extent that the behavioral economics and neuroeconomics sources discussed above have called into question the role of consciousness in human decision making, one might wonder whether I mean to undercut intention in tort as well. That is not the case, at least as intentional tort is currently defined. To be liable for intentional tort, all one needs is belief in a substantial certainty of harmful consequence, and “belief” can of course be wrong.<sup>459</sup> At a minimum, it need not be precise. But recklessness is more problematic because unlike intent, it requires *consciousness* or *awareness* of likely harm (or at least presumes the existence of a capacity to be consciously aware of likely harm).

Second, while neurobiological explanations may serve to reduce the importance of the concept of blame, that is not to say that they reduce the need to engage in “forceful intervention in the face of violence or antisocial behaviour.”<sup>460</sup> The criminal law and regulation should of course continue to target antisocial behavior for eradication.

Alternatively, in lieu of greater “indefiniteness” in recklessness, the law could strive for further clarity through further description. We could add categories and subcategories and fill a treatise with precise terminology meant to better reflect the way that human actors behave in the face of uncertain risks. Moreover, recklessness could be explicitly defined

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458. Ulen, *supra* note 340, at 400.

459. For a discussion of the meaning and role of belief in tort and criminal law, see Simons, *Dimensions*, *supra* note 9, at 302–04.

460. Robert M. Sapolsky, *The Frontal Cortex and the Criminal Justice System*, in *LAW & THE BRAIN*, *supra* note 317, at 227, 240.

differently for different purposes,<sup>461</sup> as it already is in practice. But greater description does not necessarily result in greater clarity. Given courts' historical record interpreting recklessness, one must wonder if they would be able to keep things straight.

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461. For example, the drafters of the Third Restatement have suggested that recklessness could have one definition in the context of punitive damages and another elsewhere in tort law. *See* REST 3D, § 2 cmt. b; Simons, *supra* note 20, at 1089 n.99.