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# SHIELDING DUTY: HOW ATTENDING TO ASSUMPTION OF RISK, ATTRACTIVE NUISANCE, AND OTHER “QUAINT” DOCTRINES CAN IMPROVE DECISIONMAKING IN NEGLIGENCE CASES

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## INTRODUCTION

From 1950 to 1980 the California Supreme Court set as one of its main tasks the project of modernizing negligence law.<sup>1</sup> This program had two main facets. With respect to substantive doctrine, the court sought to purge what it regarded as vestiges of politically regressive common law, particularly limited-duty or “no duty” rules that governed premises liability claims, nonphysical harm claims, and claims alleging nonfeasance. In terms of method, the court adopted and advocated an antiformalist, reductively instrumentalist approach to judicial decisionmaking.

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1. See, e.g., *J’Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979) (expanding liability for negligence causing economic loss); *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (recognizing the duty of therapists to warn certain third parties endangered by their patients); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975) (adopting comparative fault); *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West Supp. 2005) (eliminating plaintiff-status categories in premises liability suits in favor of a general duty of reasonable care); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (granting to certain “bystanders” an action for negligent infliction of emotional distress); *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (recognizing attorney duties to nonclients and asserting that duty is a policy question, the resolution of which involves the balancing of various factors); *Malloy v. Fong*, 232 P.2d 241, 246 (Cal. 1951) (eliminating charitable immunity and citing section 1714 of the California Civil Code as evincing a general policy of holding careless actors responsible to victims of their carelessness).

These efforts were thought to be complementary. The view was that nineteenth century negligence doctrine, including duty doctrines, as well as the defenses of assumption of risk and contributory negligence, systematically accorded undue protection to landowners and firms, either out of medieval notions of privilege (in the case of the former) or a pro-entrepreneur, every-man-for-himself ideology (in the case of the latter). Seizing on these doctrines, late nineteenth century judges had been all too prone to issue matter-of-law rulings that, for a given class of negligence claims, either assigned responsibility for victims' injuries to the fault or choices of victims, or wrote them off as harms not traceable to anyone's wrong. Antiformalism permitted judges to undermine this deep bias in the law by redefining the question being posed to judges in negligence cases. Thus, nominally *legal* questions that seemed rather obviously to raise issues of *responsibility*—questions of duty, fault, assumption of risk, etc.—were “revealed” instead to be open-ended *policy* questions about appropriate levels of *liability*: whether it would serve the cause of justice or the common good to leave it open to juries to award damages in the class of cases represented by a given case.<sup>2</sup>

With legal blinders off, judges could identify several important policies that might be served by permitting the imposition of liability in what had been no-liability cases, including those of (1) punishing and deterring antisocial conduct, (2) shifting losses away from innocent victims to noninnocent actors, and (3) spreading losses from shallower to deeper pockets. To be sure, they could also identify potentially countervailing considerations, including those of (4) discouraging weak or feigned claims, (5) protecting courts from floods of litigation, and (6) avoiding the undue suppression of socially valuable but injury-generating activity.<sup>3</sup> The justices, however, believed that factors (4) and (5) could be addressed through case management,<sup>4</sup> and appeals to factor (6) rang hollow in the post-World War II boom period. Thus was the happy marriage of instrumentalism and progressivism consummated, most notably in the 1968 decisions of *Dillon v. Legg*<sup>5</sup> and *Rowland v. Christian*.<sup>6</sup>

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2. Of course, the court also presumed that judges have one other set of important substantive questions before them in negligence suits, namely, whether to preempt or override a given jury by entering judgment-as-a-matter-of-law on a “fact” issue such as breach or causation.

3. See, e.g., *Rowland*, 443 P.2d at 564 (citing, among others, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (3d ed. 1964) for the propriety of this multifactor inquiry).

4. See, e.g., *Dillon*, 441 P.2d. at 917–25.

5. *Id.*

6. *Rowland*, 443 P.2d at 561.

The foregoing sketch of mid-twentieth century California progressive tort jurisprudence sheds light on the claims of Dilan Esper and Greg Keating in their fine article, *Abusing "Duty,"* on which we have been invited to comment.<sup>7</sup> In one respect, Esper and Keating's allegiance to the *Dillon/Rowland* approach seems apparent. Just as the judges who decided these cases bemoaned prior courts' misguided reliance on outdated "no duty" doctrines and plaintiff-conduct defenses, Esper and Keating decry the excessive eagerness of contemporary California appellate judges to circumvent juries and issue matter-of-law rulings for defendants.<sup>8</sup> For example, they criticize judges for too readily denying relief to persons injured in recreational activities by taking it upon themselves to determine what counts as the sort of "inherent" risks that, under *Knight v. Jewett's* rendition of primary assumption of risk, fellow participants have no duty to guard against.<sup>9</sup> They also find fault in decisions that, in their view, reanimate pre-*Rowland* "no duty" rules by limiting the liability of possessors of land. These include *Ornelas v. Randolph*, which interpreted California's recreational use statute to bar claims simply because the victim's injury occurred in the course of a recreational use of land, without regard to whether the property was held open by the possessor for such use.<sup>10</sup> And they also take issue with *Kentucky Fried Chicken of California, Inc. v. Superior Court (KFC)*, which dismissed on "no duty" grounds a negligence claim against a restaurant by a customer who suffered emotional distress as a result of a restaurant employee's refusal to accede to the demands of an armed robber.<sup>11</sup> In thus placing responsibility for regressive negligence decisions at the feet of duty, the critical component of *Abusing "Duty"* seems to lay the groundwork for a renewal of the mid-twentieth century call for progressive instrumentalism.

Yet, this latter expectation is not met. For Esper and Keating do not argue that it is a per se error to treat duty doctrine as a ground for denying

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7. Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265 (2006).

8. *Id.* at 268-71.

9. *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992). In *Knight's* parlance, which Esper and Keating adopt, primary assumption of risk refers to a doctrine that does not turn on injury victims' decisions knowingly to expose themselves to a risk of injury, and instead specifies certain activities (typically recreational sports) that, because of their vigorous nature, and because of the victim's voluntary participation in them (regardless of whether that participation includes a subjective appreciation of the risks at stake), do not oblige participants to take reasonable care to avoid injuring each other. *See* Esper & Keating, *supra* note 7, at 271. This is in contrast to secondary assumption of risk, which refers to the traditional affirmative defense that is available to certain negligence defendants and which is based on the plaintiff's knowingly choosing to encounter a risk of injury. *See id.* at 292.

10. *Ornelas v. Randolph*, 847 P.2d 560 (Cal. 1993).

11. *Ky. Fried Chicken of Cal., Inc. v. Superior Court (KFC)*, 927 P.2d 1260 (Cal. 1997).

relief, nor do they claim that the cure for these decisions resides in judges realizing that legal analysis of concepts such as duty is mere verbal cover for the “real” policy analysis that lies beneath. Indeed, they seem to view excessive instrumentalism as part of the problem, in that it has encouraged contemporary judges to read the politics of the modern tort reform movement into the law of negligence.<sup>12</sup> Thus, contrary to the teachings of *Dillon* and *Rowland*, they argue that the key to restoring an appropriate degree of progressivity to California negligence law is for judges to become better *lawyers*—that is, for them to gain a clearer understanding of the meaning of the concept of duty as it functions within the tort.<sup>13</sup> In particular, judges must realize that (1) duty analysis requires “categorical” rather than “individualized” determinations, (2) duty questions call on judges to set standards of conduct, rather than to set policy-based limits on aggregate liability, and (3) duty analysis, because it belongs in the domain of tort law, should not be infected with alien notions imported from contract and property law.<sup>14</sup> If judges remember these things, Esper and Keating reason, they will stop abusing duty—they will realize that they are being too aggressive in bouncing claims out of court on grounds of primary assumption of risk or out of sollicitousness for property rights.<sup>15</sup>

Jurists cut from the standard California progressive mold will likely dismiss Esper and Keating’s call for greater analytical rigor as pointless.<sup>16</sup> By contrast, we applaud it. Indeed, we observed some time ago that California’s version of progressivism, however well-intentioned, had erred in supposing that responsibility concepts like duty are linked in any tight way to regressive politics, and equally had erred in presuming that progressivism and instrumentalism line up in the neat way that they had supposed.<sup>17</sup> Concepts like duty do not have unique political valences. Just as a broad notion of due process was once favored by “the right,”<sup>18</sup> then by “the left,”<sup>19</sup> and now by “the right” again,<sup>20</sup> so duty has at different times

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12. Esper & Keating, *supra* note 7, at 325.

13. *Id.* at 268–69.

14. *Id.*

15. *Id.* at 269–73.

16. For an instance of (utterly undeserved) mockery along these lines from a leading California progressive, see Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 790 (2001).

17. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1824–26 (1998).

18. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by Ferguson v. Skrupa*, 372 U.S. 726 (1963).

19. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

20. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

served as a basis for expanding and contracting responsibilities and liabilities.<sup>21</sup> Likewise, if the last twenty-five years have demonstrated anything, it is that methodologies such as antiformalism and instrumentalism can serve many masters; hence, the falsity of the longstanding supposition among torts professors that the liberation of judges from the strictures of doctrine will reliably generate liberal judicial decisions.<sup>22</sup>

So we agree with Esper and Keating that, to the extent there are problems with the prodefendant results they decry, the problem does not lie simply in the courts' reliance on the concept of duty. We also agree that the path forward lies in being more attentive to, rather than more dismissive of, legal concepts like duty. On this particular point, too, we have been quite outspoken. For example, in a contribution to a *Vanderbilt Law Review* symposium we strongly criticized the late Gary Schwartz for using his perch as Reporter of the "general principles" component of the *Restatement (Third)* to impose California's brand of instrumentalism on the entire nation's negligence law.<sup>23</sup> That criticism aimed in particular at his dogmatic insistence on collapsing questions of duty into a blunderbuss policy inquiry as to the propriety of permitting juries to impose liability.<sup>24</sup> Such reductionism, we demonstrated, does not follow the usage of the courts and does not promote sound decisionmaking.<sup>25</sup> Although courts tend to invoke the concept of duty in several different senses, in its primary sense it specifies as a condition of negligence liability that the defendant was under an obligation to persons such as the plaintiff to conduct herself with reasonable care so as to avoid causing the kind of injury suffered by the plaintiff.<sup>26</sup>

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21. See Goldberg & Zipursky, *supra* note 17, at 1812–25 (arguing that *MacPherson* is a paradigmatic instance of a court recognizing a "yes duty"/sword argument, as opposed to a "no duty"/shield argument).

22. See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 717 (2001). Try this at home. Take the *Dillon/Rowland* conception of duty as policy analysis turning on the sorts of factors identified as (1)–(6) in the text above. See *supra* text accompanying note 3. Insert Reagan- and Bush-era political values. Watch closely as factor (6) rises exponentially. In about ten years, your *Dillon* will become a *Thing*. See *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (limiting *Dillon* claims with rule-based requirements out of concern for unpredictable and uninsurable liability).

23. Goldberg & Zipursky, *supra* note 22, at 678.

24. *Id.* at 668–69.

25. *Id.* at 669.

26. *Id.* at 664–87, 698–709.

At a broad level, at least, Esper and Keating seem to share our view that the duty element should not be (or not usually) an excuse for judges to engage in all-things-considered policy analysis, but instead refers to the issue of whether the defendant was under an obligation to persons such as the plaintiff to act with reasonable care for the aspect of the plaintiff's well-being alleged to have been adversely affected by the defendant's careless conduct. Insofar as that is the case, we are gratified to see them pick up and extend this line of analysis. Still, we are not persuaded that Esper and Keating's approach really can save duty from being abused by the California courts. Their critical observations are largely on the mark—many of the decisions they denounce deserve serious critique. But their diagnosis of what has gone wrong in these cases is inadequate, and their proposals for improvement are underdeveloped and politically shortsighted. Or so we shall argue in Part I.

Part II offers a brief account of our own take on some of the decisions criticized by Esper and Keating, and a correspondingly different prescription for shielding duty from abuse. In our view, the mistake that contemporary courts have made is a version of the same mistake that was made in the 1960s—namely, that of treating the duty element as but an occasion for judges to ask the open-ended, policy-driven question of whether there are any reasons to deny juries the ability to impose liability. So defined, duty simultaneously becomes the only hook that judges need to set matter-of-law limits on negligence liability *and* loses all of its texture and shape, thereby functioning as a blank check that judges can pull out whenever they want to carve out exemptions from liability. By cramming what once were, and ought to be, distinct doctrinal grounds for taking cases away from juries under the blunderbuss heading of “no duty,” these courts have misframed the questions before them, resolved those questions through weak reasoning, and permitted themselves more latitude than they should have to decide for defendants as a matter of law.

Although, as we have observed, Esper and Keating purport to share this view, their own position does not permit them to challenge the foregoing aspects of California jurisprudence. Indeed, because of the weakness of their stated criticisms, they are left essentially to urge contemporary courts to return to the more plaintiff-friendly approach of the *Dillon/Rowland* era. Whatever the merits of that approach, it simply fails to engage many twenty-first century judges' sense that there are appropriate occasions for them to craft as-a-matter-of-law limits that exclude certain forms of conduct and situations from the reach of negligence law. A more promising line of argument, in our view, is to suggest to the California

courts that their predecessors—egged on by academics such as Prosser and Fleming—erred years ago in adopting the view that duty is a blank check and hence *the* tool by which they can shape the contours of negligence liability. A more accurate and subtle appreciation of duty, as well as a better understanding of why it is distinct from other doctrines that bear on the assignation of responsibility, including assumption of risk, will provide judges with outlets through which to voice their sometimes legitimate concerns over the scope of negligence liability, yet will do so in a way that focuses their analysis so as to deter them from overstepping their proper role. In short, the path ahead is for California courts to get out of the habit of reflexively invoking “no duty” arguments *whenever* they feel the need to control litigation and jury discretion. A more measured and more justifiable approach would take seriously various distinct doctrines within negligence law as providing occasions for circumscribed and law-governed refinements of the negligence tort.

### I.

As noted above, Esper and Keating propose a three-fold solution to the problems they see in contemporary California negligence jurisprudence. First, they remind judges that duty issues are distinct from breach issues because the former must be decided categorically, not individually.<sup>27</sup> Second, they argue that judges must appreciate that the duty element invites them to articulate standards of conduct that will actually tell actors how they are supposed to behave.<sup>28</sup> Third, they insist that judges must be vigilant not to let the domain of negligence law (and tort law more generally) become infected by concepts drawn from the other major departments of the civil side of modern common law, namely, contract and property.<sup>29</sup> In their view, if appellate judges grasp these points, they will see that they have been inappropriately taking issues and cases away from juries.<sup>30</sup>

Unfortunately, all three proposals are unconvincing, and their combination is particularly so. The argument that the courts’ “no duty” rulings are insufficiently categorical is severely underspecified because Esper and Keating never explain the level of categorization that they have

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27. Esper & Keating, *supra* note 7, at 326.

28. *Id.* at 271–72. This is opposed to the *Dillon/Rowland* idea that duty rulings merely function to cap aggregate liability, and therefore can be set arbitrarily, without regard to whether they articulate intelligible standards of conduct.

29. *Id.* at 326–27.

30. *Id.* at Part III.

in mind, nor the reasons favoring one level of categorization over another. For example, one might adopt the substantive duty rule that there is *always* a duty to take reasonable care to avoid physical harm through misfeasance, with no exemptions. Doing so would, of course, solve the problem of judges inappropriately taking cases away from juries on “no duty” grounds, at least if judges faithfully followed the law. But Esper and Keating do *not* argue for a rule of this generality. Indeed, even though they believe that the California Supreme Court in *Knight v. Jewett*<sup>31</sup> set the stage for an undue expansion of the doctrine of primary assumption of risk (which, like the *Knight* majority, they understand as a “no duty” doctrine), they nonetheless believe that a narrower version has a place in negligence law.<sup>32</sup> So “categorical” cannot mean for them that courts confronted with allegations of careless misfeasance causing physical harm should never issue “no duty” rulings. (Even if it did, they offer no reason to equate “categorical” with “a rule not admitting of qualifications.” Rules with qualifications still create categorical lines.) Thus, for them, as for the California courts, the trick is to define the appropriate occasions for, and the appropriate breadth of, exemptions to the background rule of a general duty to take reasonable care not to cause physical harm. Yet the idea of “categorical” rulings is insufficiently determinate to provide a reason for courts to adopt relatively few or relatively narrow exemptions. We still need to know why fewer or narrower exemptions are preferable to more or broader exemptions.

Relatedly, we see no reason to suppose that, were the California courts to aspire to the issuance of relatively broad categorical rulings, the law would move in the direction that Esper and Keating believe it should go. In fact, their calls for the use of broader categories are at least as likely to encourage California courts to adopt a stingier, pro-defendant approach.<sup>33</sup> Suppose that they were to convince the California Supreme Court that the rule of the *Ann M.* case—that a possessor of land ordinarily has a duty to protect victims from third-party attacks on the land only when there has been a prior similar attack in the area<sup>34</sup>—was somehow insufficiently

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31. *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).

32. Esper & Keating, *supra* note 7, at 294–97 (endorsing, with an important qualification, *Knight*'s characterization of primary assumption of risk as a “no duty” doctrine).

33. Likewise, the proclivity of the California courts to carve out broad activity-types to which primary assumption of risk doctrine will apply is precisely a proclivity to be more categorical. Here again, the aspiration toward being categorical leads the courts to take more cases away from the jury. Perhaps it is not surprising, then, that by the time Esper and Keating turn their attention to *Ornelas*'s broad interpretation of California's recreational use statute, they seem to drop this branch of their argument. Decisions like *Ornelas* are exactly concerned to carve out broadly categorical exclusions from liability. *See infra* text accompanying notes 74–78.

34. *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 215–16 (Cal. 1993).

categorical. Esper and Keating seem to assume that the only available “categorical” option would be the recognition of a duty whenever such attacks are reasonably foreseeable to a person in the position of the possessor. But there is another categorical position, readily available to the court, which it will likely find more attractive if it is convinced to move away from *Ann M.*, namely, the rule that landowners should never be held liable in negligence for physical injuries occurring on their properties as the result of criminal acts by third parties. (This was, of course, long the rule under the doctrine of superseding cause.)<sup>35</sup> No doubt Esper and Keating would deem this a poor choice. But their complaint about this rule cannot be that it is somehow not categorical.

Esper and Keating’s “guidance” suggestion is also problematic. At one point, for example, they insist that “[d]uty doctrine must be used . . . to articulate the more particular standards of care owed by certain positions (for example, operating an amusement park), or incurred by certain undertakings (for example, by entering various ‘special relationships’).”<sup>36</sup> This assertion is troubling in several ways. For one thing, by insisting on a kind of particularity, they appear to counteract their previous argument advocating more broadly categorical duty rules. Moreover, by focusing on the “particular standard of care” owed by certain classes of defendants with respect to certain activities, they seem to invite the conflation of duty and breach—and with it the judicial usurpation of the jury’s role—that they so vehemently decry throughout their article. Of all people, Esper and Keating should not be the ones saying that the California courts’ excessive invocation of duty will be alleviated if judges conceive of it as inviting them to identify particular standards of care owed by particular actors in particular situations.

Finally, while the worry expressed by Esper and Keating that alien principles of contract and property have been creeping into tort seems on its face to capture something important about what has been happening in the California courts, their call for tighter boundary patrols is not likely to be heeded, nor is it in the end actually responsive to the doctrinal developments they decry. As is the case with their other prescriptions, the call for attention to the proper domains of tort, contract, and property might well fuel rather than retard the current direction of doctrine. Indeed, that call favors a broad realm of jury discretion to impose tort liability only if one concludes that the cases with which Esper and Keating are concerned

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35. DAN B. DOBBS, *THE LAW OF TORTS* § 190, at 470–71 (2000).

36. Esper & Keating, *supra* note 7, at 326.

are appropriately handled by tort principles. Yet it seems possible that, if pressed, the California courts would be willing to treat assumption of risk cases as “contract” cases—that is, cases in which duties and liability are determined by some sort of implicit agreement between the parties. To observe this possibility is just to point out that an insistence on keeping torts, contract, and property separate from one another does not by itself answer the question of which sort of dispute is properly placed in which domain. Rather, a substantive account of the scope of each domain is required. Esper and Keating have not provided that account, and even if they do, it is not obvious why the California courts are required to buy theirs.

The larger problem is that, despite its surface plausibility, the invasion of tort by contract and property really is not the problem with the California decisions that Esper and Keating criticize. If the courts were going hog-wild on express assumption of risk, then there would be reason to wonder if they were too willing to subsume tort to contract. (So, too, if the old privity rule for claims of negligence against product manufacturers were revived.) The brand of assumption of risk with which Esper and Keating are concerned, however, is not express but implied. And, although implied assumption of risk has some resonance with contractual ideas, it is not in fact a contract-based doctrine. Rather, it is a tort doctrine that treats victim choice as relevant to the allocation of responsibility as between tortfeasor and victim. Simply put, there is nothing alien or exotic about the idea that attributions of responsibility for a wrongfully caused injury ought sometimes to take account of knowing and voluntary actions of the victim that helped bring about the victim’s injury. Indeed, recognition of the propriety of considering victims’ choices is presumably one reason why Esper and Keating *agree* with the California courts that injuries to participants in recreational activities arising out of risks that juries find to be inherent in those activities *should* be treated differently than injuries suffered by bystanders to such activities, or by victims that in other settings make no meaningful choices relevant to their injuries. In other words, it is because they recognize that the fact of a victim’s choice is relevant to tort judgments about responsibility that they criticize the courts “merely” for *too readily* invoking primary assumption of risk as a ground for entering judgment for defendants, as opposed to criticizing them for invoking it at all.<sup>37</sup> Thus, their critique has nothing to do with a trespass by contract principles into the domain of tort.

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37. *Id.* at 296–97.

As for the landowner liability cases, Esper and Keating are surely correct that decisions like *Ornelas*, *Ann M.*, and *KFC* reflect a judicial solicitousness for property owners' rights that is completely alien to the spirit of *Rowland*'s abolition of the old common law status categories. (This is most apparent in *KFC*, in which the court actually hinges its "no duty" argument on the property rights provision of the California Constitution.<sup>38</sup>) But even here it is important to be clear on the role that property law is playing. It is not as if the status categories are coming back to dominate California duty analysis, or that a set of concepts at home in the law of property, but not in tort, is now being invoked as a basis for ruling in favor of defendants. It is rather that, in the evaluative balancing that California courts undertake when they consider "no duty" arguments, they are giving great—at times excessive—weight to owners' property rights as compared to other relevant interests. To reason this way is not to treat the potential liability of property owners to persons injured on their premises as somehow governed by property law principles. It is to carve out for property owners a greater domain in which they can act unaccountably, that is, without regard to the risks of injury they pose to others. Esper and Keating believe, as the *Rowland* court surely would have, that this tack is wrongheaded in its libertarianism. But that is not to say that it is a move fueled by a mistake about the proper domain of tort and property, or by the misapplication of property concepts in tort cases.<sup>39</sup>

## II.

Given the weakness of each of the foregoing grounds for criticizing the California courts' recent penchant for issuing judgments as a matter of law in favor of negligence defendants, it will be tempting for California appellate judges to dismiss Esper and Keating's critique as being driven by a nostalgic or an independently derived normative commitment to the left-liberal principles that were embraced by the California courts in the 1960s, but that have been beaten back since 1980.<sup>40</sup> In this respect, their argument

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38. Ky. Fried Chicken of Cal., Inc. v. Superior Court (*KFC*), 927 P.2d 1260, 1270 n.2 (Cal. 1997).

39. Whatever its problems, *Ornelas*, even more clearly than *KFC*, does not turn on the misapplication of property law principles or concepts to a tort case. See *Ornelas v. Randolph*, 847 P.2d 560, 562 (Cal. 1993). Thus, there is no suggestion from Esper and Keating that the court's defendant-friendly reading of California's recreational use statute turned on its willingness to import property law into tort law—as opposed to its having misread statutory text, legislative history, or legislative purpose. See Esper & Keating, *supra* note 7.

40. For the suggestion that 1960s liberals' eagerness to reform tort law blinded them to ideas of responsibility, and that this blindness has come to haunt them by enabling conservatives to make it

does them a disservice. Many of these decisions are problematic and many of them deserve to be deplored not on nostalgic or theoretical grounds, but for their sloppy legal reasoning. For that to happen, however, we will need a subtler appreciation of both duty and negligence law than Esper and Keating have provided. Specifically, what is needed is a plan for *shielding duty*—a way of understanding duty’s place among the concepts of negligence law that will protect the duty element from being abused in the manner Esper and Keating so vividly depict.

We propose that the best way to shield duty is for the California courts to take more seriously than they have—and more seriously than Esper and Keating have—the full roster of rich and textured concepts contained and linked together within negligence law. Among other things, doing so will involve (1) grasping the idea, rejected by *Knight* (and by Esper and Keating), that assumption of risk is both a genuine affirmative defense (as opposed to a “no duty” doctrine) and one that stands apart from the defense of comparative fault; (2) appreciating not only why it makes sense for courts to adopt a default rule for premises liability claims of no-duty-to-trespassers, but also why it makes sense to carve out exceptions, including one for attractive nuisances; (3) comprehending that duty in its primary sense calls for a relational inquiry that asks whether the alleged tortfeasor owed it to persons such as the victim to take reasonable care to avoid causing harm of the type suffered by the victim; and (4) appreciating that the level of deference that judges should pay to jurors on issues such as breach may appropriately vary across certain categories of cases, including, for example, cases that allege unreasonable conduct in emergency situations. The reason this sort of approach promises better results is because it does not demand, as Esper and Keating demand, that judges somehow ignore or otherwise rid themselves of their sense that certain classes of negligence cases call for them to take a relatively aggressive stance in relation to the jury. Instead, it asks them to channel that intuition by using doctrinal vehicles appropriate to the cases before them. It is not necessarily (or not only) confusion or regressive politics that leads judges faced with cases like *Knight*, *Ornelas*, *Ann M.*, and *KFC* to feel pressure to take some steps to limit liability or jury discretion. It is confusion that converts that pressure into ham-handed “no duty” decisions. When these decisions go wrong, it is because they deploy the blunderbuss California conception of duty rather than the more finely grained doctrines and concepts that traditional doctrine makes available to them. Thus, duty will

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“their” issue, see John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 364–70, 398–408 (2005).

be abused again and again by California courts so long as scholars and judges continue to insist that judges should deploy the crudely reductionist account of negligence law found in *Rowland* and *Dillon*, as opposed to a richer, subtler rendition of the tort, its component parts, and how they hang together.

Ours would be a somewhat bleak position if all we could say in favor of it is that it can support mild judicial self-restraint as the lesser of two evils. But that is not in fact our position. For one thing, the prospect of a measured approach to reining in juries through a sharper understanding of duty and other doctrines is hardly the only thing we offer. Indeed, two of the doctrines whose resurrection we advocate—assumption of risk conceived as a genuine affirmative defense (as compared to assumption of risk as a “no duty” doctrine) and attractive nuisance—are pro-plaintiff. More generally, our approach goes hand-in-hand with the sort of anti-instrumentalist role that Esper and Keating wish to ascribe to tort concepts such as duty. As we have argued elsewhere, this approach is rooted in a conception of tort that is rights-based, and that assigns responsibility and permits redress at least somewhat independently of concerns over aggregate policy considerations.<sup>41</sup> Thus, our argument is not simply an effort at political or pragmatic accommodation. Rather, it is offered as part of a view which says that the best way to think about negligence law is to combine the progressive insight that there are broad swaths of activity that carry with them duties to take care against causing to certain classes of persons certain kinds of harm (particularly physical harm) with the traditional insight that ultimate judgments about whether and to what extent an actor can be held responsible for wrongfully harming another must take account of the wide array of ordinary moral intuitions or judgments that have been adopted, refined, and updated by common law judges as they have gone about deciding particular cases.<sup>42</sup>

Although now is not the occasion for a full-blown articulation and defense of the foregoing claims, we can at least begin to flesh them out by, first, reconsidering the morass of California case law on primary assumption of risk and, second, by addressing two of the landowner cases that understandably disturb Esper and Keating.

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41. See generally John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 696–97 (2003); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).

42. See Goldberg & Zipursky, *supra* note 40, at 402–07; John C.P. Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1329–48 (1990).

## A. RECAPTURING ASSUMPTION OF RISK

*Record v. Reason*<sup>43</sup> stands out as particularly weak among the post-*Knight* assumption of risk cases discussed by Esper and Keating. Record seriously aggravated an existing back problem when he fell off a rubber inner tube that was being towed at a high rate of speed behind a boat.<sup>44</sup> He sued the driver in negligence for driving much too fast and turning much too sharply.<sup>45</sup> The defendant moved for summary judgment on the strength of *Knight's* notion that participants in recreational activities owe no duty to other participants to take care not to cause harm to them.<sup>46</sup> In opposition, the plaintiff argued that there were several disputed fact issues, including those of how fast the boat was moving, the sharpness with which it turned, and a claim by Record, corroborated by a passenger on the boat, that, before the expedition, he specifically requested of the driver an easy run.<sup>47</sup>

A divided California Court of Appeal affirmed the trial court's grant of summary judgment, embracing a broad and procedurally peculiar version of primary assumption of risk.<sup>48</sup> Pointing to *Ford v. Gouin*<sup>49</sup>—the companion decision to *Knight* in which water-skiing was deemed to be a recreational activity that excuses its participants from an obligation to take reasonable care not to hurt each other—the *Record* majority reasoned that recreational tubing fell in the same category, since it is an activity that is “done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.”<sup>50</sup> As for the factual issues raised by the plaintiff, particularly his alleged request to the driver to drive slowly, the court deemed them irrelevant.<sup>51</sup> Citing *Knight* for the proposition that a “party cannot change the inherent nature and risk of a sport by making a unilateral request that other participants play less vigorously,”<sup>52</sup> it concluded that, under controlling California law, “a defendant’s liability must be based on ‘the nature of the sport itself’ rather than ‘the particular plaintiff’s subjective knowledge and expectations.’”<sup>53</sup> In other words, because *Knight* and *Gouin* defined

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43. *Record v. Reason*, 86 Cal. Rptr. 2d 547 (Ct. App. 1999).

44. *Id.* at 549.

45. *Id.*

46. *Id.*

47. *Id.* at 550.

48. *Id.* at 557.

49. *Ford v. Gouin*, 834 P.2d 724 (Cal. 1992).

50. *Record*, 86 Cal. Rptr. 2d at 554.

51. *Id.*

52. *Id.*

53. *Id.* (quoting *Knight v. Jewett*, 834 P.2d 696, 706 (Cal. 1992)).

primary assumption of risk as a “no duty” doctrine, and because the question of duty is treated as an issue of law “which depends on the nature of the sport or activity in question and on the parties’ general relationship to the activity,”<sup>54</sup> allegations or evidence regarding what had or had not been said or was or was not expected by a particular participant were beside the point. Notably, the *Record* court emphasized that one important rationale behind this approach was to render more cases amenable to summary judgment, and that another was to avoid the “disparities” that would arise between different plaintiffs, depending on the subjective expectations that they bring with them to various activities.<sup>55</sup>

What went wrong in *Record*? Esper and Keating argue that the problem was the majority’s eagerness to expand the categories of recreational activities to which the *Knight/Gouin* “no duty” rule applies, and to decide for itself the question of whether the risk of being flung off an inner tube is “inherent” in the activity of tubing.<sup>56</sup> These issues, they argue, are unsuitable for a determination by a court as a categorical matter, or at a summary judgment stage. While, in our view, they are right to bridle at the *Record* court’s affirmance of summary judgment, it is difficult to see what grounds they have for rejecting it. Indeed, their critique of the case reveals a basic instability in their position. On the one hand, they seem to want to endorse *Knight*’s treatment of primary assumption of risk as a genuine “no duty” defense, which renders primary assumption of risk a question of law. On the other, they want to leave it to juries to decide in each case whether the victim of an injury incurred in the course of a recreational activity counts as the realization of a risk “inherent” in that activity. Moreover, the judicial inclination evidenced in *Record* to develop rules for handling broad classes of activities (rather than particular instances of those activities) is exactly the sort of categorical approach to duty that Esper and Keating at one point advocate. So even though it is understandable that they are put off by the *Record* court’s conclusion that the dispute as to whether the plaintiff communicated to the driver that he wished to go more slowly was irrelevant to the disposition of the assumption of risk issue, they seem unable to explain why it should be relevant given *Knight*’s and *Gouin*’s conclusions, which they accept, that primary assumption of risk is a “no duty” doctrine.<sup>57</sup>

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54. *Id.* at 555.

55. *Id.* at 554 (quoting *Knight*, 834 P.2d at 706).

56. Esper & Keating, *supra* note 7, at 297–98.

57. The well-reasoned dissent in *Record* plausibly distinguishes *Gouin* as a case that involved an experienced water-skier, which revealed no particular reason to believe that the defendant had defied standard expectations as to the level of risk posed by water-skiing, and in which there was no discussion

In our view, *Record* does in fact vividly demonstrate a mistake about duty, but it is not the mistake that Esper and Keating identify. Rather, the mistake traces back to *Knight's* initial decision to fold primary assumption of risk into the black hole of duty-as-policy-based-liability-exemption, which is in turn the product of an earlier mistake made by the court in *Li v. Yellow Cab Co.*<sup>58</sup>

Justice Kennard's powerful dissent in *Knight* captures the gist of *Knight's* error. Implied assumption of risk is simply not a "no duty" doctrine. It is instead a defense that turns on what a particular plaintiff subjectively understands and voluntarily chooses to do.<sup>59</sup> Analogous to the defense of implied consent to torts such as battery, implied assumption of risk doctrine gives the defendant the opportunity to prove that a particular plaintiff did in fact knowingly and voluntarily undertake to confront a specific, identifiable risk (or set of risks) that stands out from background risks, and that was later realized in the form of an injury to the plaintiff. As such, implied assumption of risk concerns whether the *plaintiff* has done something that undermines her *entitlement to complain* about the defendant's conduct, not whether the defendant was under an obligation to take care to avoid injuring a person such as the plaintiff, or whether that obligation was breached. In short, even if the majorities in *Knight*, *Gouin*, and *Record* were reasonable to perceive something about the facts of those cases that warranted concerns about the prospect of inappropriate impositions of liability, they went off the rails in treating those concerns as hinging on the question of duty, and thus, in responding to them by declaring recreational activities as "duty-free zones"—activities in which actors are free from any obligation to be careful not to cause physical injury to other participants.

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of ground rules between plaintiff and defendant. *Record*, 86 Cal. Rptr. 2d at 558–60 (Vogel, J., dissenting). More generally, the dissent in *Record* focuses on the plausible contention that prior California case law on assumption of risk in recreational activities did not foreclose the possibility that an express request for a lower risk level defeats the default assumption of risk inherent in the activity. *Id.* at 558. Our points are simply, first, that the majority position in *Record* is a reasonable application of *Knight*, and, second, that, if the facts alleged by the plaintiff in *Record* were proven, the majority's approach to the case would not have been available had *Knight* instead treated assumption of risk as a genuine plaintiff-conduct defense. That the dissenting justice could find fact-intensive reasons for not applying *Knight's* rendition of primary assumption of risk doctrine to a particular case does not undercut our point that *Record* was a plausible application of *Knight's* ill-conceived conversion of assumption of risk into a "no duty" doctrine.

58. *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975). See *infra* text accompanying note 69.

59. *Knight*, 834 P.2d at 715–20 (Kennard, J., dissenting) (citing Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 258 (1987)).

Once one grasps that assumption of risk is not about the absence of a duty of reasonable care, the source and nature of the absurdities rightly decried in *Abusing "Duty"* come into focus. It is only by torturing the concept of duty via the injection into it of the foreign idea of assumption of risk that one can fathom why a court might conclude that there is no obligation owed by a golfer to other golfers to yell "fore" as that golf ball approaches them. For the same reasons, it would otherwise be obvious that a sailor manning the tiller of a boat is obligated to warn fellow sailors that the boom is swinging over them, and that a ski instructor is under a duty to take care to identify appropriately manageable slopes for novice students. The abuse of duty in these cases, as in *Record*, comes from treating primary assumption of risk as a "no duty" doctrine, as opposed to a plaintiff-consent or plaintiff-waiver defense.

Why did *Knight* stray down this path? The answer involves a mixture of politics, societal change, jurisprudence, and doctrine. By the year it was decided (1992), the conservative backlash in the California courts was in full swing, as was the modern tort reform movement. There was thus an eagerness among some of the justices to identify tools that could cabin or eliminate liability for broad categories of cases at a pretrial level (or, better yet, before they were filed). Thus, it is no surprise to find the *Knight* court citing the increased availability of summary judgment as a major reason for treating primary assumption of risk as a "no duty" doctrine:

If the application of the assumption of risk doctrine in a sports setting turned on the particular plaintiff's subjective knowledge and awareness, summary judgment rarely would be available in such cases, for, as the present case reveals, it frequently will be easy to raise factual questions with regard to a particular plaintiff's subjective expectations as to the existence and magnitude of the risks the plaintiff voluntarily chose to encounter.<sup>60</sup>

The ability to eliminate tort cases at the summary judgment stage was, in short, a hugely significant argument in favor of casting primary assumption of risk as a "no duty" argument.

Societal change—particular in litigation activity and in terms of public attitudes toward litigation—also played an important stage-setting part in *Knight*. The tort reform movement in the 1980s and 1990s was born in part out of a perception that litigation was intruding on basic activities and changing the texture of day-to-day life. Supposedly, municipal parks and swimming pools were being closed because liability insurance had become

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60. *Id.* at 706.

too expensive, or was not available.<sup>61</sup> More generally, ordinary social interactions were being converted into lawsuits. *Knight* and *Gouin* nicely capture these concerns—both arose out of informal recreational activities involving groups of adults; both are cases in which an injury leads to a sequence of events in which an appellate court is asked to scrutinize the reconstructed history of a social event among friends, only now with lawyers, insurance companies, and money in the picture. No wonder, then, that the court saw the identification of a “no duty” doctrine tied specifically to such activities as an attractive position to take.

The courts’ jurisprudential mindset played a role in *Knight*, too. Although, twenty-five years after *Dillon* and *Rowland*, the political winds had changed, the court’s jurisprudential mindset had not. It remained (and remains) deeply skeptical about the value and cogency of common law tort concepts and doctrines. It was therefore not at all inclined in *Knight* to respect the idea that assumption of risk identified an intelligible doctrine distinct from either duty or comparative fault. Indeed, the suggestion that there might be legal principles that undercut recovery apart from fault, causation, and the policy issue of “duty,” struck it (and continues to strike it) as a bit of nineteenth century formalism. Relatedly, the court clearly conceived of negligence liability as a matter of deterrence or desert, not as a matter of responsibility between the parties. For this reason, it was suspicious of the idea that the presence or absence of a sanction for a careless defendant should vary according to whether the plaintiff in question interacted with the defendant on the basis of certain subjective knowledge or understandings—“there would be drastic disparities in the manner in which the law would treat defendants who engaged in precisely the same conduct, based on the often unknown, subjective expectations of the particular plaintiff who happened to be injured by the defendant’s conduct.”<sup>62</sup> Because *Knight* considered the imposition of liability entirely in terms of when a defendant ought to be sanctioned—as opposed to considering the traditional tort question of whether a plaintiff is entitled to demand redress from a defendant for wrongfully injuring her—recognition of assumption of risk as a plaintiff-consent defense struck the court as irrational and unfair.

Finally, there was a certain doctrinal landscape to contend with. *Knight* fell after, and plainly needed to address, one of the more important episodes in the court’s prior overhaul of common law tort doctrine, namely,

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61. For some recently expressed doubts about one such supposition, see Carl T. Bogus, *Fear-Mongering Torts and the Exaggerated Death of Diving*, 28 HARV. J.L. & PUB. POL’Y 17, 19–36 (2004).

62. *Knight*, 834 P.2d at 706.

its rejection of contributory negligence and its adoption of comparative fault in *Li*. (Although seventeen years had elapsed between *Li* and *Knight*, the court had not yet fully addressed the effect of *Li* on the availability of implied assumption of risk, preferring to let the lower appellate courts work it out.) The reformist and plainly pro-plaintiff spirit of *Li*, issued in the *Dillon/Rowland* era, directly addressed implied assumption of risk, albeit only in dicta. The court concluded that, for instances in which a jury could find that a plaintiff had knowingly and voluntarily chosen to participate in a risky activity, but also could find that this choice was unreasonable in terms of the risks it posed to the plaintiff's physical well-being, the law would treat the latter quality of the plaintiff's act (its unreasonableness) as taking precedence over the former quality (its voluntariness).<sup>63</sup> Thus, any instance of *unreasonable* implied assumption of risk would henceforth be treated under the aegis of the partial defense of comparative fault.<sup>64</sup> After *Li*, courts split on the question of whether instances of implied assumption of risk that involved *reasonable* rather than *unreasonable* risk-taking still functioned as a complete bar to recovery, or whether the adoption of comparative fault meant that courts would simply no longer give credence to the idea of assumption of risk as a distinctive affirmative defense.<sup>65</sup>

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63. *Li*, 532 P.2d at 1240–41.

64. *Id.*

65. In our view, *see infra* text accompanying notes 69–72, it is a mistake to carve up the universe of assumed risks into unreasonably and reasonably assumed risks: either can support an assumption of risk defense to a claim of negligence. To give the reader, however, a flavor of the distinction that courts wrestled with after *Li*, we offer two illustrations designed to highlight it.

(1) *Unreasonable implied assumption of risk*. Adult *D* drives his car to adult friend *F*'s house and suggests to *F* that they go for a joy ride. *F* knows that *D* is highly intoxicated and also knows that he can easily decline the invitation without any negative consequences. If *F* decides to ride with *D*, his decision constitutes (probably as a matter of law) a voluntary assumption of the risk of being injured by *D*'s drunk driving, as well as an instance in which he has acted unreasonably with respect to his own physical well-being. (Lest a false implication be drawn from this example, we do not mean to suggest by it that negligence claims by automobile guests against drivers, much less persons not enjoying a preexisting relationship with a driver, will commonly give rise to the implied assumption of risk defense. This is why the example is laden with details that are necessary to establish the genuine voluntariness of the passengers' decision and to snuff out any whiff of compulsion.)

(2) *Reasonable implied assumption of risk*. Expert figure skater *S* goes to a local ice rink for some recreational skating and notices that sections of railing are missing that, if present, would prevent skaters from falling awkwardly off the edge of the ice onto the surrounding floor, which is situated several inches below the surface of the ice. *S* berates the rink's owner for his failure to replace the rail, which can be done cheaply and easily, and stands to avert numerous potentially serious injuries to customers. Nevertheless, in light of her expertise, and the fact that she has on numerous occasions skated without incident at rinks without safety rails, *S* decides to skate at the rink. A jury could readily find on these facts that *S* acted reasonably with respect to the risk of being injured by falling off the ice onto the floor. Even if they did, however, they could also find (and perhaps would reasonably have to find) that *S* knowingly and voluntarily assumed this risk.

Since even before *Li*, plaintiffs had offered an impressive doctrinal and fairness-based argument in favor of the outright abolition of implied assumption of risk as a bar to liability. It would be odd, they reasoned, for courts to permit that old-fashioned doctrine to bar claims brought by *reasonable* risk-takers, because then *unreasonable* risk takers—who, after *Li*, could often recover at least some damages under comparative fault principles—would fare better than reasonable risk takers. Impressed by this argument, but loathe to accept its conclusion, the *Knight* majority, following some lower court decisions and prominent commentators, recast the reasonable assumption of risk cases as “primary” assumption of risk cases—that is, “no duty” cases—thus sidestepping the plaintiff’s charge that the same defense was being granted and denied arbitrarily.<sup>66</sup> Thus, *Knight* concluded that it is fair to bar completely claims by reasonable risk-takers, while permitting unreasonable risk-takers to recover partial damage awards, because the former claims were *not* being thrown out on the basis of the plaintiff’s conduct, but instead on the policy-driven ground that the persons who carelessly generated the risks that these plaintiffs had decided to assume were not in the first place under a duty to act carefully toward the plaintiffs.<sup>67</sup>

The foregoing and rather elaborate analysis of *Knight* can be summarized as follows: the *Knight* court inherited the broadly pro-plaintiff doctrines fashioned by its predecessor court in the 1960s and 1970s, its skepticism about the intelligibility of common law doctrines such as assumption of risk, and its unilateral focus on the propriety of permitting a jury to sanction the defendant, irrespective of the plaintiff’s entitlement to recover. In the 1980s, however, a new cadre of judges came on board who were committed to scaling back tort litigation and who were sensitive to public displeasure at a system of liability that at least seemed to be turning daily activities into lawsuits. Boxed into a doctrinal corner by *Li*, but armed with the always-available escape valve provided by the *Dillon/Rowland* conception of duty as a device by which judges can for “policy” reasons place matter-of-law limits on broad swaths of cases, they unsurprisingly invoked duty as the solution to their problem. While perhaps not on board for the subsequent “abuses” documented by Esper and Keating, the Reporters of the “Apportionment” component of the *Restatement (Third) of Torts* (Michael Green and Williams Powers), as well as leading scholars in this area (especially Kenneth Simons), have endorsed *Knight*’s reconceptualization of implied assumption of risk as an issue of duty qua

66. *Knight*, 834 P.2d at 703 & n.3.

67. *Id.*

liability-cabining.<sup>68</sup> Thus has California's commitment to reductionism come to dominate and distort yet another area of tort doctrine.

Our proposal for repairing the distortions created by this chain of events flows straightforwardly from the foregoing analysis. All that is required is a return to the proper conception of assumption of risk. This will involve, first of all, revisiting *Li*, for it is *Li* that, quite gratuitously, gave *Knight* the occasion to distort the doctrine. We say gratuitously because the fairness argument that plaintiffs mounted against the continued recognition of implied assumption of risk after the adoption of comparative fault rests on a mistake traceable to *Li*. The mistake was to suppose, as *Li* did, that, whenever a plaintiff's act is unreasonable as to his or her own physical well-being, it must be treated as comparative fault, even if the unreasonable act turns out to be a genuinely knowing and truly voluntary decision to encounter an identifiable, nonbackground risk of injury.<sup>69</sup> Instead, this class of unreasonable acts should, in our view, be treated as assumptions of risk, *not* as comparative fault, precisely because these acts form a distinctive species of unreasonable conduct in which the victim of an injury chooses to encounter the risk that generated that victim's injury. Once they are so treated, the anomaly seized on by the plaintiff's argument—and the pressure to find a new basis for assumption of risk doctrine in duty—evaporates. There is nothing odd about treating reasonable assumptions of risk as barring recovery when one also treats unreasonable assumptions of risk the same way.

In sum, genuine assumption of risk, regardless of its reasonableness or unreasonableness, ought to operate as a complete affirmative defense to a claim of negligence. While it is true that assumption of risk was applied during the nineteenth and early twentieth centuries to justify harsh and regressive decisions (for example, in nineteenth century accident claims brought by factory workers), it hardly follows that the doctrine itself is regressive; the regressiveness lies in courts' failures to be circumspect

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68. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT § 2 cmts. i & j (2000) [hereinafter APPORTIONMENT]; *id.* § 2 cmt. j, Reporter's Note (citing *Knight* and *Gouin*). See also Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481 (2002); Simons, *supra* note 59 (articulating a theoretical framework within which to interpret assumption of risk). Insofar as the Reporters are not on board with the aggressive post-*Knight* applications of primary assumption of risk charted by Esper and Keating, there is a certain irony at work here. Reporters Green and Powers have insisted on reducing the role of the duty element in the negligence tort as a prophylactic measure (that is, to reduce the incidence of judges taking "breach" questions away from juries under the guise of issuing "no duty" rulings). Here, however, they have acceded to a reconceptualization of assumption of risk in terms of duty, thereby giving courts exactly the sort of excuse to interfere with jury discretion that they are concerned to deny them elsewhere.

69. *Li*, 532 P.2d at 1240–41.

about the preconditions of active knowledge, and voluntary choice within certain important scenarios.<sup>70</sup> We see no reason to think that courts today will be unable to weed out these misapplications of the doctrine merely because they accept the concept of assumption of risk on its own terms.<sup>71</sup> Indeed, for reasons emphasized by Esper and Keating, courts will sometimes be entitled to identify categories of cases in which the defense simply ought not to apply because of the relative passivity, ignorance, or powerlessness of the typical victim.<sup>72</sup> For example, courts should not (and do not) treat surgical patients as having “assumed the risk” of surgical malpractice (at least for nonelective, noncosmetic surgery), in part because the interaction between surgeon and medically-needful patient does not even begin to permit the kind of voluntary interaction that might, in an appropriate case, support the defense. If today tort law still governed workplace injuries, the same might well be true for typical workplace accidents involving wage laborers, given that the decision to remain on or report to a hazardous worksite is hardly likely to be free of coercion.<sup>73</sup> But other domains of activity, including recreational games and sports, are ones in which the defense legitimately operates. Even in these domains, whether the plaintiff appreciated and voluntarily accepted the risk in question will typically be an issue of fact for the jury. If, however, appellate courts remain nervous about the intrusion of tort law into such activities, they might consider articulating matter-of-law guidelines about when circumstances will support an inference of knowing and voluntary assumption of risk. Still, the ultimate question will be whether the evidence shows that a given plaintiff really did appreciate and choose to encounter risks associated with the activity that included risks of the sort created by the defendant’s careless conduct.

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70. See *infra* note 73 and accompanying text.

71. *But cf.* APPORTIONMENT, *supra* note 68, § 2 cmt. i, Reporter’s Note (rejecting Simons’s conception of assumption of risk, which embraces a form of implied consent theory, on the ground that it might become too broad). Simons’s apparent willingness to concede that his conception of implied assumption of risk as a form of waiver or consent ought to be abandoned for prophylactic reasons strikes us as puzzling and unwarranted. See Simons, *supra* note 68, at 502–03 (conceding the possibility of libertarian excess).

72. Esper & Keating, *supra* note 7, at 314–17.

73. *Cf.* Suter v. San Angelo Foundry & Mach. Co., 406 A.2d 140, 148 (N.J. 1979) (recognizing that New Jersey’s comparative fault statute generally applies to products liability claims, but refusing to recognize any plaintiff-fault defense for product liability suits brought by workers who allege having been injured by a defective product in an industrial setting on the ground that such incidents are highly likely to be involuntary on the part of workers and hence not their fault), *superseded in part by statute*, N.J. STAT. ANN. § 2A:58C-3 (West 2000), *as recognized in* Dewey v. R.J. Reynolds Tobacco Co., 577 A.2d 1239, 1252 (N.J. 1990).

Assumption of risk, understood as a true affirmative defense rooted in a notion resembling implied consent, gives courts a sharper and safer tool than *Knight's* "no duty" version of it. If they were to embrace it, courts would not be left to make preposterous statements about golfers' and sailors' lack of duty. And it would be clear that an unusual case like *Record*, in which there was a credible allegation of an overt discussion of danger levels prior to the activity taking place, simply did not warrant summary judgment given the open fact issues. But openness in cases like *Record* does not mean that summary judgment would rarely or never be available on assumption of risk. There will be plenty of cases in which the evidence that an adult chose to water-ski or to play football or basketball will, if unmet by contrary evidence, be sufficient to establish that the risk was voluntarily assumed. To be more precise, California courts would have room, under the traditional version of assumption of risk, to craft summary judgment rules that filter out large numbers of prototypical cases, while still permitting jury trials for instances in which the plaintiff's knowing and voluntary choice is genuinely a contested issue. By contrast, under California's current understanding of assumption of risk, plaintiffs in such activities are categorically shut out, regardless of the state of the evidence as to the terms on which they participated. And defendants are left with the impression that, at least when it comes to recreational activities, they have entered a duty-free zone.

#### B. PREMISES LIABILITY AND PROPERTY RIGHTS MORE GENERALLY

Although the preceding analysis focuses on assumption of risk, similar types of considerations bear on the appropriate treatment of the premises liability cases discussed in *Abusing "Duty."* This is because, as noted above, California's abuse of duty results from an unfortunate confluence of certain broad forces. Politically and socially, the courts are under pressure to cut liability, having opened up many doors in the 1950s, 1960s, and 1970s, and having witnessed a supposed litigation explosion. The courts are now dominated by judges who harbor "let's cut back" sentiments. Unfortunately, in the *Dillon/Rowland* era, the California courts gutted negligence law of many of the features that hold it together, that give it form, that constrain judges charged with applying it, and that allow it to mesh well with commonly held judgments about when it is appropriate or inappropriate to hold one person responsible to another. Thanks in part to the legal academics who helped foment this jurisprudential revolution, the mindset of many judges and lawyers today remains insensitive to—even arrogant about—the cogency of traditional concepts and categories, which

means that inevitable, politically fueled shifts in the direction of the law can operate freely and fully, without any doctrinal dampers. And so the current California bench has turned back to *Dillon's* and *Rowland's* denuded concept of duty as the tool for controlling litigation and liability as they see fit.

Our diagnosis suggests that what is needed today is a recovery of the full array of doctrines that have long been denounced as formalistic and regressive, but turn out to be critical to the law's ability to digest new social, economic, and political developments without simply degenerating into the agenda of the dominant political viewpoint. Assumption of risk as a distinctive affirmative defense has been our main example. But the same diagnosis and prescription applies, we think, to premises liability cases. We can see this by asking how it is that, at the late date of 1993, the court in *Ornelas v. Randolph* was willing, on the strength of California's recreational use statute (section 846 of the California Civil Code), to dismiss a premises liability claim brought on behalf of a young child.<sup>74</sup> The child was injured when a metal pipe fell on him as his playmates played on old machinery that sat on an open portion of the defendant's property, which in turn was located next to the subdivision in which the plaintiff lived.<sup>75</sup> It is genuinely startling to note, as Esper and Keating do, that this child trespasser fared worse than would have a child trespasser bringing a comparable claim a century earlier under the pre-*Rowland* regime and its supposedly regressive status-categories.<sup>76</sup> But herein lies an important clue to the problem. For, if there is blame to be cast for *Ornelas*, some of it lies with *Rowland* itself.

*Rowland* is often treated as an instance of unalloyed progress. Yet while it might be difficult to muster tears over the demise of the licensee-invitee distinction, *Rowland's* rejection of the idea that trespassers stand in a different relation to possessors of lands than do nontrespassers and still runs counter to judgments about responsibility that are shared by many (and not just libertarians). Indeed, *Rowland* was almost insultingly dismissive in deeming those judgments to be nothing more than vestiges of feudal notions of hierarchy tied to property ownership.<sup>77</sup> Anyone with "modern" sensibilities would see, said the California Supreme Court, that

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74. *Ornelas v. Randolph*, 847 P.2d 560 (Cal. 1993).

75. *Id.*

76. *See Barrett v. S. Pac. Co.*, 27 P. 666, 667 (Cal. 1891) (recognizing the attractive nuisance doctrine).

77. *See Rowland v. Christian*, 443 P.2d 561, 565 (Cal. 1968), *superseded in part by statute*, CAL. CIV. CODE § 847 (West Supp. 2005).

the only real substantive question in a premises liability case is the jury question of whether the possessor took reasonable steps under the circumstances to maintain a safe premises.

By eliminating trespassers as a separate category in the name of progressivism, *Rowland* set the stage for *Ornelas*. For what *Rowland* did was to leave each landowner who might face a negligence claim with nothing to do but make a plea to the jury, except in the rare case where the evidence was so one-sided on breach, causation, or injury as to induce the trial judge to grant judgment as a matter of law. This perhaps was a tolerable state of affairs in 1968, but it certainly was not in 1993, nor is it in today's climate. So no surprise that, in interpreting section 846, *Ornelas* adopted a particularly broad—and again thoroughly “categorical”—reading of the statute's immunity provisions. Indeed, the court could not have been more explicit about what it took itself to be doing, noting that, under its interpretation of the statute, “[t]he landowner's duty to the nonpaying, uninvited recreational user is, in essence, that owed a trespasser under the common law as it existed prior to *Rowland*.”<sup>78</sup>

But not exactly. For, as Esper and Keating note, pre-*Rowland* law recognized an exception to the no-duty-to-trespassers rule for so-called attractive nuisances—dangerous conditions likely to induce minors to enter the land without permission. The animating idea behind the exception, was, of course, that children constitute a special category of trespasser that ought to be treated differently by the law because, among other things, they lack the experience, maturity, and knowledge to grasp the significance of ethereal legal boundaries, to appreciate fully threats to their own physical safety, and to exercise the judgment and self-control required to resist potentially exciting but dangerous situations. Together, these and other reasons provide, in our view, very plausible grounds for recognizing a doctrinal exception to the old “no duty” rule, one that, not surprisingly, tracks ordinary intuitions about when it is or is not appropriate to hold children (and/or others) responsible for their safety. And were the exception still recognized, it is quite possible that a case like *Ornelas* would have survived summary judgment.

So why, today, is this seemingly intuitive exception no longer available? The superficial answer is because there is nothing in the text of section 846 that supports its recognition. The more thorough answer is that the *Ornelas* court, like the *Knight* court, fully accepts the *Dillon/Rowland* court's enthusiasm for eliminating almost all of the supposedly archaic

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78. *Ornelas*, 847 P.2d at 562.

formal content of negligence law, yet, unlike that court, is also anxious to find legal levers by which to cabin in or close off large swaths of negligence liability. In *Knight*, that lever was duty. Here, the lever is the statutory construct of “recreational use.”

*KFC*<sup>79</sup> is another case held up by Esper and Keating as a conspicuous example of the California courts abusing duty in the name of property rights. According to the plaintiff’s allegations, an armed robber grabbed the plaintiff, the sole customer in the defendant’s fast food restaurant, and placed a gun to her back.<sup>80</sup> After she handed over her wallet, the robber ordered an employee to hand him the money in the store’s cash register.<sup>81</sup> In response, the employee stated she would have to go to the back of the restaurant for a key.<sup>82</sup> This response caused the robber to become extremely agitated, to press his gun harder into the plaintiff’s back, and to assert that he would shoot her if “the employee did not ‘quit playing games’ and open the cash register immediately.”<sup>83</sup> The clerk then turned over the money and the robber fled.<sup>84</sup>

Brown sued KFC in negligence.<sup>85</sup> KFC moved for summary judgment on the ground that a business is under no duty to undertake reasonable efforts to protect its patrons from violent third party attacks by strangers on its premises.<sup>86</sup> The trial court denied summary judgment, and KFC’s petition for a writ of mandate was denied by the California Court of Appeal.<sup>87</sup> The Supreme Court of California then reviewed that denial.<sup>88</sup> Framing the issue as “whether a shopkeeper owes a duty to a patron to comply with an armed robber’s demand for money in order to avoid increasing the risk of harm to patrons,”<sup>89</sup> it reversed and entered judgment for KFC.<sup>90</sup> The majority was persuaded by two rationales. First, it reasoned

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79. *Ky. Fried Chicken of Cal., Inc. v. Superior Court (KFC)*, 927 P.2d 1260, 1262 (Cal. 1997). Like many other tort decisions issued by the California courts, *KFC* entered the appellate courts via a petition for a writ of mandate filed by the defendant asking a higher court to find that a lower court had erred egregiously by not granting it judgment as a matter of law. *See id.* at 1263.

80. *Id.* at 1262.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 1263.

87. *Id.* at 1262.

88. *Id.*

89. *Id.*

90. *Id.* at 1270. The court declined to treat as distinct theories of liability the plaintiff’s claims that KFC failed to provide adequate security for its patrons and failed to provide adequate training to its employees on how to respond to criminal activity. *Id.* at 1263. We will not address this aspect of its

that the recognition of a duty owed by the likes of KFC to its patrons to comply with robbers' demands would "encourage hostage taking by robbers who become aware that such conduct assures compliance with their demands."<sup>91</sup> A second consideration occupied less space in the court's opinion, but was attributed at least as much significance as the first: "It is enough to observe that recognizing a duty to comply with an unlawful demand to surrender property would be inconsistent with the public policy reflected in article I, section 1 of the California Constitution and Civil Code section 50."<sup>92</sup>

Focusing on the latter rationale, Esper and Keating contend that *KFC* stands for the idea that a business's cash is more important than a person's life, which in turn reveals the "absurdity of the moral logic at work in the California Supreme Court's decisions expanding property rights and constricting tort duties."<sup>93</sup> We agree. It is jarring to see a court embrace the sort of raw libertarian conception of property rights that would authorize a business to risk a patron's life for \$150. Hardly less jarring, in our view, is the court's reliance on a half-baked policy argument that a change in tort doctrine would induce robbers to take more hostages. Thus, it is easy to see why Esper and Keating treat *KFC* as a clear instance of the California Supreme Court abusing duty in the name of property rights and at the expense of personal injury claimants.

And yet, to see the court's resolution of *KFC* as simply about property rights is to miss something important about the case. For there were and are reasons to conclude that Brown's claim against KFC was really quite weak, reasons that have nothing to do with libertarianism or makeshift deterrence arguments. Notwithstanding her ordeal, Brown left the restaurant without any physical injury, in part because, after the KFC employee tried her ploy in response to the robber's demand, she handled the situation in a manner that avoided further violence. So, although we, like Esper and Keating, are

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opinion, except to note that the focus of the plaintiff's complaint did seem to be on how the employee handled the robbery, rather than steps KFC might have taken prior to the robbery, and that any claims focusing on the absence of prior safeguards might face tough hurdles on the issues of breach and causation.

91. *Id.* at 1269.

92. *Id.* at 1270. Article I, section 1, states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." *Id.* at 1270 n.2 (emphasis added) (quoting CAL CONST. art. I, § 1). Section 50 of the California Civil Code states: "Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest." *Id.* at 1270 n.3 (quoting CAL. CIV. CODE § 50 (West 1982)).

93. Esper & Keating, *supra* note 7, at 321.

stunned by the court's apparent willingness to endorse as a general principle that businesses can choose to cling to some cash even if it means posing a grave risk of death to one of their patrons, we can nonetheless see why the court might have been moved to frown on this particular claim. All things considered, Brown was pretty lucky. And, given that the focus of her claim was on what KFC did wrong *after* she had already been robbed at gunpoint and grabbed and threatened as a hostage, her claim that the subsequent actions of KFC's employee were responsible for her distress rings hollow. Finally, the allegation as to KFC's carelessness was quite weak. In sum, the idea that a physically unscathed survivor of an ordeal that was already traumatic because of the prior actions of an armed robber could recover from the owner of the premises in which the ordeal took place on the theory that an employee's lapse under life-threatening circumstances had magnified the intensity of the ordeal probably struck the majority, with some justification, as resting on an overly broad conception of the sort of misconduct and injury that ought to generate solicitude (or at least money) through the tort system.

In our view, then, *KFC* is remarkable not because of its outcome—which was probably correct—but because of the court's inability to identify appropriate grounds for concluding that Brown had no cause of action, which left it to take its stand on the combination of an unconscionable moral position and a fatuous bit of policy analysis. As our prior discussion suggests, the cure for this sort of performance lies in getting courts to appreciate the doctrinal concepts and principles that allow judges to bring shape and discipline to negligence law, and to treat the parties before the court in a manner that permits judges to achieve a reflective equilibrium between legal doctrine and sensible results. In fact, two lines of traditional doctrinal analysis were available to the *KFC* court that would have allowed it to give expression to its doubts about Brown's claims in a more plausible and structured manner: the rule that there is no general duty to avoid causing pure emotional harm,<sup>94</sup> and the rule that in genuine emergency situations, a defendant's compliance with the duty of reasonable care should be judged in light of the difficulty of acting prudently in such circumstances.<sup>95</sup>

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94. On the historical and continued reluctance of courts to acknowledge a duty to take reasonable care to avoid causing emotional harm of a comparable breadth to the duty to take care to avoid causing physical harm, see John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1660–76 (2002).

95. DOBBS, *supra* note 35, § 129, at 304.

Although California's expansion of duty famously includes the recognition of new duties to take care not to cause others emotional harm, even under California law there was no basis for concluding that a restaurant such as KFC owed a duty to take care to avoid causing emotional harm to a patron such as Brown in a situation such as the one it faced. The line of decisions that, starting with *Dillon*, permits "bystander" recovery simply had no application to the facts of *KFC*.<sup>96</sup> So the only possible avenue Brown could have pursued would have been to assert a "direct" duty owed to her by KFC under *Molien v. Kaiser Foundation Hospitals*<sup>97</sup> and its progeny.<sup>98</sup> Yet, there is no obvious basis for supposing that a restaurant/patron relationship is the sort that generates a duty on the former to be vigilant of the emotional well-being of the latter, and it is very difficult to see why a court would wish to charge restaurants with attending to their patrons' emotional well-being *apart from their obligation to attend to patrons' physical well-being*.<sup>99</sup> In short, insofar as KFC plausibly had a duty to Brown with regard to the risk of injury from third-party wrongdoing, it could only have been a duty to take reasonable care to protect her against *physical harm*, not emotional harm. And, as we have seen, she did not suffer physical harm.

We suspect that part of the reason that the court did not go down this road was because it anticipated a counterargument from the plaintiff along the following lines: if the defendant had a duty to take reasonable care to prevent physical injury, and if the defendant breached that duty, and if the plaintiff's emotional harm that was caused by that breach was substantial or severe enough to give a court reason to believe the plaintiff is not faking, then there should be liability. This type of argument is fallacious, however, because it plays a game of mixing and matching with respect to the elements of duty and injury—it identifies the relevant duty as a duty to take care to avoid causing physical harm, but then identifies the relevant injury as a nonphysical harm that falls outside the scope of the duty.

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96. See *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (limiting *Dillon* claims to persons who contemporaneously witness a close relative being harmed by the defendant's negligence).

97. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980).

98. See *Burgess v. Superior Court*, 831 P.2d 1197, 1199–1204 (Cal. 1992) (distinguishing "direct" from "bystander" claims and noting the limited class of special relationships, such as therapist-patient, that warrant the recognition of a duty to be vigilant of the emotional well-being of another).

99. Of course, by attending to its duty to take care for the physical well-being of its customers, a business will often save them from emotional distress. For example, by being careful not to serve food with impurities in it, a restaurant will often spare its patrons from the distress that they would experience upon discovering such impurities. To observe that businesses' efforts to guard patrons' physical well-being will have this incidental effect is hardly to assert that they are duty-bound to be vigilant of their patrons' emotional well-being independently of their physical well-being.

Here it may be useful to analogize Brown's claim to that of an adult trespasser *T* against property owner *O* brought under pre-*Rowland* California law. Suppose *O* has acted unreasonably so as to leave his land in an unsafe condition, such that, were invitee *V* to be injured because of this condition, *V* would have a winning negligence claim against *O*. Notwithstanding the fact that the dangerous condition would give rise to liability to *V*, if *T*, while trespassing on *O*'s land, were to suffer the same injury as *V* because of the same dangerous condition, he would not, under pre-*Rowland* law, have an action against *O*. Why not? Because there is an "alignment problem" with his claim—a mismatch between the duty being breached and the person complaining of the breach.<sup>100</sup> Under the legal rule posited, *T* is not a beneficiary of the duty that *O* has breached. Thus, he is not entitled to complain of *O*'s conduct as a breach to him, even if the exact same conduct was a breach as to *V*. Although the issue is different when we contemplate a case in which one victim might bring suits for two different types of injury, a similar alignment issue is still present. A person who suffers only emotional harm as the result of careless conduct that would amount to a breach of a duty to take care against causing physical harm is not in a position to obtain relief for that conduct because the injury that was suffered is not the sort of injury that the defendant was duty-bound to guard against.

Unfortunately for Californians, in order for lawyers and judges to grasp these points, they must be prepared to take seriously the traditional doctrinal idea that duties of care are to be defined relationally, and in terms of injury-types. Yet, as is now well-known, during the heyday of *Dillon/Rowland* revolution, the California Supreme Court purported to disavow the idea that duty is relational, preferring instead the notion advocated by Holmes and Prosser (among others), that duty is nonrelational—an obligation to take reasonable care that is owed "to the world," and with respect to any form of harm.<sup>101</sup> For this reason, it is not in the least surprising to see today's judges failing to grasp the importance of considerations of alignment to the proper resolution of negligence cases. In other words, the abuse of duty is again traceable to modern judges' failure to appreciate the resources that already exist within the law to craft sensible doctrine.

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100. See JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 265–66 (2004) (discussing how proximate cause and other doctrines require that the elements of negligence align with one another to constitute a well-formed claim).

101. Goldberg & Zipursky, *supra* note 17, at 1756, 1759–60, 1764–66.

With respect to breach, Justice Kennard's dissent rightly raised the relevance of the so-called emergency doctrine. As she explained, when supported by the facts, it warrants a jury instruction as follows:

[A] person confronting a sudden danger "is not expected nor required to use the same judgment and prudence that is required in the exercise of ordinary care in calmer and more deliberate moments. . . . [His] [Her] duty is to exercise the care that an ordinarily prudent person would exercise in the same situation. If at that moment [he] [she] does what appears to [him] [her] to be the best thing to do, and if [his] [her] choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, [he] [she] does all the law requires of [him] [her]. This is true even though in the light of after-events, it should appear that a different course would have been better and safer."<sup>102</sup>

As this instruction indicates, KFC had a powerful argument that its clerk did not act carelessly. Indeed, given the content of this pattern jury instruction, the court might well have been entitled to rule that no reasonable jury could find that the employee's action constituted a breach of any duty owed to KFC's patrons. After all, it is highly plausible to suppose that, in the heated circumstances of an armed robbery, the I-need-to-get-the-key ploy initially struck the clerk as the best thing to do, and is the sort of choice that many others would make under the same circumstances. Combined with the court's sense that, given our culture's strong notions of private property, one can expect many persons to decline to surrender money to one who is making an unlawful demand for it, a no-breach-as-a-matter-of-law conclusion seemed readily available. If so, it would have provided an independent doctrinal ground for ruling for KFC that would not have rested on the evidently unsatisfactory moral and policy grounds cited by the court.

### CONCLUSION

In their sustained critique of California courts' abuse of duty, Dilan Esper and Greg Keating have depicted a disturbing phenomenon. We, like many other torts professors, knew that the California Supreme Court has been cutting back on tort liability, and sensed that the lower California courts were probably doing the same. But Esper and Keating have amassed a large body of evidence displaying a trend of significant proportions. As California is America's largest tort jurisdiction and has been the unrivaled

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102. Ky. Fried Chicken of Cal., Inc. v. Superior Court (*KFC*), 927 P.2d 1260, 1273-74 (Cal. 1997) (Kennard, J., dissenting) (quoting CAL. CIVIL JURY INSTRUCTIONS (BAJI) § 4.40 (1994)).

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leader in developing tort doctrine over the past fifty years, their study is important to assessing the state and direction of contemporary tort law.

From one point of view, the story they tell is a now-familiar one about the pervasive effects on law of political change: tort reform is rolling along in the courts, not just in the legislatures. But the phenomenon they have depicted also must be fit into a larger story about where the California Supreme Court was, and is, “coming from” on duty, negligence law, and tort law generally. On this question, we hold a different view, both descriptively and normatively, from Esper and Keating. They show an evident fondness for the *Dillon/Rowland* duty doctrine of the 1960s and 1970s, and see the current trend as an ad hoc and hard-hearted retreat from the just principles embraced in that era. And their prescription, at the end of the day, is to recapture those principles, largely through an appreciation of the categorical nature of the duty to take care to avoid causing foreseeable physical injuries, and a recognition of the independence of this principle from principles of contract or property law.

We are skeptical of Esper and Keating’s proposal for halting the erosion of duty, and we have articulated the reasons for our doubts above. Keeping duty categorical will only work if the courts pick the right categories (those favored by Esper and Keating), and there is no reason to believe they will. Similarly, drawing the “right” boundaries between contract, property, and tort is a prescription that leaves open many highly regressive possibilities. Again, it is Esper and Keating’s favored boundaries that must be selected if the abuse of duty is to be stopped, and there is no reason to believe courts will or must pick their proposed boundaries. However successful their article is in depicting the problem, its solutions offer little promise.

Our solutions are different because our larger story is different. In our view, California’s duty revolution of the 1960s and 1970s deserves praise to the extent that it aimed to undo genuinely regressive doctrines, and to carry through on the insight of *Heaven v. Pender*<sup>103</sup> and *MacPherson v. Buick Motor Co.*<sup>104</sup> that the duty to be vigilant of another person’s well-being is not rooted in preexisting relationships or formalistic rules, but in the idea that another person’s well-being (even a stranger’s) is something worthy of safeguarding. In this important respect, we are in agreement both with *Rowland* and *Dillon*, and with Esper and Keating, who rightly insist on giving duty a moral foundation.

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103. *Heaven v. Pender*, (1883) 11 Q.B.D. 503.

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

There are other important aspects of California's duty revolution, however, that we find much less attractive, including its hostility toward concepts and ideas embedded in the common law of torts, and its attempt to rid these concepts of any meaning apart from that which policymakers (be they politicians or judges) pour into them. As we have contended here and elsewhere, this combination of conceptual nihilism and judicial aggressiveness is as dangerous as it is ill-conceived. For when the political winds change, as they invariably do, tort law, now unmoored from its conceptual foundations, is vulnerable to political capture. As Esper and Keating have shown, this is exactly what has been happening in the California courts.

Our prescription is therefore different from theirs. Judges and lawyers should embrace the full array of ideas, concepts, and principles that constitute negligence law and tort law. Ideas like assumption of risk, attractive nuisance, the emergency doctrine, and the normative distinctiveness of emotional harm—not vacuous notions of policy-balancing—are what will permit appellate judges to channel their concerns about keeping the tort system under control in a way that permits tort law to continue to play the important role of articulating and enforcing the duties that we owe to each other.

